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NORTH CAROLINA REPORTS

VOL. 138

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1905.

REPORTED BY
J. CRAWFORD BIGGS

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2 ANNO. ED.
BY
WALTER CLARK

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CASES REPORTED

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

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

SPRING TERM, 1905.

McNEILL v. RAILROAD.

(Filed 4 April, 1905.)

Judgments—Interest.

By virtue of section 530 of The Code, a judgment bears interest from the time of its rendition until paid, though nothing is said therein about interest.

ACTION by W. H. McNeill, against the Durham and Charlotte Railroad Company, heard by *Ward, J.*, at January Term, 1905, of MOORE.

Plaintiff recovered a judgment against defendant in the sum of $4,000 for injuries caused by its negligence, and for costs. Defendant appealed to this Court, where the judgment was affirmed. There was no provision in the judgment for interest from the date of its rendition. Upon the certificate of this Court, plaintiff moved in the court below for execution on the judgment, and defendant moved that the case be (2) retired from the civil docket and, also, that the judgment be marked satisfied, it appearing that defendant had paid $4,000 on the judgment and had paid the costs. The court granted plaintiff's motion and signed an order to the clerk to issue execution for the amount due on the judgment. To this order and to an order overruling the motion, defendant excepted and appealed.

W. J. Adams, U. L. Spence, and James D. McIver for plaintiff.
Guthrie & Guthrie and H. F. Seawell for defendant.

WALKER, J., after stating the facts: The question in this case is whether the plaintiff is entitled to interest on his judgment, nothing being said therein about interest. The contention of the defendant is that while by section 530 of The Code it is provided that a judgment shall bear interest until paid, in order to do so it must be expressly stated

in the judgment that it bears interest, by reason of the concluding words, namely, "and the judgment and decree of the court shall be rendered according to this section." In construing these words, it is our duty to try to get at the real intention of the Legislature by carefully attending to the phraseology of the entire section. We must ascertain the relation of the provision in the clause we have quoted to the general object intended to be secured by the act, and determine whether that provision is mandatory or merely directory. "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes
(3) the substantial purposes of the statute." 2 Sutherland Stat. Const. (Lewis), sec. 611. The principle is aptly stated in Sedgwick on Stat. and Const. Law (1857), 368, as follows: "When statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases , by a somewhat singular use of language, the statute is said to be directory. In other cases, the statute is held to be imperative or mandatory." Tested by either statement of the rule, we think the statute under consideration is directory so far as it provides that the judgment must itself state that it shall bear interest from the date of rendition until it is paid. It is perfectly clear that such a statement in the judgment is not essential to effectuate the intent of the Legislature, which is to allow interest on judgments. If the amount of the principal is fixed, the statute provides that it shall bear interest, and everything is already stated in the judgment necessary to carry out this leading object of the statute. If it was further stated that it should bear interest until paid, this would be saying no more than the law already provides. The insertion of the statement, therefore, is not essential, and the main intention will not be defeated by its omission.

It is best always that the court in its judgment should state fully the amount to be raised by the execution, both principal and interest; but the plaintiff will not forfeit his right to interest by the failure to do this, when enough appears on the face of the judgment to enable the officer to compute the amount justly due. All he is required to know is the amount of the principal, and then the statute makes that amount bear interest to the time of payment. In *Deloach v. Worke,* 10 N. C., 36, this Court says: "The evident design was to allow the

plaintiff interest on the principal sum recovered in a judgment (4) from the time of its rendition; and the direction to the jury to distinguish between the principal and interest was intended to provide for those cases in which the whole sum is assessed in damages, so as to enable the clerk or the sheriff to compute the interest on the principal sum. But where the principal and interest are discriminated on the record, or it can be collected from an inspection of it what the principal sum was, it is equally within the spirit of the act that interest should be calculated on that."

At common law a judgment did not carry interest when an execution or *sci. fa.* was issued upon it. In an action upon the judgment the plaintiff could recover interest by way of damages for the detention of the money. The statute was passed for the purpose of amending the law in this respect. *Collais v. McLeod,* 30 N. C., 221. The intent was that principal should bear interest in this case as in all others, because it was just and right that it should, and that the technical rule of the common law should not longer stand in the way. The sole purpose was to have it appear on the record what sum will carry interest after judgment. We would be insisting too much on the letter instead of the spirit of the statute if we should hold otherwise. *Deloach v. Worke, supra.*

The views we have expressed are supported by decisions of this Court other than those already cited. *Farmer v. Willard,* 75 N. C., 402; *Long v. Long,* 85 N. C., 415. In neither of those cases was there any statement in the judgment that it carried interest. The Court held that the judgments bore interest by virtue of the express provision of the statute to that effect. See, also *McRae v. Malloy,* 87 N. C., 196. In *Amis v. Smith,* 16 Peters, 311, the Court says: "We can see no good reason why interest upon a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in (5) it." Language almost identical was used in *S. v. Vogel,* 14 Mo. App., 189. "In order," says the Court, "that the judgment should bear interest, it was not necessary that the court delivering the judgment should say so, and make this statement a part of the judgment, because the statute provides that every judgment shall bear interest." *Rhodes v. Vaughan,* 9 N. C., 170, 171.

While, as we have substantially said, it is best always to follow established precedents and the directions of the law in drawing judgments, yet strict observance of a prescribed formula is not absolutely essential to save a right expressly given by statute, if a party is otherwise entitled to it, and the court is enabled from what does appear in the judgment to determine the right and to enforce it by its process. Lewis' Sutherland, sec. 610 *et seq.* Besides, as the provision is expressed

affirmatively, there being no negative words to indicate that the Legislature intended noncompliance to work a forfeiture, the general rule is that in such a case the provision is merely directory. Sedgwick, *supra,* 370. We cannot think the Legislature intended an insertion of the statement that the judgment carried interest should be indispensable to its recovery.

As the payment was by the law applied first to the interest accrued, and then what was left to the principal, a balance was due on the judgment. The court was therefore right in ordering execution to issue for the amount due.

No error.

Cited: R. R. v. Mfg. Co., 166 N. C., 182; *Durham v. Davis,* 171 N. C., 308.

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(6)

LEHEW v. HEWETT.

(Filed 4 April, 1905.)

Deeds—Mistake—Reformation—Evidence—Competency—Sufficiency—Questions for Jury.

1. In an action to correct a deed, evidence of a conversation between plaintiff and the grantor, showing the agreement made at the time the land was purchased, is admissible.
2. In an action to correct a deed made to the plaintiff's wife, who is dead, the plaintiff can testify as to what took place between him and the grantor, who is living; and the fact that his wife's estate is affected by the evidence does not render it incompetent under section 590 of The Code.
3. Where there is any evidence of an alleged mistake in a deed or other similar equity requiring clear and convincing proof to sustain it, the case must go to the jury with proper instructions as to the intensity of the proof, and the judge has no right to declare the evidence insufficient to establish the equity because he may not consider it clear, strong, and convincing.
4. In an action to correct a deed executed to plaintiff's wife, evidence that plaintiff paid for the land with his own money, that his wife had no money, that he took possession when the deed was executed and held it ever since, that they had no children, that he held possession as against her heirs, after her death, for eight years, without any claim for rent or any right of entry being asserted by them, is sufficient to support a verdict for plaintiff.

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

ACTION by S. W. Lehew against F. B. Hewett and others, heard by *Brown, J.,* and a jury, at September Term, 1904, of BRUNSWICK.

From a judgment for the plaintiff, the defendants appealed.

This action was brought to correct a deed. Plaintiff alleged and introduced evidence to show that he bought the land from Frank Hewett in 1878 and paid for it out of his own money. He directed the deed to be made so as to convey the land to his wife, Mary B. Hewett, and if she died first, then to himself. Frank Hewett drew the (7) deed so that it conveyed the land to Mary B. Hewett in fee, without mentioning the plaintiff. There was evidence that plaintiff and his wife had no children, and that plaintiff took possession when the deed was executed and has held it ever since. His wife died in 1889. Plaintiff testified that he did not discover the mistake in the deed until 1897, a short time before this action was commenced. Defendant moved to nonsuit the plaintiff under the statute. The motion was overruled, and defendant excepted. Upon issues submitted, the jury found that plaintiff paid the purchase-money for the land upon an agreement with Frank Hewett that it should be conveyed by deed to Mary B. Hewett, and if she died first, then to the plaintiff, and that this clause was omitted from the deed by mutual mistake of the parties. There was judgment upon the verdict for the plaintiff, and the defendant having duly excepted, appealed and assigned the following errors:

1. That the court erred in admitting the conversation between himself and Frank Hewett, which was objected to on the ground (1) it was a contract concerning land, and not in writing, and (2) that it was not admissible under section 590 of The Code, as it was substantially a transaction between himself and his wife, now deceased.

2. That the judge erred in not holding that the evidence was not sufficient to be submitted to the jury to reform the deeds declared for, or either of them.

3. That the judge erred in not deciding that the evidence was not sufficient to justify the court in reforming the deeds, or either one of them.

Iredell Meares for plaintiff.
John D. Bellamy for defendant.

WALKER, J., after stating the case: The first assignment of (8) error cannot be sustained. It is true that contracts relating to land must be in writing, but every deed presupposes an oral agreement between the parties, which is to be finally evidenced by the deed, and the conversation between plaintiff and Hewett related to such an agreement. It was for the purpose of showing the variance between this preliminary agreement and the deed that the evidence was offered, and it was clearly competent for that purpose. It was the very gist of the

controversy, and to question the right to introduce parol testimony is to deny the jurisdiction of a court of Equity in such cases. *Warehouse Co. v. Ozment,* 132 N. C., 839. We find it stated in 3 Greenleaf on Ev. (16 Ed.), sec. 360, that, subject to certain stated modifications, the rule is inflexible "that extrinsic verbal evidence is not admissible at law to contradict or alter a written instrument. In equity the same general doctrine is admitted, subject, however, to certain other modifications necessarily required for that relief which equity alone can afford. For equity relieves not only against fraud, but against accidents and the mistakes of parties; and whenever a written instrument, in its terms, stands in the way of this relief, it is obvious that parol evidence ought to be admitted to show that the instrument does not express the intention of the parties, or, in other words, to control its written language by the oral language of truth. It may express more or less than one of the parties intended, or it may express something different from that which they both intended; in either of which cases, and in certain relations of the parties before the court, parol evidence of the fact is admissible as indispensable to the relief." Nor was this evidence incompetent under section 590 of The Code. Plaintiff testified to no transaction or communication between himself and his wife, but solely to what took place between him and Hewett, who is now living. The mere fact that his wife's estate is affected by the evidence does not
(9) render it incompetent.

The last assignment of error is the one mainly relied on. By it the defendant challenges the correctness of the ruling made in this case when before us at a former term (130 N. C., 22), and in several other cases, to the effect that the judge cannot pass upon the weight of evidence and withdraw a case from the jury when it appears to him that the evidence is not clear, strong, and convincing. It is argued by counsel that whether it is of that character is a preliminary question of law for the judge to decide; but it is clear to us that this cannot be so. A decision of the judge to submit a case to the jury would, if defendant's counsel is right in his view, be virtually an intimation to the jury that the evidence is clear, strong, and convincing; whereas, under our law, it is peculiarly the duty of the jury to pass upon the weight of the evidence; and a like result would follow when the evidence is required only to preponderate, or the State is required to prove its case beyond any reasonable doubt, in a criminal action. For the same reason, the judge cannot withdraw a case from the jury if there is any evidence, though it may not be clear, strong, and convincing. The statute positively forbids him "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." Code, sec. 413. Under this act the weight of the evidence

is left entirely with the jury. The court must, of course, explain to the jury the law in regard to the intensity of the proof, but the jury must finally decide what weight should be given to it in reaching a conclusion, whether it is sufficient, according to the rule laid down by the court, to warrant a verdict in favor of the party who claims the right to recover upon it. This must necessarily be so; otherwise, the judge may decide, in a case where only a preponderance of the evidence is required to entitle a party to a verdict, that there is or is not such preponderance, and in a criminal case that the evidence does or (10) does not exclude reasonable doubt. The difference between those cases and ours, in respect to the proof, is one only in degree and not in principle. *Cobb v. Edwards,* 117 N. C., 253; *Hemphill v. Hemphill,* 99 N. C., 436; *Lehew v. Hewett,* 130 N. C., 22. If the judge cannot decide the question as matter of law in one of the cases, he cannot do so in either of the others, because they all relate to the quantity of proof, the law merely requiring stronger evidence when there is a presumption against the existence of the fact proposed to be established than when there is no such presumption. We cannot assimilate a trial before a jury to one before a chancellor under the former system of equity, as the Constitution and the statute regulate trial by jury and forbid the judge to express any opinion upon the weight or sufficiency of the evidence; whereas there was no such restraint put upon the chancellor, who passed upon the evidence himself as a trier of the facts, and determined whether it was of the convincing character required by the rule in chancery. As these equitable matters are now submitted to a jury, under the guidance of the judge as to the law, they must be investigated like other issues of fact and according to the method and procedure of ordinary jury trials. It has been the settled rule of this Court for many years that if there is any evidence of the alleged mistake in a deed, or other similar equity requiring clear and convincing proof to sustain it, the case must go to the jury with proper instructions as to the intensity of the proof, and the judge has no right to declare the evidence insufficient to establish the equity because he may not consider it clear, strong, and convincing. *Ferrall v. Broadway,* 95 N. C., 551; *Berry v. Hall,* 105 N. C., *Cobb v. Edwards* and *Lehew v. Hewett, supra; Avery v. Stewart,* 136 N. C., 426. *In Ferrall v. Broadway, supra,* the Court says: "What effect is to be given to testimony, competent in law to establish a fact, belongs exclusively to the jury to determine, as also the credibility of witnesses who give the testimony. This is so universally recognized and acted on in the administration of the (11) law in tribunals constituted of a judge and jury, and exercising their several functions, as to need no support from references. The error committed in the charge is in imposing upon a jury the rule which

a judge, passing upon facts without a jury, prescribed for his own action, as one which the jury is bound to obey."

But, apart from the rule that the judge cannot weigh the evidence, even in causes of an equitable nature, when the proof must be clear, strong, and convincing, we think there was sufficient proof in this case to carry it to the jury. The plaintiff testified that he paid for the land $1,330, and as to this he was corroborated by the testimony of Wescott and by other evidence in the case. His wife had no estate out of which to pay the purchase-money, except an interest in land which she kept during her lifetime. He took immediate possession of the land and continued in possession to the time of bringing this suit. He had no children by his first wife, and yet continued to hold the possession as against her heirs after her death, for about eight years, without any claim for rent or any right of entry being asserted by them. This has generally been considered a fact, *dehors* the deed, entitled to much consideration by a jury. *Shelton v. Shelton,* 58 N. C., 292. There was at least sufficient evidence in law to support the verdict.

When the verdict is against the weight of the testimony, the losing party can apply to the judge, in cases like this one, as in other cases, to set aside the verdict; and this seems to be the only mode of relief. The judge can, of course, set aside the verdict of his own motion, if he sees proper to do so. This disposes of the assignments of error. The other points made in the brief are without merit.

No error.

Cited: King v. Hobbs, 139 N. C., 171; *White v. Carroll,* 147 N. C., 334; *Gray v. Jenkins,* 151 N. C., *McWhirter v. McWhirter,* 155 N. C., 147; *Archer v. McClure,* 166 N. C., 148; *Lamb v. Perry,* 169 N. C., 445; *Glenn v. Glenn, ib.,* 731; *Ray v. Patterson,* 170 N. C., 227; *Champion v. Daniel, ib.,* 332; *Grimes v. Andrews, ib.,* 523; *Sills v. Ford,* 171 N. C., 736; *Poe v. Smith,* 172 N. C., 73; *Johnson v. Johnson. ib.,* 532; *Potato Co., v. Jeanette,* 174 N. C., 243; *Boone v. Lee,* 175 N. C., 384; *Long v. Guaranty Co.,* 178 N. C., 506; *Reece v. Woods,* 180 N. C., 633; *Leftowitz v. Silver* 182 N. C., 350.

PHILLIPS v. RAILROAD.

(Filed 4 April, 1905.)

Railroads—Proximate Cause—Fires—Damages—Instructions.

1. The question as to proximate cause, under all the circumstances, is necessarily one of fact for the jury, under proper instructions.

2. The owner of premises is not bound to anticipate negligence of a railroad, and by way of prevention make provision against communication of fire.
3. The fact that the plaintiff's land did not adjoin the defendant's right of way, and the fire necessarily traversed the land of several intermediate proprietors before reaching plaintiff's property, did not *per se* absolve the defendant from liability, but was a circumstance to be weighed in considering whether the defendant's negligence was the proximate cause of the plaintiff's damage.
4. In an action for damages from fire set out by the defendant, if the fire caught on the defendant's right of way by reason of the defendant's negligence and spread across the lands of several intervening landowners to the plaintiff's land two and one-half miles away, the defendant would be liable to the plaintiff for the damages sustained.

ACTION by B. P. Phillips and wife against Durham and Charlotte Railroad Company, heard by *Ward, J.*, and a jury, at January Term, 1905, of MOORE.

From a judgment for the plaintiff, the defendant appealed.

W. J. Adams, U. L. Spence and J. D. McIver for plaintiffs.
Guthrie & Guthrie and H. F. Seawell for defendant.

CLARK, C. J. This is an action for damages alleged to have been sustained by fire negligently set by sparks from defendant's engine falling on its right of way, on which it had negligently per- (13) mitted leaves and other inflammable material to accumulate, which fire had extended thence across the lands of intervening proprietors till it had reached and damaged plaintiff's premises, which were 2½ miles distant in a direct line, and farther following the course and path of the fire. The engineer testified that he thought his engine had on a spark arrester the day of the fire, but was not certain, and another witness said positively that the engine had no spark arrester that day.

The question as to proximate cause, under all the circumstances, is necessarily one of fact for the jury, under proper instructions to the jury; and these, we think, the court gave in the following instructions, asked by the defendant:

"It is not the duty of a railroad company to go off its right of way and premises to clear up rubbish from all lands adjoining and adjacent to its right of way, and it is not liable or chargeable with negligence for the spread of fire from its own right of way which was too remote for the railroad company to reasonably anticipate and expect such spread of fire in case sparks from its locomotive should accidentally set fire to adjoining lands.

"If sparks from a railroad locomotive should set fire to combustible material on the land of an adjoining landowner, there is no liability for

negligence on the part of the railroad company if it simply fails to prevent the spread of such fire to the lands and premises of more remote landowners.

"That the defendant is not liable if the jury shall find from the evidence that the burning of the plaintiff's property was a consequence not to be reasonably expected in the natural and usual course of events from the act complained of; and if the jury shall so find, they should answer the issue No. 2, 'No.'

"To render the defendant liable in this action, the injury suffered by the plaintiff must have been the natural and probable conse-
(14) quence of the defendant's negligence; such a consequence as under the surrounding circumstances of the case might or ought to have been foreseen by the wrongdoer as likely to result from his action.

"In considering whether or not the burning of the plaintiff's property was a natural and probable consequence of defendant's act in starting the fire, if you shall find that the defendant did start the fire, the jury should consider the distance to the plaintiff's property from the point at which the fire started, the condition of the intervening land with reference to combustible material thereon, the state of the wind, if they should find from the evidence that the same was unusual and extraordinary, and not to be expected for the locality and season, and the probability or otherwise of the fire being gotten under control by property-owners or others before it reached plaintiff's premises.

"That if the jury shall find from the evidence that the fire was caused by the ignition of combustible matter on the defendant's right of way by a spark from defendant's engine, and burned across the property of intervening landowners to plaintiff's property, which it burned, but that there intervened after the act of the defendant an unusual and extraordinary wind, a wind not to be expected in that locality and at that season, without which the plaintiff's property would not have burned, the defendant is not liable, and the jury should answer 'No' to second issue.

"That if the jury finds from the evidence that the engine of the defendant on the occasion complained of was properly equipped with a spark arrester and the fire was not kindled on the right of way of the defendant, the defendant is not liable, and the jury should answer the second issue 'No,' and the burden of showing that the fire started on the right of way is on the plaintiff.

"Even though the jury should find from the evidence that the defendant's right of way was not free from combustible material, still
(15) the defendant is not liable unless they shall also find from the evidence that the presence of such combustible material was by

the fault and negligence of the defendant, and further that it was the proximate cause of the injury and destruction of the plaintiff's property; and unless they so find they should answer the second issue 'No.'

"If the jury shall find from the evidence that the defendant exercised due and reasonable care and precaution to keep its right of way reasonably and properly clear of rubbish and other combustible material at the point where the fire is alleged to have originated, and, without the knowledge or default of the defendant, two trees were cut on adjoining lands and the limbs or laps were thrown upon the right of way and left there by other parties, and this conduct of third persons was the proximate cause of the injury to the plaintiff's property, the defendant is not liable, and the jury should answer the second issue 'No.'"

There was no exception to the charge upon the first issue, nor to the following:

"That it is not the duty of a railroad company to clear up all of its right of way or to cut down all the bushes or trees, except so far as to make its track and roadbed safe, nor to cut down all the growing shrubbery on its right of way; but a railroad company does owe to the public and the neighboring landowners the duty to keep its track and roadbed clear of all such substances as are liable to be ignited by sparks and cinders; and, also, a railroad company must not only keep its track and roadbed free from such inflammable substances, but it must go to the extent of keeping a reasonable distance of its right of way beyond its track and roadbed free from such substances, and whatever distance from its track or right of way that may be reasonably necessary in the exercise of ordinary care to prevent such inflammable and combustible substances being ignited by its engines must be kept free from them; and if the company fails in this duty to the public it is liable in damages to those who are directly injured thereby; and if it (16) is necessary to keep its entire right of way free from combustible substances to prevent ignition from engine sparks, then the whole right of way must be kept clear from these inflammable and combustible substances."

There was no exception to this instruction, nor to the following:

"It is not negligence for a railroad company to fail to adopt and to use approved appliances merely because they are known and approved, and it is not its duty to keep a lookout for improvements and inventions and buy all such as are approved; nor is it the duty of a railroad company to equip its engines with the best approved devices and appliances for arresting sparks which tend to fly from its engines; but it is the duty of a railroad company to use proper spark arresters in its engines and to prevent the escape of iridescent sparks, and it is negligence not to adopt and use spark arresters in the engines which are in general

use, and a railroad is liable in damages for any injury directly caused by failure to use approved spark arresters which are in general use.

"You must first ascertain whether or not the fire was caused by fire or sparks from the engine. The burden of proof is on the plaintiffs to show this. If plaintiffs have not shown it, that ends the case, and you should answer the second issue 'No'; and if you find that the fire was occasioned by fire or sparks from the engine, then you must go further and inquire whether or not the defendant company has been negligent, and also whether or not the damage to plaintiff, if you find she has been damaged, was proximately caused by such negligence; if so, you should answer the second issue 'Yes.'"

To the following instructions the defendant excepted:

"If the jury shall find from the evidence, the burden being on the plaintiff, that the defendant company permitted dead grass and
(17) straw and pinetops and an accumulation of inflammable and combustible matter to exist on its right of way so near the track as to collect fire from the engine, and it did collect fire from the engine and it became ignited by sparks from the engine, and the fire spread rapidly across the right of way and thence across the lands of several other persons to the *feme* plaintiff's property and destroyed her property, then this would be negligence on the part of the defendant; and if you find these to be the facts it devolves on the defendant to show that the engine was properly equipped with the usual and proper appliances to avoid doing injury from the escape of burning sparks, and if you find it was not thus furnished and the fire was conveyed from the smokestack to the right of way and thence across the land of several other persons to *feme* plaintiff's land and destroyed her property, and you find that this was the natural and proximate cause of the property of *feme* plaintiff being destroyed by fire, and that said injury suffered was the natural and probable consequence of said negligence and such as under the surrounding circumstances of the case might or ought to have been reasonably anticipated by the defendant as likely to result from its actions, then you will answer the second issue 'Yes.'

"That upon all the evidence in this case, if you believe the same, you will answer the third issue 'No.'"

As to the fourth issue, the court charged the jury as to the measure of damages, to which there was no exception, and, among other things, further charged the jury that "in estimating the amount of damages which plaintiffs are entitled to recover, if you find that they are entitled to recover damages, you can consider the evidence describing the property injured or destroyed, or any part of it i.e., whether old or new, decayed or sound, and from all the evidence from your estimate of the damages which plaintiffs are entitled to recover, if you find that

they are entitled to recover damages; and where there is no evi- (18)
dence of the description of any of the property destroyed, and where there is evidence of the value of the property destroyed, you may consider evidence of the value of said property in finding the value of same in estimating plaintiff's damages, if you shall find that they are entitled to recover damages; but you are not required to accept the estimated value of the property destroyed or the amount of damages estimated by any witness."

We find no error in the above, nor in the refusal of sundry prayers for instruction, which in substance asked the court to tell the jury: "That it was incumbent on the plaintiff to keep his premises in such order that if the defendant should negligently let fire escape, the premises of the plaintiff would not be endangered thereby; that the defendant, not being able to keep trash off other premises than its own, is not liable for damages by fire to premises to which the defendant could not reasonably expect the fire to spread; that if intermediate owners allowed rubbish to accumulate on their premises, and the fire extended across such premises to the plaintiff's, the defendant was not liable; that if the plaintiff had allowed rubbish to accumulate upon her own premises, by which the fire spread and injured the plaintiff, the defendant would not be liable; that negligence in starting a fire is not the proximate cause of the destruction of property on land which does not abut on the premises on which the fire started, but to which it spread across intervening land; that upon the whole evidence in this case the negligence of the defendant was not the proximate cause of the plaintiff's damage; that the burden was on the plaintiff to show that the engine was not equipped with a proper spark arrester, and that on the evidence the engine was thus equipped; and that after the plaintiff's premises were threatened with fire, if they could with exercise of care and prudence have saved from injury any part of the property, but failed to do so, the defendant was not liable for such part." (19)
As to this last, there was no evidence to authorize the instruction asked, and the other prayers were properly refused, except so far as given in the charge or other special instructions. The owner of premises is not bound to anticipate negligence of a railroad, and by way of prevention make provision against communication of fire. 13 A. & E. (2 Ed.), 482. *Hoag v. R. R.*, 80 *Pa. St.*, 182.

The fact that the plaintiff's land did not immediately adjoin the defendant's right of way, and the fire necessarily traversed the land of several intermediate proprietors before reaching the plaintiff's property, was a circumstance, with other circumstances mentioned in the instructions given to the jury, to be weighed in considering whether the defendant's negligence was the proximate cause of the plaintiff's dam-

age (and the charge fairly presents this view); but the fact that the plaintiff's land did not adjoin the right of way does not *per se* absolve the defendant from liability, if in fact the defendant's negligence was the proximate cause of the damage to the plaintiff's property; otherwise, the right to recover would depend solely upon whether the land set fire to by negligence of the defendant was held in large or small tracts. 1 A. & E. (2 Ed.), 450-454, and cases cited.

In *Black v. R. R.*, 115 N. C., 667, where, as here, the fire crossed the land of several intervening landowners before reaching and destroying Black's turpentine boxes 1½ miles from the railroad track, the learned judge below told the jury that if the fire caught on the defendant's right of way by reason of the defendant's negligence, and spread "across the land of another person to the plaintiff's land, the defendant company would be liable to the plaintiff for damages sustained," and on appeal this instruction was the chief matter in contest, and was sustained, *Burwell, J.*, saying that the law in this respect had been
(20) correctly and succinctly stated by the court below. Among many other cases to same purport, *R. R. v. Bales*, 16 Kans., 252; *Perley v. R. R.*, 98 Mass., 414; *R. R. v. Richardson*, 91 U. S., 454. In *Poeppers v. R. R.*, 67 Mo., 715, the fire spread 8 miles, and in *R. R. v. McBride*, 54 Kans., 172, it spread 10 miles, before reaching plaintiff's property, but it was held that the loss was not necessarily too remote.

The greater the distance from the defendant's track to the premises which are damaged, the greater the probability that intervening and independent causes might stop or extend the fire, and hence the less probability that the original negligence of the defendant is the proximate cause of the injury; but that is a matter for the jury under proper instruction, and the defendant has no cause to complain of those given in this case. *R. R. v. Hope*, 80 Pa. St., 373.

No error.

Cited: West v. R. R., 140 N. C., 622; *Williams v. R. R., ib.*, 625; *Knott v. R. R.*, 142 N. C., 242; *Thomas v. Lumber Co.*, 153 N. C., 354; *Wyatt v. R. R.*, 156 N. C., 315; *Hardy v. Lumber Co.*, 160 N. C., 121; *Aman v. Lumber Co., ib.*, 373; *Deligny v. Furniture Co.*, 170 N. C., 199; *Meares v. Lumber Co.*, 172 N. C., 294; *Denny v. R. R.*, 179 N. C., 534, 535.

BARBER v. JUSTICE.

(Filed 4 April, 1905.)

Appeal—Countercase—Time of Service—Correction—Certiorari.

1. Neither this Court nor the court below can change, without agreement of both parties, the requirements of section 550 of The Code, which provides that if the appellant's case on appeal is not returned by appellee in five days, "with objections," it shall be deemed "approved."
2. Where appellee's countercase, through inadvertence of counsel, was not served until the eighth day after service of appellant's case on appeal, a motion by appellee for *certiorari* will be denied, though appellee produces a letter from the trial judge that appellant's case is erroneous and, if given an opportunity, he will correct it.
3. It is only when the trial judge has settled the case on appeal, in the exercise of his proper jurisdiction, that this Court, upon affidavit of error therein, and a letter from the judge that he wishes to make the correction, will give him such opportunity.

ACTION by W. T. Barber against Luther Justice, heard by (21) *Peebles,* J., and a jury, at October Term, 1904, of SCOTLAND. From a judgment for the defendant, the plaintiff appealed. Appellee's motion for a *certiorari* being denied, he assented to a new trial.

John D. Shaw & Son and Gibson for appellant.
Jonathan Peele and M. L. John for appellee.

CLARK, C. J. Motion by appellee for *certiorari.* The appellant served his statement of case on appeal within the statutory time. Appellee's countercase was not served until the eighth day thereafter. The Code, sec. 550, provides that if the appellant's case is not returned by appellee in five days "with objections" it shall be "deemed approved." *S. v. Price,* 110 N. C., 600 and cases cited. There is no agreement to extend time alleged or admitted, and neither this Court nor the court below can change the statutory requirement. The appellee does not allege that he was misled by the opposite party, but says that he relied upon the statement of another member of the bar that he had ten days in which to serve his countercase. In a criminal case, *S. v. Downs,* 116 N. C., 1066, the Court said: "Ignorance of law excuses no one, and the vicarious ignorance of counsel has no greater value. *S. v. Boyett,* 32 N. C., 336. . . . If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel could manage to be the more valuable and sought for, in many cases, would be his advice." If this is true in criminal cases, certainly the inadvertence of counsel in a civil case cannot be more efficacious. In *Phifer v. Ins. Co.,* 123

(22) N. C., 410, *Douglas, J.*, says: "While it is always matter of regret that any one should suffer by following the advice of licensed attorneys, we cannot ignore the rights of adverse parties, or disturb the orderly procedure of the courts without sufficient cause."

If the judge had, notwithstanding, "settled" the case, it would not have cured the failure to serve countercase in time, for the judge could no more extend the statutory time after failure to serve countercase in time than he could beforehand. *Barrus v. R. R.*, 121 N. C., 505; *McNeill v. R. R.*, 117 N. C., 642; *Forte v. Boone*, 114 N. C., 176. Knowing the above and similar authorities, the judge below did not attempt to settle the case, but the petitioner produces a letter from him that the appellant's "case" is exceedingly erroneous and, if given an opportunity, he will correct it. The appellee had an opportunity to do this by filing his exceptions to appellant's case within five days after service thereof, and not having done so, he waived the right to have the matter submitted to the judge for correction. The case must be "deemed approved," says the statute, Code, sec. 550. In *Ice Co. v. R. R.*, 125 N. C., 17, the application was from the appellant fixed with a heavy judgment (and not as here from appellee, who can but suffer a new trial), the facts were exceptional, and that case is a precedent which can rarely be followed and only under a like unusual combination of circumstances.

It is only when the judge has settled the case, in the exercise of his proper jurisdiction, that upon affidavit of error therein and a letter from the judge that he will correct it if given the opportunity, the Court will give him such opportunity. Such letter from the judge is required, not as a courtesy to him, nor as an acknowledgment of any inherent discretion in him, but because it would usually be doing a vain thing, and most often would result in needless delay, to grant a *certiorari* to give the judge opportunity to correct a case, already certified by him (23) as correct, unless counsel have had the diligence to procure a letter from the judge that he wishes to make the correction. *Cameron v. Power Co.*, 137 N. C., 104; *Sherrill v. Tel. Co.*, 116 N. C., 654; *Boyer v. Teague*, 106 N. C., 571, and other cases cited in Clark's Code, (3 Ed.), p. 936. Here, the judge not having been vested with jurisdiction to settle the case, by reason of appellee's failure to file exceptions to appellant's case in the time allowed by law, this Court cannot set aside the appellant's rights under the statute and confer jurisdiction by issuing a *certiorari*.

Upon the motion being denied, the appellee in open court assented that a new trial should be awarded, and it is so ordered.

PER CURIAM. New trial.

Cited: Cressler v. Asheville, post, 487; *Cozart v. Ins. Co.*, 142 N. C., 523, 524; *Vivian v. Mitchell*, 144 N. C., 477; *Truelove v. Norris*, 152

N. C., 756; *Drewry v. McDougald, ib.,* 759; *Smith v. Miller,* 155 N. C., 248; *Hawkins v. Tel. Co.,* 166 N. C., 214; *Transportation Co. v. Lumber Co.,* 168 N. C., 61; *Allen v. McPherson, ib.,* 437; *Lindsey v. Knights of Honor,* 172 N. C., 820; *Ham v. Person,* 173 N. C., 74; *S. v. Faulkner,* 175 N. C., 789; *Howard v. Speight,* 180 N. C., 655.

TYSON v. SINCLAIR.

(Filed 4 April, 1905.)

Wills—Rule in Shelley's Case.

Where a will provided, "I devise to my grandson my storehouse and lot during the term of his natural life, then to the lawful heirs of his body in fee simple; on failing of such lawful heirs of his body, then to his right heirs in fee," the limitation over "on failing of such lawful heirs of his body, then to his right heirs in fee," does not prevent the operation of the rule in *Shelley's case,* and the grandson took an estate in fee simple.

ACTION by L. P. Tyson and others against J. P. Sinclair, and others, heard by *Ward, J.,* at Spring Term, 1904, of MOORE.

This was a civil action to compel the specific performance of a contract for the sale of land, heard upon the facts alleged and (24) admitted in the pleadings. The defendants appealed from the judgment rendered.

W. J. Adams for plaintiffs.
No counsel for defendants.

BROWN, J. The case turns upon the construction of the second paragraph of the will of Thomas B. Tyson, to wit: "I give and devise to my grandson, Thomas B. Tyson, my storehouse and lot in the town of Carthage, adjoining the public square and opposite my dwelling house, with all the buildings thereon situated, during the term of his natural life, then to the lawful heirs of his body in fee simple; on failing of such lawful heirs of his body, then to his right heirs in fee."

His Honor in the court below adjudged that under this will, Thomas B. Tyson, the grandson, took an estate in fee simple. We think this construction the proper one. The Rule in *Shelley's case* applies and is in force in this State. *Starnes v. Hill,* 112 N. C., 1. It applies to devises as well as conveyances. *Chamblee v. Broughton,* 120 N. C., 175. It applies when the same persons will take the same estate, whether

they take by descent or purchase; in which case they are made to take by descent; but when the persons taking by purchase would be different or have different estate than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and "the heirs, heirs of the body," etc., take as purchasers. *Ward v. Jones,* 40 N. C., 401.

We have not been favored with either brief or argument upon the part of the appellant in this case, and are at a loss to understand upon what words in the paragraph of the will he relies to distinguish this case from numerous others like it in the books. *Patrick v. Morehead,* 85 N. C., 62; *Leathers v. Gray,* 101 N. C., 162. The limitation over,
(25) "on failing of such lawful heirs of the body, then to his right heirs in fee," does not prevent the operation of the rule. If the limitation over had been to "the next of kin," then the rule would not apply. "Any words added to the limitation which carry the estate to any other person, in any other manner, or in any other quality than the canons of descent provide, will take the case out of the operation of the rule, and limit the first taker to a life estate." *May v. Lewis,* 132 N. C., 117. The words used in this case are "to his right heirs in fee." The limitation over carries the estate just as it would go under the canons of descent, both in manner and quality. *Nichols v. Gladden,* 117 N. C., 497. The judgment is

Affirmed.

Cited: Perry v. Hackney, 142 N. C., 375; *McSwain v. Washburn,* 170 N. C., 364; *White v. Goodwin,* 174 N. C., 726; *Daniel v. Harrison,* 175 N. C., 120; *Radford v. Rose,* 178 N. C., 291; *Stokes v. Dixon* 182 N. C., 325.

CLARK v. RAILROAD.

(Filed 4 April, 1905.)

Sales—Evidence—Agreement of Third Person—Novation.

1. In an action to recover from the defendant on a promise to pay for cross-ties sold by the plaintiff to S., evidence that the trustee in bankruptcy of S. claimed the money and forbade the payment of it to the plaintiff was incompetent.
2. It is not competent to ask a witness as to his purpose in writing a letter. Its construction is for the court, and his purpose is immaterial.
3. Where certain ties were shipped to the defendant, pursuant to an agreement between the buyer and the plaintiff that the plaintiff was to have the possession and control of them until the purchase price was paid by the defendant; that the defendant was notified of this agreement before

receiving the ties, and assented thereto: *Held*, the plaintiff was entitled to recover of the defendant the amount due on said ties.

4. Where a debtor and his creditor enter into an agreement by which a third person is to pay the debt to the creditor, and the debtor is released, and the third person agrees to this, there is a novation, and the creditor may sue the third person.

ACTION by O. L. Clark against the Delaware, Lackawanna and (26) Western Railroad, heard by *Moore, J.*, and a jury, at October Term, 1904, of NEW HANOVER.

From a judgment for the plaintiff, the defendant appealed.

John D. Bellamy and George Rountree for plaintiff.
John D. Shaw, Jr., for defendant.

CONNOR, J. The plaintiff alleged and introduced testimony tending to show that prior to 1 November, 1903, he was the owner and had in his possession about 20,000 cross-ties. That the manager of the Standard Pole and Tie Company proposed to buy them to be shipped to defendant—bill of lading to be in plaintiff's name. Plaintiff agreed to sell, provided they were shipped in his name and the defendant would become responsible to him for them. That he was not willing to trust the Standard Pole and Tie Company. That he ordered cars and began to ship them to Wilmington to his (plaintiff's) order. Ties were to be put in vessel and carried as plaintiff's property to defendant at Hoboken, N. J. Plaintiff had this understanding with the manager of Standard Pole and Tie Company. Plaintiff was to have check for amount due on the ties when they reached defendant, when he was to release them. Plaintiff introduced letter from himself to George F. Wilson, purchasing agent of defendant, bearing date 25 February, 1904, stating in substance that when the Standard Pole and Tie Company shipped cargo that they gave him a mortgage on 19,000 of them for balance due, stating amount, saying: "The ties were not released, but put in with theirs, and would be released on payment of $3,447 to me when cargo was discharged. Please hold back payment of cargo till they give you order to pay my claim. These people wrote me that they had notified you; but for fear they have not, will ask you myself to put in voucher for $3,447, which will release everything and leave balance due Standard Pole and Tie Company." He inclosed (27) stamp for reply, asking Wilson to notify him. The plaintiff received from Wilson answer to letter of 25 February, and saying: "I beg to advise you that I am authorized by Standard Pole and Tie Company to remit to you on account of shipment made by them the sum of $3,468.47. I have had no advice of the shipment you referred to. How-

ever, on arrival of shipment, after inspection is made, remittance will be made to you as directed."

The plaintiff testified that defendant had not paid for the ties. Plaintiff introduced agreement between himself and Standard Pole and Tie Company. The 19,500 ties were shipped to defendant company. They were mixed with other ties, aggregating 26,000. Plaintiff introduced the deposition of one Walsh, who testified that he had conversation with Wilson, purchasing agent of defendant; that he stated to Wilson he went to see him about payment for his ties—showed him letter of 29 February, 1904. Wilson said shipment of poles had not been received; when they were received and inspected he would immediately, or as soon as convenient, forward to O. L. Clark a check for the amount of the lien, which was some $3,000 plus. That he had a second conversation with Wilson, in which he said that the ties had been received, but had not been inspected. That as soon as they were inspected he would send Mr. Clark a check for the amount of the lien, and there was no need to worry about it. That he did not understand why Mr. Clark was worrying about it. That the Delaware, Lackawanna and Western Railroad Company had guaranteed the payment to Clark through the agent who negotiated the original delivery of the ties. . . . That the Delaware, Lackawanna and Western Railroad Company had agreed to pay Clark this lien on these ties, and that was sufficient to set him at rest.

Defendant introduced G. F. Wilson, who testified that he was purchasing agent for defendant company. He denied having had
(28) any conversation with Walsh; said that he bought ties from Standard Pole and Tie Company; that plaintiff was not known in the transaction; that he was simply to disburse the money for the Standard Pole and Tie Company; that the ties were sold to defendant absolutely; that there were no conditions connected with the sale. Defendant offered to show that the trustee in bankruptcy of the Standard Pole and Tie Company claimed the money and forbade the payment of it to the plaintiff. This was ruled out by the court, and defendant excepted. The exception cannot be sustained. The testimony was clearly incompetent. The defendant asked the court to give certain special instructions, which were refused. We think that the court properly refused to give the instructions. They involved an instruction to find for the defendant upon all of the testimony, and were equivalent to an instruction that the plaintiff was not entitled to recover. His Honor instructed the jury that if they found "that the plaintiff had in his possession or under his control 24,000 cross-ties of the Standard Pole and Tie Company on 10 November, 1903, then this paper, the agreement or contract between plaintiff and Standard Pole and Tie Company of

that date, gave him a valid lien upon those cross-ties as long as he retained them in his possession, at least on 19,500 of them.

"If the cross-ties were not in the possession of the plaintiff, the description in the agreement between him and Standard Pole and Tie Company would not be sufficient to give a valid lien; but if plaintiff had possession, he had a valid lien on the cross-ties as long as he kept them in his possession.

"By shipping the cross-ties to Wilmington, N. C., the plaintiff did not lose his lien upon them, if he had a lien.

"If the jury find that the Standard Pole and Tie Company and plaintiff agreed that the cross-ties should be shipped to the defendant from Wilmington, and that the plaintiff was not to release his lien upon the cross-ties by the shipment by the plaintiff, by schooner, to the defendant in New Jersey, until the plaintiff was paid the amount (29) the Standard Pole and Tie Company owed him, or until the defendant guaranteed the payment of the debt of the Standard Pole and Tie Company to the plaintiff, then the court charges you the shipment from Wilmington, N. C., to the defendant does not lose the plaintiff his lien upon the cross-ties, or waive it."

Here the court read the letter of plaintiff to George F. Wilson, purchasing agent, dated 25 February, 1904, and the letter of George F. Wilson, purchasing agent, to plaintiff, dated 29 February, 1904.

"The court charges the jury that if the plaintiff had a lien upon 19,500 cross-ties, that he reserved the lien by agreement between himself and the standard Pole and Tie Company, and if the defendant received these cross-ties, and if before the defendant received these cross-ties the defendant received the letter of the plaintiff dated 25 February, 1904, which I have just read, and wrote the letter to plaintiff dated 29 February, 1904, which I have just read, then the defendant would be indebted to the plaintiff, and the jury will answer the first issue 'Yes.'

"The indebtedness of the defendant to plaintiff is $3,468,47 if you believe the evidence, with interest from the commencement of this action.

"Before the jury can answer the first issue 'Yes,' they must find that the letter of plaintiff to George F. Wilson, of 25 February, 1904, was received before defendant received the cross-ties, and that the letter of George F. Wilson to plaintiff, of 29 February, 1904, was written before defendant received the cross-ties."

The defendant excepted to the charge, specifying the parts thereof to which exceptions were pointed.

The defendant files seventeen assignments of error based upon exceptions to his Honor's ruling upon the admission of testimony. We have examined each of them. None of them can be sustained. The plaintiff simply gave a history of the transaction with the (30)

Standard Pole and Tie Company leading up to the correspondence with Wilson, the purchasing agent of the defendant, notifying him of the terms and conditions upon which the ties were shipped and the promise by the defendant to send check for the amount as soon as the ties were received and inspected. We can see no possible objection to any portion of this testimony. Defendant proposed to ask Wilson in respect to his purpose in writing the letter of 29 February, 1904. This was clearly incompetent. The letter spoke for itself, and it was entirely immaterial with what purpose he wrote it. Its construction, read in the light of plaintiff's letter of 25 February, and the other testimony, was for the court. As we have said, the court properly refused its special instructions. The uncontradicted testimony of the plaintiff, corroborated by the letter of George F. Wilson, purchasing agent of the defendant, shows that the ties were shipped to the defendant, pursuant to an agreement made with the manager of the Standard Pole and Tie Company and the plaintiff, that the latter was to have the possession and the right to control the delivery of them until the purchase price was paid by the defendant; that defendant was notified of this agreement before receiving the ties and expressly assented to the terms of such agreement. The right of the plaintiff is referred to by the parties and so treated by the court as a lien. It is immaterial whether this is apt language to express such right. His Honor expressly told the jury that the right of the plaintiff to recover was dependent upon the retention of possession, and continued only so long as he kept such possession. It does not very clearly appear, but we infer that, notwithstanding the agreement, the ties were shipped from Wilmington to defendant in name of the Standard Pole and Tie Company, and if the defendant, without notice of the terms of the agreement, had paid the Standard Pole and Tie Company for them the plaintiff would
(31) have been without remedy against it. However this may be, as we have said, the plaintiff notified the defendant of his right before the receipt of the ties, and it expressly promised to remit the amount due. The defendant certainly has no cause of complaint of the charge. The right of the plaintiff is made to depend upon the finding by the jury that he had a lien, or, as we interpret the language in the light of the testimony, the possession and control. We are of the opinion that the plaintiff is entitled to recover upon another view of the case. The letter of 25 February from plaintiff to defendant expressly states that the writer has sold the ties to the Standard Pole and Tie Company with the understanding that they were not released, but put in with others, and would be released upon payment of the amount due. He requests the defendant to assent to and carry out this agreement. There is no room for controversy as to the proper con-

struction of this letter. The defendant answers, saying: "I am authorized by the Standard Pole and Tie Company to remit to you on account of shipment made by them . . . On arrival of shipment, after inspection is made, remittance will be made to you as directed." This makes out a clear case of novation, which is thus defined by Mr. Parsons, "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of his orginal ceditor." 1 Parsons on Contract, 217; 9 Cyc., 377. The Standard Pole and Tie Company owed the plaintiff for the ties. It sells them to the defendant and directs the payment to be made by defendant to plaintiff. This arrangement is assented to by all of the parties, whereby the Standard Company is released from its liability to the plaintiff and the defendant becomes the debtor. The substitution of one debtor for the other constitutes a consideration for the promise by the defendant. It will be noted that the letter of the defendant of 29 February, 1904, states expressly that it is authorized by the Standard Company to remit (32) to the plaintiff, and promises to do so "as directed." This view would entitle the plaintiff to recover without reference to any lien on the poles. We have examined the entire record and find in his Honor's rulings

No error.

THOMPSON v. CRUMP.

(Filed 4 April, 1905.)

Wills—Rule in Shelley's Case—Dower.

Where a will provided, "I bequeath to my son J. all my lands for and during his life, and after his death to his lawful heirs born of his wife," the words "born of his wife," qualifying and explaining "his lawful heirs," confine the remainder to the children of his wife and prevent the operation of the rule in *Shelley's case*, and J. took only an estate for life in the lands, and his widow is not entitled to dower therein.

SPECIAL PROCEEDING by S. B. Thompson and others v. T. E. Crump, heard by *Justice, J.*, at chambers, on 25 November, 1904.

This is a special proceeding brought before the Clerk of the Superior Court of UNION for the partition of certain lands. The facts which present the particular question to be determined are not disputed, and are as follows: James W. Thompson, deceased husband of T. E.

Crump, one of the defendants in this action, by virtue of the will of his father, L. B. Thompson, took and up to the time of his death was possessed of two tracts of land consisting of 115 acres. The item of the will by which this land passed to James W. Thompson is as follows: "I give and bequeath unto my son, James W. Thompson, all my lands which I now or may hereafter own, for and during his life, and
(33) after his death to his lawful heirs, born of his wife, and in case he shall have no such heirs to take the estate, in that case it is my will and desire that it go to his full sister, F. Bogan, and children; and in case there be none of that class, then I allow it to go to James W. Thompson's half sister, C. E. Hargett." The petitioners and defendants in the special proceeding, with the exception of one Redwine, who became the owner of a certain share by purchase, and T. E. Crump, widow, are the lawful children of James W. Thompson. In answer to the petition for a sale and division of the 115-acre tract, which is the land mentioned in the will of L. B. Thompson, defendant T. E. Crump alleges that she is entitled to dower therein. The clerk of the court, before whom the proceeding was commenced, ruled that she was not entitled to dower. The defendant appealed to his Honor, *M. H. Justice, Judge,* at chambers, who affirmed the ruling of the clerk, and from his judgment the defendant appealed to this Court.

Redwine & Stack for plaintiffs.
Williams & Lemmond for defendant.

BROWN, J., after stating the facts: The application of the *Rule in Shelley's case* to the item of the will by virtue of which James W. Thompson took and remained in possession of the two tracts of land comprising 115 acres is the sole question presented for our determination. If the rule applies and James W. Thompson died seized in fee of the premises conveyed, then it is plain that T. E. Crump, his widow, would be entitled to dower in the land. But if there are superadded words so limiting and qualifying the estate bequeathed to James W. Thompson as to make the rule inapplicable, then his "lawful heirs" by virtue of the will would take, by purchase, a contingent re-
(34) mainder in fee simple, thus destroying the widow's right to dower.

There can be no doubt that the item of the will presented for our consideration does contain words of qualification which prevent the application of the *Rule in Shelley's case.* The words "born of his wife," qualifying and explaining "his lawful heirs," confine the remainder to the children of his wife and prevent the operation of the rule. The superadded words show that the devisor intended to make the words

"lawful heirs" a *designatio personarum*—that is, they show an intention on his part to limit the remainder over to a particular class of heirs This case falls plainly within the rule that, where a freehold is given to one person, remainder to the heirs of the body of that person and another, and such persons are capable of having a common heir of their bodies, the *Rule in Shelley's case* does not apply, and the heirs of their common bodies take by purchase a contingent remainder in fee simple, and the original taker receives merely an estate for life. *Dawson v. Quinnerly,* 118 N. C., at 188.

In holding that the interest of James W. Thompson was only an estate for life, with remainder over "to his lawful heirs, born of his wife," we have adhered strictly to the view that the *Rule in Shelley's case* is a rule of law and not of construction, but, in so doing, we have also carried out what seems to us to be the plain intention of the devisor, whose will we are considering. It is our opinion that James W. Thompson took only an estate for life in the 115 acres, and his widow is not entitled to dower therein.

Affirmed.

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

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(35)

KENNEDY v. MANESS.

(Filed 4 April, 1905.)

Ejectment—Deeds—Description—Adverse Possession—Instructions—Costs.

1. In an action of ejectment, where the description in the defendant's deed was, "Beginning at a white oak, running south of west 33 rods to a stake; thence east of south 33 rods to a stake; thence west of north 33 rods to the beginning, containing 6 acres, more or less," the plaintiff's exception to a ruling by the court that the description was void for vagueness, and admitting the paper only as a declaration of the grantor bearing upon the character of the possession by the defendant, is without merit.
2. An instruction that if the jury should find that said 6-acre tract had marked lines and boundaries where said lines and boundaries passed through wooded lands, and there was a white oak marked as a corner in said woods, and at two other corners there were stakes, and at the other corner there had been a stake that was broken off, and that the defendant cultivated every year the open land up to the straight lines running from one stake to the other, used the woods for a pasture and for wood, timber, and litter, and used the fruit from the orchard—these would constitute such known and visible boundaries as to make a possession thereunder

that would ripen into title by twenty years adverse possession, is not erroneous.

3. In an action of ejectment, an instruction that "The fact that the plaintiff did not know how the defendant claimed to hold the land upon which he was living has nothing to do with the case; it was the duty of the plaintiff, before he undertook to buy, to go to defendant and find out how he held," is not erroneous.

4. In an action of ejectment against several defendants, where the jury found for one of the defendants, a judgment which provided that he go without day and recover of the plaintiff "his costs of the action" is proper.

ACTION by Duncan Kennedy and others against Thomas W. Maness and others, heard by *Peebles, J.,* and a jury, at September Term, 1904, of MOORE. From a judgment in favor of the defendant Maness,
(36) the plaintiffs appealed.

H. F. Seawell for plaintiffs.
No counsel for defendant.

CLARK, C. J. This was an action to recover 216 acres of land lying in one body, but in four separate tracts. The defendants answered, denying the plaintiff's title; an issue was submitted as to title of each defendant in his respective tract. The plaintiffs recovered judgment except as to the 6 acres of which the defendant T. W. Maness was adjudged owner, and another tract of 57 acres, with respect to which last the court below granted a new trial. Upon the trial it appeared that Thomas W. Maness was in possession of the 6 acres claimed by him, and was not in possession of any other part of said lands. To this he claimed title by continuous adverse possession. He introduced a deed dated 15 February, 1875, from Elias Maness, under whom the plaintiffs claim by virtue of *mesne* conveyances from the purchaser at a foreclosure sale under a mortgage executed by said Elias Maness, 22 May, 1878. The aforesaid conveyance from Elias to Thomas W. Maness described the property as follows: "Beginning at a white oak, running south of west 33 rods to a stake; thence east of south 33 rods to a stake; thence west of north 33 rods to the beginning, containing 6 acres, more or less." It was in evidence that the defendant had lived on the said 6 acres since 1875; that this 6-acre tract was surveyed for Elias that he might make said conveyance to his son (Thomas); that there are lines around the 6 acres; that there is a public road on one side; that through the woods part there is a chopped line; that at the beginning there was a white oak with a blaze and two chops; that there were in 1875, and there still are, stakes at two of the other three corners; that Thomas has cultivated a part of the
(37) cleared land every year; the woods he has used as pasture,

except a part of it which he cleared up and has cultivated; that he has also continuously used the fruit from the orchard. There was conflicting evidence that Thomas W. Maness has occupied and used said 6-acre tract, claiming it as his own continuously since 15 February, 1875, and, on the contrary, that he rented it from the purchaser at the mortgage sale, which was left to the jury, who found for the defendant.

The plaintiff contended that the conveyance from Elias Maness to Thomas W. Maness, 15 February, 1875, was void for vagueness in the above-recited description. The court so ruled and admitted the paper only as a declaration of Elias bearing upon the character of the possession by Thomas of said 6-acre tract, and charged the jury that "if they should find from the evidence that said 6-acre tract of land had marked lines and boundaries, as testified by the witnesses, where said lines and boundaries of said tract passed through wooded lands, and there was a white oak marked as a corner in said woods, as testified by the witnesses, and at two other corners of said tract there were stakes, and at the other corner there had been a stake that was broken off, and that Thomas Maness cultivated every year the open land up to the straight lines running from one stake to the other, used the woods for a pasture and for wood, timber, and litter, and also used the fruit from the orchard—these would constitute such known and visible boundaries as to make a possession thereunder that would ripen into title by twenty years' adverse possession as aforesaid." The plaintiffs excepted and assigned the same as error. The court further instructed the jury that "The fact that the plaintiffs did not know how Thomas W. Maness claimed to hold the land upon which he was living, has nothing to do with this case. It was the duty of the plaintiffs, before they undertook to buy, to go to this party and find out how he held." The (38) plaintiffs expected to this instruction and assigned the same as error.

In none of these particulars do we find any error. The plaintiffs also contend that there was error in taxing all the costs against the plaintiffs, but the judgment provides only that "Thomas W. Maness go without day and recover of the plaintiffs his costs of this action." To this he is certainly entitled. The costs between the plaintiffs and the other defendant is a matter for adjudication in the several judgments between them.

No error.

(39)

RAMSBOTTOM v. RAILROAD.

(Filed 4 April, 1905.)

Railroads—Injury to Livestock—Negligence—Proper Care—Proximate Cause—Questions for Jury.

1. In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle: *Held*, that section 2326 of The Code, in reference to the killing or injury of cattle and livestock by engines or cars, and changing the burden of proof when action is brought within six months, does not apply.
2. To establish actionable negligence, the plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury.
3. Proper care is that degree of care which a prudent person should use under like circumstances and charged with a like duty.
4. The proximate cause of an injury is one that produces the result in continuous sequence and without which it would not occur, and one from which any man of ordinary prudence could foresee that such result was probable under all the facts as they existed.
5. Where two different conclusions could be fairly drawn as to whether there was a negligent breach of duty in not stopping a train, and whether the injury was one that any man of ordinary prudence might have expected from the facts as they existed, an instruction that withdrew the decision of both of these elements of actionable negligence from the jury and submitted to them only the question whether the failure to stop the train caused the injury, was erroneous.

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

ACTION by T. H. Ramsbottom and T. B. Smith, trading as Ramsbottom & Smith, against Atlantic Coast Line Railroad Company, heard by *Brown, J.*, and a jury, at October Term, 1904, of COLUMBUS. From a judgment for the plaintiffs, the defendant appealed.

Lyon & Lyon for plaintiffs.
Junius Davis for defendant.

HOKE, J. There was evidence to the effect that some time prior to the commencement of this action, and within six months, two horses owned by the plaintiffs got on the track of defendant company at a point about a quarter of a mile from a trestle, and 100 yards or little more ahead of one of defendant's trains, which was approaching from

the south. The track was straight for at least a half mile back from the trestle, and at a point about 150 yards from the trestle a wagon road crossed the railroad track. The horses ran along the track about 100 yards ahead of the train, passing the wagon-road crossing, and continued to go along the track till they ran into the trestle and were seriously injured. When the horses were seen by the engineer of defendant's train about a quarter of a mile from the trestle, the speed of the train was slackened to 6 miles an hour, and the train, being fully under control, followed along behind the horses at a (40) distance of 100 yards until the horses were injured, and stopping at a distance of 100 feet from the trestle. There was some conflict of evidence as to the speed of the horses as they went along the track ahead of the train, and some conflict as to the character and condition of the ground, tending to make it more or less probable that the horses would leave the track without stopping the train.

Upon these facts the judge below held—correctly, we think—that the statute in reference to the killing or injury of cattle and livestock by engines or cars running on any railroad (Code, sec. 2326) and changing the burden of proof when action is brought within six months, does not apply, and the burden of the issue as to negligence was on the plaintiff. This point is really not before us, as the ruling of his Honor was against the plaintiff, who did not appeal; but as there will be another trial, and the same question will arise, we deem it not improper to express our opinion concerning it.

Properly, then, putting the burden of this issue on the plaintiff, the court further charged the jury as follows: "That up to the time the horses passed the crossing there was no negligence on the part of the engineer. The evidence showed that he had slowed down the train and had shut off steam and had the engine under control; and he had a right to believe that the horses could get off the track or turn off at the crossing. After the horses passed the crossing, if an engineer of ordinary prudence and care could by reasonable diligence have seen that the horses were badly frightened and were rushing forward towards the trestle, then it was the engineer's duty to stop the engine, and if you find the further facts to be in addition that the horses were driven onto the trestle by the approaching train and its failure to stop sooner than it did after passing the crossing, it is negligence on the part of the defendant, and you will answer the first issue 'Yes.'" (41)

In this charge we think there was error which entitles the defendant to a new trial. It has been held in this State that where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether the injury

was caused by the negligence of one or the concurrent negligence of both of the parties.

But where, upon the facts admitted, or as they shall be found by the jury, men of fair minds could come to different conclusions on the question of actionable negligence, it is the province of the jury to determine whether such negligence does or does not exist. *Russell v. R. R.*, 118 N. C., 1098; *Graves v. R. R.*, 136 N. C., 3.

To establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with like duty; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. Shearman and Red. on Neg., secs. 25-28; *Brewster v. Elizabeth City*, 137 N. C., 392; *Raiford v. R. R.*, 130 N. C., 597; *Pittsburg v. Taylor*, 104 Pa., 306; *McGowan v. R. R.*, 91 Wis., 147.

We are of the opinion that the present case is one in which two different conclusions could be fairly drawn as to whether there
(42) was a negligent breach of duty in not stopping the train, and whether the injury was one that any man of ordinary prudence might have expected from the facts as they existed.

The charge of the court, we think withdrew the decision of both these elements of actionable negligence from the jury, submitting to them only the question whether the failure to stop the train caused the injury.

There will be a new trial, and with appropriate instructions on the degree of care required, and as to the meaning of proximate cause, the question will be left to the jury to determine whether there was a negligent breach of duty in failing to stop the train, and whether such failure to stop was the proximate cause of the injury, the burden of the issue being on the plaintiffs.

New trial.

Cited: Kearns v. R. R., 139 N. C., 476; *Brown v. Durham*, 141 N. C., 253; *Jones v. R. R.*, 142 N. C., 212; *Bowers v. R. R.*, 144 N. C., 686; *Boney v. R. R.*, 145 N. C., 250; *Stewart v. Lumber Co.*, 146 N. C., 86; *Harton v. Tel. Co., ib.*, 437; *McGee v. R. R.*, 147 N. C., 155; *Cordell v. Tel. Co.*, 149 N. C., 413; *Snipes v. Mfg. Co.*, 152 N. C., 45; *Hudson*,

v. McArthur, ib., 455; *Penny v. R. R.*, 153 N. C., 301; *Bryan v. Lumber Co.*, 154 N. C., 490; *Kearney v. R. R.*, 158 N. C., 547; *Hardy v. Lumber Co.*, 160 N. C., 120; *Ward v. R. R.*, 161 N. C., 184; *Monds v. Dunn*, 163 N. C., 113; *Alexander v. Statesville*, 165 N. C., 532; *McAtee v. Mfg. Co.*, 166 N. C., 456, 457; *Norman v. R. R.*, 167 N. C., 545; *Buchanan v. Lumber Co.*, 168 N. C., 45; *Davis v. R. R.* 170 N. C., 595; *Wright v. Thompson*, 171 N. C., 91; *Garland v. R. R.*, 172 N. C., 639; *Chancey v. R. R.*, 174 N. C., 352, 353; *Brown v. R. R., ib.*, 697; *Avery v. Palmer*, 175 N. C., 381; *Lea v. Utilities Co., ib.*, 463; *Davis v. R. R., ib.*, 652; *Brady v. Lumber Co., ib.*, 706; *Hudson v. R. R.*, 176 N. C. 492; *Blalock v. R. R.*, 178 N. C., 357; *Enloe v. R. R.*, 179 N. C., 88; *Winns v. R. R.*, 181 N. C., 497.

INSURANCE COMPANY v. RAILROAD

(Filed 4 April, 1905.)

Railroads—Fires—Evidence—Train Sheets—Instructions.

1. A record containing the entries made in the usual course of business on the train sheets by witness (a train dispatcher), from reports telegraphed to him by station agents as to the arrival and departure of trains, is admissible for the purpose of showing the position of a train at a certain time.
2. In an action against the defendant for burning cotton, an instruction that if the fire originated from sparks from an engine on the defendant railroad, the presumption was that the sparks were negligently emitted, and if the defendant had failed to rebut such presumption the jury should find the cotton was burned by defendant's negligence, correctly presented the law governing defendant's liability.

ACTION by the Firemens Insurance Company and others (43) against the Seaboard Air Line Railway, heard by *Long, J.*, and a jury, at October Term, 1904, of WAKE.

Plaintiffs alleged that on 19 October, 1902, certain cotton, upon which plaintiff companies had issued policies of insurance, was burned by the negligence of the defendant's agents and servants. That by reason of the destruction of said cotton, plaintiffs were compelled to pay the value thereof; that the owners of said cotton transferred and assigned to the plaintiffs all rights of action which they had against the defendant company for the negligent burning thereof. Defendants denied the material allegations in the complaint. The parties went to trial upon the following issues:

"1. Was the property of the Hamlet Ice Company insured by the plaintiffs, as alleged in the complaint, at the time it was burned?" Answer: "Yes."

"2. Was the said property burned by the negligence of the defendant company, as alleged in the complaint?" Answer: "No."

From a judgment upon the verdict the plaintiffs appealed.

Busbee & Busbee and Douglass & Simms for plaintiffs.
Day & Bell and T. B. Womack for defendant.

CONNOR, J., after stating the facts: In the trial of this cause it became material to show at what time the defendant's wrecking train No. 371 reached Hamlet, the station on defendant's road at which the cotton was burned. Defendant introduced one C. Lane, who testified that he was employed by the defendant road as train dispatcher on 19 October, 1902; that it was his duty to keep a record of the arrival and departure of all trains at all telegraph stations; that the record was made and kept on the train sheet; at the time trains arrived at and left
(44) stations the operator at such stations notified the dispatcher, who immediately recorded on the sheet the time as it was reported to him; that such sheet constituted a record of the arrival and departure of all trains. That he governed the movements of trains by such record; that on 19 October, 1902, the official report was sent him, and that he immediately recorded thereon the time of the arrival of the extra train, which was the wrecking train, at Hamlet of that date, and that he had the record before him. The defendant then offered the record in evidence for the purpose of showing the time of the arrival of the wrecking train at Hamlet, which witness McDonald testified was taken charge of by shifting engine 371 on its arrival. Objection. The court ruled that the witness could refresh his recollection by an inspection of the record, enabling him to speak touching his own acts at the time with regard to the matter under inquiry, but at that time ruled out the declaration which any other agent of the company made to him at the time by wire or otherwise. The witness stated that he could not state of his own personal knowledge the time at which the wrecking train arrived at Hamlet. The court admitted the record in evidence, showing the entries made by witness of statements made to him by wire from the agent of the defendant at Hamlet as to arrival and departure of said wrecking train, to which plaintiff duly excepted. Defendant also introduced one J. W. Hunt, who testified that he was employed by defendant company as conductor and that as such he ran wrecking train on 19 October, 1902, from Raleigh to Hamlet; that it arrived at Hamlet at 12:37. Witness is then shown a book which he identifies as a register

showing the time of arrival, which he says is kept at Hamlet; that it was his duty to register the arrival of the train, and that he did register it on that day. He identifies the entry in his own handwriting. "Extra train. Time arrival, 12:37 p.m." Signed by him and also by engineman. This last record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury. (45)

It is contended by the plaintiffs that the "train sheets" are not admissible, because, while containing entries made by the train dispatcher in the usual course of business, he had no personal knowledge of the truth of the statements recorded; that he simply recorded information derived from the operator at Hamlet, 100 miles or more distant from Raleigh. This, they say, is but hearsay. The defendant, on the other hand, contends that the entry made by the train dispatcher, although based upon information derived from the operator, by reason of the circumstances under and the manner in which the information was communicated, is surrounded by all possible safeguards against error, uncertainty, or falsehood,—and therefore comes within the exception to the general rule excluding hearsay evidence. The question is of first impression in this State. We have given it careful and anxious consideration, desiring to make no departure from the well-settled principles of the law of evidence or the decisions of this Court, at the same time recognizing and keeping in view the duty of the Court to make diligent effort to find in those general principles such safe and reasonable adaptability that in the changing conditions of social, commercial, and industrial life there may be no wide divergence in the decisions from the standards by which men are guided and controlled in important practical affairs. The law of evidence, based upon certain more or less well-defined general rules, evolved from experience, has been molded by judicial decision and legislative enactment into a system having for its end and purpose, and believed to be adapted to, the discovery of truth in judicial proceedings. Mr. Greenleaf says: "In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurb. The most that can be affirmed of such things is that there is no reasonable doubt concerning (46) them." Professor Thayer says: "The law of evidence is the creature of experience rather than logic."

"The distinctions of the law are founded on experience, not on logic. It, therefore, does not make the dealings of men dependent upon mathematical certainty." Holmes Com. Law, 156. "It is no doubt true that to a very great extent the law of procedure, as well as the primary law, is founded, not on the experience of isolated persons, but the general

experience of men engaged in the business and vocations of life." 1 Elliott, sec. 3.

The courts early adopted and have at all times rigidly adhered to the rule that witnesses, in testifying, must be confined to that which is within their personal knowledge, and that which is but hearsay must be excluded. 1 Greenleaf (16 Ed.), 98; 1 Elliott on Ev., 215. The wisdom of this general rule and the reason upon which it is founded are obvious and require no vindication or discussion. The courts, however, soon found from experience that unless exceptions were made to the general rule it would be impossible, in many cases, to establish the truth; that the legal rights would be sacrificed and wrongs be without remedy. *Judge Elliot* says: "As already stated, it was conceived originally that witnesses should always be present, but this was found impracticable. In consequence, the general rule has become honeycombed with so-called exceptions. The grounds of making these exceptions differ, as do the different exceptions. The ground as to some is that the hearsay is rendered necessary by the difficulty of other proof; as to others, the ground is that, owing to the circumstances under which certain declarations were made, some guarantee of their reliability is furnished other than the mere fact of their having been made—that is, the circumstances add peculiar weight to this evidence, and dis-
(47) pense with the ordinary tests of credibility." 1 Elliott, 320.

The general and well-recognized exceptions are stated in Elliott on Ev., 331; 1 Greenleaf, 114. Professor Wigmore says that the reasons upon which the exceptions are based are "circumstantial guarantee of trustworthiness and necessity." 11 Wigmore Ev., sec. 1420. The principle with its limitations is well stated by *Jessell, M. R.*, in *Sugden v. St. Leonards,* L. R., 1, Pro. Div. (1875-6), 154 (241). He says: "Now, I take it, the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exception was that very difficulty. In the next place the declarant must be disinterested—that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be disposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge, not possessed in ordinary cases." Among the exceptions to the general rule we find "Entries and declarations of third parties made in the regular course of duties or business." Such entries are of two kinds: (1) Those made by the entrant respecting a transaction conducted by or matter known to him personally, in which no

other person has taken any part. (2) Those made by the entrant upon information communicated to him by some other person acting in the line of his duty to make report to him. The entries made by the train dispatcher fall within this class. It is undoubtedly the general rule that if the entrant and the person making the report upon which the entry is made are both living and available, they should be produced to testify to the truth of the subject-matter of the entry. That if one be living and available and the other dead or unavailable—that is, insane or beyond the process of the court—the entry may be (48) introduced upon the testimony, as to its authenticity, of the living, available person. Can the entry be admitted when, as in the case before us, the entrant is living and the person upon whose report the entry is made is not produced nor his absence accounted for?

Mr. Greenleaf, referring to the decisions of the courts in respect to the admissibility of this class, says: "Other courts . . . admit them (the entries) without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transactions." 1 Greenleaf, 120 (a). He says that other courts refuse to permit such entries to be introduced.

Judge Elliott, quoting the language of Mr. Greenleaf, says: "We are inclined, also, to agree, in the main, with the writer quoted in the last preceding section, but not entirely without qualification. It may be—although, as shown by the authorities there cited, there is sharp conflict among the authorities—that such entries are admissible, in a proper case, when duly authenticated, on proof that the informant knew the facts or properly reported them, even though he is not put upon the stand, especially if he is unavailable; and there are authorities looking very decidedly in that direction in addition to those referred to in the preceding section." Citing *Meyor v. Brown,* 130 Mich., 449; *Bank v. Bank,* 108 Tenn., 374; *Donovan v. R. R.,* 158 Mass., 450.

Professor Wigmore, after a very interesting discussion of the question in its several aspects, says: "The conclusion then is, that when an entry is made by one person in the regular course of business, recording an oral or written report made to him by one or more persons in the regular course of business of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, . . . provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclu- (49) sion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and

general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employer affect the trust that is given to such books. It would seem that expedients which the whole business world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with the technical judicial scruples on the part of the same persons, who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical."

We have made these extracts from the works of three standard American authors on the law of evidence to show the trend of thought and opinion upon the admissibility of entries falling within the class under discussion. An examination of the decided cases discovers a conflict of authority. In *Fielder v. Collier,* 13 Ga., 495, the action was assumpsit for balance due on account. The defendant shipped to plaintiff for sale as commission merchants cotton upon which they obtained advancements. The cotton when sold brought less than the amount advanced. The action was brought for the difference. For the purpose of showing the items making up the account, including expenses of selling, etc., the plaintiffs offered to show a transcript from their books (this (50) under the rule of practice in that State was admissible, if at all, as the original). The testimony was, upon objection, excluded. Upon appeal, *Lumpkin, J.,* said: "Shall this proof be received, or shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the subagents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to procure? . . . They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. After the lapse of a very brief period, the clerks themselves could only call to mind what had been done by referring to their entries and memoranda." The exact question is presented and decided in *Donovan v. R. R.,* 158 Mass., 450.

The defendant offered for the purpose of showing the position of a train at a certain time, the train sheets kept by the dispatcher, with the

testimony of the person who made them. The facts are singularly like those before us in respect to the manner in which the entries were made. This may be explained by the fact that all railroads necessarily have some approved system of controlling the movement of trains and keeping a record thereof—using the telegraph offices on their line of road as the medium for communication. It would be impossible, without the most disastrous results, to do otherwise. *Barker, J.*, says: "The failure to produce the East Summerville operator is relied upon by the plaintiff as one ground for his contention that the entries were not shown to be competent evidence." He proceeds to note cases holding inadmissible certain shop-book entries, and says: "But no entries were transferred to the dispatcher's sheet from the sheet kept at the East Summer-
ville station. As telegraphic messages are read by sound, as well (51)
as automatically recorded in symbols, these entries stand upon
the same footing as if made from oral statements uttered at the indicated station and audible in the dispatcher's office." The reasoning of the learned judge is so satisfactory to our minds that we quote his language. "It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry when made should be true, and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the train at the station and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to misstate the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum, and every step by which the information spread upon it was gathered, transmitted, and entered, was an act performed by some person in the line of his duty and in the usual course of his employment under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction." The case most strongly relied upon by the plaintiffs sustaining their exception is *R. R. v. Noel,* 77 Ind., 110 (121). The character of the entries do not very clearly appear. The Court cites no authorities and disposes of the question quite summarily. It is simply stated that the defendant offered as evidence "the entries in books." It does not appear how they were authenticated, by whom or upon what basis they were made. The case is noticed by the Massachusetts Court as being "entries possibly similar." The decision is not very satisfactory as an authority,
because of the meager statement of the facts. Many of the (52)

cases cited by the plaintiffs are based upon construction of the "book-debt laws" of the States. Some of them do not come within any of the exceptions to the general rule. We find no case directly in point, or giving us much aid, in our Reports. In *Fairly v. Smith,* 87 N. C., 367, it was held that market reports published in newspapers when the information was gathered from reliable sources were admissible.

The record made by one appointed for that purpose by the signal service bureau of the state of the weather held admissible. *Knott v. R. R.,* 98 N. C., 73. Professor Wigmore suggests that when an entry is made in the usual course of business based upon reports made by one whose duty it is to make such report, but who is not required to make and keep any record of the transaction, the entry so made is admissible upon the ground of necessity growing out of the fact that it is not to be expected that the person making such report would remember the fact reported—and that he is therefore unavailable in a legal sense. It is not to be expected that an operator, who reports to the dispatcher the time of arrival and departure of a number of trains daily could undertake to testify from memory the hour and minute of each arrival or departure. He has no duty imposed upon him to do so. If he did undertake to testify, as in this case, three years after the event, but little credence would be attached to his testimony. For practical purposes he is as essentially unavailable as if dead or insane. We are of the opinion that, applying either test, trustworthiness or necessity, the entries made on the train sheets were admissible. It has occurred to our minds that possibly the train sheet is admissible as a quasi-public record. It is true that neither of the persons making it are sworn officers, yet it is well settled and now recognized by all courts that common carriers in the operation of their trains are discharging a
(53) public duty, with many of the incidents attaching to public agencies. It would seem not unreasonable that courts should give to their records, made in the discharge of such duty, and meeting the other requirements of public records, the same recognition as is given to such records. It is not easy to see why this entry is not surrounded by the same "circumstantial guarantee of trustworthiness" as an entry made under similar conditions by a clerk in a public office. We do no more than suggest this view. The exception must be overruled. We deem it proper to say that in nothing said herein do we wish to be understood as opening the door to other testimony than that permitted by the statutes in force in this State in regard to book debts. Code, sec. 591, 2, 3; Laws 1897, ch. 480. The plaintiff requested his Honor to charge the jury: "That if the jury shall find from the evidence that the fire originated from sparks from an engine of the defendant railroad company, the presumption is that the sparks were

negligently emitted (and such presumption arises whether the fire started on the outside or inside of the compress building)." This was declined. His Honor, at the request of the plaintiffs, charged the jury: "That if the jury shall find from the evidence that the fire originated from sparks from an engine of the defendant railroad company, the presumption is that the sparks were negligently emitted; and if the jury shall further find that the defendant railroad company has failed to rebut such presumption, the jury should answer the second issue 'Yes.'"

We find no error in the refusal of the court below to give the third special instruction, and think that the fourth instruction given presented to the jury the law governing the defendant's liability, if they found that the defendant company burned the cotton. We have examined the entire record with care. His Honor's charge is clear, full and correct. It would seem that the real question, around which the controversy was fought out and decided, was whether the cotton was set fire to and burned by the defendant's engine. (54)

No error.

Cited: Cunningham v. R. R., 139 N. C., 439; *Duffy v. Ins. Co.,* 142 N. C., 108; *Jones v. R. R., ib.,* 214; *Wade v. Tel. Co.,* 147 N. C., 225; *Jones v. R. R.,* 148 N. C., 451; *Lumber Co. v. Lumber Co.,* 176 N. C., 504.

CRUTCHFIELD v. HUNTER, RECEIVER.

(Filed 11 April, 1905.)

Banks—Receiver—Creditor's Suit.

Where a bank failed and a receiver was appointed at the instance of a creditor in an action brought in behalf of himself and all other creditors, the plaintiff cannot maintain an action against the receiver to recover a deposit, but his remedy is to file a petition in the original cause.

ACTION by George P. Crutchfield against T. A. Hunter, receiver of the Bank of Guilford, heard by *Shaw, J.,* and a jury, at (Special) January Term, 1905, of GUILFORD.

This was an action commenced on 4 December, 1903, to recover a debt. The plaintiff submitted to a nonsuit upon an intimation of the court that the debt was barred by the statute of limitations, and appealed.

E. J. Justice for plaintiff.

Scales, Taylor & Scales and J. N. Wilson for defendant.

BROWN, J. The plaintiff was a depositor with the Bank of Guilford, and on 31 July, 1898, deposited with it $290 and took a receipt from the cashier therefor on one of the deposit slips of the bank. He has not been given credit for this deposit on his account with the bank, and never has been credited with it, or had it paid to him in any
(55) settlement with the bank or in any other way. The bank failed, and on 3 January, 1899, a receiver was appointed to take charge of its assets, at the instance of a creditor in an action brought on behalf of himself and all other creditors.

This action cannot be maintained. The remedy of the plaintiff is to file his petition in the original cause wherein a receiver was appointed. Upon the hearing of his petition and the answer of the receiver thereto, the pleas raised will be adjudicated. *Dobson v. Simonton,* 93 N. C., 268, is "on all-fours," and the opinion presents a full discussion of the subject. Let this action be dismissed without prejudice.

Dismissed.

Cited: Black v. Power Co., 158 N. C., 472.

GRIFFIN v. RAILROAD.

(Filed 11 April, 1905.)

Instructions—Prayers—Error, Not Prejudicial.

1. A defendant cannot complain of an instruction to the jury which was substantially responsive to his prayer relating to the same phase of the case.
2. Where a case has been fairly tried on the merits and there has been no miscarriage of justice, the judgment will not be disturbed for an error which is very slight and no substantial prejudice to the party complaining has resulted therefrom.

PETITION by defendant to rehear this case, which was decided at Fall Term, 1904, no opinion being filed.

This was an action brought to recover damages for the killing of plaintiff's intestate, who was run over by defendant's train while lying on the roadbed of the defendant company. The chief question
(56) before the jury, as stated in the petition to rehear, was whether the engineer exercised due or ordinary care in keeping a proper lookout upon the track; and whether, if he had kept a proper lookout, he could have discovered the intestate in an apparently helpless condition in time to have stopped the train and avoided the injury.

W. A. Horton, the engineer, introduced by defendant, after testifying as to the proper equipment of the train and other particulars of the accident, testified as follows:

Q. As you approached the station of Peachland, were you keeping a lookout? A. Yes, sir; I was looking right in the track.

Q. What kind of lookout were you keeping? A. A careful one, watching the track all the time.

Q. As you passed from Peachland, keeping a lookout, did you discover anything? If so, when and where? A. Well, after I passed that mail crane there, about midway between that and the crossing, I saw the deceased's face.

Q. You saw his head? A. Yes, sir. I saw his face up near the rail. I think I was about 100 yards from him, as best I could tell, from the telegraph poles. It was about half-way between the mail crane and the top of the hill.

Q. As you approached the station of Peachland, how is the grade? A. As you come up to the station it is upgrade to a point nearly opposite the warehouse.

Q. After you leave the station, how is it? A. Then it begins to go down.

Q. Which is the steepest? A. The grade on the east side of the depot is greater than on the west side; that is, it is steeper, but it goes down from the station as you go in.

Q. Did you discover any portion of his body? A. No, sir; I did not see anything of his body until I got right over him.

Q. Was his head on the rail or adjoining the rail? A. The back part of his head was up against the rail. His head was not on the rail at all.

Q. Was it on the cross-ties? A. I am not positive about that. I really believe when we got back there that his head was leaning on the cross-ties.

Q. You are not certain how it was before? A. No, sir.

Q. When you discovered that face of a man, what did you do?

A. I applied the brakes so as to stop. (57)

Q. What kind of brakes? A. Air brakes. I throwed them in the emergency application, and stopped the train as quick as possible.

Q. Could you have stopped any sooner by any means that you have that you did not use then? A. No, sir.

Q. How do you apply emergency brakes? A. Well, the brake valve is right in front of you.

Q. What means did you have to use in making the stop? A. The brake valve right in front of me, and the sand blower. They are right together there.

Q. Did you use both of them? A. I am not positive about the sand.

Q. Give me your best impression. A. I cannot say positively I used the sand. My impression is that I did do it.

Q. How far did your train run before it was stopped? A. From the time I put on the brakes to where it stopped was something like 1,200 feet.

Q. How far beyond the place where the man was did you go? A. It looked like about a train length from the rear end of the train to where we went back to him. It was in the night. Since then, I know where I stopped at, and I know it was about that distance.

Q. State whether or not this face could have been discovered by a person on an engine at a greater distance than it was discovered by you that night? A. No, sir; I do not think it could.

Q. Could a train have stopped at that place, traveling 45 miles an hour, in a shorter distance than it was stopped by you that night? A. No, sir; I do not think it could.

Q. How long have you been an engineer over this particular road? A. Ten or twelve years.

Q. Have you looked to see, at this particular point, where this person was since this accident? A. Oh, yes, sir; I look at it every other day. I come by there every other morning.

Q. Have you had occasion to look at it with a good headlight, to see in what distance it could be seen? A. Yes, sir; I have been up there several times.

Q. What do you say now as to what distance he could have been seen? A. One hundred yards is about the furthest distance anybody would be able to see him.

(58) Q. I mean you. A. That is as near as I have ever been able to see him.

On cross-examination this witness, W. A. Horton, questioned by plaintiff, answered as follows:

Q. Did you not tell Mr. Bailes that night that your plow struck him? (Defendant objected. Overruled, and exception.) A. No, I did not.

Q. Did not you tell Mr. Bailes, also, that you saw the man in time to stop, but that you thought it was a piece of paper, or something of that kind? (Defendant objected. Overruled, exception.) A. No, sir.

Q. You had a conversation with Mr. Bailes that night? (Defendant objected. Overruled, and exception.) A. I did not.

Q. Did you not say in Bailes' presence that night that your plow struck him? (Defendant objected. Overruled, and exception.) A. No, sir; I did not.

Q. Did you not, in Mr. Bailes' presence that night, say that you saw the body in time to have stopped the train, but you thought it was a

piece of paper or something, and you did not stop? (Defendant objected. Overruled, and exception.) A. I did not.

Q. Did not you say in Mr. Bailes' presence, or to Mr. Bailes, that night, that you did not discover it was a man until you got to the frog of the switch? (Defendant objected. Overruled, and exception.) A. I did not.

Mr. J. T. Bailes was examined on behalf of plaintiff, and, among other things, testified as follows:

Q. Did you have any conversation with Engineer Horton the night Mr. Griffin was killed? A. I did.

Q. Did Mr. Horton tell you that night, while you were standing there over or near the body of Mr. Griffin, that the plow struck him? (Defendant objected. Overruled, and exception.) A. He did.

Q. Did he tell you, or say in your presence, that he saw the man in time to stop, but that he thought it was a piece of paper until he got near to him or over him? (Defendant objected. Overruled, and exception.) A. He did.

Q. Did he state to you, or in your presence, that his head was lying on the rail, and his plow struck him? (Defendant objected. Overruled, and exception.) A. He did.

The defendant asked the court to instruct the jury as follows: (59)

"That if the jury find from the greater weight of the evidence that the plaintiff's intestate could see the train approaching while he was in a place of danger with his head near the rail or on the rail, and was neither in an unconscious nor helpless condition, and failed to get out of the way of the train, but remained stationary, you will answer the first issue 'No.'" Refused, and defendant excepted.

The court charged the jury as follows: "If the jury should find that the intestate, although killed by the moving train of the defendant, saw the approaching train, and was conscious of the danger, and had the time and ability to remove himself from the position of peril, and failed to do so, then the plaintiff would not be entitled to recover, and the jury would answer the first issue 'No,' and they need not consider the other issues." Defendant excepted.

J. D. Shaw and Shepherd & Shepherd for petitioner.

Lockhart & Son, Robinson & Caudle, and Redwine & Stack in opposition.

PER CURIAM: We have given this case a careful examination and find no new point presented and no authority cited which was not considered by us at the last term. The instruction of the court to the jury,

which is assigned as error, was substantially responsive to the defendant's prayer relating to the same phase of the case, and there is, therefore, no cause to complain of it. *Thompson v. Tel. Co.*, 107 N. C., 449; *Greenleaf v. R. R.*, 91 N. C., 33. We do not see that the instruction, when properly construed, was inherently wrong. The other point made as to the failure of the judge to explain to the jury the use that could be made by them of the testimony of the witness Bailes, who is alleged to have contradicted the defendant's witness Horton, cannot be sustained.

We do not think there was any misunderstanding by the jury
(60) of the nature and effect of this evidence, and there certainly has not been any real miscarriage of justice. The parties themselves did not seem to attach much, if any, importance to the alleged omission to charge upon this point. Assuming, for the sake of argument, that there was an omission in this respect, it was not so grave under the facts and circumstances of this case appearing in the transcript, as to constitute reversible error. We do not mean to intimate that there was any error at all, but, if there was, it was very slight and no substantial prejudice to the defendant has resulted therefrom. 2 Enc. Pl. and Pr., 499 *et seq.*, and notes. It is unnecessary to discuss the assignment more in detail, as by reason of the recent rule of this Court upon the subject this case cannot become a precedent. The case seems to have been fairly tried on the merits, and the verdict and judgment should not be disturbed.

Petition dismissed.

Cited: Freeman v. Brown, 151 N. C., 113; *Singleton v. Roebuck*, 178 N. C., 205; *S. v. Stancill, ib.*, 685. *Marshall v. Telephone Co.*, 181 N. C., 298.

STEWART v. CARPET COMPANY.

(Filed 11 April, 1905.)

Elevator—Instructions—Defective Appliances—Disobedience of Orders Res Ipsa Loquitur.

1. It is error for a judge to base an instruction upon a hypothetical state of facts or upon facts of which there is no evidence.
2. In an action for damages for injuries received by the fall of an elevator, an instruction which made the question of defendant's negligence turn wholly upon the defectiveness of the elevator was erroneous, where there was evidence that the plaintiff was injured solely by reason of his disobedience of orders.

3. The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor, but it gives the plaintiff the advantage of a footing in the case or a basis of recovery, and calls for proof from the defendant.

ACTION by W. H. Stewart against the Van Deventer Carpet (61) Company, heard by *Bryan, J.*, and a jury, at September Term, 1904, of GUILFORD.

This action was brought to recover damages for injuries received by plaintiff, an employee of the defendant, by the fall of a freight elevator on which at the time he was riding, as he alleges, in the performance of his duty. The evidence introduced by the plaintiff tended to show that his duty was to carry filling and warps from the first to the second floor of the mill. This was done by putting the load on the elevator and operating it himself. At the time of the injury he had about 50 pounds of filling and warps on the elevator, which was started by pulling a rope. When the rope was pulled the brake was released and the elevator would rise, and when the rope was turned loose it would stop. The elevator was moved up and down by a cable attached at one of its ends to the carriage and at the other to a heavy weight, the cable winding over a drum three or four times. Plaintiff had been operating the elevator since the first day of February. In September, when he was hurt, he was carrying a load of filling and warps on the elevator, and when he reached the second floor it fell and injured him. Plaintiff did not know what caused the fall. He denied that he had been forbidden by the superintendent or his assistant to use the elevator, and instructed to use the stairway instead, and he also denied that there was any notice posted to the effect that employees should not use the elevator. Plaintiff and other employees were in the habit of using the elevator without objection. There was nothing broken about the elevator to plaintiff's knowledge. It had been operated by him safely that morning and for some time before the day he was injured. There were no "safety catches" on the elevator. There was evidence on the part of defendant tending to show that the elevator was in good condition, as shown by an examination of a machinist made immediately after plaintiff was (62) injured. There was evidence showing the proper manner of operating the elevator and of handling the brake-rope, one of the defendant's witnesses testifying that if the operator holds on to the brake-rope and the elevator is descending, it will strike the floor and the drum and pulley will continue to unwind the coil and make a slack in the cable. That the slack was not the result of any defect in the elevator, but of carelessness of the operator in not turning loose the brake-rope. This witness stated that when he went to the elevator to examine it after the plaintiff fell, he found that the brake-rope had been taken off,

the elevator had been allowed to run too fast and the cable had unwound from the drum. If the brake had been put on at the proper time this would not have happened. The witness also stated that there were no safety catches on the elevator; that he had seen only one, and that was on a passenger elevator. There was also evidence that the plaintiff had been forbidden to use the elevator and told to use the stairway, and that notices had been posted giving like instructions to the employees, At the close of the testimony defendant moved to nonsuit the plaintiff, and also asked for special instructions. This motion and the prayers for instructions were refused, and defendant excepted, as it did to certain instructions given by the court. There was a verdict for the plaintiff and a motion for a new trial by defendant, which being overruled, defendant again excepted. From a judgment for the plaintiff, the defendant appealed.

John A. Barringer for plaintiff.
King & Kimball for defendant.

WALKER, J., after stating the case: It is unnecessary to consider more than two of the defendant's exceptions, which relate respectively to the first and second issues. The court charged the jury as follows: "If
(63) the jury find that the appliances in common use upon elevators were not provided by the defendant, and that plaintiff, in discharging his duties, was injured thereby, then you will answer the first issue 'Yes.'

"Where the negligence of an employer is a continuing one, as the failure to furnish safe appliances in general use, there can be no contributory negligence by the employee which discharges the liability of the employer."

The first of these instructions was erroneous, because there was no evidence that the defendant had failed to equip the elevator with appliances "in common use." It is true that the employer must adopt and use all approved appliances which are in general use. *Witsell v. R. R.*, 120 N. C., 557; *Lloyd v. Hanes,* 126 N. C., 359; *Dorsett v. Mfg. Co.,* 131 N. C., 262; *Marks v. Cotton Mills,* 135 N. C., 290; *Bottoms v. R. R.,* 136 N. C., 472. But while this is so, there must be evidence upon which the jury can find that the particular appliance, which it is claimed the employer should have adopted and attached to his elevator, was in general use. It is error for a judge to base an instruction upon a hypothetical state of facts or upon facts of which there is no evidence in the case. This is a well-settled rule, and should be carefully observed in order that the jury in their consideration of the case may be kept strictly within the limits of the evidence and decide the case upon the

facts, and not upon mere conjecture or surmise. If their attention is diverted from the true questions involved in the case and directed to irrelevant matters, their conclusion cannot be relied on with safety as determining the rights of the parties according to the law and the evidence. The charge of the court must always be applicable to the facts of the case. *King v. Wells,* 94 N. C., 344; *Burton v. Mfg. Co.,* 132 N. C., 17; *Joines v. Johnson,* 133 N. C., 487. A like reason underlies the rule that it is not error to refuse an instruction asked to be given to the jury which is not supported by the evidence. Clark's Code (3 Ed.), p. 535. If this instruction referred to the evi- (64) dence in regard to "safety catches," it was erroneous, as it does not appear that they were generally used as approved appliances in the equipment of elevators. The same may be said of the second of the instructions we have mentioned as having been given to the jury. It is assumed therein that there had been a failure to furnish safe appliances in general use, when there was no evidence to support the assumption as we have already shown. It may be further said of both instructions that by them the jury were told that, if appliances in common use were not provided by the defendant for the elevator, and plaintiff while he was in the performance of his duties was injured thereby, they should answer the first issue "Yes," and that this would be continuing negligence, which would exclude plaintiff's negligence, if any, from the consideration of the jury. This confined the jury to the consideration of the defendant's negligence in only one respect, whereas there was evidence that the plaintiff had deliberately violated instructions to use the stairway, in performing his work, and not the elevator. If at the time he was injured the plaintiff was doing what he had been forbidden to do, and using the elevator contrary to orders, when he should have used the stairway, his employer is not liable for the consequent injury to him, as decided by this Court in *Whitson v. Wrenn,* 134 N. C., 86. When he chose to disregard the instructions he had received and do the work in his own way, the resultant injury to himself will be referred to his own negligence or wilful disobedience, as its proximate cause, and not to any fault of his employer. The master owes the servant no duty with respect to the condition of machinery or an implement which the servant has been positively forbidden to use. This is a just and reasonable principle, and if any other rule prevailed, the master could never know at any time the nature and extent of his liability. Under the charge of the court as to continuing negligence, this defense was entirely excluded from the consideration of the jury. It is true, there was (65) evidence tending to show that the orders of the defendant to its employees not to use the elevator had been continually and habitually violated by them. This required the court to present to the jury by

proper instructions the effect this evidence would have upon the orders of the defendant to its employees, but it did not deprive the defendant altogether of the right to have its version of the facts submitted to the jury with directions as to the law applicable thereto, so that the case could be decided under the law according as the jury might find the truth to be. When the court by the second instruction made the question of the defendant's negligence turn wholly upon the defectiveness of the elevator, it rendered useless any attempt of the defendant to show that the plaintiff was injured, not by its negligence, but solely by reason of his disobedience of orders. It therefore practically eliminated all evidence bearing upon that question from the case. And yet it must be conceded that if the plaintiff had been forbidden to use the elevator, and he and the other employees had not habitually disregarded the order, the defendant owed him no duty in regard to it, as it was not a machine, implement, or apparatus which had been furnished to him for the performance of his work, but, on the contrary, something which he had been told not to use. It follows that if the jury had taken the defendant's view of the evidence and found that plaintiff was at the time of his injury acting in disobedience of orders, no negligence could be imputed to the defendant, even if the elevator was defective, as defendant omitted no duty to the plaintiff in respect to its condition, as we have said, and the plaintiff's own act in disobeying instructions would in law be regarded as the proximate and, indeed, the only cause of his injury. The defendant was entitled to have this view of the case submitted to the jury, but the charge of the court excluded it.

(66) There was much discussion by counsel of the doctrine of *res ipsa loquitur* and its relevancy to the facts of this case. "The thing speaks for itself" is a principle applied by the law where under the circumstances shown the accident presumably would not have occurred in the use of a machine if due care had been exercised, or, in the case of an elevator, when in its normal operation after due inspection. The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury, which requires the defendant "to go forward with his proof." The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of

the jury, even in the absence of any additional evidence. *Womble v. Grocery Co.,* 135 N. C., 474; 2 Labatt on Master and Servant, sec. 834; 4 Wigmore on Evidence, sec. 2509. In all other respects the parties stand before the jury just as if there was no such rule. The judge should carefully instruct the jury as to the application of the principle, so that they will not give to the fact of the accident any greater artificial weight than the law imparts to it. Wigmore, in the section just cited, says the following considerations ought to limit the doctrine of *res ipsa loquitur:* (1) The apparatus must be such that in the ordinary instances no injurious operation is to be expected, unless from a careless construction, inspection, or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured. He says further that the doctrine is to some extent founded upon (67) the fact that the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged, and perhaps inaccessible to the party injured. What are the general limits of the doctrine and what is the true reason for its adoption, we will not now undertake to decide. It is established in the law as a rule for our guidance and must be enforced whenever applicable, and to the extent that it is applicable to the facts of the particular case.

If the jury find that the fall of the elevator was caused by the plaintiff's careless handling of the brake-rope, the rule, of course, would cease to operate, nothing else appearing, as that finding would exclude the idea of any defect in the elevator, and the plaintiff could not recover unless the jury should also find that the elevator was not supplied with approved appliances in general use, and that the defendant's failure so to supply it was the proximate cause of the injury to the plaintiff.

The proof in this case does not disclose any distinct act of negligence on the part of defendant, nor does it show any specific defect in the elevator, and, in view of this state of the evidence, the jury should be instructed that their verdict must not be founded upon mere conjecture, as to the cause of the accident, but that the proof must fairly tend to show and must satisfy them that negligence, in fact, existed and caused the injury. But the evidence must be submitted to the jury, because the rule of *res ipsa loquitur* gives the plaintiff the advantage of a footing in the case or of a basis for recovery, and calls for proof from the defendant, and should the jury find against the latter upon insufficient testimony, its only remedy will be an application to set aside the verdict as being against the weight of the evidence, and the presiding judge will assume the responsibility resting upon him in such a case, as in all

others of a like kind, and grant the relief, if satisfied that a
(68) proper showing has been made for the exercise of the power lodged with him, and the ends of justice demand that he should do so.

Our conclusion, then, is that the court erred in its instruction to the jury, and for this there must be another trial.

New trial.

Cited: Lyles v. Carbonating Co., 140 N. C., 27; *Ross v. Cotton Mills, ib.,* 119, 120; *S. v. Martin,* 141 N. C., 839; *Liles v. Lumber Co.,* 142 N. C., 45; *Shaw v. Mfg. Co.,* 143 N. C., 134; *Holland v. R. R., ib.,* 439; *Overcash v. Electric Co.,* 144 N. C., 578, 581; *Furniture Co. v. Express Co., ib.,* 644; *Boney v. R. R.,* 145 N. C., 251; *Shaw v. Mfg. Co.,* 146 N. C., 239; *Winslow v. Hardwood Co.,* 147 N. C., 277; *Cox v. R. R.,* 149 N. C., 119; *Crawford v. R. R.,* 150 N. C., 623; *S. v. Quick, ib.,* 822; *Dail v. Taylor,* 151 N. C., 288; *Morrisett v. Cotton Mills, ib.,* 34; *Jones v. Ins. Co.,* 153 N. C., 391; *Turner v. Power Co.,* 154 N. C., 137; *Boney v. R. R.,* 155 N. C., 112; *Houston v. Traction Co., ib.,* 8; *Brock v. Ins. Co.,* 156 N. C., 117; *Patterson v. Nichols,* 157 N. C., 405; *Fry v. R. R.,* 159 N. C., 360; *Craig v. Stewart,* 163 N. C., 533; *S. v. Wilkerson,* 164 N. C., 437; *Trust Co. v. Bank,* 166 N. C., 117; *Ridge v. R. R.,* 167 N. C., 518; *Shaw v. Pub. Service Corp.,* 168 N. C., 616; *Horne v. R. R.,* 170 N. C., 659; *Gallup v. Rozier,* 172 N. C., 288; *Orr v. Rumbough, ib.,* 759; *Easeley v. Easeley,* 173 N. C., 531; *Smith v. R. R.,* 174 N. C., 112; *Cashwell v. Bottling Works, ib.,* 326; *Nixon v. Oil Mills, ib.,* 732; *Horton v. R. R.,* 175 N. C., 487; *Williams v. Mfg. Co.,* 177 N. C., 514; *Matthis v. Johnson,* 180 N. C., 133; *Page v. Mfg. Co., ib.,* 332, 334, 335; *Newton v. Texas Co., ib;* 567; *Jones v. Bland* 182 N. C., 75; *White v. Hines ib.,* 285.

EVERETT v. RAILROAD.

(Filed 11 April, 1905.)

Railroads—Liability as Insurer—Loss from Negligence—Released Bill of Lading—Rate Approved by Corporation Commission.

1. A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence.
2. Where a common carrier receives freight and fails to deliver on demand, and admits loss and responsibility, the law will presume such loss attributable to its negligence.

3. Where the plaintiff shipped household goods over defendant's road on a released bill of lading wherein they were valued at $5 per 100 pounds, with a freight rate approved by the Corporation Commission, and a portion of the goods weighing 600 pounds was lost, and the jury found the lost goods were worth $250, the plaintiff was entitled to recover the full amount of his loss as found by the jury.

ACTION by W. S. Everett and wife against the Norfolk-Southern Railroad Company and another, heard by *Ferguson, J.*, and a jury, at Spring Term, 1904, of PAMLICO.

The plaintiff brought action for damages sustained by failure of the defendants to deliver certain packages of freight, delivered to the defendant, the Norfolk-Southern Railroad Company, at (69) Elizabeth City, N. C., on 22 October, 1901, to be transported for hire over the lines of the defendant, Norfolk-Southern Railroad Company, via Norfolk, Va., to Thomasville, N. C., on the Southern Railway. The defendants did not deny that certain parcels or packages of freight delivered to the Norfolk-Southern had not been delivered to the plaintiff on demand. Both defendants admitted that under the evidence, as it stood, each of them was liable to the plaintiff for damages, but contended that the amount was only $30.

The following facts also appeared from the record: The goods were shipped on a released bill of lading, wherein they were valued at $5 per 100, with a freight rate approved by the Corporation Commission. The following were the approved rates on household goods calculated by 100 pounds to be carried 100 miles:

1. Unlimited in value and unreleased, classified as double first-class rate, 96 cents.

2. Unlimited in value, but released, first-class rate, 48 cents.

3. Limited in value to $5 per hundredweight, but unreleased, first-class rate, 48 cents.

4. Limited to $5 in value and released, fourth-class rate, 24 cents.

The goods were shipped under the last-named classification and rate. The portion of goods lost weighed 600 pounds, which, according to the valuation specified in the bill of lading, would amount to $30. The jury found that the goods lost were worth $250. The question presented to the jury on the issue agreed upon was, What was the actual value of the goods lost by the defendant? The question submitted to the court under the admitted facts of the case and the verdict was, "Shall the plaintiff recover $250, the value of the articles lost as found by the jury, or $30, the value of the articles as specified in the bill of lading?" On the verdict, judgment was rendered in favor of the (70) plaintiff for $250, and the defendant excepted and appealed.

A. D. Ward for plaintiff.
F. H. Busbee & Son for defendant.

HOKE, J., after stating the facts: It is the law of this State that a common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration; but it cannot so limit its responsibility for loss or damage resulting from its negligence. In *Capehart v. R. R.*, 81 N. C., 438, *Ashe, J.*, commencing on several decisions as to the right of a common carrier by contract to restrict its liability, thus sums up the matter: "That a common carrier, being an insurer against all loss and damage except those occurring from the act of God and the public enemy, may, by a special notice brought to the knowledge of the owner of goods delivered for transportation or by express contract, restrict its liability as an insurer where there is no negligence on its part. 2. That a common carrier cannot, even by contract, limit its responsibility for loss or damage resulting from its want of the due exercise of ordinary care." Elsewhere in the opinion it is held, as stated, that a contract restricting liability as an insurer must be for valuable consideration and reasonable in its terms.

The defendant having received the goods for transportation as a common carrier and failed to deliver on demand, and also admitting both loss and responsibility, the law will presume such loss attributable to the defendant's negligence. *Mitchell v. R. R.*, 124 N. C., 236; *Hosiery Co. v. R. R.*, 131 N. C., 238; *Parker v. R. R.*, 133 N. C., 335. This presumption of the law, arising from the facts proved and admitted, is confirmed by the statement that the goods were shipped released, that is, released from liability against which the defendants were
(71) permitted to contract, to wit, loss occasioned otherwise than by their negligence.

We have it, then, established that the defendants by their negligence as common carriers caused the loss of the plaintiff's household goods delivered to them for transportation, to the pecuniary value of $250; that by the valuation specified in the bill of lading the amount of the loss is limited to $30, and the question presented to the Court is, For which sum shall judgment be rendered? It is the law of this State, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. *Capehart v. R. R., supra; Gardner v. R. R.*, 127 N. C., 293. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy

and void, and, at the same time, permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore, it is held that any limitation of liability by contract designed for the purpose is forbidden. *Hosiery Co. v. R. R., supra.*

In *Gardner v. R. R., supra,* it is said: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted even by express stipulation to exempt itself from loss occasioned by its own negligence." Citing *Steam Co. v. Ins. Co.,* 129 U. S., 397, and numerous other decisions. It is further said: "The measure of such liability is necessarily the amount of the loss, and if the common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for only a small part of the loss—it is thereby exempted *pro tanto* from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts (72) and nullify the settled policy of the law."

In *Moulton v. R. R.,* 31 Minn., 89, it is said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for its own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages whereby the carrier is relieved from such liability. It would, indeed, be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside by means of a contract limiting the recovery of damages to one-half or one-quarter of the known value of the property. This would be mere evasion, which would not be tolerated."

In *Express Co. v. Blackman,* 28 Ohio St., 156, it is said: "To permit carriers to fix a limitation for the amount of their liability for negligence is, in effect, to permit them to exempt themselves from such liability."

In Hutchison on Carriers, 250, the doctrine is thus stated: "A majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants, and it is also held by a majority of the courts that a contract limiting the liability of the carrier to a certain sum in case of loss, that is, contracts designed to secure a partial exemption from liability, while valid and conclusive where the loss is occasioned by something other than the carrier's negligence, cannot be allowed where the loss was occasioned by the negligence

of himself or his servant, but that in such case the owner may recover the full value of the goods."

The defendants do not seriously contend that such is not the law of this State, nor do they controvert the position that they would
(73) ordinarily be responsible for the amount of the loss established by the verdict of the jury. It is claimed by the defendants, however, that the amount of recovery against them could only be for $30, because the value to that amount was fixed under the rating established and sanctioned by the Corporation Commission. That the defendants are compelled to take the goods at that rate, and as they can only charge the rate, they should only be held to the valuation which is made the basis of the rate. This position is plausible, but not convincing.

In the first place, it is fair to conclude that the Corporation Commission intended that this regulation should be in accordance with law, and that the valuation should only obtain in case of loss not arising from negligence. But if it were otherwise, the result would be the same. The Commission is authorized to make just and reasonable rates of freight, but it has no power to change the law nor to make a rate based upon any such idea; and if this regulation has the necessary effect of enabling the common carriers of the State in shipments of this kind to evade their responsibility for negligence, the conclusion is not that the law is thereby changed, but that the regulation itself is invalid.

We are satisfied that in this instance both the Commission and the railroads were prompted by a laudable motive to afford shippers of small means a lower freight rate. But we cannot allow such consideration in a particular case to change the rule of law that we here uphold. It is one in which the entire public is interested, as well as the individual shipper, established and adhered to for grave and weighty reasons, and necessary for the protection of the great body of shippers. A principle so vital to the public interest should not be altered, or weakened, because, in a given instance, the motive is good and the particular result desirable. If this valuation entered as an essential element into the rate here contended for, and the result would enable carriers
(74) to evade the law, the rate itself is invalid, and to that extent is not a binding regulation.

There is a class of cases which permits the shipper and carrier to make an agreed valuation of goods delivered for transportation, and which, under certain circumstances, in case of loss, will hold the shipper to the agreed valuation, though this be less than the actual value and though the loss be occasioned by the carrier's negligence. In some jurisdictions contracts of this kind are not sanctioned in respect to loss occasioned by negligence. In others, such agreements are upheld where, the carrier being without knowledge or notice as to the true value, the parties agree

upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate. In yet others, such agreements would seem to be upheld where the agreed valuation is known to be less than the actual value, provided the same are fairly entered into and made the basis of the shipping rate.

But in none of these is the valuation relied upon in this bill of lading sanctioned or justified to the extent here claimed for it. So far as we can discover, all of them condemn an effort to limit liability for negligence by a uniform predetermined valuation arbitrarily fixed and placed in a printed bill of lading without any reference to the actual value of the property, and without any estimate made or attempted to value the property of the particular shipment, more especially where the difference between the stipulated and actual value is so pronounced that the evident purpose and necessary effect are to practically deny recovery for negligence.

The better considered authorities, as far as we recall, forbid and condemn a limitation of liability for negligence under the circumstances here described. See *Moulton v. R. R., supra; R. R. v. Keener,* 93 Ga., 108; *R. R. v. Wynn,* 88 Tenn., 320; *Willock v. R. R.,* 166 Pa., 184; *Express Co. v. Blackman, supra. R. R., v. Keener* was a case very much like the one we are now considering. In that case (75) *Simmons, J.,* in delivering the opinion of the Court said: "Where a shipper enters into an express contract with a common carrier, by which he agrees in consideration of a reduced rate of freight that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, the contract will be upheld as to loss not involving negligence on the part of the carrier, but carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence; and this is so, as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability." After stating that under certain circumstances an agreed valuation will be upheld, *Judge Simmons* continues: "But the principle which relieves the carrier from liability for more than the agreed value does not apply where the valuation is merely arbitrary and fixed wihtout reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there is no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of $5 per 100 pounds for wearing apparel and household goods indiscriminately could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier without regard to the actual value of the property, and it follows from

what we have said that it was inoperative for that purpose, if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence."

It is not claimed here that the carrier was misled or deceived in any way as to the kind or value of these goods. There is neither allegation nor issue addressed to any such question; and, as we understand
(76) it, the defendants did not intend or desire to raise it. Some of the goods lost were perhaps not correctly classified as household goods, but the amount properly described as household goods was more than sufficient to justify the verdict. As a matter of fact, no inquiry was made about the value of the goods and no statement made concerning them one way or the other. The agent just classified them at the established rate and uniform valuation provided for by the regulation and printed in the bill of lading, and no effort was made to estimate or put any value on the goods of this particular shipment.

The defendants rest their defense, and, as we understand, desired to rest it, on the sole ground that they received the goods at a rate and on a valuation established and sanctioned by the Corporation Commission, and claim that by virtue of such regulation the recovery is limited to $5 per 100 pounds, amounting in the goods lost to $30.

We declare our opinion to be that the valuation does not restrict the liability of the carriers for losses arising from their negligence; and that the rules of the Corporation Commission could give it no such effect, even if so intended. The plaintiff is entitled to recover the full amount of his loss as declared by the verdict of the jury.

The judgment of the court below is

Affirmed.

Cited: Summers v. R. R., post, 300; *Marable v. R. R.,* 142 N. C., 562; *McConnell v. R. R.,* 144 N. C., 90; *Jones v. R. R.,* 148 N. C., 585, 587; *Winslow v. R. R.,* 151 N. C., 254, 255; *Stringfield v. R. R.,* 152 N. C., 128, 129, 137, 8; *Harden v. R. R.,* 157 N. C., 243, 248, 250; *Mule Co. v. R. R.,* 160 N. C., 224, 247; *Kime v. R. R., ib.,* 464; *Horse Exchange v. R. R.,* 171 N. C., 72; *Schloss v. R. R., ib.,* 353.

(77)

CLARK v. TRACTION COMPANY.

(Filed 11 April, 1905.)

Street Railways—When a Passenger—Duty of Conductor—Care Due Certain Persons—Premature Starting—Instructions—Damages.

1. The plaintiff boarded defendant's street car, paid his fare, and received a transfer and alighted at the usual transfer place, and when the car which he desired to board stopped for the purpose of taking on passengers, he approached the car with other passengers, and at the time of the injury was in the act of stepping on the car: *Held*, the plaintiff was a passenger.
2. Where the evidence is practically undisputed and a reasonable mind can draw only one inference from it, it is the duty of the trial judge to instruct the jury, if they believe the evidence, to answer an issue as to negligence "Yes" or "No."
3. Where the evidence showed that the plaintiff was injured by the starting of a street car without warning, when he was in the act of boarding it at a regular stopping place, and that the conductor was not on the platform, an instruction that, if the jury believed the evidence they should find the plaintiff was injured by the defendant's negligence, was proper.
4. When a street car stops to receive passengers, it is the duty of the conductor to be at his station on the platform, where passengers are in the habit of boarding the car, and to give them such assistance as is necessary in getting on and off the car, and to see that the car is not started until reasonable time has been given intending passengers to get safely on the car.
5. It is the duty of a street car conductor to know before he starts his car whether any person is in the act of getting on or not, and if he is busy, it is not enough for him to wait a reasonable time for passengers to board the car, but it is his plain duty to look and see that intending passengers are safely on board before signaling the motorman to start.
6. The sick, lame, children, and aged persons are entitled to more care and attention from conductors than ordinary passengers. They should be allowed more time in which to get off and on the car and to secure a safe position therein.
7. In an action for personal injuries, an instruction authorizing a recovery of damages for actual suffering of body and mind, for actual nursing, medical expenses, and "loss of time or loss from inability to perform ordinary labor or capacity to earn money," was proper.

ACTION by W. Y. Clark against the Durham Traction Com- (78) pany, heard by *Bryan, J.*, and a jury, at October Term, 1904, of DURHAM.

This was a civil action for the recovery of damages for injury by the negligence of the defendant. The court submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: Yes.

2. If so, did the plaintiff by negligence on his part contribute to said injury? Ans.: No.

3. What damages, if any, is plaintiff entitled to recover? Ans.: $500.

From a judgment for the plaintiff, the defendant appealed.

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

BROWN, J. The first proposition which is presented by several of the exceptions of the defendant brings up the question as to whether or not the plaintiff was a passenger on the defendant's line at the time of the injury sustained by him. The court charged the jury if they believed the evidence in the case to be true, to find that the plaintiff was a passenger. In this instruction we see no error. The only testimony upon this point is that of the plaintiff himself and the testimony of the defendant's witness Sorrell. We see nothing in the testimony of the latter tending to contradict the statement of the plaintiff as to his relation to the defendant company at the time of the injury. The plaintiff stated that he boarded the street car of the defendant in East Durham, paid his fare, received a transfer for the Mangum Street line, and was brought to the Mangum Street connection; got off at the
(79) crossing of Main and Mangum streets for the purpose of boarding the other car, and attempted to do so. The car stopped at the usual place for the transfer of passengers. Two men preceded him and boarded the car successfully. Plaintiff followed immediately behind, got hold of the rod on the west side of the vestibule at the end of the car with his right hand and put his foot on the steps of the car. Before he got his weight entirely on the car it started. At the time he had his right foot on the steps of the car and his right hand on the vestibule rod. No warning was given. The conductor was not present at that end of the car. Plaintiff says he saw the conductor sitting close to a young lady. No one helped him on the car. The car started suddenly and jerked the plaintiff down on the pavement. These uncontradicted facts, we think, justify the court in charging the jury that if they believed them to be true, plaintiff was a passenger on the defendant's line.

It is the settled law in this State, so far as steam railroads are concerned, that when a person comes upon the premises of a railroad company at the station and has a ticket, or with the purpose of purchasing one, he becomes thereby a passenger of the company. *Tillett v. R. R.*, 115 N. C., 665; *Seawell v. R. R.*, 132 N. C., 859.

The authorities in other States, where electric lines are more extensively operated than in this, all go to show that the same principle is applied to the operation of surface railroads, whether operated by

steam or electricity. The plaintiff had purchased a ticket, that is to say, he had paid his fare, and had boarded defendant's line in East Durham, and while on the car had received a transfer from one portion of the line to another. He got off at the usual place where passengers alight for the purpose of boarding the other car. The Mangum Street car, which the plaintiff desired to board, stopped for the purpose of taking on passengers. Plaintiff, with his transfer in his pocket, approached the car with two other passengers, and at the time (80) of the injury had one foot upon the steps of the car and his right-hand hold of the rod. These facts plainly make him a passenger. Mr. Joyce, in his work on Electric Law, sec. 528, says: "A passenger on a street railway is a person whom the company has undertaken to carry by virtue of a contract, express or implied. To create the relation of carrier and passenger it is not necessary for one to have entered the car, but the relation may exist before a person has actually boarded a car." It has been held in several cases where a person had obtained a transfer ticket from one car which entitled him to ride on another car of the defendant company, and he had approached the car, standing to receive passengers, when the car started and he was thrown to the ground, that such person is a passenger. *R. R. v. Patterson,* 9 App. D. C., 243; *R. R. v. Kaspar,* 85 Ill. App., 316; *Keator v. Traction Co.,* 191 Pa. St., 102.

The person in transferring from one car to the other is still a passenger, the transfer being but a part of the trip, for the whole of which the company agrees to convey in safety.

Was the defendant company guilty of negligence? His Honor instructed the jury if they believed the evidence to answer that issue "Yes." In this instruction we are likewise unable to discover any error. The evidence in the case was practically undisputed, and we do not see how any reasonable mind can draw more than one inference from it. In addition to what we have already quoted from the plaintiff's testimony, he testified that when he put his right foot on the steps of the car, and before he could get his weight on his foot, the car started. No warning was given; he was jerked on the pavement; his shoulder was hurt; his leg was twisted and knee hurt, and he was dragged 8 or 10 feet before he got loose. The car then ran 50 or 100 feet, and then came back. No one helped him on the car. The conductor was not on the platform. After he was hurt he took the car and (81) went on to his destination. After he reached home he went to bed and stayed four or five weeks. He suffered great pain and has used crutches ever since. Sent for the doctor. He further testified that before he was hurt his condition was as good as most men of his age. That he is 84 years old. That he did not use crutches before his in-

jury, but had walked with a cane for twenty-five or thirty years. That he was on the west side when the car came up, and motioned his hand to the motorman. Did not hear any bell. As he took hold of the handle of the car it started. He testified that Mangum Street is a regular stopping place for the transfer of passengers. We see nothing in any of the testimony for the defendant which at all tends to contradict or modify in any way the plaintiff's testimony. Inasmuch as only one inference can be drawn therefrom, it was plainly the duty of the judge to instruct the jury as he did. Clark's Code (2 Ed.), 531; *Chesson v. Lumber Co.,* 118 N. C., 67.

When the car stopped for the purpose of receiving passengers, either from the street or those transferred from other cars, it was plainly the duty of the conductor to be at his station on the platform where passengers are in the habit of boarding the car. It was his duty to give them such assistance as was necessary in getting on and off the car and to see to it that the motorman was not signaled and the car not started until reasonable time had been given the passengers there assembled, who manifested intention to get on the car. The authorities show that if a street car has stopped for the reception of passengers, or if an intending passenger has signaled it to stop and has put his foot upon the step of the car in the act of getting on, and is injured by a sudden starting, he will have the right to damages for his injury, whether the servants who started the car knew that he was in the act of getting on or not. Such person is entitled to the care due a passenger, and it is the conductor's duty to know before he starts his car whether
(82) any person is in the act of getting on or not. If the conductor is busy, it is not enough for him to wait a reasonable time for passengers to board the car, but it is his plain duty to look and see that intending passengers are safely on board before signaling the motorman to start. Thompson's Law of Negligence, sec. 3514; Clark's Street Railway Accident Law, p. 54; *Cohen v. R. R.,* 60 F. R., 698.

In the latter case it is said: "The conductor of street cars is bound to know, when he starts his car suddenly and with full force, that no person attempting to embark is at that moment with one foot on the platform and the other on the ground, and with his hand upon the railing, in the act of getting on board, or is otherwise in a position of danger."

The adjudicated cases fully support the views of the eminent text-writers above cited. *Dudley v. Cable Co.,* 73 F. R., 129; *Terminal Co. v. Morris,* 44 S. E., 720; *Akersloot v. R. R.,* 15 L. R. A. (N. Y.), 489.

In *Akersloot v. R. R., supra,* the New York Court says: "The conductor of a street car must see that a passenger entering the car is in a place of safety before he gives the signal to proceed, and the passenger

is entitled to damages if he is thrown down and injured by the premature starting of the car.

"It is the duty of a conductor, before giving the signal to start, to look around and see that all passengers to take passage at that place are safely on board, and failure so to do is not excused by the fact that he does not see an intending passenger. The passenger has a right to rely upon the care and protection of the company's employees, and he is not bound to prepare for or even anticipate a sudden and unexpected start of the car which may throw him upon the ground." Nellis on Street Surface Railways, p. 461.

The authorities are all to the effect that a degree of attention beyond that due to ordinary passengers should be bestowed on those affected with a disability by which the hazards of travel are (83) increased. The sick, the lame, children. and aged persons are entitled to more care and attention from those in charge of a car than those in full possession of their strength and faculties. They should be allowed more time in which to get on and off the car and to secure a safe position therein. *Sheridan v. R. R.*, 36 N. Y., 39; *Wardle v. R. R.*, 35 La. Ann., 202; Booth on Street Railways, sec. 330.

These authorities seem to settle the question beyond any doubt that the plaintiff was not only a passenger upon the defendant's line, but that, if the evidence is believed to be true, he was injured by the negligence of the defendant's employees, and, therefore, is entitled to recover damages for his injury.

His Honor instructed the jury that "in this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury." The defendant excepted to the words "these are understood to embrace loss of time or loss from inability to perform ordinary labor or capacity to earn money." This instruction seems to be a *verbatim* quotation from Sutherland on Damages, vol. 3, p. 261, and is fully sustained by the numerous authorities there cited. It is also approved *in totidem verbis* in *Wallace v. R. R.*, 104 N. C., 452.

Upon a review of the whole case and all of the exceptions, we are of opinion that there is

No error.

Cited: Snipes v. R. R., 144 N. C., 20; *S. v. R. R.,* 145 N. C., 578; *Britt v. R. R.,* 148 N. C., 39; *Davis v. R. R.,* 147 N. C., 72; *Roberts v. R. R.,* 155 N. C., 86; *Kearney v. R. R.,* 158 N. C., 554; *Thorp v. Traction Co.,* 159 N. C., 35; *Anderson v. R. R.,* 161 N. C., 465; *Brown v. Power Co.,* 171 N. C., 557; *Graham v. R. R.,* 174 N. C., 3; *Ware v. R. R.,* 175 N. C., 505, 507; *Kirkpatrick v. Crutchfield,* 178 N. C., 351, *Loggins v. Utilities Co.,* 181 N. C., 224.

(84)

MASSEY v. BARBEE.

(Filed 11 April, 1905.)

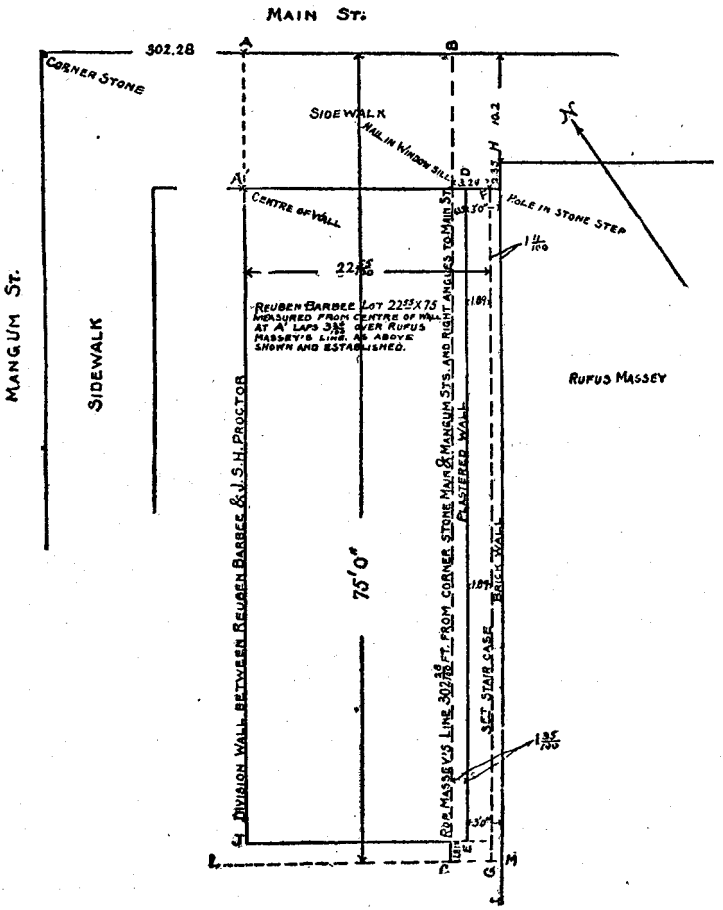
Consent Judgment—Construction.

1. A consent judgment providing that a basement hall shall be for the joint and common use and unobstructed enjoyment of the parties; that a space therein used as a stairway shall remain for their joint use and unobstructed enjoyment, and that said stairway shall be repaired at their joint expense, and that said basement hall and stairway shall be used only for ingress and egress by the plaintiff, gives the plaintiff no right to use or occupy the closets under the stairway or its landing or to have any change made in the interior structure of the building so that light can be admitted through the windows to the stairway.

2. The law will not inquire into the reason for making a consent decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it, and it must be interpreted as they have written it.

ACTION by R. Massey against W. R. Barbee and wife, heard by *Bryan, J.,* at October Term, 1904, of DURHAM, upon a case agreed.

The following is the map referred to in the opinion: (85)



This action was brought to have declared and enforced the rights of the plaintiff under a consent judgment entered in a former action between the same parties, which judgment is as follows: "This cause coming on to be heard before *Neal, J.*, it is ordered and adjudged, both plaintiff and defendants in open court through their counsel consenting thereto, that the defendants are the owners of the lot, the eastern boundary of which is the line D to E ('plastered wall') of the plat hereto attached, projected to D in front and to E in the dotted line L-M in rear of said lot, which said dotted line is adjudged to be the southern

boundary of defendant's lot, and that the plaintiff is the owner of the lot, the western boundary of which is described by the line H to M ('brick wall') of the plat hereto attached. Said defendants are
(86) entitled to hold and possess the lot herein adjudged to belong to them, and the plaintiff is entitled to hold and possess the lot herein adjudged to belong to him, respectively, in fee simple; and it is further ordered and adjudged that there shall be built in the basement under the storehouse of said defendants, on their lot, as indicated on said plat, a partition wall to be constructed of wood, brick, or other material, as the said parties to this action may agree upon, and that the said partition wall shall be built along said dotted line marked on blueprint 'B C'; that said partition wall and a front and rear door thereto shall be built and maintained at the equal and joint expense of the parties hereto, their heirs and assigns. It is further ordered that the said basement hall between the lines marked on said plat designated as 'brick wall' and the said dotted lines 'B C' shall be for the joint and common use and unobstructed enjoyment of the said Rufus Massey, his heirs, assigns, and tenants, and of the said W. R. and Virginia Barbee, their heirs, assigns, and tenants. It is further ordered that the space between the line 'D-E' and the 'brick wall' which is now used as a stairway shall be and remain for the joint and common use and unobstructed enjoyment of the said plaintiff Rufus Massey, his heirs, assigns, and tenants, and the defendants W. R. and Virginia Barbee, their heirs, assigns, and tenants. It is further ordered and adjudged that the said stairway shall be repaired at the joint and common expense of the parties hereto, their heirs and assigns. It is further ordered that the basement hall aforesaid and the portion of said lot between the line 'D-E' and the line marked 'brick wall,' the stairway aforesaid, shall be used only for ingress and egress by said plaintiff, his heirs, assigns, and tenants, to and from their respective buildings. It is further ordered and adjudged that the plaintiff and defendants pay their respective costs in this action incurred, to be taxed by the clerk of this
(87) court. It is further ordered that the clerk of this court have this judgment and attached plat registered in the office of the Register of Deeds of Durham County."

The hearing in the court below was upon a case agreed, which need not be set out, as facts sufficient for an understanding of the same are stated in the opinion of this Court. Judgment was given against the plaintiff, who excepted and appealed.

Manning & Foushee for plaintiff.
Winston & Bryant and Graham & Graham for defendants.

WALKER, J., after stating the facts: It is stated in the case agreed that there had been no change in the building of the plaitniff or the building of the defendants, or in the stairway or other parts of the space between the brick wall and the plastered wall, as shown on the diagram filed in the case, except in the basement, which has been made to conform to the requirements of the consent judgment ascertaining and declaring the rights of the respective parties in the premises. The plaintiff claims and asks to be let into the possession and enjoyment of a one-half interest in certain closets under the stairway and its landing, and also asks for the removal of certain wooden walls or partitions erected by the defendants to make bedrooms or offices, which obstruct the light from a window in the front end of the building and thereby darken the stairway. The former judgment of the Superior Court, which was entered by the consent of the parties, and under which the plaintiff makes his claim and asks for relief, is not very definite in its terms, but we cannot see, after a most careful examination, that there has been any violation of it or any invasion of the plaintiff's rights in the property as declared therein. He must abide by that judgment, as it was written with his consent. The court cannot change it. but can only construe its provisions. (88)

The consent judgment provides with some particularity for the repair of the basement hall and for its joint use and occupancy by the parties and also for the joint and unobstructed use of the stairway in the space between the line "D E" and the "brick wall," and for the repair of the stairway at the joint and common expense of the parties. It is also provided "that the basement hall and the portion of said lot between the line 'D E' and the line marked 'brick wall' (the stairway aforesaid) in said plat shall be used only for ingress and egress by the plaintiff, his heirs, assigns, and tenants, to and from their respective buildings."

It appears, we think, from our recital of the material parts of the consent judgment, that no change in the occupancy of the building, other than that set out, was contemplated by the parties. It seems clear to us that the provision as to the use of the basement and the stairway by the plaintiff and the fact that reference is made only to those portions of the building, exclude the idea of an intention by the parties that the plaintiff should use or occupy any other portion, such as the closets under the stairway and its landing, or that any change should be made in the interior structure of the building so that light can be admitted through the windows to the stairway. If such had been the intention, some provision would certainly have been made in the consent judgment for effectuating it, or at least some reference would have been made to it. We find no expression in the judgment indicative of

such an understanding, and there is no rule of law by which we are authorized to read it into the contract of the parties, or by construction to give the latter a meaning which its words will not warrant. We have no more right to construe the agreement of the parties contrary to its spirit and intent than we have to vary or modify its terms without the consent of the parties. The rights of the parties must be determined solely by the judgment to which they have assented. "The judg-
(89) ment, or, as it is termed, the decree, is by consent the act of the parties rather than of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately and in good faith done in carrying out its provisions must remain undisturbed." *Vaughan v. Gooch,* 92 N. C., 524. And in *Edney v. Edney,* 81 N. C., 1, *Dillard, J.,* says for the Court: "A decree by consent as such must stand and operate as an entirety or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it." The law will not even inquire into the reason for making the decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it. *Wilcox v. Wilcox,* 36 N. C., 36. It must therefore be interpreted as they have written it, and not otherwise, and thus construed we cannot see that the plaintiff has at present any cause of action against the defendants, so far as appears from his complaint.

We decide merely that the plaintiff cannot have the relief he seeks but that the parties are entitled to use and enjoy the space between the two walls (including the basement, the occupancy of which is specially provided for), as they have been accustomed to do since the consent judgment was entered and in accordance with its plain directions. How the rights of the respective parties will be affected by any change in the stairway or other interior structures, and what right, interest, or estate they may have acquired by the consent judgment in the land, or space between the walls, as it is called in the case, are questions which we leave undetermined, as it is not necessary they should now be
(90) decided. Our judgment is, therefore, given without prejudice to any future consideration and decision of those matters, or to the assertion of any right by either party under changed conditions and circumstances. We do not think it will serve any useful purpose to state more fully the reasons which have led us to our conclusion.

No error.

Cited: Bank v. McEwen, 160 N. C., 423; *R. R. v. R. R.,* 173 N. C., 417.

FISHER v. TRUST COMPANY.

(Filed 18 April, 1905.)

Administration Suits—Power of Attorney—Revoked by Death—Powers Coupled with Interest—Sales of Property—Receivers—Discretion of Court—Receiver's Certificates.

1. Under section 1151 of The Code, the Superior Court has jurisdiction to entertain suits brought by creditors or by any party interested in the proper administration of an estate, and the court may bring the creditors in as defendants and protect the rights of the parties by the appointment of a receiver and by other appropriate orders.
2. A power of attorney is revoked by the death of the person giving it, except where a power is coupled with an interest in the thing itself, the power must be grafted on the estate; and an interest in the proceeds of the property does not constitute an interest in the thing.
3. Where F. signed a contract giving power to defendant to make sales of his property, and it was stipulated that it should be binding upon his heirs, executors, administrators, and assigns, but it was not signed by his wife, and it was further provided that the right to make sales was dependent upon F's agreeing to the price and he should execute the deeds: *Held*, the contract was revoked by F's death; but for expenditures made, and it may be for services rendered, defendant is entitled to be repaid and compensated from the proceeds of the property when sold.
4. While the court will not usually appoint as receiver a person interested in the property, or a party to the controversy as attorney or otherwise, yet the selection rests in the sound discretion of the court, and when no suggestion is made affecting the personal fitness of the receiver or that he will not discharge the duties of the position properly, the appointment of the attorney of the plaintiff will not be interfered with.
5. The practice of appointing a receiver upon an unverified complaint, and without notice to creditors and other persons interested, is not commended.
6. Where a receiver was appointed to take charge of and manage the estate of testator, pending a settlement of the estate, the court has no right to make an order conferring upon the receiver the power to issue certificates for disbursements made by the administrator *c. t. a.*, or to otherwise encumber the property.
7. An order in an administration suit, authorizing a receiver to issue certificates or otherwise encumber the property, does not bind creditors brought in after it was made.

ACTION by Isabella Fisher, administratrix, with the will annexed of B. J. Fisher, against the Southern Loan and Trust Company, O. M. Fisher and others heard by *Bryan, J.*, at September Term, 1904, of GUILFORD. From a judgment for the plaintiff, the defendant Trust Company appealed.

This action, in the nature of a bill in equity, was originally instituted at February Term, 1904, of GUILFORD, by plaintiff as administratrix of B. J. Fisher and certain creditors, against the children and heirs at law of her intestate. The plaintiffs named in the summons, other than the administratrix, declining to permit the use of their names or to prosecute the action, were by an order made in the cause at the same term made parties defendant, and there was an order that summons issue to them returnable to the next term. Thereafter, it appearing that summons had been duly served on the infant defendants without general guardian, E. J. Justice, Esq., was duly appointed guardian *ad litem* of said infants. At February Term, 1904, the plaintiff administra-
(92) trix filed her complaint against the infant defendants, setting forth that B. J. Fisher died on 15 April, 1903, in the city of New York, leaving a last will and testament which was duly admitted to probate before the Surrogate of New York County. That said Fisher devised his entire real and personal estate to his wife, the plaintiff, for life, remainder to his children, the infant defendants. That the executor named in said will renounced his right to qualify and the plaintiff was duly appointed administratrix with the will annexed. That thereafter said will was duly admitted to probate before the Clerk of the Superior Court of Guilford, and the plaintiff was duly appointed and qualified as administratrix with the will annexed in this State. That said Fisher was at the time of his death the owner of much valuable real estate in and adjacent to the city of Greensboro in said county and State, a full description of which is set out in the complaint. That said real estate was encumbered with large indebtedness secured by mortgages and deeds of trust amounting to about $45,000, much of which was past due, including unpaid interest. That the rents accruing from said real estate amount to about $3,000 per annum. That said Fisher left but a small quantity of personal estate, entirely insufficient to pay even the interest on his debts. That the plaintiff and her children, the infant defendants, resided in the city of New York, the ages of said children ranging from eight to eighteen years. That the plaintiff had no means of support other than the estate of said Fisher. That one of the creditors holding a mortgage on a part of said real estate securing an indebtedness of $10,000, demanded payment of his debt and threatened to foreclose his mortgage. That other creditors having deeds of trust demanded payment of interest. That if said mortgages and deeds of trust were forclosed, property of the value of more than $100,000 would be sacrificed to pay an indebtedness of less than one-half
(93) that amount. That by reason of plaintiff's residence in New York and the attention demanded by her family, it was impracticable for her to give proper attention to said real estate. That she

was advised that she could not sell the real estate without the orders of the court. That she had no means with which to pay the indebtedness of her late husband otherwise than by a sale of said real estate. That she desired the appointment of a receiver with power to take charge of and administer the said estate and to protect the interests of the plaintiffs and defendants as well as the creditors and mortgagees. That said receiver be empowered to lay off a portion of said unimproved real estate into lots, to advertise the same for sale, to sell the buildings, and do all such other things necessary and proper in the premises. That A. L. Brooks, Esq., being attorney for said estate and plaintiff's trusted legal advisor, would be a proper person to name as receiver, etc. This complaint is not verified. The guardian *ad litem* at the same term filed his answer, admitting all of the allegations in the complaint and joining the plaintiff in her prayer that a receiver be appointed. This answer was filed 25 February, 1904, unverified. That at said term an order was made appointing A. L. Brooks, Esq., commissioner and receiver of both real and personal estate situate in the county of Guilford belonging to the estate of said Fisher, to manage, control, and direct the affairs of same; to survey and lay off unimproved real estate; to advertise and sell same either at public or private sale and to sell at public or private sale the Planters Hotel. "That if for any reason sales of sufficient property cannot be made to satisfy the outstanding interest and principal indebtedness which creditors may demand the payment of, then, and in that event, the said receiver is hereby authorized, empowered, and directed to borrow such sum or sums of money as may be necessary to satisfy such claims, and to execute and deliver to the lender receiver certificates or notes, and to secure the same, (94) if desired by such lender, by executing a mortgage or mortgages upon any and so much of the property belonging to the estate of the said B. J. Fisher as may be necessary for such purpose. That the said commissioner and receiver is hereby authorized and empowered to collect and receive any and all rents, obligations, and dues owning and belonging or hereafter becoming due to the said estate, and to execute receipts therefor; to make report to this court of all sales of land and loans secured by him, either in term or at chambers, and to execute deeds therefor or receiver certificates and notes, as the case may require. And the said commissioner and receiver is hereby further directed, within sixty days from this term of court, to advertise for all parties holding claims against the same to make proof thereof for payment; and that the commissioner and receiver herein appointed shall from time to time make report to this court, either at chambers or at the term, of all his dealings and transactions with the said estate; and this cause is retained for further orders and directions."

On 3 March, 1904, the plaintiff in her own behalf filed a petition in the cause setting forth that she lived with her husband and their children in the city of New York. That at the time of his death her husband owned no personal estate except furniture. That they had lived under the impression that her husband was a wealthy man, and their expenses were in keeping with such impression. That her children were attending school in New York, and that to maintain them in the social condition in which they lived required considerable income. That one of her children is an invalid. That they had no income whatever. That since the death of her husband she had paid out of her personal estate an indebtedness against her husband secured by mortgage of over $5,000; that she had also paid funeral expenses, attorney's fees, support of herself and children,
(95) amounting in all to $8,250. That she is now in need of money with which to maintain and support her family and is compelled to have money from the estate of her husband for such purpose, etc. She prays that the receiver be directed to issue to her a receiver's certificate for $8,250. She files with her petition a statement showing the purposes for which said expenditures were made, doctor's bill, funeral expenses, mourning clothing, attorney's fees, mortgage debt, etc. That thereupon and at the same time the said receiver filed the following petition: "I beg leave to call the court's attention to the annexed petition and affidavit of Isabella Fisher and W. S. Jessup, showing that Mrs. Fisher has advanced to the estate of the late B. J. Fisher, out of her separate personal estate, over $9,000, of which she desires to be repaid; and also the urgent necessity for some money provision for the maintenance and support of herself and children, and for the education of her children. The petitioner desires that the court direct him as commissioner and receiver to issue to her a receiver's certificate for $8,250 upon said claim. If the court shall be of opinion that such an order should be made, and that I as receiver . . . should so execute a certificate for said amount, I respectfully request that the court will direct me in the premises, as it may appear to be just," etc. Whereupon on 10 March, 1904, an order was made, reciting the facts set forth in said petition and directing "That A. L. Brooks, receiver, etc. . . . be and is hereby directed to issue to said Isabella Fisher a receiver's certificate against the property of the estate of the late B. J. Fisher in the sum of $8,250 and deliver the same to her, and of his actions . . . make report to the next term of the Superior Court of Guilford or . . . at chambers in the meantime, should such a course be necessary."

On 19 August, 1904, plaintiff filed her complaint against defendant Southern Loan and Trust Company, adopting the allegations in

the original complaint, and further alleging that her intestate (96) prior to his death entered into a contract with the said company by which he turned over to it for sale, upon the conditions therein set forth, certain real estate described in said contract, and being the same real estate described in her complaint. That by the terms of said contract the company was authorized, and it agreed, to expend $5,000 on the improvement of said property, which was to be repaid from the proceeds of the first sale thereof. The said company further undertook as agent of said Fisher to sell the property at such prices as might be named by said Fisher, the said Fisher agreeing to execute to the purchasers a good and sufficient deed with full warranty, etc. For making sales the company was to receive a commission of one-third of the proceeds. The said Fisher covenanted with the company for himself, his heirs, executors, administrators, and assigns, to carry out and perform his part of said contract. Plaintiff further alleged that the defendant company, relying upon the provisions of said contract, claimed that it had the right and power to sell said property, and that such claim on the part of the said company prevented the sale of said property by herself or by the commissioner appointed by the court. She further alleged that the said contract or power of attorney terminated upon the death of the said Fisher. She prayed that the said contract should be declared null and void and delivered for cancellation. At September Term, 1904, defendant company filed its answer, admitting a portion of said complaint, alleging that it had no sufficient knowledge or information to form a belief as to other allegations, admitting the execution of the contract, and alleging that the death of the said Fisher did not operate to revoke the powers conferred therein, and alleging that it had expended large sums of money, a great amount of time and labor in preparing the said land for sale under said contract, and in otherwise proceeding under said contract, and had a vested right to perform its powers thereunder, and further alleging that it had sold a portion of said lands and would have sold more but for an agree- (97) ment with the said Fisher that it was best to postpone the sale of the lots until the city had proceeded further with the proposed lines of sewer, etc. Defendant denied necessity for appointment of receiver and alleged that the estate should be settled in accordance with the statutes in force in this State providing for settlement of estates of deceased persons. The defendant demanded that the order theretofore made appointing a receiver be revoked and that the receiver be discharged, for such other and further relief, etc.

The cause coming on for trial at September Term, 1904, upon the pleadings and exhibits the defendant company moved the court to discharge the receiver and dismiss the action. Motion denied, whereupon

the court rendered judgment that the contract set out in the pleadings was inoperative and of no effect by reason of the death of the said Fisher, and directed cancellation of the same, to which defendant excepted. The court thereupon made an order that the receiver proceed to sell the land, etc., and report the same to the court, to all of which the defendant duly excepted and appealed. The defendant assigns as error, (1) the refusal of the court to hear evidence or submit issues to the jury; (2) refusal to sign judgment discharging the receiver and dismissing the action, and (3) that no provision was made in the order declaring the contract void for reimbursing the defendant company for moneys expended, etc.

Brooks & Thompson, King & Kimball, and E. J. Justice for plaintiff.
Pou & Fuller, W. P. Bynum, Jr., and Scales, Taylor & Scales for defendant.

CONNOR, J., after stating the facts: The proceedings had in this action have been somewhat eccentric and irregular. It was original-
(98) ly brought by the administratrix and mortgage creditors against the children of the deceased, who had under his will only a remainder after the life estate of their mother, who appears only in her representative capacity. The creditors, refusing to proceed with the cause, are made parties defendant and summons issued returnable to the September term of court. The plaintiff as administratrix proceeds to file her complaint against the children, who by their guardian *ad litem* at the same term file an answer admitting every allegation of the complaint. A receiver is, at the same term, and without notice to the creditors or the trustee, appointed with very extensive and unusual powers. The jurisdiction of courts of Equity to entertain administration suits, at the instance of creditors, devisees, or legatees has been uniformly recognized and frequently exercised. Such suits are less frequent since the distinction between legal and equitable assets has been abolished and full powers in the settlement of estates conferred upon courts of probate. Whatever doubt may have existed in respect to the jurisdiction after the establishment of our present judicial system was removed by the act of 1876, ch. 241, Code, sec. 1511; *Haywood v. Haywood,* 79 N. C., 42; *Pegram v. Armstrong,* 82 N. C., 327. It is true that the language of the statute would seem to contemplate actions by creditors, but we think the purpose was to give to the court, if it did not have it, jurisdiction to entertain suits brought by any party interested in the proper administration of an estate. When the infant defendants by their answer admitted the facts upon which the jurisdiction attached, and joined in asking the same relief, we can see no reason why the

court should not retain the cause, bringing the creditors in as defendants, and proceed to protect the rights of the parties by appropriate orders, etc. The facts set out, in our opinion, entitle the parties to have the aid of the court in protecting the property by the appointment of a receiver and the adjustment of conflicting claims, (99) to the end that it might be brought to sale with an unencumbered title to purchasers under such circumstances and conditions as would pay the debts and leave the largest possible surplus for the devisees. When the plaintiff filed her complaint against the defendant Loan and Trust Company, it developed the fact that prior to his death Fisher had entered into a contract with the company in regard to a portion of his real estate, by which the said company was empowered to make sale thereof in the manner and upon the terms set out. It is manifest that until the rights and powers of the defendant company in respect to this property are adjudged and settled, it will be impossible to make sale or deal with it. The court, therefore, upon the admissions in the pleadings and inspection of the contract, properly proceeded to dispose of this very important question. We concur with his Honor in respect to the effect which the death of Fisher had upon this contract. There was no question or issue of fact in this regard for the jury. It has been universally recognized as sound law in this country since the decision of *Hunt v. Rousmanier,* 21 U. S., 174, that a power of attorney is revoked by the death of the person giving it. To this rule there is one exception: that if a power be coupled with an interest, it survives the person giving it and may be executed after his death. That the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself, the power must be grafted on the estate. The doctrine, with the reason therefor, is thus stated by *Marshall, C. J.* "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual must be in his name, must be such an act as the principal himself would be capable of performing and which would be valid if performed by him. Such (100) a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power and vests in the person by whom the power is to be executed, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule

ceases with the reason on which it is founded." *Carter v. Slocumb,* 122 N. C., 475; 22 A. & E. (2 Ed.), 1132. The fact that the power may have been irrevocable during the life of the person giving it does not affect the principle. It is equally well settled that an interest in the proceeds of the property does not constitute an interest in the thing—the subject-matter of the power. *F. L. and T. Co. v. Wilson,* 138 N. Y., 287. The defendant company, conceding the law to be as stated, says that the contract under which it claims the right to proceed with the sale of this property is distinguished from the cases cited, for that performance is made binding on Fisher's heirs, executors, administrators, assigns, and upon the company's successors; that thereby the parties contracted that the rights and duties should continue and be operative after the death or dissolution of either contracting party. It must be conceded that parties may enter into contracts, the performance of which may be enforced by or against their representatives after the death of the contracting party. We do not think this contract falls within that class. An insurmountable difficulty confronting the defendant company in making sales under it is that the wife of Fisher, although named a party, did not execute the contract; it would be ruinous to all parties interested in the estate to permit sales
(101) of the property subject to the dower rights of the widow. Again, the right and power to make sales is dependent upon Fisher's agreeing to the price. It requires no argument to show that this power cannot be exercised by his personal representative; his heirs at law and devisees, except his widow, are infants, and therefore incapable of acting. Again, there is no power conferred on the defendant company to execute deeds for the property when sold. Fisher agrees that he will execute deeds to purchasers for land whenever the company makes a sale. This certainly is nothing more than a contract on his part to convey when sales are made at prices agreed upon by him. The only possible right accruing to the company would be to compel specific performance by the heirs or devisees of Fisher. This they could not do, because the condition upon which the right accrues can never exist, nor could the purchaser be required to accept title subject to the dower right of the widow. While we, for the reasons given, concur with his Honor, we are of the opinion that he should not have directed the cancellation of the contract. The defendant company avers that it had prior to Fisher's death, pursuant to the terms and provisions of the contract, expended large sums of money in opening up and improving the real estate, preparing it for sale, etc. It also alleges that it had a vested interest in the contract. In so far as the right conferred is a power to the defendant company to sell it is avoided and annulled by way of revocation by Fisher's death; but for expenditures made, and it may be for

services rendered, it is entitled to be repaid and compensated from the proceeds of the property when sold. The plaintiff and defendant devisees show no equity for cancellation, but for a decree removing any cloud from the title to the property and declaring the effect of Fisher's death upon the right to make sales. In all other respects the rights of the parties are unaffected by Fisher's death. The judgmnet in this respect, thus modified, is affirmed.

The defendants insist that Mr. Brooks should not have been (102) appointed receiver and commissioner because of his relation to the parties. It is undoubtedly true and abundantly sustained by authority that the court will not usually appoint as receiver persons interested in the property, or the parties to the controversy as attorney or otherwise. The selection of the person to be appointed necessarily rests in the sound judicial discretion of the court. The chancellor, under the equity practice, usually referred the question of selection to the master, and, unless good cause was shown, appointed the person nominated by him. While objection to the person appointed on the ground of relationship to the parties or interest in the property is proper to be considered upon appeal, the appellate court will not, save for strong reasons, interfere with the appointment made by the court. No suggestion is made affecting the personal fitness of the receiver, or that he will not discharge the duties of the position properly. Mr. High says: "It is not regarded as an abuse of judicial discretion to appoint as receiver the attorneys of the respective parties to the cause, and the court, in making such appointment, will not be interfered with upon appeal." High on Receivers, 69. If in the progress of the cause any conditions arise which will render it embarrassing either to the receiver or the parties for him to continue, we are quite sure that the court will either associate some one with him or appoint another in his stead. So far as we can see at this time, there is no conflict of interest in regard to management or sale of the property. The welfare of all is promoted by procuring the best possible results. We note the fact that very extensive and, we think, unusual powers are conferred upon the receiver by the order made at February Term, 1904. We do not commend the practice of appointing a receiver upon the unverified complaint and without notice to creditors and other persons interested. We note, also, that at the same term an order was made authorizing the receiver to issue a certificate to the plaintiff administratix for a large (103) amount. We very much doubt whether it is within the power of the court in a proceeding like this to authorize the issuance of receiver's certificates. This practice which has grown up of late years is very largely confined to the Federal courts in suits for the foreclosure of mortgages and trust deeds executed by railway companies and other

corporations, whose property is affected by a public duty. We are not prepared to say that these certificates may not be authorized in similar suits dealing with other corporations, such as cotton or other mills, machine shops, etc., in all of which it is of vital interest to creditors and owners that their operations be continued until they can be brought to sale. If such power exists, it should not be exercised until notice has been given to creditors. High on Receivers, 312. However this may be, we are clearly of the opinion that the reasons upon which the power is claimed and exercised do not apply to a case like this or to claims like those for which the certificate for $8,250 was issued. *Judge Gresham,* in *Loan and Trust Co. v. Coal Co.,* 55 Fed., 481, discusses the subject, and clearly limits the power to issue such certificates to suits for the foreclosure of railway mortgages and to operating expenses. *Kneeland v. Trust Co.,* 136 U. S., 89. The liens, encumbrances, and order of payment of the indebtedness of a deceased person are fixed either by contract or by statute, and we can find no power in the court to change or disturb such order. In saying this we do not question the power of the court to make necessary orders for the protection of the property, payment of taxes, insurance, surveying, and such like expenses. These are essential to the purpose and end for which the court lends its aid. The order of February term, so far as it confers upon the receiver the power to issue such certificates or otherwise encumber the property, should be modified. Having been made prior to the time the creditors were brought in, they are not bound by it. They are bound by
(104) the orders made at the December Term, 1904. It is evident that the condition of the family of Mr. Fisher demands a prompt settlement of all controverted matters and sale of the property, so that they may have an income for their necessary support. A decree will be drawn declaring that by the death of B. J. Fisher the power to make sale or otherwise interfere with the property described in the contract of 11 October, 1900, is revoked. That defendant, Southern Loan and Trust Company, file with the receiver an itemized statement of all amounts expended by it under and pursuant to the provisions of said contract. The defendant company or any other creditor may upon notice move the court to modify the order of February Term, 1904, by striking from it all provisions conferring upon the receiver the power to issue certificates or otherwise encumber the property. Mrs. Fisher, in her individual right, should be made a party plaintiff, so that her interest may pass under a sale of the property. In all other respects the judgment appealed from is affirmed. Neither party will recover costs in this Court.

Modified and affirmed.

Cited: Settle v. Settle, 141 N. C., 564; *Shober v. Wheeler,* 144 N. C., 409; *Oldham v. Rieger,* 145 N. C., 257; *Yarborough v. Moore,* 151 N. C., 119.; *Mitchell v. Realty Co.,* 169 N. C., 520.

(105)

HUGHES v. KNOTT.

(Filed 18 April, 1905.)

Sales—Delivery f. o. b. Cars—Time of Payment—Executory Contract —Ability to Pay—Tender—Waiver—Custom.

1. Where a contract for the purchase of a lot of tobacco provided "that plaintiffs would take and pay for said tobacco on 1 July, and that defendants prize it on or before 1 July, all of said tobacco to be delivered f. o. b. cars Raleigh, and there was no provision naming the carrier, or the point of destination: *Held,* it was the duty of the plaintiffs to give these shipping directions before they could demand performance.
2. In a contract for the sale of personal property, nothing being said as to the time of payment, the price must be paid either before or concurrently with the passing of the title.
3. If a party to an executory contract is in a condition to demand performance by being ready and able at the time and place, and the other party refuses to perform his part, an offer is not necessary.
4. Testimony tending to show the general custom in the tobacco trade to accept checks in payment for tobacco is competent, not for the purpose of varying the contract, but as interpreting its terms.
5. Where plaintiff went to defendants' place of business during business hours for the purpose of paying for the tobacco, and had available funds for that purpose, either in money or checks, and the defendants were not at their place of business, the plaintiff is entitled to a reasonable time to convert his funds into currency.

ACTION by W. T. Hughes and another against R. H. Knott and another, heard by *Long, J.,* and a jury, at September Term, 1904, of WAKE. From a judgment in favor of the plaintiffs, the defendants appealed.

The plaintiffs sue for the possession of a lot of tobacco described in the complaint. They allege that they are the owners and entitled to the immediate possession thereof, setting forth the facts upon which their claim of ownership is based. The defendants deny the plain- (106) tiff's title. It appeared that on 20 January, 1904, the plaintiffs and defendants entered into a contract in writing, by the terms of which the plaintiffs "bought of the defendants two lots or parcels of scrap tobacco now in their warehouse in the city of Raleigh, upon the

following terms and conditions." Plaintiffs agree "that they will pay for first lot of bright scrap of about 25,000 pounds 4 cents, less 3 per cent, and for the second lot, known as pickings and dark scrap, $1 per hundredweight." It was agreed that plaintiffs "will take and pay for said tobacco on 1 July, 1904, provided the same shall conform to sample as hereinafter provided." It was agreed that defendants should pick and prize the tobacco on or before 1 July, 1904. "All of said tobacco to be sound and delivered f. o. b. cars Raleigh." There were other provisions in the contract in regard to settling any dispute which might arise in regard to the quality, etc., of the tobacco. It was further provided: "Said Hughes & Co. further agree to take all the tobacco of the same grade and quality as said sample which Knott & Williamson may purchase on or before 1 July, 1904, not to exceed 45,000 pounds, upon the terms and conditions herein set forth. And said Knott & Williamson agree that said W. T. Hughes & Co. shall have all the said scraps up to said sample up to 1 July, 1904, not to exceed 45,000 pounds." It is admitted in the pleadings and testimony that on 29 June, 1904, the tobacco described in the contract was picked and prized by defendants and accepted by plaintiffs, an invoice therefor being delivered to them by the defendants. Plaintiff Hughes testified that he came to Raleigh on 29 June, went to defendants' warehouse, saw the tobacco and accepted it. This was on Wednesday. That he told defendants to put it (107) in the depot and get the bill of lading and that he would return to Raleigh on Saturday or Monday and pay for it. Told them that he was very busy. Mr. Williamson asked about exchange on check; witness said that if there was any he would pay it. Witness said he would come Saturday or Monday. Mr. Williamson said "All right." This was in his warehouse. Hughes testified that after the agreement Williamson said "Be here on time," and witness replied, "I will do it." That he came from his home in Louisburg to Raleigh on Monday, 4 July, went immediately to defendants' warehouse and it was closed. Endeavored to find them; could not find Mr. Williamson; found defendant Knott that night by going to his house. Told him that he was there to pay for tobacco—was prepared to do so—would not ask him to take check, but would pay spot cash. Knott replied that witness had broken the contract by not being here on 1 July. Did not see Williamson that day at all; saw him afterwards; he said they had decided to keep the tobacco; that witness had broken his contract by not being present on 1 July. Hughes testified that the plaintiffs were ready, willing, and able to pay for the tobacco on 29 June and on 4 July, 1904; that he had checks on Norfolk National Bank and a large amount of collateral with him on 4 July, so that when he went to the bank he was prepared to have check cashed. He also testified that it was agreed between Wil-

liamson and himself on 29 June that defendants were to put tobacco in depot by Monday; that he wanted it in depot before he paid for it. Defendant Williamson testified that plaintiff Hughes was at his warehouse on 29 June, and accepted the tobacco; that plaintiff did not say when he would take it. When he got ready to go he said that he would be up here between then and Monday and pay for the tobacco. Witness said to him that there was another party interested in it and he would advise him to attend to the matter according to contract. He denied agreeing with plaintiff to wait until Monday for payment. (108) There was other testimony regarding the alleged extension of time of payment to 4 July, 1904. In view of his Honor's charge to the jury it is not necessary to set it forth. From a judgment for plaintiffs, defendants appealed.

Armistead Jones & Son and W. H. Ruffin for plaintiffs.
B. M. Gatling and Pou & Fuller for defendants.

CONNOR, J., after stating the facts: The learned judge instructed the jury to answer the first issue, which was directed to the question of title, in the affirmative. The exception to this instruction presents the question for our decision. His Honor was of opinion that, by the terms of the contract and the conduct of the parties, the title to the property passed; that before the defendants could demand payment they were required to deliver the tobacco free on board cars in Raleigh; he therefore instructed the jury that "the obligation of the defendants under the contract was to place the goods on board cars Raleigh, N. C., and immediately their right to demand pay for the goods in cash accrued to them, and not until then. The contract as construed by the court means that the defendants were entitled to cash as per contract for the goods upon delivery f. o. b. cars Raleigh. As the defendants admit that they never delivered the goods f. o. b. Raleigh, as the court construes the contract to be, under that state of facts, the defendants were guilty of a breach of contract."

The defendants insist that in the absence of any provision in the contract naming the carrier to which the tobacco was to be delivered or the point to be shipped, it was the duty of the plaintiffs to give directions to the defendants in both respects before they could demand performance.

In *Armitage v. Insole,* 14 Ad. and Ell. (68 E. C. L.), 727, the plaintiffs sued for breach of contract by the defendant "to deliver free on board" a quantity of coal. The defendants demurred (109) for that it did not appear that the plaintiffs named the ship or the place of destination. *Coleridge, J.,* said: "When circumstances,

left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars. Here, both time and place should have been fixed by the plaintiffs, but certainly, place." *Wightman,* J., said: "I should say, the agreement being silent as to time, that it must be at the option of the plaintiffs. But, however that may be, the defendant clearly cannot give the coal free on board until they know the ship and at what port it is to discharge. Whatever, therefore, the construction of the agreement may be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship."

In *Dwight v. Eckhert,* 117 Pa. St., 490, 508, *Clark, J.,* says: "It is a well-established principle of law that in a contract for sale and delivery of goods 'free on board vessel' the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made; for until he knows that, the seller could not put the goods on board." Benjamin on Sales, 699; Mechem on Sales, sec. 1130.

The plaintiffs rely upon *Henderson v. Bessent,* 68 N. C., 223. We find nothing said therein which conflicts with the authorities cited. It was there held that under the contract it was the duty of the defendant to have certain tobacco manufactured by the day named. So, in our case, it was the duty of the defendants to have the tobacco prized and ready for delivery on 1 July, 1904, and it was the duty of the plaintiffs to be ready "to take and pay for said tobacco" and notify the defendants to what carrier it should be delivered and to what place they desired it shipped. In the absence of any directions in either respect, we are unable to see how the defendants could be in default. It is conceded that the evidence does not show that any shipping directions
(110) were given. It may be that in fact such directions were given.

As the cause must be sent back for a new trial, we deem it proper to express an opinion in regard to the other questions discussed before us.

We do not concur in the construction put upon the contract by the judge below. Whatever views we may entertain in regard to the rights acquired and the duties imposed by the terms of the contract of 20 January, 1904, we are clearly of the opinion that, upon the admissions in the pleadings and the testimony of both parties, the subject-matter of the contract (the tobacco) was designated, set apart, and on 29 June, 1904, accepted by the plaintiffs as conforming to the contract in all respects. It was prized into 45 hogsheads, weighed, and numbered. An invoice was made and delivered to the plaintiffs; nothing more was to be done in that respect. There can be no question that if the plaintiffs had been in Raleigh on 1 July and tendered the price thereof in money, they would have been entitled to have immediate possession, that

is, to demand its delivery f. o. b. cars, carrier and destination being fixed by them. What, then, were the relative rights and duties of the parties in regard to the order of payment and delivery? The conditions prescribed by the two first rules laid down by Mr. Benjamin (Sales, 318) had been met and complied with. The third rule, upon compliance with which both the title and right of possession vest, is: "When the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered in the possession of the buyer." It is immaterial here whether we so construe the contract that payment of the price was a condition precedent or concurrent. It is well settled by abundant authority that, in a contract for the sale of personal property, nothing being said as to the time of payment, the price (111) must be paid either before or concurrently with the passing of the title. Mechem, *supra,* 540; *Bloxam v. Sanders,* 3 B. and C. (10 E. C. L.), 477; *Scudder v. Brodburg,* 106 M. and S., 427. *Battle, J.,* in *Grandy v. McCleese,* 47 N. C., 142, construing a contract for sale of corn in which no time was fixed for payment, said: "The legal effect of it was to bind the parties to the performance of concurrent acts. The plaintiff was to send for the corn and to pay for it upon delivery and the defendant was to deliver it upon receiving payment. Neither party could demand performance by the other without the allegation and proof of his own readiness and ability to perform his part of the agreement." The status of the parties is well stated by *Pearson, J.,* in *Grandy v. Small,* 48 N. C., 10: "The acts to be done by the parties under this contract were concurrent. The plaintiff was mound to pay the money on delivery of the corn. His doing so was a condition precedent to the right of action, and the question is whether there was anything to discharge hi mfrom its performance." The plaintiff' recognizing this condition, say that they were discharged from the duty of paying on 1 July, 1904, by an express contract with the defendants that payment should be postponed until 4 July, 1904. This the defendants deny. This question should have been submitted to the jury. It is directly raised by the pleadings. If the plaintiffs had on 1 July, 1904, tendered the price and it had been rejected and delivery of the tobacco refused, there can be no question that in view of the admitted facts the plaintiffs could have recovered the possession of the property upon tendering the price or, upon refusal to deliver, by showing readiness and ability to pay. Upon giving shipping directions they would have been entitled to demand its delivery f. o. b. the cars at Raleigh. As no directions were given, and his duty was imposed upon defendants for the benefit of plaintiffs, they could waive it or, by failing to give them, for- (112)

feit the right to demand performance in that respect. If the jury find with the plaintiffs in respect to the change of time for payment, they would have the same rights and duties on 4 July which by the original contract they had on 1 July. They say that on that day "Plaintiffs went to Raleigh, as agreed, ready, able, willing, and prepared to take and pay for said tobacco, but the defendants failed and refused to deliver it." This averment is denied by the defendants, and in this way the second controverted question of fact is presented by the pleadings. It should have been submitted to the jury. It is conceded that no tender of the price was made on 4 July, 1904. It is further conceded by plaintiffs, that when plaintiff Hughes went to Knott's home on the night of 4 July, the latter said: "We were there in the warehouse on the first day of July, and you did not come, and we are holding the scrap." Defendants say in their answer that the only reason why they did not deliver the tobacco was that plaintiffs did not make any tender of the price on 1 July. The defendants by their refusal to deliver waived a tender.

"If a party to an executory contract is in a condition to demand performance by being ready and able at the time and place, and the other party refuses to perform his part, an offer is not necessary." *Grandy v. Small, supra; Blalock v. Clark,* 133 N. C., 306. There is a class of cases in which neither a tender nor an averment of readiness is necessary, as when before the day fixed for performance the party renders it impossible to perform on his part, as an agreement to marry on a day named, if the defendant marries some one else before the day. The case before us does not fall within the principle upon which these cases are based. *Grandy v. McCleese, supra.* The defendants had the tobacco on 4 July. The plaintiff Hughes testified that he came to Raleigh on 4 July, ready and prepared to pay for the tobacco, and that he had a check on the Norfolk National Bank and ample collateral to
(113) secure the money from the bank here if demanded; that he did not ask the defendants to take this check, but told Knott that he would get the money the next day and pay him; that he went to the defendants' warehouse during the day, but failed to find them; that he did not find either of them until 9 o'clock at night, when he found the defendant Knott at his home and told him that he was prepared to pay for the tobacco and would do so next morning. Whereupon Knott said that they had decided to keep it. He did not tender the check. If Knott had demanded the currency, the plaintiffs would have been compelled to pay it, but as we have seen, the defendants waived the tender. Were the plaintiffs ready to comply with their part of the contract? We have held that testimony tending to show a custom among cotton dealers to accept checks in payment for cotton sold in large lots was compe-

tent. The plaintiffs in this case offered to prove general custom in the tobacco trade in that respect. Objection to it was sustained. As we have seen, the view which his Honor took of the case rendered this immaterial. While we do not intend to relax the well-settled rule that where performance of a contract is a condition precedent to the plaintiff's right of action, he must allege and show either a tender or waiver, etc., we are of the opinion that if the jury should find that there was an agreement to extend the time of payment to 4 July, and it should appear that on that day plaintiff Hughes was here and went to the warehouse of defendants during business hours for the purpose of paying for the tobacco, and had available funds for that purpose, either in money or checks which he could have promptly converted into money, and the defendants were not at their place of business, that the plaintiff would be relieved of the duty of converting such checks into currency on that day and carrying the same about on his person until he could find the defendants. The plaintiff Hughes testified that in the conversation on 29 June the defendant Williamson asked him about the exchange on the check, to which he said if there was any ex- (114) change he would pay it. This would indicate that it was understood between the parties that checks would be received in payment.

Upon another trial the plaintiffs would be permitted to prove, if they can, such custom as alleged, not for the purpose of varying the contract but as interpreting its terms. *Brown v. Atkinson,* 91 N. C., 389.

We have been unable to find any authority in regard to the question as to what would constitute readiness and ability under the circumstances testified to by the plaintiff Hughes. It would seem that if his view of the entire transaction is correct, he should have been allowed a reasonable time, after the refusal of the defendants to deliver the tobacco, to convert his funds into currency, and if his funds were available for that purpose, the jury would be justified in finding that he was ready, able, and willing, within the terms of the contract as modified by the conduct of the parties. All this, however, will be for the jury upon proper instructions by the court. For the errors pointed out there must be a New trial.

Cited: Wilson v. Cotton Mills, 140 N. C., 57; *Hughes v. Knott, ib.,* 550; *Coles v. Lumber Co.,* 150 N. C., 186; *Phelps v. Davenport,* 151 N. C., 22; *Gallimore v. Grubb,* 156 N. C., 577; *Supply Co. v. Roofing Co.,* 160 N. C., 446; *Gaylord v. McCoy,* 161 N. C., 694; *Medicine Co. v. Davenport,* 163 N. C., 300; *Davidson v. Furniture Co.,* 176 N. C., 570, 571; *Little v. Fleishman,* 177 N. C., 25; *Stern v. Milling Co.,* 178 N. C., 481; *Rucker v. Sanders* 182 N. C., 611.

(115)

FOIL v. NEWSOME.

(Filed 18 April, 1905.)

Wills—Residuary Clause—Construction—Estate—Trustees Under Will —Powers of Sale of Land.

1. Where a will provided, among other things, that "the residue of my estate of every kind I give, bequeath, and devise to my daughter during her lifetime; said estate to be placed in the hands of my trustee; said trustee is to invest and keep invested said estate, and the interest or income accruing therefrom paid by him to my daughter during her life, and at her death paid over by said trustee to her issue": *Held*, the testator did not die intestate as to any portion of his property, and the above residuary clause includes the real as well as the personal property.
2. The words "balance and residue of my estate of every kind" include the reversionary interest in the real estate in which a life estate had been carved out.
3. The trustee has, by implication, the power to sell the land for the purpose of converting it into an income-producing property.
4. The usual rule adopted by the courts is to find in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property an implied power to sell real estate, to the end that he may discharge such duty.

WALKER, J., did not sit in these appeals.

PROCEEDING for partition by T. A. Foil and others against A. H. Newsome and others, heard by *Cooke, J.*, at November Term, 1904, of ROWAN, upon agreed facts. From the judgment rendered, both parties appealed.

Overman & Gregory for plaintiffs.

Burton Craige, L. H. Clement, A. Burwell, and T. C. Linn for defendants.

PLAINTIFF'S APPEAL.

(116) CONNOR, J. This was a petition for sale of land for partition. The plaintiffs claimed an undivided interest in the *locus in quo* with defendant Ingold Newsome, as heirs at law of Tobias Kesler. Defendant Ingold Newsome claimed that she was sole seized for life, remainder to her children and other defendants, under the will of said Kesler. That defendant James H. Ramsey, trustee, was empowered under the provisions of the will to sell the land and invest the proceeds for the purpose of executing the trust declared therein. The cause having been transferred to the trial docket of the Superior Court, the

parties agreed that the judge should try and determine the controversy upon an agreed state of facts in a suit for the purpose of obtaining a construction of the will—waiving all questions of form or procedure.

The decision of the controversy is dependent upon the construction put upon the fifteenth item of the will, which is in the following words: "The balance and residue of my estate of every kind I give, bequeath, and devise to my daughter, Ingold Newsome, wife of A. H. Newsome, during her lifetime; said estate to be placed in the hands of my trustee hereinafter named and appointed for the uses and purposes as follows, to wit: Said trustee is to invest and keep invested said estate, and the interest or income accruing therefrom is to be by him paid to my said daughter, Ingold Newsome, for and during her natural life, and at her death said estate to be paid over by said trustee to her issue: *Provided, however,* that my said trustee shall not be chargeable with interest on any money or personal estate lying idle in his hands." It appeared that said Kesler held mortgages upon certain tracts of land described in the petition; that said mortgages were foreclosed and the lands purchased by the executor. As to such tracts, the plaintiffs do not except to the judgment of the court. The other tracts were owned by Kesler at the time of his death. The plaintiffs are his children and grandchildren, and defendant Ingold is his daughter—the other defendants, except Ramsey, trustee, being her children. His Honor was of opinion that by item 15 of the will a life estate was devised to the de- (117) fendant Ingold. That said land, together with the personalty, was to be under the control of the defendant Ramsey, trustee. That as to the remainder in fee after the termination of the life estate, the testator died intestate and the same descended to and vested in his heirs at law. That as there was objection to the partition during the continuance of the life estate, the prayer of the petition was refused. To this ruling the plaintiffs excepted and appealed, assigning as error in the judgment of the court "that the defendant Ingold Newsome is entitled to a life estate in all the lands described in the petition. That plaintiffs are not entitled to partition during the life of said Ingold."

We concur with his Honor in holding that item 15 of the will, being the residuary clause, includes the real as well as the personal property. "The word 'estate,' taken in its primary sense, as used in a will, without anything in the context to limit it, is a word of very extensive meaning. It is nearly synonymous with the word 'property' when that word is not qualified by the word 'personal.' Under the word 'estate' used in its primary sense, real property of every description will ordinarily pass, and the presumption is that the testator, in using the word, uses it in its broad and inclusive signification, unless the context restricts its meaning to some particular species of property." 1 Underhill on Wills,

295. In *Clark v. Hyman,* 12 N. C., 382, *Taylor, C. J.,* says: "That the words 'property, possessions, or estates' are sufficient, if not qualified, to carry real estate, is well settled by many decisions; but it is otherwise, if it appears from the context that personal estate only was in contemplation of the parties." In *Harrell v. Hoskins,* 19 N. C., 479, *Gaston, J.,* says: "The words 'all my property,' unless they are explained by other words in the will to have a different meaning, embrace every subject of property and every interest therein which belonged
(118) to the testator. The word 'estate' is confessedly sufficient for these purposes; and in holding it to be thus sufficient, it has been said to import the entire property of the testator." In *Pippin v. Ellison,* 34 N. C., 61, it is said that the word "estate" has a broader meaning than property. Schouler on Wills, sec. 510; Pritchard on Wills, 415; 11 A. & E. (2 Ed.), 359; *Page v. Foust,* 89 N. C., 447. In the case before us the word "estate" is followed by the words "of every kind." The plaintiffs say that, conceding the general rule to be as stated. it must be taken subject to the well-settled modification that the usual import of words may be restrained in their operation by the context; that prior words of general signification may be controlled and modified as to their meaning by subsequent expressions, and the intention of the testator reached from the whole will. *Holt v. Holt,* 114 N. C., 241. It is urged that the words following the general descriptive terms, "said estate to be placed in the hands of the trustee," "said trustee is to invest and keep invested said estate, and the interest or income accruing therefrom is to be paid," etc., "and at her death said estate to be paid over by said trustee," etc., are appropriate to personalty only. We have carefully examined the cases of *Doe, etc., v. Buckner,* 6 Dunford and East, 610 (1796), and *Doe v. Harrell,* 5 Barn. and Ald. (7 E. C. L.), 8. We have also noted the observations of Mr. Jarman in regard to these and other cases. *Newland v. Majorbanks,* 5 Taunt., 208; Jarman on Wills (5 Ed.), 335. They forcibly illustrate the wisdom of his words: "The cases . . . often present questions extremely embarrassing to a judge or practioner, and different minds will almost unavoidably form different opinions as to the weight to be ascribed to particular expressions or circumstances of inapplicability as excluding real estate." Mr. Underhill says: "The earlier English cases show. a decided tendency to restrict the meaning of the word 'estate' to personal property, meaning thereby everything except freehold lands." He says that they
(119) have been by implication, if not expressly, overruled by subsequent decisions of the same courts. "The modern tendency, both in England and the United States, is to give such words as 'estate,' 'property,' or 'effects' their broadest meaning consistent with a true construction of the testator's intention."

The plaintiffs direct our attention to the whole will, and say that we will find there manifested an intention sustaining their contention. The will shows a carefully considered plan or scheme in the distribution and settlement of a large estate. The wife is the first provided for. Each child is given real and personal property with limitations and trusts attached thereto. The testator uniformly uses apt words, distinguishing gifts of real and personal property, such as "give and devise," and "give and bequeath," respectively, whereas in the residuary clause he uses the terms "give, bequeath and devise," showing a recognization of the different kinds of property to pass. He carefully excludes one of his grandchildren by name from any participation in his estate. It is true that the terms "keep invested," "paid over," relate to handling and disposing of personalty. They also say that the testator uses the word "income" as synonymous with "interest" in every other clause in which a disposition of personalty is made. They further say that it is a well-settled rule of construction that the heir is favored and can be excluded only by express terms or necessary implication, citing many authorities from this and other courts. 2 Jarman on Wills, 112; Schouler on Wills, sec. 480; *Holton v. Jones,* 133 N. C., 403. These well-considered arguments are entitled to and have received our most careful consideration.

On the other hand, defendants' counsel urge on our attention the equally uniform rule that every testator is presumed to intend to dispose of all his estate, and not to die intestate as to any part. *Pearson, J.,* in *Boyd v. Latham,* 44 N. C., 365, says: "The rule, *ut res magis valeat quam pereat,* comes in aid of the general presumption that (120) one who makes a will intends to dispose of all his estate." *Foust v. Ireland* 46 N. C., 184; *Apple v. Allen,* 56 N. C., 120. The words in the residuary clause "all my estate of every kind," following the words "give, bequeath, and devise," strongly indicate a purpose to dispose of all of his property not specifically given away. *Gaston, J.,* in *Harrell v. Hoskins, supra,* says: "The devise, then, of all the property not previously disposed of, either by gift or loan, is a residuary devise and will carry with it every reversionary interest in the testator which has not been specifically devised, whether such interest were in contemplation of the testator or not and whether it were known or unknown to him, unless it expressly appear upon the will or be necessarily inferred from it that his intention was confined to pass other estates and interest only, and actually to exclude such reversion therefrom. The true inquiry then is, whether it is manifest in the will that the testator intended to exclude the reversion from the operation of the residuary devise." Discussing the question and considering the arguments urged against the construction, he admits their force, and further says: "But as the

words of the residuary devise do, in their ordinary as well as their legal import, comprehend this reversion, the argument to be successful should establish a manifest intent in the testator not to include it. . . . Courts of justice in many cases cannot hope to define with certainty the intentions of testators. It is safer, when words are found in a will which by usage and legal interpretation embrace certain devisable interests and are used without qualification or explanation, to understand the testator as meaning what he says, rather than to indulge in the hopeless pursuit of making out his meaning by refined and minute analysis. Things and interests embraced within the disposing words of a will must be taken to pass by them; unless there can be found a declaration plain to the contrary." In *Saumerez v. Saumerez,* 4 My. and C. (18 (121) Eng. Ch.), 330, the testator in the residuary clause of his will used words sufficient to include the reversion in certain realty given to his son for life. The *Lord Chancellor* said: "But the difficulty is that in directing the application of such residue of his property, he has used expressions and prescribed a course of dealing not applicable to land, but to personalty only. He directs his son's share to be placed in the names of trustees and the interest to be paid to him who was already tenant for life of the land, and he authorizes his trustees in certain cases to advance part of the capital. . . . The question then is, whether such expressions and directions are sufficient to give a restricted meaning to the gift of the residue of the property, and to confine these words (sufficient of themselves to pass freehold as well as personal property) to passing the personal property only." He proceeds to say that it is not necessary to ascertain whether the testator had any particular property in contemplation or not; that such gifts may be introduced to guard against the testator's having overlooked some property or interest in the gifts already described. "The circumstances of his using expressions and giving directions applicable only to the personal estate may prove that he did not at any time consider, or was not aware, that this fee would be a part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property." It will be observed that the expressions relied upon by the plaintiffs to limit and restrict the meaning of the operative words of gift relate only to the management and control of the property, and not to the estate or interest given, nor to the inclusive scope of the terms, "the balance and residue of all my estate of every kind."

We are, upon careful consideration, of the opinion that the testator did not intend to die intestate in respect to any portion of his (122) property; that there is nothing in the declaration of trust in

regard to the control of the property which plainly shows an intention to restrict the operation of the words "give, bequeath, and devise" as applied to "the balance and residue of my estate of every kind." To put any other construction upon the language used would give to the real estate, not specifically devised, a direction clearly inconsistent with his expressed wish, and destroy the general scheme or plan adopted for the disposition of his property.

Affirmed.

DEFENDANTS' APPEAL.

CONNOR, J. The defendants (children of Ingold Newsome) and J. H. Ramsey, trustee, except to so much of the judgment as holds that Tobias Kesler died intestate as to the reversion in the real estate given to Ingold Newsome for life. They insist that the language of item 15 of the will is sufficiently comprehensive to carry the fee subject to the life estate. The facts are set forth in the opinion disposing of the plaintiff's appeal. The same reasons, controlled by the same line of authorities which led us to the conclusion that a life estate passed to Mrs. Newsome, lead us to the same conclusion in regard to the fee. The words "balance and residue of my estate of every kind," we think, include the reversionary interest in the real estate in which a life estate had been carved out. The presumption that a testator intended not to die intestate in regard to any part of his estate is strengthened by the use of language so inclusive as that found in this item of the will. The same observation applies to a consideration of the entire will. He provides for each of his children, carefully excepting one of his grandchildren by name. We find nothing in the will or the condition of the estate or family, so far as we are informed by the record, to rebut the presumption, or cause us to think that he intended the reversion in the land undisposed of by specific devise of uncertain value, (123) by reason of the uncertain time at which the life estate will terminate, to be held until such time and divided among his heirs at law. We infer that Mrs. Newsome, at the time the will was executed, 29 September, 1894, was a young woman, as six of her children are now infants, only one being of full age. We also infer from the size of the several tracts of land described in the complaint, and the fact that they are not specifically devised, that they are of inconsiderable value. In view of these facts, casting light upon his purpose, as indicated by the language used, we conclude that his intention was in harmony with the presumption raised by the law. This view is sustained by the fact that he appoints a trustee to manage and control the property given to his daughter and children and derive an income therefrom. *Page v. Atkins,* 60 N. C., 268. We are also of the opinion that the trustee has

by implication the power to sell the land for the purpose of converting it into an income-producing property. The usual rule adopted by the courts is to find in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property, an implied power to sell real estate to the end that he may discharge such duty. *Vaughan v. Farmer,* 90 N. C., 607; *Crawford v. Wearn,* 115 N. C., 540; *Council v. Averett,* 95 N. C., 131. This construction reconciles the use of the word "invest"—pay over interest or income.

The judgment of the court below in respect to the disposition of the reversionary interest in the land described in the petition must be reversed. As all the parties in interest are before the court, we can see no reason why, if so advised, they may not take an order for the sale of the land by the trustee in this case. In this way the rights of all parties and security of title to the purchaser may be amply protected.

The Superior Court having acquired jurisdiction, may retain the cause and make all proper and necessary orders in the premises.

(124) Let this be certified.

Reversed.

Cited: Harper v. Harper, 148 N. C., 458; *Powell v. Wood,* 149 N. C., 238; *Jones v. Myatt,* 153 N. C., 228; *McCallum v. McCallum,* 167 N. C., 311; *Norris v. Durfey,* 168 N. C., 325; *Laws v. Christmas,* 178 N. C., 361; *Allen v. Cameron* 181 N. C., 122.

MURDOCK v. COMMISSIONERS.

(Filed 18 April, 1905.)

Taxation—Solvent Credits—Order of County Commissioners—Remedy to Test Legality of Tax.

1. Laws 1901, ch. 7, sec. 33, providing that the value of cotton "in the hands of a commission merchant" shall be listed as a solvent credit, does not apply to cotton in the plaintiffs' own hands and under their control and keeping.
2. The Superior Court has no jurisdiction to entertain an appeal from an order of county commissioners with reference to the plaintiff's return of taxes. If the tax was paid under protest, the proper remedy to test its legality is by an action to recover the amount paid.

THIS was an appeal from an order of the Board of Commissioners of IREDELL County, heard by *Bryan, J.,* and a jury, at January Term, 1905, of IREDELL. The issue submitted was as follows: "Are the plaintiffs liable for the taxes assessed against them on $10,080 worth of cot-

ton?" The jury, under direction of the judge, answered the issue "No." The defendants appealed.

The plaintiffs, R. K. Murdock and N. P. Watt, in June, 1902, returned $10,080 worth of cotton as solvent credit, and at the same time deducted their indebtedness, amounting to $10,080, therefrom, the said $10,080 being the money used by them in the purchase of the cotton returned for taxation. (125)

L. C. Caldwell for plaintiffs.
H. P. Grier and W. G. Lewis for defendants.

BROWN, J. His Honor, *Judge Bryan,* instructed the jury upon the evidence to answer the issue "No," and gave judgment for plaintiffs for $95.61, the amount of the tax which plaintiffs had paid. In this we think there was error.

1. We are of opinion that the evidence failed to bring the transaction within the terms of Laws 1901, ch. 7, sec. 33. All the evidence, including that of the plaintiffs themselves, tended to prove that the cotton was not "in the hands of a commission merchant or agent, in or out of the State," but was in the plaintiffs' own hands and possession and under their control and keeping; that on 1 June, 1902, it was in their warehouse in Statesville, to which they had the keys. Therefore, "the value of the cotton in the hands of a commission merchant," under the facts of this case, could not very well be assessed as a solvent credit, and therefore the action of the board was legal.

2. The Superior Court had no jurisdiction to render the judgment set out in the record. It is true, the case on appeal calls this proceeding a civil action, but the record discloses that it is not, as is shown by the following extract: "The appellant board declined to accept the return as made by appellees, and ordered the clerk of its board to make out a receipt of the taxes in conformity to corrected tax return, from which order the appellees appealed to the Superior Court in term.

"The following is the order of said board: 'Ordered that the clerk of this board make out tax receipt against Watt & Murdock for $10,080, as a corrected receipt for return of 1902.'

"At the meeting of the board of commissioners in August, the following appears of record: 'The question of taxes against (126) Watt & Murdock; upon the motion to reconsider, motion overruled, from which defendants give notice of appeal.' Notice of appeal waived in open session."

It appears from the judgment of the Superior Court that the *ad valorem* tax of $95.61 assessed upon the cotton was paid by plaintiffs, and the court renders judgment in their favor against defendants for

that sum. Although the point was not made, we feel it our duty to notice the defect of jurisdiction in the Superior Court to render the judgment. There is no statute with which we are acquainted, and none has been called to our attention, which gives the Superior Court jurisdiction to entertain such an appeal or proceeding as this, or to render a judgment in it against the defendants for the amount of the tax paid. If the plaintiffs paid this tax in obedience to the order of the board of commissioners under protest, the proper remedy to test the legality of the tax is by an action brought in a court of a justice of the peace to recover the amount paid. Then the Superior Court would have appellate jurisdiction. The proceeding is irregular. Let the judgment of the Superior Court be reversed and this proceeding

Dismissed.

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(127)

COPPLE v. COMMISSIONERS.

(Filed 18 April, 1905.)

Liability of County for Care of Poor—County Superintendent of Health —Delegation of Duties—Smallpox Patient.

1. Under sections 707 (21) and 3540-1 of The Code, imposing the general duty on county commissioners to provide for the poor, in order to make a binding pecuniary obligation on the county, there must be an express contract to that effect, or the service must be done at the express request of the proper county officer or agent.
2. A county superintendent of health has no right to delegate the performance of his official duties to others, so as to give his employees the right to make their services a county charge.
3. Under Laws 1893, ch. 214, sec. 9, providing that contagious diseases shall be promptly quarantined by the county superintendent of health, the services rendered by plaintiff in removing a person afflicted with smallpox to a pesthouse, taking his meals to him and attending to him continually during his sickness, is a legitimate county charge, where the patient is insolvent and the services were rendered by the direction of the superintendent of health.

ACTION by T. M. Copple against the Board of Commissioners of DAVIE County, heard by *Cooke, J.*, and a jury, at Fall Term, 1904, of DAVIE, on appeal from a justice of the peace.

The facts are as follows: Plaintiff having presented his account to the board of commissioners, the defendants, for services rendered an insolvent smallpox patient, and for other items, and payment having been refused, instituted this action before a justice of the peace, on 20

March, 1901, to recover $83.87, the amount demanded. On the trial before the justice the plaintiff obtained judgment for the amount. On appeal he recovered to the amount of $52, being a portion of his account. The items of the account as originally presented are (128) as follows:

Four days @ $1 per day	$ 4.00
Removing Henry Dry to pesthouse	5.00
Twenty-three days @ $2 per day	46.00
Ten days @ $1.75 per day	17.50
Thirty-five vaccinations @ 32½c. each	11.37
Total	$83.87

Dated May, 1900. (Signed) T. M. COPPLE.

The defendants denied any indebtedness and in their answer set forth the defense that the board of commissioners are not liable in any manner for any part of the account; and, second, that the board has never at any time employed the plaintiff to do anything, either professional or otherwise, whereby the county of DAVIE should in any way be responsible to plaintiff for the payment of any sum whatever.

On the trial in the Superior Court the following evidence was offered: The plaintiff in his own behalf testified that he was a regular practicing physician in the county of Davie and a member of the county board of health and lived at Cooleemee, a cotton-mill village about 7 miles from the town of Mocksville; that he was called to see one Henry Dry, who was sick, and upon examination plaintiff pronounced his disease smallpox; that he at once notified Dr. James McGuire, who was the county superintendent of health, and who lived at Mocksville; that Dr. McGuire came down to Cooleemee and agreed with plaintiff that Dry had smallpox, and decided that he must be removed and isolated. Dry was at this time in the house of Mr. Meisenheimer, who had a family. At the suggestion of some employee of the Cooleemee Cotton Mills that the company had had a house built on the outskirts of the village for a pesthouse, and that if Dr. McGuire would order the patient removed there and turn him over to the plaintiff for treatment, it would be more convenient and cheaper for the county, Dr. McGuire re- (129) quested plaintiff to remove the patient to said house and take charge of the case and continue to treat him, which plaintiff did. That there was no one else to be found who was immune, and who would remove and wait on the sick man. That plaintiff took his own horse and buggy and removed Dry to the pesthouse and visited and treated him professionally and carried his meals to him three times a day. That

Dry was insolvent and unable to pay anything, and plaintiff could not procure any one who was immune and who would go and wait on the smallpox patient, and plaintiff had to do so himself. That the house of Mr. Meisenheimer was quarantined by Dr. McGuire and afterwards all the territory of Cooleemee, by order of the Board of Commissioners of Davie County, which order was shown from the records of the defendants and a copy of which will be attached as a part of this case—"Exhibit A." Plaintiff testified that he performed the services sued for in his account, duly sworn to, and that the prices charged were reasonable, just, and usual for such services, and that no part of the same has ever been paid, though the account has been presented to the defendants and payment asked by him.

Dr. James McGuire, witness for the plaintiff, testified that he was superintendent of the board of health for the county of Davie, and at the time referred to by plaintiff he received a phone message to come to Cooleemee, a distance of about 7 miles from Mocksville, the county-seat of Davie, to see a smallpox patient; that he went and met Dr. T. M. Copple, the plaintiff, at Mr. Meisenheimer's house, and examined Henry Dry, and found that he had a genuine case of smallpox. That the situation was discussed. That the defendant had a pesthouse built at the county home some 3 miles west of Mocksville, but the same had never been used. It was mentioned by some one, perhaps Mr. Terrell, superintendent of Cooleemee Cotton Mills, that the company had erected a house on its lands outside of the mill premises for such purposes.
(130) That it was necessary, witness thought, to quarantine Mr. Meisenheimer's house and to have Henry Dry removed to the pesthouse. He concluded it would be more convenient and cheaper to the county to have the patient removed to the latter pesthouse, and requested the plaintiff to do it and take charge of the case, which plaintiff did. Witness also testified that after this he made several visits to said patient alone, and also in company with the plaintiff, whose services he requested; fumigated the Meisenheimer house and received pay from the defendant for his services, but nothing for the services of plaintiff, which were not included in witness' charges. That witness received $3.50 for each visit made by himself, being 50 cents a mile. The letter of witness to plaintiff requesting plaintiff to meet him at Mr. Meisenheimer's house and help fumigate the house was shown witness and identified by him and put in evidence and a copy of which was attached to the record as "Exhibit B."

Among other things, the court charged the jury as follows: If they believed the evidence it was the duty of the county to try to stop the spread of the disease of smallpox and to have the house of Meisenheimer quarantined, and, if necessary, to have Cooleemee territory quarantined; and if they should find that Dr. McGuire thought it best to have Henry

Dry removed to the pesthouse, and that it would be cheaper and more convenient to have him removed to the house of the Cooleemee Cotton Mills instead of the county pesthouse several miles away, as was suggested, that the defendant would be liable therefor, and that the jury could allow the plaintiff whatever sum they might find was a fair and reasonable compensation for the services rendered. That if they should find that there was no one immune, or from any other cause the plaintiff could not get any other person to remove the patient, and he had taken his own horse and buggy and carried the patient to the pesthouse, and there cared for him and treated him and carried his meals three times a day to him, they could allow the plaintiff whatever sum (131) they should find was a fair and reasonable compensation for such services as he rendered. That the statute by implication gave Dr. McGuire the power and authority to have the patient removed and cared for, and the defendant, in law, is liable for a just and reasonable sum. But as the plaintiff failed to show that Mr. Meisenheimer was not able to pay for fumigating his house, you will not allow the plaintiff anything for that, and the defendant is not liable for vaccination charges in said account, and you will not allow the plaintiff anything for that.

Under the charge on the general issue the jury answered that the defendants were indebted to the plaintiff in the sum of $52. There was judgment for this amount, and the defendants excepted and appealed.

Jacob Stewart and E. L. Gaither for plaintiff.
T. B. Bailey and A. T. Grant, Jr., for defendants.

HOKE, J., after stating the facts: So far as municipal obligation is concerned, it is accepted doctrine that the care and support of the indigent and infirm is a matter of statutory provision. In *Smith v. Coleraine,* 9 Metcalf, 492, it is said by *Chief Justice Shaw:* "It has been too often decided to be now questioned that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation." Where a statute imposes such duty on a county in general terms, leaving the method and extent of relief to the judgment and discretion of local officers and agents, in order to make a binding pecuniary obligation on the county, there must be a contract to that effect, express in its terms, or the service must be done at the express request of the officer or agent charged with the duty and having the power to make contracts concerning it. The statutes of our State on this subject are of this character. By section 707, subdivision 21, and section 3450 of The Code, the county commissioners are directed to provide for the maintenance, comfort, and well ordering of the poor. (132)

By section 3541 it is provided that paupers who may become chargeable to the county shall be maintained at the county poorhouse, or at such place or places as the board of commissioners may agree upon. The general duty is here imposed of providing for the poor; the place, method, and extent of relief are vested in the judgment and discretion of the county commissioners. Although the person may be a proper subject of county charge, any one who officiously provides for such person cannot recover of the county the amount of his outlay.

Where the county commissioners have provided a poorhouse, styled now, a home for the aged and infirm, they have the right to require that all persons who are cared for at their expense shall be placed in the house which they have provided for the purpose.

Authorities are numerous to the effect that counties cannot be held responsible for obligations of this kind unless there has been a contract made by the proper county officers in express terms, or unless the services are rendered by their request and under circumstances from which a contract may be inferred. *Salisbury v. City,* 44 Pa. St., 303; *O'Keith v. City,* 145 Mass., 115; *Patrick v. Town,* 109 Iowa, 342. In *Salisbury v. City,* in holding that a claim without such express contract could not be maintained, the court said: "To hold otherwise would be to impose unknown and unexpected claims in vast numbers on the county treasury and to allow the jury, instead of the guardians of the poor, to determine the amount of public expenditure."

In *Patrick v. Town, supra;* it is held that "where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such (133) duty, their mere neglect will not operate as an implied request to a private party to supply the needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract." And further, "The statute requiring each town to support poor persons in certain cases, and the supervisors to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town without a contract to that effect made between him and such supervisors, or a majority of them."

The Court is also of opinion that the county superintendent of health has no right to delegate the performance of his official duties to others, certainly not so as to give his employees the right to make their services a county charge. The office of superintendent of health is one of trust and responsibility. Such superintendent is paid a salary pursuant to the statute, at that time fixed by the board of commissioners, and they have the right to expect and require that he will perform the duties for which he is paid. It is not necessary, however, to question either of

these wise and salutary principles in order to uphold the charge of the court in the present case, and support the verdict and judgmnet in plaintiff's favor. This, we think, is a case of emergency expressly provided for by statute, giving the county superintendent of health the power to impose this charge upon the county as to insolvents to the extent here allowed. By the statute of 1893, ch. 214, sec. 9, it is provided that quarantine shall be under the control of the county superintendent of health, who shall see that diseases specially dangerous, as smallpox, diphtheria, etc., shall be promptly quarantined and isolated within twenty-four hours after the case is brought to his knowledge, and in case of death or recovery, there shall be disinfection, etc. The expense of the quarantine shall be borne by the householder in whose house the case occurs, if he is able; otherwise, by the city, town, or country in which he resides. The failure of the county superintendent (134) of health to perform the duties imposed in this section shall be punished, etc. This power of quarantine, to make it efficient, extends not only to the house, but to the removal and isolation of the person suffering from the disease, and the expense of such removal and the care and maintenance of the patient after the removal, to an amount that is reasonable and necessary, where the patient is insolvent and when incurred under the contract of the superintendent of health, is a legitimate county charge.

This statute has never been repealed, so far as the Court can discover. It was certainly in force when this service was rendered, and if the plaintiff's right had become absolute, no subsequent repeal could invalidate it. Code, sec. 3764.

According to the undisputed evidence in the case, Henry Dry had a genuine case of smallpox and was insolvent. To prevent the spread of the disease, in the judgment of the officer who was given control of the matter, it was necessary to remove and isolate the patient. This was done by removing him to a pesthouse already provided, near to the place, and where an attendant, immune, and ready and willing, was at hand to render proper and necessary services. This plaintiff carried the patient to the pesthouse himself, took his meals to him three times a day, and attended to him continually during his sickness, when no one else could be found to do it, at the request and by the direction of the superintendent of health. This was no delegation of that officer's duties. The superintendent did attend the patient. He was performing the duties imposed upon him by statute, and this was a case where the employment of help was necessarily contemplated and authorized. *Bank v. Bank,* 75 N. C., 534.

It cannot be suggested for a moment that the power of the superintendent was exhausted when he had the patient removed, and that the

(135) statute contemplated that he was to be left without food or attendance. There was no abdication of his office by the superintendent. On the contrary, in providing for the care and attendance, that officer was carrying out his duty as prompted by every instinct of humanity and sanctioned by the express provision of a wise and merciful law.

It will be noted that the charge of his Honor expressly excludes from the plaintiff's account the item for 35 vaccinations made for the superintendent on other patients, this being a charge for work strictly professional and an official duty incumbent on the superintendent himself, and refers the question for the jury to decide as to what was a fair and reasonable compensation for the other service rendered. Here, then, existed every fact required to make this a valid charge in accordance with the doctrine as stated—a duty imposed by statute and services incident and necessarily rendered at the request of the officer in charge of the matter.

It is stated that the town had a pesthouse somewhere near Mocksville; but it was also shown that no patient had ever been treated there, and by fair and reasonable intendment it appears that no care or attendance was provided.

The Court is inclined to the opinion that if conditions had been different, if the county pesthouse had been properly equipped and ready, and nurses and sustenance provided, the county commissioners might have reasonably required that patients of this character should be removed into the public pesthouse, provided the quarantine could be made effective that way. This aspect of the case, however, is not presented. The county pesthouse was not ready, and time was of the essence.

The Court holds that under the statute, and on the facts of the case, the superintendent of health had the power to direct this removal and provide for the maintenance of the patient to the amount of its (136) reasonable worth; that the question was left to the jury under proper instructions, and that the judgment of the court below be Affirmed.

Cited: Comrs. v. Henderson, 163 N. C., 117; *R. R. v. Oates,* 164 N. C., 171; *Fountain v. Pitt,* 171 N. C., 115; *Comrs. v. Spitzer,* 173 N. C., 148

CLEMENT v. IRELAND.

(Filed 18 April, 1905.)

Decree of Confirmation of sale—Motion to Vacate—Grounds—Final Judgment.

1. Where a foreclosure sale was regularly made and report of sale filed on 1 September with the clerk, and a decree of confirmation entered at October term, defendants being present and resisting the confirmation and giving notice of appeal, which was not perfected: *Held*, the decree was regular and final, and a motion at a subsequent term to set it aside was properly denied.
2. No judge of the Superior Court has the power to set aside at a subsequent term a decree of confirmation except upon the ground of mistake, inadvertence, surprise, or excusable neglect, or for irregularity.
3. The fact that, at the same term at which the decree of confirmation was entered, an order was made permitting additional pleadings to be filed, wherein the defendants seek to charge the purchaser with the rents and profits of the land received prior to the sale, does not make the decree any the less final.

ACTION by W. R. Clement and others against H. B. Ireland and wife, heard by *W. R. Allen, J.*, by consent, at WINSTON, in March, 1904.

Upon the defendant's motion to set aside a judgment or order of confirmation of sale made in this cause, by *Neal, J.*, at October Term, 1902, of DAVIE. From the order of *Judge Allen,* refusing to set aside the decree of confirmation made by *Judge Neal,* the defendants appealed to this Court.

T. B. Bailey and Watson, Buxton & Watson for plaintiffs. (137)
A. H. Eller and E. E. Raper for defendants.

BROWN, J. This cause was before this Court at August Term, 1901, and is reported in 129 N. C., at page 220. The appeal then heard was from an order of *Timberlake, J.*, setting aside a decree confirming a foreclosure sale of the land described in the pleadings, which had been made by *Robinson, J.* The decree was set aside and the judgment affirmed by this Court upon the ground of excusable neglect and irregularity. The irregularity consisted in the fact that the sale had been made at the same term of court when it was confirmed, and that sufficient time had not elapsed between the making of the sale and its confirmation. The present *Chief Justice,* who wrote the opinion says: "The sale was made at the noon recess of the court and was immediately reported, and confirmed that afternoon." In analogy to the provisions as to sales for partition, the opinion intimates that as much as twenty

days should elapse between making a sale and its confirmation, whether it be done under a special proceeding or in a civil action. It appears that under the original decree of foreclosure and in pursuance of subsequent orders in the cause, the commissioners made another sale of the property on 1 September, 1902, after due advertisement, when and where H. W. Fries became the last and highest bidder at $6,000. The commissioners filed their report in the clerk's office on 1 September, 1902. At Fall Term, 1902, of Davie, which convened on 6 October, the judge presiding, *Walter H. Neal,* after a full hearing, at which the defendants appeared and opposed the motion to confirm, entered a decree of confirmation of the sale and ordered title to be executed to the purchaser, H. W. Fries. At the same time he made another order allowing pleas since the last continuance to be filed, wherein the defendants seek
(138) to charge H. W. Fries with the rents and profits of the land for the time between the two sales. From the decree of *Judge Neal* confirming the sale and directing title to be made, the defendants, being present, prayed an appeal and served due notice thereof. Nothing was done by the defendants towards perfecting their appeal, but on 20 March, 1903, they served notice on counsel for the executors of H. W. Fries, he having died shortly before that date and his executors having made themselves parties to this suit, of motion to set aside the judgment of *Judge Neal,* at October Term, 1902.

We are of opinion that the decree of confirmation entered by *Judge Neal* at October Term, 1902, was final in so far as it perfected title of the purchaser to the property upon payment of the purchase money. It appears that pursuant to that decree and shortly thereafter the commissioners executed a deed to the purchaser.

It will be observed that the decree of confirmation made by *Judge Robinson* was set aside and the judgment of *Judge Timberlake* affirmed upon entirely different grounds from those presented by this appeal. A final judgment can be set aside by a motion in the cause upon the grounds of mistake, inadvertence, surprise, or excusable neglect, and may be set aside at any time upon the ground of irregularity. *Clement v. Ireland, supra; Carter v. Rountree,* 109 N. C., 29; Freeman on Judgments, sec. 100.

When the decree of confirmation was entered by *Judge Neal* the defendants were represented; they had their day in court, and being dissatisfied with the decree, they appealed to this Court and failed to perfect their appeal. No judge of the Superior Court, after the entry of that decree, has the power to set it aside except upon the grounds we have mentioned. If the confirmation of a sale could be thus prevented, and any judge of the Superior Court could set it aside in his

discretion, the confirmation of a sale could possibly be prevented (139) as often as a resourceful defendant saw proper to file an affidavit.

In speaking of what are final orders and appealable, Black in his work on Judgments, sec. 22, says that an order vacating an arrest and an order confirming a sale of land are final orders, and appealable. See, also, *Fertilizer Co. v. Grubbs,* 114 N. C., 470; *Edwards v. Morpin,* 7 Mackey (D. C.), 39.

In *Roulhac v. Brown,* 87 N. C., 3, it was held that a motion to vacate an order of arrest heard and determined by a judge of the Superior Court was final and *res judicata,* and that the judge presiding at the next term properly refused to entertain a motion to set it aside. See, also, *Smith v. Fort,* 105 N. C., 452.

The confirmation by the court of an administrator's sale of land has been held to be a final judgment, from which an appeal could be taken. *Tutt v. Boyer,* 51 Mo., 429.

The fact that *Judge Neal* made a subsequent order at the same term permitting additional pleadings to be filed, wherein the defendants seek to subject H. W. Fries for the rents and profits of the land alleged to have been received by him between the two sales, does not make the decree of confirmation any the less final. "A decree in other respects final is not rendered interlocutory by a direction therein contained in aid of the execution of the decree requiring the defendants to account concerning certain specified matters." Freeman on Judgments, sec. 28; *Winthrop v. Meeker,* 109 U. S., 180.

Nothing in this opinion is to be construed as in any way preventing the trial of the issues raised in the supplementary pleadings filed in pursuance of *Judge Neal's* order at Fall Term, 1902, wherein the defendants seek to charge H. W. Fries with certain rents, profits, and damages while in possession of the lands described in the pleadings. The order of *Judge Allen* is affirmed and the cause is remanded to the Superior Court of Davie, to be proceeded with according (140) to law.

Affirmed.

Cited: Herring v. R. R., 144 N. C., 211; *Williams v. McFadyen,* 145 N. C., 159; *Davis v. Pierce,* 167 N. C., 137.

ROLLINS v. EBBS.

(Filed 18 April, 1905.)

Verdict—Guardian Bond—Penalty Omitted—Sureties—Agency—Estoppel.

1. If a verdict is necessarily inconsistent as to material issues, a new trial must be awarded; but a verdict should be taken in its entirety and all material facts found should be liberally and favorably considered with a view to sustaining it, if possible.
2. Where the verdict establishes the fact that the defendants signed a bond intending to make it the guardian bond of their principal, and turned it over to be delivered as a guardian bond; that the same was complete when they signed it, except as to the amount of the penalty, and that some one inserted the penalty and delivered the same to the clerk as a complete bond, and the clerk did not know any change in the bond had been made: *Held*, these facts are not inconsistent with a finding that the penalty was not in the bond when the defendants signed it, and that since signing they have never authorized any one to insert the penalty.
3. When the defendants signed as sureties a bond, except the penalty, and intrusted it to another for delivery, intending it to be used as a guardian bond, they gave such person implied authority to fill out the bond and deliver it in its completed form, and when so delivered and accepted without notice or knowledge of the clerk that any change had been made in it, and the ward's fund thereby obtained and dissipated, they will be estopped to deny their obligation on the bond.

WALKER and CONNOR, JJ., dissenting.

ON petition of plaintiff to rehear; for former opinion, see 137 N. C., 355.

(141) The action was instituted by Thomas S. Rollins, present guardian of James Blaine House, against F. C. Ebbs, former guardian, and the sureties on his guardian bond, to recover for default of the principal. On the trial below at May Term, 1904, of the Superior Court of HAYWOOD County, there was a verdict of the jury on issues submitted, and judgment on the verdict for the penalty of the bond, to be discharged on the payment of $4,666.66 2-3 with interest, the amount of the default. On appeal to this Court a new trial was awarded, the majority of the Court holding that the verdict was inconsistent on material issues, the *Chief Justice* and *Associate Justice Douglas* dissenting. See 137 N. C., 355. A petition to rehear has been formally allowed, and the case is again before the Court on this order.

Moore & Rollins for petitioner.
W. T. Crawford in opposition.

HOKE, J., after stating the facts: On the trial below the jury rendered the following verdict:

1. Did defendants, I. N. Ebbs, M. L. Duckett, D. P. Plemmons, J. M. Rector, and Jasper Ebbs make and deliver their bonds in writing to the State of North Carolina for the benefit of James Blaine House, as alleged in paragraph 3 of the complaint? "Yes."

2. Did defendant F. C. Ebbs, as guardian of James Blaine House, receive the sum of $7,000, property of his ward, as alleged in paragraph 4 of the complaint? "Yes."

3. Did 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? "Yes."

4. In what sum, if any, is the plaintiff or the relators damaged because of said breach of said bond? "In the sum of $4,666.66 2-3, with compound interest from 8 March, until paid." (142)

5. Was the paper-writing or bond described in paragraph 3 of the complaint incomplete when delivered to the Clerk of the Superior Court of Madison, 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 further defense contained in the answer? "No."

7. Was the penalty $13,000 left out of the bond or paper-writing described in paragraph 3 of the complaint because of the mistake or inadvertence of the clerk of the Superior Court, as alleged in the reply of the plaintiff? "No."

9. Was it the purpose and intention of the defendants, at the time of assigning 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? "Yes."

10. Was the penalty inserted in the paper-writing, purporting to be a bond, at the time Jasper Ebbs signed the same? "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? "No."

12. Was the penalty, $13,000, inserted in the paper-writing at the time M. L. Duckett signed the same? "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? "No."

In the former opinion, a majority of the Court held that according to the verdict on the last four issues the bond was void, and that such finding was inconsistent with the verdict on the first, fifth, seventh and ninth issues, which in effect declared it to be a valid and binding bond.

(143) It is undoubted law that if this verdict is necessarily inconsistent as to material issues, a new trial must be awarded; but a majority of the Court are now of opinion maintained by the *Chief Justice* in his full and forcible dissenting opinion, that the verdict is not inconsistent on any material question, and that the plaintiff should have a judgment in his favor, as heretofore entered in the court below. It is a settled principle that verdicts should be taken in their entirety, that all material facts found should be considered and liberally and favorably construed with a view to sustaining them, if it can be done. Thompson on Trials, sec. 3654.

A fair interpretation of this verdict establishes the facts that the defendants signed and sealed this bond, intending to make it the guardian bond of their principal, F. C. Ebbs; that they were to turn it over to their principal or one of their cosureties, or some one intrusted by them for the purpose, to be delivered as a guardian bond; that the same was complete in all respects when they signed it and turned it over for delivery, except as to the amount of the penalty; and that some one inserted the penalty and delivered the same to the clerk as a complete bond, and that the clerk was not aware, at the time he received and approved the same, that any change in the bond had been made. The fact that it was delivered by some one to whom they had intrusted it for delivery necessarily follows from the verdict of the jury on the first and ninth issues, that these defendants had caused the paper-writing declared on to be delivered as a guardian bond, and intended it should be so considered and filed when they signed it.

This interpretation is confirmed by the testimony of the defendants, which shows that I. N. Ebbs, a cosurety, and brother of the former guardian, and also a notary public, carried the bond to the clerk, complete in form, with the penalty inserted and acknowledged and justified before himself as a notary public by the principal and other sureties, and he acknowledged and justified before the clerk.

(144) The Court does not think that there is anything here inconsistent with the verdict on the last four issues to the effect that the penalty was not in the bond when the sureties signed it, and that, since signing, they have never authorized any one to insert the penalty. When these sureties signed the bond, except the penalty, and intrusted it to another for delivery, intending it to be used as a guardian bond, they gave such person implied authority to do what was necessary to make it a complete bond. They enabled their principal, in this way, to qualify as guardian and to take charge of the fund, and this end having been accomplished and the fund thereby obtained and dissipated, when called on for a reckoning they will be estopped to show that it was not their bond. There was an implied authority to fill out the bond and deliver

it in its completed form, and when it was so delivered and accepted, without notice or knowledge on the part of the clerk that any change had been made in it, the sureties who signed the bond under such circumstances will not be heard now to say that they are not bound by its provisions. It is no answer to this position to declare or prove that, since signing, they had never given any one authority to put in a penalty. They turned over the bond to the principal or some one for him, clothed him with apparent authority to fill up the bond, impose it on the clerk as a completed instrument and thereby obtain the fund.

In Murfree on Official Bonds, 168, the doctrine as to such instruments is stated as follows: "It is a well-established general rule that irregularities in the execution of official bonds do not affect their validity unless they are known to the obligee. Among other irregular practices, that of executing bonds in blank by sureties falls within this rule. If a surety executes a bond of this character in blank and intrusts it to his principal, the latter is his agent and not the agent of the obligee, and the surety is fully bound by the acts and omissions of the obligor acting as his agent." And the same principle is set forth in general terms, 2 Cyc., 159: "If the party to an instrument in- (145) trusts 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 protect the same; and, as between such party and innocent third persons, the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his authority." Again it is said in the same volume at p. 161: "This implied authority to fill blanks is confined to such insertions as are necessary to make the instrument perfect according to its entire form and intended use." "This rule is founded," says the same authority, "not only upon that principle of general jurisprudence which casts the loss, when one of the two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agencies which makes the principal liable for the acts of his agent, notwithstanding the private instructions of the principal have been disregarded, when he has held that the agent had a position of more enlarged authority." This principle finds support in well-considered adjudications in this State and elsewhere. *Gwyn v. Patterson,* 72 N. C., 189; *R. R. v. Kitchin,* 91 N. C., 39; *Humphreys v. Finch,* 97 N. C., 303.

In *R. R. v. Kitchin* it is said that, "Where the bond is placed in the hands of a coöbligor for delivery, without condition or instructions, and he subsequently erases the name of one of the signers before delivering it to the obligee and without his knowledge or consent, the bond is not vitiated." In such case the coöbligor acts as the trusted agent of

his associate coöbligors, and his abuse of the trust in altering the bond does not relieve them from liability upon the same. *Ashe, J.*, in delivering the opinion, adds that it is sustained on another principle, "that where one of two persons must suffer loss by default or mistake of a third person, he who first reposed the confidence or by his (146) negligent conduct made it possible for the loss to occur, must bear the loss."

In *Humphreys v. Finch, Smith, C. J.*, in upholding the principle here declared, quotes with approval two cases from the Supreme Court of the United States—*Dair v. U. S.*, 83 U. S., 1, and *Butler v. U. S.*, 88 U. S., 272. Both were cases of official bonds, and are apt authorities for the position we here maintain. In *Dair's case* some of the sureties to an official bond were endeavoring to set up the defense that it was not to be delivered until executed by another surety, and it was held that such defense was not permissible to the surety. *Justice Davis,* in delivering the opinion, said: "Sound policy requires that the person who proceeds on the faith of acts or admissions of this character should be protected by estopping the party, who has brought about this state of things, from alleging anything in opposition to the natural consequence of his own course of action. It is accordingly established doctrine that whenever an act is done or statement made by a party, which cannot be contradicted without fraud on his part and injury to others whose conduct has been influenced by the act or admission, an estoppel will arise." And the judge further says that, "In the execution of the bond, the sureties declare to all persons, interested to know, that they were parties to the covenant and bound by it." In *Butler's case* this decision was applied to a case where every blank in an official bond was left in the form of a writing to be filled, and was filled by the principal in the scope of his apparent authority, and *Chief Justice Waite* in delivering the opinion, said: "The printed form, with its blank spaces, was signed by Butler (the surety) and delivered to Emory (the principal), with authority to fill the blanks and perfect the instrument as a bond. By inserting in proper places the amount of the penalty, Butler could have taken away from Emory the power to bind him otherwise than as specified. This, however, he did not do. Instead, he re- (147) lied upon the good faith of Emory, and clothed him with apparent power to fill all the blanks in the paper signed, in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the Government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emory are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agree-

ment. He acted in good faith, and the question now is, Which of two innocent parties shall suffer? The doctrine of *Dair's case* is that it must be Butler, because he confided in Emory and the Government did not. He is in law and equity estopped by his acts from claiming, as against the Government, the benefit of his private instructions as to his agent."

There are many decisions in other States to the same effect. *Fullerton v. Sturgis,* 5 Ohio, 529; *S. v. Young,* 23 Minn., 551; *McCormick v. Bay City,* 23 Mich., 457; *Brown v. Colquitt,* 73 Ga., 60; *South Berwick v. Huntness,* 53 Me., 89; *Chicago v. Gage,* 95 Ill., 593; *White v. Duggan,* 140 Mass., 18; *Rose v. Douglas Township,* 52 Kan., 451. In this last case the decision is as follows: "If a person signs his name as surety to an official bond, which is blank as to the amount of the penalty, and then intrusts such bond to another, and the same is afterwards filled up and then presented by the principal or any one for him to the proper officers for approval, and is accepted as an official bond of the principal, held, that such bond so accepted is *prima facie* evidence that it was filled up or completed with the authority of all the parties thereto; and further, that if such bond was afterwards filled up by inserting the amount of penalty therein without the authority, consent, or knowledge of the surety, such surety cannot complain, because by his own act or negligence he enabled the principal or some one for him to have such bond approved, accepted, and filed as an official (148) bond."

In *McCormick v. Bay City, supra,* it is said that "Where a person signs his name in blank as surety to an official bond and delivers it to his principal to have it completed and signed by others, and handed over to the proper authority, he makes that person his agent for the whole business, and is estopped and bound by his action, without regard to any secret instructions as to the conditions on which it should be completed and filed." Further, "Public officers, in receiving official bonds into their custody, are not bound to hunt up sureties and make inquiry of them. They have a right, where such action has been had, to rely upon their genuine signatures, voluntarily affixed to a regular document conforming to law."

There is nothing in the principle here declared that conflicts with the general doctrine which obtains in this State, that an agent, to bind a principal under seal, must have authority conferred by a writing under seal, and a sealed instrument which is changed by an agent, who has no authority by writing under seal, has no force to bind a principal. The doctrine, in these very terms, was approved by *Chief Justice Smith* in *Humphreys v. Finch, supra,* where he upheld the instrument on the principle of equitable estoppel. Nor is there anything in the decisions

of this State, cited in the former opinion, nor in any the Court can find, which forbids the application of the principle to the facts of the case the Court is now considering. In all of these it appears by express statement or by fair intendment that the obligee of the sealed instrument knew of the defect in its execution, or they were conveyances of real estate where the defect occurred in the line of a grantee's title, and such grantee was thereby affected with notice. In *McKee v. Hicks,* 13 N. C., 379, the obligee knew that the bond was in blank and the same was filled out in his presence when he lent the money. *Hall, J.,* in delivering the opinion, said that "Whatever injustice may be done to the plaintiff in this case is attributable to his own oversight in tak-
(149) ing a security for a debt which the law cannot recognize."

In *Davenport v. Sleight,* 19 N. C., 381, the defendant, desiring to buy a boat from the plaintiff, gave a sealed bond in blank to his agent and sent the agent to buy the boat. The plaintiff and the defendant's agent bargained, and having reached an agreement, the blank was filled in with the amount (evidently in the presence of the plaintiff). The bond was held void as a sealed instrument on the authority of *McKee v. Hicks.*

In *Graham v. Holt,* 25 N. C., 300, the defendant and one John Holt decided to execute their note to the plaintiff for the price of certain goods. The amount was contained in the inventory at John Holt's house, and neither of the three could remember it. The three being together, John Holt and the defendant executed a sealed note to the plaintiff, leaving the amount blank for John Holt to take home and fill up with the data which he had. This was done by him, and the bond delivered to the plaintiff. Here, also, the plaintiff knew of the defect.

In *Blacknall v. Parish,* 59 N. C., 70, the defendant desired to sell some land, drew a deed and delivered it, signed and sealed, to an agent, with the bargainee and the price left blank. The agent made a sale to the plaintiff at a reasonable price, filled in the blank with the name of the plaintiff and the price, both the "plaintiff and the agent supposing that the instrument thus made was a good deed."

In *Cadell v. Allen,* 99 N. C., 542, a deed for real estate was executed by one Cuthbertson under a power of attorney from Stephen and Thomas Lacy. The power of attorney was without seal, the defect was one in the line of the grantee's title, and he was affected with notice.

In *Bland v. O'Hagan,* 64 N. C., 471, it appears by fair intendment that the grantee knew of the defect—certainly, there is nothing to show the contrary—and in *Barden v. Southerland,* 70 N. C., 528,
(150) which cites this last case as authority, it appears by express terms that the obligee of the amount knew that the amount was filled in by an agent acting under parol authority.

The Court has thus far found no case in this State which forbids the application of equitable estoppel to the facts established by this verdict.

Several of the authorities cited in support of the present opinion go to the extent of holding that where an official bond has been executed, knowing that there are blanks in it to be filled by inserting things necessary to make it a perfect instrument, the person who signs and seals under such circumstances shall be considered as agreeing that these blanks may be filled after he has executed the bond, and if the surety, relying on the good faith of his principal, shall permit him to have possession of the bond signed in blank, the surety will have clothed the principal with real authority to fill the blanks at his discretion in any proper manner consistent with the nature of the obligation. And this was no doubt in the mind of *Justice Douglas* when he stated in his dissenting opinion "that the 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." So stated, the doctrine would uphold the bond, even if the penalty required by the statute had been filled in by the officer who took it. But the Court does not decide this question here, as the facts of this case do not present it.

The Court is of opinion that the defendants are estopped to deny their obligation on the bond as filed and accepted by the clerk; that the verdict is not inconsistent on any material question, and that the orginal judgment of the court below be affirmed.

Petition allowed. (151)

WALKER, J., dissenting: When this case was before us at a former term, we held that the findings of the jury were inconsistent, and that we could not determine the rights of the parties without a more definite verdict. The jury found that the penalty was not inserted in the bond at the time the sureties signed it, and that they had not since authorized any one to insert the penalty of $13,000 which was in the bond when it was delivered to the clerk. The majority of the Court now think that this finding does not exclude the idea of an implied authority to insert the penalty, in view of the answers of the jury to the other issues. There is no other answer from which an implied authority may be inferred that would not also and just as well warrant the inference of express authority. When the jury found that the sureties gave no authority, the law construes their verdict to include every kind of authority, for there is nothing to restrict it to one kind to the exclusion of another. It is presumed that the court instructed the jury as to what

would be necessary to constitute authority to fill the blank in the bond, and also explained the law as to express and implied authority, and when the jury respond that no authority had been given, they could only mean that no authority of any kind known to the law had been given, and the finding therefore included both express and implied authority.

The plain meaning of the last issue and the answer thereto cannot be changed by drawing any inference from the answer to the first issue as to what the jury intended to find. It would be a more natural deduction that the jury intended by the first issue to say that a paper-writing in the form of a bond was actually delivered by Ebbs to the clerk; and in view of the other issues submitted and the answers
(152) thereto, that is, I respectfully think, the only reasonable construction of the finding. The charge was not sent up and, therefore, we are not informed what instructions were given by the court on the first issue; but it is more than likely that the judge directed a verdict on that issue and then submitted the other special issues in order to ascertain the facts, so that the questions of law might be fairly presented and the liability of the defendants determined. I can account for the conflicting findings in no other way.

It is now held that there was an implied authority to insert the penalty and deliver the bond to the clerk in its completed form, and that if the latter accepted and acted upon it under these circumstances without any knowledge of the real facts, the sureties cannot be heard to question the validity of the bond under the doctrine of equitable estoppel. There cannot be any implied authority to do a thing in a way positively forbidden by the law. Authority to execute a bond in behalf of another, or to perfect one in form when essential parts have been omitted, and deliver it, must be given under seal. This is conceded. How, then, can an authority be implied to fill the blank in a manner contrary to this rule? What is meant, I suppose, is that if the paper-writing was intrusted to the principal obligor, F. C. Ebbs, and he handed it to some one else, who inserted the penalty and then delivered it in its completed form to the clerk, and the latter had no knowledge of the facts, but received and acted upon it as a perfect and valid bond, it being regular on its face, the doctrine of equitable estoppel applies and the defendants are bound, although Ebbs abused the trust and confidence reposed in him. This is the ground upon which the Court now rests its decision, but it is clear to me that the doctrine has no application to the case. Whether the validity of the bond is sustained upon the doctrine of equitable estoppel or upon that of agency, it is essential to the application of either doctrine that the party claiming the benefit of it
(153) should have been misled to his prejudice, and he must have been

free from negligence. Discussing this question in *People v. Bostwick,* 32 N. Y., 452, the Court says: "The principle that where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss, is not one of universal application, if the language be taken in a proper sense. In such cases, the one who claims the benefit of the rule must not himself be guilty of negligence." Leading text-writers thus state the rule: "The party relying on the estoppel must show that he was ignorant of the facts, and that such ignorance was not chargeable to his neglect." Fetter's Equity, 48 (c). "An equitable estoppel does not operate in favor of a person chargeable with fraud, misconduct, or negligence." Eaton's Eq., 177. See, also, Beach Mod. Eq. Jur., sec. 1108; Pomeroy's Eq. Jur., sec. 810; *Odlin v. Gove,* 41 N. H., 465; *Moore v. Bowman,* 47, *ib.,* 494. The same principle is recognized and stated in *Dair v. U. S.,* 16 Wall., 1, which is cited by the Court. It is there said that the party claiming the benefit of the estoppel must not himself be at fault. If he neglects to make proper inquiry, when such inquiry would have disclosed to him the exact condition of things, the estoppel will not avail him, as in that case he would not be an innocent party. In Baylies on Sur. and Guar., 212, the principle is stated in concrete form as follows: "But while the courts recognize the principle that where a fraud has been perpetrated from which one of two innocent parties must suffer, he who put it in the power of a third person to commit the fraud must bear the loss, they require that the party invoking this principle be without fault himself; that where the instrument upon which it is sought to charge the surety is an official bond, or a bond taken and approved in the course of judicial proceedings, the principle does not apply as against the surety; that the officer taking and approving the bond does not exercise due diligence unless the bond is signed in his presence and delivered to him by all the obligors, or by some (154) one having authority, in writing properly attested, to bind them; that if such diligence is not observed, the officer must bear the consequences of his neglect; and if the negligence of the officer involves loss to individuals for which the officer is not able to respond, the loss ought not to be thrown on those who have not consented to bear it." This view of the law is cogently stated by *Brickell, C. J.,* for the Court in *Guild v. Thomas,* 54 Ala., 414, where, after approving the doctrine as laid down in Baylies, *supra,* it is said: "The principle that where a fraud has been perpetrated from which one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must bear the loss, is admitted. If it has any just application in this case, as in all cases to which it is applied, the party invoking it must be without fault himself. The appellant was in fault in not in-

quiring into and ascertaining whether the principal was authorized to make an unconditional delivery of the bond. He trusted to the representations of the principal, and this misplaced trust is the immediate cause of the loss he must bear, if the principal cannot respond to his liability." If it were not sustained by the highest authority, the doctrine that no one who has himself been in fault can avail himself of an equitable estoppel, is so plainly just and right that no authority would be needed in its support. If a party has been negligent in the performance of his duty, neither he nor any other person whom he represented can claim that he is innocent of any wrong, and thereby visit the consequences of that neglect upon another, although the latter may have put it in the power of a third person to mislead him and he was actually misled, the consequent injury, if any, being the result of his own want of care or of the failure to perform the duties enjoined upon him by the law. *Guild v. Thomas, supra.*

(155) If these principles are applied to the facts of this case, what will be the necessary conclusion? The penalty of a guardian bond is not fixed at a certain sum, but the statute provides (1) that it shall be at least double the value of all the personal property and of the rents and profits issuing from the real estate of the infant, which value the clerk of the Superior Court shall ascertain by the examination of the applicant for letters of guardianship or of any other person; (2) the bond must be acknowledged before the clerk, and (3) it must be approved by him. Code, sec. 1574. These requirements have an important bearing upon the principle now brought into this case, and they show most clearly that it can have no proper weight or influence in its decision. With reference to the first of these requirements it may be asked, How can any authority to fill the blank in the bond be implied when the holder of it could not under any circumstances have such a power, as it is given to the clerk alone to ascertain and fix the amount of the penalty, and for the very good reason of affording the infant adequate security as against the default of his guardian? The penalty could not be inserted in the bond until the clerk had first made the preliminary investigation and ascertained what the amount should be.

Notwithstanding this express provision of the statute, it is suggested that Ebbs could insert the penalty by virtue of implied authority to do so. In other words, that he could exercise an authority conferred by statute on some one else, or could exercise a statutory power in his private capacity. The very fact that he brought the bond to the clerk in an apparently completed form was cogent proof to the latter, or should have been, that there was something wrong, as the clerk well knew that the penalty could not be inserted in the bond until the amount thereof had been ascertained in the manner prescribed by the statute, and this was

enough to put him on his guard.

Before passing to the next point, it may be said, also, in regard to this requirement, that if the defendants even placed the bond in the hands of F. C. Ebbs, their alleged principal, or in the (156) possession of any one else, with the intent that it should become the guardian bond of Ebbs, the only authority that could be implied (if authority can be given in such a case otherwise than by an instrument under seal) was that the bond should be filled up according to the law—that is, by the clerk in the manner provided in the statute; and they had the right to suppose that this would be understood by everybody, and especially by the clerk, who is charged with the duty of ascertaining the amount of the penalty to be inserted. How can the clerk be termed an innocent third person who was deceived by appearances, when he must have known that nobody possessed the authority to fix the penalty but himself? In this respect our case differs materially from those cited in the opinion. They will be found on examination to be cases dealing with private bonds, or with official bonds where the penalty was fixed at a sum certain, or with official bonds signed, with a blank space left for the name of the obligor, which was afterwards filled by some third person. Those cases are manifestly different from ours, as there was nothing in them to excite inquiry on the part of the officer, and surely nothing of so pronounced a character as the assumption by another of authority which belonged solely to him, nor did it appear in them that the law required him to take the acknowledgment of the obligors. The decision in each one of those cases proceeded upon the idea that on its face the bond in question had every appearance of regularity, and that, if there had been thereon anything indicating irregularity, the principle of equitable estoppel would not have applied.

But this is not all that can be said in this connection. The statute further requires that the clerk shall himself take the acknowledgment of the bond. He had no right to receive, and certainly not to accept, it as a perfect bond until he had done this. If he had performed his duty in this respect, what would he have discovered? Why, (157) of course, that the defendants had signed the paper-writing in blank, and that it was not their bond, as I. N. Ebbs had no authority to fill the blank. How apt are the authorities we have cited when considered in connection with these requirements of the statute! They hold that the officer should require acknowledgment, while our statute expressly provides for it. It is not contended that an omission to comply with directory provisions will invalidate a bond, but my sole purpose now is to show that the clerk is not an innocent party and is not, therefore, within the protection of the doctrine of equitable estoppel. He was negligent at every turn and acted in open violation of the law.

The rule upon which the decision of the Court is based has been thus formulated: "An obligee may properly accept, without inquiry, an instrument perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery; that the surety who executed the instrument and placed it in the usual channel for delivery cannot limit the general authority by a condition of which the obligee has no notice; that if the condition is disregarded and a fraud accomplished, he who has clothed his principal with the semblance of a general authority to make the delivery must stand the hazard he has incurred." *Spitler v. James,* 32 Ind., 202. But can it be said that this instrument was "perfect in form and execution," when the clerk was aware that he had not fixed the penalty, and that sureties had not acknowledged it—two things which are made by the statute essential to its perfectness? Nor did the Legislature have in view the delivery of an instrument of this kind by any third person—that is, such a delivery as is meant in the statement of the rule just quoted, and which would be sufficient in other cases to make a perfect bond—delivery being the final essential act or requisite in the
(158) making of a good bond. This is so for two reasons; first, because the bond could not be made complete until the clerk had fixed the penalty, and, second, because the presence of the obligors themselves is contemplated by the statute, as they must be there to acknowledge the execution of the bond before the clerk. This requirement of the law was intended to prevent just such a controversy as is now presented. It was necessary for the obligors to be there and acknowledge the bond, because they could not know the extent of their liability until the clerk had ascertained the value of the property and fixed the amount of the penalty. It was a provision enacted for the benefit of the obligors, and at the same time for the absolute security of the infant's estate. Speaking of a common practice said to obtain for clerks to take bonds in a certain irregular way, the Court in *Gilbert v. Anthony,* 1 Yerger, 69, said: "If such a practice had generally prevailed and no injurious consequences were to be apprehended from its continuance, it might perhaps be countenanced; but it is not only an illegal, but a dangerous practice, and there will not be a more favorable time to correct it than the present. All officers, and especially those concerned in the administration of justice, would do well to perform their duties in the manner which the law has prescribed, instead of endeavoring to discover one more convenient and eligible in their opinion; by so doing, much litigation would be prevented, much unnecessary consumption of the time of the courts avoided, and the officers themselves exempted from liabilities to which they will always be otherwise exposed."

The doctrine of equitable estoppel requires that both parties should be equally innocent, as where one against whom the estoppel is set up has by misplaced confidence made that to appear which did not in fact exist, and the other, being himself without fault, has been misled by what was thus made to appear. One of the essential elements of the estoppel is that the party claiming the benefit of it should not be in fault, and when this is the case, the party who reposed the (159) confidence is bound by what was done, although he did not authorize it, because he relied upon the simple assurance that another will do an act which he knows may be defeated by various accidents, and he must, therefore, take the risk of such assurance being fulfilled. *Barnes v. Lewis,* 73 N. C., 138. While he may not have authorized the act, he has put it in his power to do the act, and for any abuse of the power which results in misleading an innocent party he must be held liable. But he will not be held responsible for any results which the other party could have prevented by the exercise of reasonable care, and especially by the performance of a duty positively imposed by statute. This would be an unreasonable and unwarranted extension of the doctrine and a departure from the reason upon which it is founded.

It is not necessary that the clerk should have had actual notice of the facts. If he omitted to do that which would have given him notice, it is in law the full equivalent of actual notice. This Court has said that constructive notice arises from the means of knowledge, and notice is presumed when the party to be affected by it has such means in his possession or they are available. *Bunting v. Ricks,* 22 N. C., 130; *Hulbert v. Douglas,* 94 N. C., 122; 2 Pomeroy Eq. Jur., sec. 604 *et seq.* If the clerk had required the obligors to acknowledge the execution of the bond and had otherwise discharged his duty, the facts would have been fully disclosed to him; and having failed to do so, the law imputes to him knowledge of what he might thus have learned. 2 Pomeroy, *supra,* 610. Another element necessary to create an equitable estoppel is that the party estopped must intend, or be in a position to reasonably anticipate, that his conduct or representation will be acted on by the party by or through whom the estoppel is asserted. Fetter Eq., 48 (d). How could this be the case when it was the duty of the clerk to fix the amount of the penalty and to take the acknowledgment of the obligors? How could the defendants foresee that the clerk would do what he should not have done, and what he was forbidden by the (160) statute to do? It is not necessary that I should controvert the general principles stated in the opinion of the Court, but only the conclusion drawn therefrom, which I have attempted to show is not warranted, in view of the special provisions of our statute (Code, sec. 1574), which take this case out of the operation of those principles. I must

think that the majority were inadvertent to the statutory requirements, for nothing is better settled in the law than that the injury must be the proximate result of the conduct depended upon to create the estoppel, and that the party claiming the benefit of it must not himself have been in fault, but in the exercise of reasonable care and due diligence under all the circumstances. Eaton Eq., sec. 61, p. 173; *Bank v. Hazard,* 30 N. Y., 230. In *Bank v. Morgan,* 117 U. S., 109, it is said: "In respect to persons equally innocent, when one is bound to know and act upon his knowledge and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former." In our case the clerk had at least the "means of knowledge." It is also said in that case that negligence will deprive a party of the benefit of the estoppel; and in another part of the opinion the Court uses this language: "If the defendant's officers, upon paying the returned checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted an examination of his accounts." In that case will be found an able exposition of the law relating to equitable estoppels where there has been mutual negligence. The requirement that the party who pleads the estoppel should be free from fault applies more strongly where the fault consists in the breach of an official duty than it does where there is merely negligence.

(161) While I do not question the correctness of the principles stated by the Court, it must be admitted the courts are not by any means agreed that the doctrine of equitable estoppel applies to the filling of blanks in bonds, some of those who hold that it does having either virtually adopted the principle of *Texhira v. Evans,* 1 Anstr., 228, which this Court has repudiated, or having applied to bonds the rules concerning commercial paper. *White v. Duggan,* 140 Mass., 18. The subject is fully and ably discussed and the authorities cited and commented on in *Walla Walla v. Ping,* 1 Wash. (N. S.), 339.

I do not think it necessary to discuss the effect of section 1891 of The Code, as the Court in its opinion does not rely on it or even refer to it, and it is apparent from its terms that it does not apply to a case like this, but to bonds wherein the amount of the penalty varies from that fixed by the law, being either more or less than that amount.

The plaintiff, in my opinion, has a perfectly plain and adequate remedy by which to recover what is alleged to be due to his wards from their former guardian, without invoking the doctrine of equitable estoppel, which can have no application to the case, for reasons already stated. I do not see how he can be injured by a new finding of the facts, upon proper issues submitted which will not be open to construc-

tion and will not require a resort to inference as to the meaning of the jury.

CONNOR, J., concurs in the dissenting opinion.

Cited: Bank v. Oil Mills, 150 N. C., 723; *Tarault v. Seip* 158 N. C., 378; *Trustees v. Board of Ed.,* 166 N. C., 467; *Phillips v. Hensley,* 175 N. C., 25.

(162)

CRANFORD v. TELEGRAPH COMPANY.

(Filed 18 April, 1905.)

Telegrams—Delay in Delivery—Mental Anguish, When Not Recoverable.

1. There can be no recovery of damages for delay in the transmission and delivery of a telegraph message when it does not in any way appear that the plaintiff was an intended beneficiary of the message.
2. Where the husband received a message announcing the death of a grandchild, in time to take the train, the fact that his wife was prevented from doing so because she did not succeed in placing her children in the care of a neighbor, was something not chargeable to any neglect of the telegraph company.

ACTION by N. P. Cranford and wife against the Western Union Telegraph Company, heard by *Bryan, J.,* and a jury, at February Term, 1905, of DAVIDSON. From judgment of nonsuit, plaintiffs appealed.

Emery E. Raper for plaintiffs.

Walser & Walser, Manly & Hendren, F. H. Busbee & Son for defendant.

WALKER, J. Plaintiffs N. P. Cranford and his wife, M. C. Cranford, brought this action to recover damages for mental anguish of the *feme* plaintiff, which they allege was caused by the negligence of the defendant in the transmission and delivery of a telegram in the following words:

CHINA GROVE, 18 June, 1904.

N. P. CRANFORD, *Lexington, N. C.*

May died today. Be buried tomorrow. A. L. CRANFORD.

A. L. Cranford is the son of plaintiffs, and May, who is mentioned in the telegram, was the child of Mrs. Ludwick, who is the (163)

sister of A. L. Cranford and the daughter of the plaintiffs.

The message was filed with the operator of the defendant at China Grove between 7 and 8 o'clock p.m., and was delivered to N. P. Cranford at 6 o'clock the next morning. Plaintiffs live about one-half of a mile from the depot at Lexington. N. P. Cranford took the train that morning and arrived in time for the funeral, though he was not met at Glass, the nearest station on the defendant's line, and had to walk to the place of burial. Mrs. Cranford did not go. She testified that she had several children, one of whom was afflicted, and that she could not get ready in time to take the train, as she was unable to place her children in the care of any of her neighbors. Plaintiff's counsel did not claim any right to damages for N. P. Cranford, but insisted that Mrs. Cranford was entitled to recover any damages she had suffered by reason of the defendant's negligent delay in sending and delivering the message.

The court, on motion of the defendant's counsel, directed judgment of nonsuit to be entered. Plaintiffs excepted and appealed.

The face of the message before us did not inform the defendant that it was intended for the benefit of the *feme* plaintiff, or that she had any interest in its prompt transmission and delivery. It does not appear that the company was informed, either in terms or by tenor of the message, that a failure to transmit and deliver it with promptness would result in damage to the *feme* plaintiff. So far as the message discloses, it was sent solely for the benefit of N. P. Cranford. The mere fact that he happened to be her husband does not give her any right to damages for the defendant's default to which she would not otherwise be entitled. We do not hold that in order to recover damages (164) for a breach of duty by the defendant in transmitting and delivering a telegram, it is necessary the interest of the plaintiff in the message should appear on its face, because it is quite sufficient to sustain an action against the defendant for any negligence in the performance of its duty to sender or sendee, if it appears either from the message itself or the fact is otherwise brought to the knowledge of the company at the time it undertakes the service in respect to which the default occurs. This is enough to apprise the defendant of the nature and extent of its liability and the probable measure of damages in the particular case, if it should fall short of performing its duty. *Kennon v. Tel. Co.*, 126 N. C., 232; *Williams v. Tel. Co.*, 136 N. C., 82. But the interest of the plaintiff in the message must in some way appear.

In our case there was nothing in the terms of the message to inform the defendant that Mrs. Cranford had any interest in it, or that it was sent for her use and benefit, or that she was expected to act upon it in any way or to direct her movements by it, nor does it appear that any

one of said facts was brought to the attention of the company by the sender at the time he filed the message for transmission, nor is it shown that the defendant even knew that such a person as the *feme* plaintiff existed. Nor is there any evidence that the message was in fact intended for the benefit of the *feme* plaintiff. The defect in the proof last mentioned is sufficient of itself to defeat the plaintiff's recovery. We do not mean to say that any contractual relation should exist between the plaintiff and the company to give the former a cause of action for a breach of duty by the latter, as it is not necessary that we should so declare in this case; but what we do decide is, that there can be no recovery of damages for delay in transmission and delivery, when it does not in any way appear that the plaintiff was an intended beneficiary of the message. We could not well hold otherwise without subjecting the defendant to liability for damages alleged to have been sustained by those who are strangers to its contracts and to whom (165) it owed no duty whatever. The mental anguish suffered by the *feme* plaintiff cannot, under the facts and circumstances of this case, be traced to any wrong committed by the defendant. There is no casual connection between the breach of the duty owed by the defendant to N. P. Cranford and the anguish of his wife, which resulted from her failure to be present at the funeral of her grandchild, and for it, therefore, the law awards no compensation. It is not every one incidentally suffering a loss from the negligence of another, who can maintain an action upon that ground. It has been said that there would be no bounds to litigation if the ill effects of the negligence of men may be followed down the chain of results to their final attenuated effect. 9 Cyc., 372. See, also 7 A. & E. (2 Ed.), 110. The plaintiff's counsel cited *Cashion v. Tel. Co.,* 123 N. C., 267 (same case, 124 N. C., 459), and *Landie v. Tel. Co.,* 124 N. C., 528, as authorities sustaining his contention. In each of those cases, we need only say, without discussing the principle upon which they rest, there was abundant evidence to show that the message was sent for the benefit of the plaintiff, the sender merely acting as her agent, while in this case there is no such evidence.

We are unable to see that the defendant owed Mrs. Cranford any duty in respect to the message in question, for a breach of which she can recover damages.

But, apart from these considerations, it appears that her husband received the message in time to take the train. The fact that she was prevented from doing so because she did not succeed in placing her children in the care of her neighbor was something not chargeable to any neglect of the defendant and for which it should not be held liable in damages.

We do not think the plaintiff made out a case in any view of the evidence, and the court was right in dismissing her action.

No error.

Cited: Dayvis v. Tel. Co., 139 N. C., 83; *Eller v. R. R.*, 140 N. C., 146; *Helms v. Tel. Co.*, 143 N. C., 390, 395; *Suttle v. Tel. Co.*, 148 N. C., 483; *Holler v. Tel. Co.*, 149 N. C., 339, 340, 344; *Thomason v. Hackney*, 159 N. C., 302; *Penn v. Tel. Co., ib.*, 309.

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WEST v. GROCERY COMPANY.

(Filed 18 April, 1905.)

False Imprisonment—Act of Attorney—Pleadings—Evidence—Agency, How Proven.

1. Where the president of the defendant company employed an attorney for the specific purpose of attaching plaintiff's goods to collect a debt, and the attorney, of his own accord, took out proceedings in arrest and bail, under which plaintiff was taken in custody, in an action for false imprisonment a demurrer to the evidence was properly sustained, there being no evidence that plaintiff's arrest was with the knowledge, consent, procurement, or ratification of the defendant or its president.
2. The exceptions for refusal to admit certain segregated portions of the answer become immaterial by the subsequent introduction of the whole paragraph containing such extracts.
3. It is not necessary to put the pleadings in evidence to show that certain allegations in the complaint were not denied.
4. The nature and extent of the authority of an agent, as well as the establishment of the agency itself, must be proven *aliunde* the declarations of the alleged agent.
5. In an action for false imprisonment, the declarations of the judge in the *habeas corpus* proceedings in which plaintiff was released were *res inter alios acta* and inadmissible.

ACTION by J. H. West against A. F. Messick Grocery Company, heard by *Peebles, J.*, and a jury, at February Term, 1905, of GUILFORD. From a judgment of nonsuit, plaintiff appealed.

E. J. Justice, W. P. Bynum, Jr., and G. S. Ferguson, Jr., for plaintiff.

Brooks & Thompson, Watson, Buxton & Watson, and D. H. Blair for defendant.

(167) CLARK, C. J. The defendant company, resident and doing business in this State, claimed that the plaintiff, also resident

here, was indebted to it for a small balance due on open account. There was an excursion run to Norfolk, Va., on which the plaintiff went, carrying a stock of refreshments. On the same train was A. F. Messick, president of the defendant company, who employed a lawyer in Norfolk, and instructed him to bring action for the said balance due by plaintiff and to attach aforesaid stock of plaintiff to enforce collection of the debt. Being advised by his attorney that it would be necessary to give bond for the attachment, Messick procured a friend to go on said bond, and left for New York that day. The next day, the attorney, without any authority from Messick or the defendant company, of his own accord took out proceedings in arrest and bail, under which the plaintiff was taken into custody, but was soon discharged upon *habeas corpus*. This is an action for false imprisonment.

It appears from the evidence that the attorney was employed for the specific purpose of attaching the goods of the plaintiff, a proceeding authorized by the laws of Virginia, as Messick was advised by said attorney, and there is no evidence that any other process or proceeding was authorized or discussed, or that the subsequent arrest of plaintiff was with the knowledge, consent, procurement, or ratification of the said Messick. A recent case, exactly in point, is *Moore v. Cohen,* 128 N. C., 345, in which the Court held that "A client is bound by the acts of his counsel in the ordinary course of procedure and in matters pertaining to that action, such as judgments, decrees and orders therein; but a plaintiff is not responsible for any illegal action taken or directed by the attorney which the plaintiff did not advise, consent to, or participate in, and which was not justified by any authority he had given," citing Cooley on Torts, 131, and *Walsh v. Cochran,* 63 N. Y., 181, 20 Am. Rep., 519, and other cases there mentioned. To same purport is *Wallow v. Finberg,* 46 Tex., 35; and many other cases might (168) easily be added.

There are divers other exceptions, but they do not require discussion. The exceptions for refusal to admit certain segregated portions of the answer offered in evidence by the plaintiff became immaterial by the subsequent tender by plaintiff of the whole paragraph containing such extracts and its admission by the court. *Cheek v. Lumber Co.,* 134 N. C., 227. It was not necessary to put the pleadings in evidence to show that certain allegations in the complaint were not denied in the answer. That was a matter of law for the court. Code, sec. 268.

The other exceptions are to the exclusion of the declarations of Swink, the lawyer, offered to enlarge the scope of his agency, and are without merit. That an agency must be proven *aliunde* the declarations of the alleged agent is elementary law (*Grandy v. Ferebee,* 68 N. C., 362; *Taylor v. Hunt,* 118 N. C., 173), and this is true both as to the estab-

lishment of the agency and the nature and extent of the authority. Huffcutt Agency, sec. 137; *Hatch v. Squires,* 11 Mich., 185; *Mitchum v. Dunlap,* 98 Mo., 418. The declarations of a judge in the *habeas corpus* proceedings were *res inter alios acta* and are equally incompetent.

The demurrer to the evidence was properly sustained.

No error.

Cited: Sutton v. Lyons, 156 N. C., 6; *Cooper v. R. R.,* 165 N. C., 581; *Adams v. Foy,* 176 N. C., 696; *S. v. Stancill,* 178 N. C., 685; *Marshall v. Telephone Co.,* 181 N. C., 298.

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HENDRIX v. COTTON MILLS.

(Filed 18 April, 1905.)

Elevators—Negligence—Accident—Burden of Proof.

1. In an action for damages for injuries sustained by plaintiff while going up in an elevator, all the circumstances attending the occurrence are to be considered in determining whether it resulted from actionable negligence upon the part of the defendant, or only an accident, and hence not actionable.
2. In an action for personal injuries, the plaintiff has the burden of proving that the defendant was negligent and that such negligence caused the injury.
3. Where the plaintiff, a boy of 12 years of age, was injured while going up on a freight elevator, his leg being caught in reaching out to get his hat which had been thrown off by another boy, and the elevator was not out of order or dangerous for persons to go on, and was in charge of an adult: *Held,* that the injury was an accident.

ACTION by Leandrix Hendrix by his next friend, L. S. Hendrix, against the Cooleemee Cotton Mills, heard by *Cooke, J.,* and a jury, at Fall Term, 1904, of DAVIE.

The plaintiff sued to recover damages for an injury received while going up on a freight elevator of the defendant's mill. From a judgment in favor of the plaintiff, the defendant appealed.

Watson, Buxton & Watson and Manly & Hendren for plaintiff.
T. B. Bailey, P. H. C. Cabell, and E. L. Gaither for defendant.

BROWN, J. All the evidence tended to prove that the plaintiff at the time of the injury was a boy 12 years of age; that he was a (170) floor sweeper at the defendant's mill, and occasionally helped

Pink Foster take small boxes of quills on the freight elevator up to the third-story spinning-room, and had used it ten or twelve times. The plaintiff gives the following account of the injury: "The day I got hurt, Pink Foster came to me to help him take up the quills for the weaving-room. I told him I would do it if the boss-man said so. Foster went off to see the boss, and when he came back, in consequence of what he said, Foster and I picked up the quills and put the box on the elevator. It was not my regular business to take up the quills. I only went when I had nothing else to do or when directed to do so by the boss. The taking up the quills and conveying them to the spinning-room was Pink Foster's regular business. Nobody ever gave me any instructions about how to do when I went upon it. That was the only elevator I ever saw. When we got on the elevator that time I squatted down at the end of the box we were taking up. The elevator was moving up. Jim Thornton was right behind me, and he threw my hat off on the card-room floor (that was the second floor, the spinning-room being the third floor). I reached out to get my hat on the card-room floor and my knee was caught, but I do not know how."

There was other evidence, but nothing that contradicted the plaintiff's own version of the occurrence.

In the view we take of this case, it is unnecessary to consider the numerous prayers for instruction and the exceptions appearing in the record.

The defendant asked the court to instruct the jury in substance that, notwithstanding the plaintiff was a minor about 12 years of age, and independent of any questions of assumption of risk and contributory negligence, unless the jury find from the evidence that the negligence of the defendant was the proximate cause of the injury the jury must find the first issue "No." This instruction was not given, (171) and the defendant excepted.

The question of proximate cause generally arises when contributory negligence is pleaded and it becomes material to ascertain the particular negligence which caused the injury, whether that of the plaintiff or the defendant. It has been variously defined, but the generally accepted definition is the one given in A. & E. p. 485 (2 Ed.): "A proximate cause in the law of negligence is such a cause as operates to produce particular consequences without the intervention of any independent unforseen cause without which the injuries would not have occurred." It is unnecessary to consider whether the questions of contributory negligence and assumption of risk arise in this case. The burden rests, first, on the plaintiff to satisfy the jury in all cases like this that the defendant committed some act of negligence or was guilty of some

omission of duty constituting negligence, and, further, that such negligence was the occasion or cause of the injury.

In *Edwards v. R. R.*, 129 N. C., 82, it is said that "The negligence of the defendant, no matter how great, would not of itself have rendered it liable unless it had contributed to the death of the plaintiff's intestate." All the authorities agree that all the circumstances attending such an occurrence as is described in the record are to be considered in determining whether it resulted from actionable negligence upon the part of the defendant or only an accident, and hence not actionable, however unfortunate it may be.

The injury to the plaintiff was not caused by any defective machinery, nor was he placed at work upon dangerous machinery without proper instructions. He was a floor sweeper and, we presume, a boy of average intelligence, as there is no evidence to the contrary. He also occasionally helped Pink Foster carry small boxes of quills on the eleva-
(172) tor to the spinning-room on the third floor. The defendant was not required to furnish a passenger elevator. There is no evidence that the freight elevator was out of order or dangerous for persons to go on. On the occasion when the plaintiff was hurt, it was in charge of Thomas Plummer, a grown man. Mr. Shore was on it, and also three boys, one of whom was the plaintiff, on his way with Foster, taking the boxes to the spinning-room on the third floor. When the boy threw the plaintiff's hat out on the card-room floor as the elevator was passing it in its ascent, the plaintiff, doubtless yielding to a natural impulse, reached out of the ascending elevator to recover his hat, and his leg was caught and injured. The plaintiff had used this elevator ten or twelve times, and was therefore accustomed to it. When he got on the elevator the plaintiff was prudent enough to "squat down," and was evidently in a place of safety. Had not Thornton thrown off the plaintiff's hat, or had the plaintiff waited till the elevator stopped at the third floor, and then have come back for it, he would not have been hurt.

We are not prepared to say that it is negligence *per se* to send minor operatives in a mill to carry small boxes of goods upstairs on a freight elevator in good order and in charge of a competent man. Such work is evidently necessary. But assuming it was negligence, under the facts of this case as testified to by the plaintiff and all the witnesses, it was not the cause of the injury.

In *Gallagher v. R. R.*, 37 La. Ann., 288, it is said that "If the accident happened from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human forethought could not be prescient, no liability attaches to the employer." This rule does not result from holding a child chargeable with contributory negligence, but (as Mr. Bishop says in article 575 of his work on Noncontract Law)

from the fact that under such circumstances there is no action- (173)
able negligence on the part of the person whose conduct is alleged to be wrongful.

We are of opinion that upon all the evidence the injury to the plaintiff was "an unforseen event from a known cause," and was not the result of any actionable negligence on the part of the defendant.

New trial.

Cited: Rolin v. Tobacco Co., 141 N. C., 311; *Pettit v. R. R.,* 156 N. C., 127, 128.

KENNEDY v. PRICE.

(Filed 18 April, 1905.)

Verified Account—Prima Facie Case—Rebuttal.

In an action before a justice of the peace to recover a sum for lumber, on appeal, plaintiff offered a verified account and then testified that he sold the trees to one P. under a "parol pledge"; that P. had the trees sawed into lumber and sold it to defendant without paying plaintiff for the trees, but that defendant had no notice of plaintiff's verbal lien until after he had bought the lumber and given his note for it: *Held,* plaintiff's own evidence negatived the *prima facie* effect of his verified account, and a judgment dismissing the action was proper.

ACTION by P. B. Kennedy against W. O. Price, begun before a justice of the peace and heard on appeal by *O. H. Allen, J.,* and a jury, at Spring Term, 1904, of DAVIE. From a judgment dismissing the action, the plaintiff appealed.

T. B. Bailey and Jacob Stewart for plaintiff.
Watson, Buxton & Watson and A. T. Grant, Jr., for defendant.

CLARK, C. J. This is an action to recover $189.88 for lumber, begun before a justice of the peace. Upon appeal, the plaintiff in the Superior Court offered his verified account as *prima facie* evidence. Laws 1897, ch. 480. But he did not rest there; he went upon the (174)
stand and testified that he had sold the trees to one Proctor under a "parol pledge"; that Proctor had the trees sawed into lumber, which he sold to defendant without paying him for them; that he (plaintiff) notified defendant's agent of his verbal lien, but not till after Price

had bought the lumber of Proctor and given his note for it. That it was after such notice that the defendant moved the lumber. The plaintiff proved his debt against Proctor in bankruptcy.

Plaintiff by his own evidence negatived the *prima facie* effect of his verified account and showed that there was no privity between himself and the defendant and that there was no lien on the lumber for which the defendant was liable. The defendant could not have more completely rebutted the plaintiff's *prima facie* case if he had put in evidence. In dismissing the action there was

No error.

Cited: Nall v. Kelly, 169 N. C., 719.

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RAILROAD COMPANY v. HARDWARE COMPANY.

(Filed 18 April, 1905.)

Malicious Prosecution—Abuse of Legal Process—Difference Between—Pleadings—Probable Cause—Malice—Damages.

1. A malicious prosecution is one in which the motive in suing out the process is a wrongful and malicious one; and an action for abuse of legal process is where the process has been put to a wrongful, illegal, and unjustifiable purpose. Neither action can be maintained unless there is an actual seizure of the property of the plaintiff or an arrest of his person.
2. In an action for damages for a malicious prosecution it is necessary to allege and prove malice, a want of probable cause, and that the prosecution has terminated.
3. In an action for damages for abuse of legal process it is necessary to allege and prove a want of probable cause, but not necessary to allege or prove malice or that the proceeding has terminated, in order to recover actual damages.
4. Where the facts set forth in the complaint are such that, if true, the law will infer both malice and a want of probable cause from them, they are tantamount to specific allegations of malice and want of probable cause.
5. In an action for damages for illegal seizure of property, proof that the defendant knew at the time it caused the attachment to issue that the plaintiff did not owe it anything is equivalent to proof of want of probable cause, and would entitle the plaintiff to recover actual damages.
6. If the plaintiff should go further and prove that the attachment was sued out wantonly, recklessly, and wilfully for the purpose of coercing the plaintiff to pay money it did not owe, that would be equivalent to proof of malice, and the jury might award punitive damages.

CONNOR, J., concurs in the concurring opinion.

ACTION by Pittsburg, Johnstown, Edensburg and Eastern Railroad Company against Wakefield Hardware Company, heard by *Bryan, J.*, at September Term, 1904, of GUILFORD. This is an action to recover damages for illegal seizure of plaintiff's cars. The defendant demurred to the complaint; the demurrer was overruled, and the defendant appealed.

L. M. Scott and J. T. Morehead for plaintiff.
Scales, Taylor & Scales for defendant.

BROWN, J. When this case was before this Court at Spring Term, 1904, it was decided that there was a misjoinder of causes of action. 135 N. C., 73. The plaintiff is now proceeding against the defendant company, not upon attachment bond, but under the principles of the common law, to recover damages for such alleged unlawful seizure. The defendant demurs to the new complaint, filed as a consequence of the former decision of the Court, upon the following (176) grounds: (1) The complaint does not allege the institution of the suit or proceedings by the defendant against the plaintiff without probable cause; (2) it does not allege malice in the institution of the said suit or proceeding; (3) it does not allege the complete termination of said suit or proceeding.

We concur with the court below in overruling the demurrer. It is not necessary to consider whether this action is one for damages for malicious prosecution. If the facts in the complaint constitute a cause of action upon the proof of which to the satisfaction of a jury damages are allowable, then the complaint is sufficient. In this view it is immaterial whether it is classified as an action for malicious prosecution or an action for abuse of legal process. It seems to us, however, that it more properly belongs under the latter classification. In some States the cause of action set out in the complaint is called an action for malicious attachment. *Lovier v. Gilpin,* 6 Dana (Ky.), 321; *Smith v. Story,* 4 Humphrey (Tenn.), 159; and cases collected in Wait's Actions and Defenses, vol. 1, page 248.

A malicious prosecution is said to be one in which the motive in suing out the process is a wrongful and malicious one; and an action for abuse of legal process is where the process has been put to a wrongful, illegal, and unjustifiable purpose. Neither action can be maintained, unless there is an actual seizure of the property of the plaintiff or an arrest of his person. A malicious prosecution has been defined as a "prosecution of some charge which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows

or is bound to know are wrong and against the dictates of public policy." 19 A. & E. (2 Ed.), 650.

In *Grainger v. Hill,* 33 E. C. L., 333, *Chief Justice Tindal* notes the distinction which he says exists between an action for malicious
(177) prosecution or arrest and one for abusing the process of the law. He says: "This is an action for abusing the process of the law by applying it to extort property or money from the plaintiff, and not an action for a malicious prosecution, in order to support which latter action the termination of the previous proceeding must be proved and the absence of reasonable and probable cause be alleged as well as proved." The eminent judge again says: "His complaint being that the process of law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."

So the distinction seems to be well taken that in an action for wrongful and unlawful abuse of process of the court it is not necessary to allege the termination of the proceeding. To the same effect in *Prough v. Entricken,* 11 Pa. St., 81.

In *Sneeden v. Harris,* 109 N. C., 354, it is held that in an action for malicious abuse of process it is not necessary to allege the termination of the proceeding.

Kirkham v. Coe, 46 N. C., 423, was an action on the case for wrongfully suing out an attachment. In that case *Judge Pearson* says that "The action may be maintained by showing a want of probable cause, without alleging or proving that the defendant was actuated by malice." The learned *Chief Justice* does not say that that character of action can be maintained only and solely by showing a want of probable cause. He says: "To maintain an action like the present it is sufficient to show a want of probable cause. To maintain an action of slander it is sufficient to show malice. To maintain an action for malicious prosecution both a want of probable cause and malice must be shown." Again, he says: "When one in the assertion of a civil right resorts to an extra-
ordinary process without probable cause, and thereby injures his
(178) neighbor, there is no ground of public policy upon which to excuse him."

In *Williams v. Hunter,* 10 N. C., 545, *Taylor, C. J.,* states in substance that if the action is brought to oppress the defendant, and with knowledge at the time he sued out the process that the plaintiff had no cause of action, it would give the injured party a right to sue.

The defendant further contends that the plaintiff must allege and prove malice in order to recover in this action. We do not think malice is a necessary ingredient in an action for damages for unlawfully attach-

ing the plaintiff's property. In *Kirkham v. Coe, supra, Judge Pearson* says: "It is a matter between private citizens, and if the wrongful act of one causes loss to another, there is no reason why compensation should not be made. Whether in such a case proof of malice would entitle the party not only to compensation, but to vindictive damages, is a question not now before us. It is sufficient to say, malice need not be proven in order to support the action, for the damage is the same to the plaintiff, and the 'gist' of action is that the defendant had injured him, caused him to sustain damages wrongfully, by suing out the process without probable cause."

We will not undertake to reconcile the difference in the language used by *Chief Justice Tindal* and *Chief Justice Pearson* in regard to probable cause. We will, of course, follow the decision of our own Court and hold that in an action for damages for a malicious prosecution it is necessary to allege and prove malice, a want of probable cause, and that the prosecution has terminated. In an action for damages for abuse of legal process it is necessary to allege and prove a want of probable cause, but not necessary to allege or prove malice or that the proceeding has terminated, in order to recover actual damages. Where punitive damages are claimed, in such latter action it seems to be necessary to allege and prove malice, or facts from which the law will infer malice. In the case before us the facts set forth in the complaint are such that, if true, the law will infer both malice (179) and a want of probable cause from them, and they are tantamount to specific allegations of malice and want of probable cause.

It appears from the complaint that the defendant held a debt against the N. C. Coal and Coke Company for $416, and that in order to collect the said debt the defendant, the Wakefield Hardware Company, instituted an action to recover it from the Coal and Coke Company and from this plaintiff, the defendant well knowing that the plaintiff did not owe it a penny. The plaintiff further alleges that, in order to extort this money from the plaintiff, the defendant caused a warrant of attachment to be issued in the said proceeding and caused the plaintiff's cars to be seized and held until _____ April, 1903, thus depriving the plaintiff of the use of its cars for more than two years. The plaintiff further says that at the April Term, 1903, of Guilford Superior Court a judgment of nonsuit was entered in said action as to this plaintiff, and the defendant, the Wakefield Hardware Company, obtained judgment for the amount of its debt against the N. C. Coal and Coke Company. The complaint alleges that said seizure of the plaintiff's cars was wanton, wilful, reckless, uncalled for, and was made for the purpose of coercing the plaintiff to pay this money, which it did not owe, the defendant believing and hoping that this plaintiff, to avoid the expense of a lawsuit

and the loss of the use of its cars, which were worth ten times the amount of the debt claimed, would pay the debt owing by the Coal and Coke Company. These allegations, as we have said, are tantamount to allegations both of malice and want of probable cause. There is no special virtue in that particular form of expression. The idea is clearly embodied in the language employed in the complaint, that the defendant in suing out his attachment and levying upon the plaintiff's property knew he had no ground for his action, and that it was an un-
(180) justifiable and indefensible suit to extort money. The words used necessarily imply malice, which, in legal proceedings, does not necessarily mean personal ill-will or spite. It means a wrongful act done intentionally without just cause or excuse. This is the famous definition given by *Bailey, J., in Bromage v. Prosser,* 10 E. C. L., 321, which has been quoted in hundreds of cases, both criminal and civil.

We hold that if the plaintiff should prove that the defendant, knowing that the plaintiff was not indebted to it at all, sued out an attachment and levied it upon the plaintiff's cars, the plaintiff would be entitled to recover such actual damages as it has sustained. The allegation and proof sustaining it, that the defendant at the time it caused the attachment to issue knew that the plaintiff did not owe it anything, is equivalent to an allegation and proof of want of probable cause, and such proof would entitle plaintiff to recover actual damages. If the plaintiff should go further, and satisfy the jury that the attachment was sued out by the defendant wantonly, recklessly and willfully, for the purpose of coercing the plaintiff to pay money it did not owe, that would be equivalent to proof of malice, for the law would infer malice from such facts, and the plaintiff would thereby lay the foundation to recover punitive damages, if the jury should find that the attachment was maliciously sued out, and should see fit to award them.

The judgment is

Affirmed.

WALKER, J., concurring: When this case was before us at a former term, the only question presented was whether there had been a misjoinder of parties and of causes of action, and we decided that there had been. It was not necessary in that appeal to determine the precise nature of the cause of action for the tort alleged in the complaint.
(181) By way of illustration in the discussion of the question of misjoinder, we treated it as a cause of action for malicious prosecution, as it may be so regarded under the decisions of this Court. *Ely v. Davis,* 111 N. C., 24, and cases cited; *Terry v. Davis,* 114 N. C., 31. Our purpose then was to show merely that it was a tort at common law as distinguished from an action upon the bond, it not being material to

inquire whether it was a cause of action for malicious prosecution or for the malicious abuse of process or for malicious attachment. It would seem that the allegations, as now made, are sufficient, and even as then made were sufficient, as the statement of a cause of action for any one of the said wrongs.

CONNOR, J. concurs in the concurring opinion.

Cited: Moore v. Bank, 140 N. C., 309; *R. R. v. Hardware Co.,* 143 N. C., 54, 58; *Gaither v. Carpenter, ib.,* 242; *Wright v. Harris,* 160 N. C., 544, 550; *Humphreis v. Edwards,* 164, N. C., 156; *Tyler v. Mahoney,* 166 N. C., 513; *Carpenter v. Haines,* 167 N. C., 554; *Tyler v. Mahoney,* 168 N. C., 239; *Estates v. Bank,* 171 N. C., 581; *Jerome v. Shaw,* 172 N. C., 862; *Shute v. Shute,* 180 N. C., 388.

GREENSBORO v. SCOTT.

(Filed 18 April, 1905.)

Municipal Corporations—Necessary Expenses, What Are—Bond Issue —Necessity for Popular Vote—Legislative Act.

1. An issue of bonds to provide a city with a waterworks plant, a sewerage system, and for grading and paving its streets, is for its necessary expenses and need not be submitted to a popular vote.
2. Where an act of the Legislature authorized a city to issue bonds for necessary expenses, upon a vote of the people, and directed that they be sold for not less than par, and the popular vote was had, but the bonds could not be floated at par, and a subsequent act authorizing the city to "issue, sell, and dispose of said issue of bonds," and to pay a commission brokerage of not more than 6 per cent, their issuance created a valid indebtedness without a popular vote.

CONTROVERSY without action by the city of Greensboro against (182) Scott and Stringfellow, heard by *Shaw, J.,* at chambers on 30 March, 1905.

By chapter 80, Private Laws, 1903, the city of Greensboro was authorized to issue its bonds for an amount not exceeding $250,000, to run not less than thirty years and not more than fifty years, and to bear no greater rate of interest than 5 per cent, and containing a provision that the bonds should not be sold, hypothecated, or disposed of for less than their par value.

It was further provided in said act that the proceeds of said bonds should be used for the following purposes and none other: Building,

constructing, and enlarging a waterworks plant to furnish water for the use of the city and its citizens; building, constructing, and maintaining a sewerage system; grading, paving, and macadamizing the streets of the city. Said act was not to become operative until after it had been submitted to an election of the voters of the city of Greensboro and approved by a majority thereof. The act authorizing said issue of bonds was read on three separate days in each house of the General Assembly and the ayes and noes entered upon the journals, as required by the Constitution.

Subsequent to the passage of this act the Board of Aldermen of the City of Greensboro passed a resolution by which it was decided that said bonds should run for fifty years and bear interest at the rate of 4 per centum per annum, and for the purpose of authorizing said issue an election was called to be held in accordance with the laws of the State of North Carolina and the charter of the city of Greensboro.

Thereafter, notice of election was published as required by law and the charter of the city of Greensboro, which said notice stated the time and place of holding said election, the amount of bonds to be
(183) issued for each purpose, but made no reference whatever to the rate of interest said bonds should bear.

Thereafter the Legislature of North Carolina, at its session of 1905, passed an act, the preamble of which set forth the provisions of the act of 1903 in regard to the selling of the said bonds at not less than their par value, and further recited that it was impossible for the city of Greensboro to sell said bonds at par unless said city pay a commission brokerage to the party effecting said sale, but that by paying a commission brokerage of not more than 6 per cent the said city could sell its bonds and save its citizens and taxpayers several thousand dollars over and above the amount it would receive had it issued its bonds bearing 5 per cent interest and selling same at a premium of 108, the highest amount realized by the city at its last bond sale.

Thereupon said city advertised for bids, when and where Scott & Stringfellow, the defendants in this action, became the last and highest bidders, said bid being par and accumulated interest, less a commission brokerage of 5 33-100 per cent.

Proffer of delivery of said bonds was made to defendants and refused, upon the ground that the issue of said bonds at less than par was invalid and the bonds would not be legal, valid, and binding obligations of the city of Greensboro beyond the net sum (95 2-3 per cent) paid. His Honor held otherwise, and adjudged that the defendants could deduct 5 1-3 per cent of the face value of the bonds delivered to them. The defendants appealed.

Scales, Taylor & Scales for plaintiff.
F. H. Busbee & Son for defendants.

CLARK, C. J. The vote of the people having been given in approval of a proposition submitted to them by virtue of an act which forbade the bonds to be disposed of at less than par, this transaction by which the defendants bid 5 1-3 per cent less than par might well (184) be invalid if the validity of these bonds depended upon the ratification of the issue thereof by the people as provided by chapter 80, Private Laws 1903, for the amount of the alleged brokerage, its payment to the purchasers, and the frank recital in the act of 1905 that the city of Greensboro could not dispose of its 4 per cent bonds at par, tend strongly to show that the purpose of this latter act is to repeal the restriction in the act of 1903 against selling at less than par. *New York v. Sands,* 105 N. Y., 210.

The act of 1905, "To allow the city of Greensboro to pay a commission for the sale of its 4 per cent bonds," recited said bonds and "authorized and empowered" the city to "issue, sell and dispose of the said issue of bonds of $250,000" at not less than par, but to pay out of the same a commission brokerage of not more than 6 per cent. The object for which the bonds are issued, i.e., to provide the city with a waterworks plant, a sewerage system, and for grading and paving its streets, is for its necessary expenses, and hence the issue of bonds for such purpose need not be submitted to a popular vote. *Fawcett v. Mount Airy,* 134 N. C., 125; *Davis v. Fremont,* 135 N. C., 538; *Tucker v. Raleigh,* 75 N. C., 271; *Wilson v. Charlotte,* 74 N. C., 748. In *Robinson v. Goldsboro,* 135 N. C., 382, the act requiring a popular vote had not been abrogated or modified by a subsequent act as in this case. The Constitution, Art. VII, sec. 7, requires a popular vote only for the creation of a debt other than "for the necessary expenses" of the municipal corporation. The authorization of the bonds by the Legislature of 1905 and their issuance by the city for such purposes create a valid indebtedness without a popular vote.

The judgment below, doubtless by inadvertence, adjudged the costs against the plaintiff, but the city did not appeal. The costs of the appeal will be taxed against the appellants.

Affirmed.

Cited: Water Co. v. Trustees, 151 N. C., 175; *Bradshaw v. High Point, ib.,* 519; *Ellison v. Williamston,* 152 N. C., 150; *Swindell v. Belhaven,* 173 N. C., 4.

(185)

SHIELDS v. BANK.

(Filed 18 April, 1905.)

Conspiracy to Defraud—Sufficiency of Evidence.

1. Evidence that plaintiff's brother had failed in business in Tennessee, and, having moved to this State, plaintiff advanced him money to buy stock in a mercantile corporation and in the defendant bank, and took an assignment of the stock in each to secure the advance, but that nothing was done by the plaintiff directly to mislead any one, and that he was not aware the business of his brother was not prospering until after the latter's death: *Held*, no proof to support the defendant's allegation that plaintiff entered into a conspiracy with his brother to cheat or defraud the defendant.
2. To sustain a charge of conspiracy, it must be proved that the party charged entered into a conspiracy to cheat and was a participant in a fraudulent purpose, either in the scheme or its execution, which worked injury as a proximate consequence.

ACTION by William S. Shields against the City National Bank of Greensboro, heard by *O. H. Allen, J.*, and a jury, at September Term, 1903, of GUILFORD. From the judgment rendered, both parties appealed.

King & Kimball and Parker & Parker for plaintiff.
Brooks & Thompson for defendant.

PLAINTIFF'S APPEAL.

HOKE, J. In this action the plaintiff alleges that he is the owner of ten shares of stock in the defendant bank, standing on its books in the name of M. L. Shields. Said stock is worth $110 per share, and all dividends declared thereon unpaid, and demands judgment that the stock be transferred to his own name, for all dividends declared,
(186) for damages and other relief. The defendant bank admits these facts in its answer, except as to the number of dividends declared, and proceeds to set up a counterclaim to the effect that plaintiff, W. S. Shields, and one M. L. Shields, his brother, combined and conspired together to enable M. L. Shields to commit a fraud on defendant bank, to its damage several thousand dollars. The scheme alleged between the said plaintiff and M. L. Shields is set out in sections 1 and 2 of defendant's further defense, as follows: "That during the year 1897 Milton L. Shields, who was a brother of the plaintiff, moved to the city of Greensboro, N. C., from Knoxville, Tenn., which latter place is still the home of the plaintiff. That the said Milton L. Shields was an ex-

travagant and unsafe business man, had recently failed in business in Tennessee, and at the time of his removing to Greensboro was totally insolvent and without credit and standing as a business man among those who knew him; all of which said facts were well known to his brother, William S. Shields, the plaintiff in this action. (2) That the plaintiff, well knowing Milton L. Shields' financial condition and untrustworthiness as a business man, and desiring to establish him in business in Greensboro and give him financial standing and credit with the defendant bank and others, to which he well knew his said brother was not entitled and ought not to have, as defendant is advised and believes, agreed and conspired with the said Milton L. Shields to have him purchase a large block of stock in the Simpson-Shields Shoe Company of Greensboro with plaintiff's money, and thereby become an officer and director of said concern, and also to purchase ten shares of the defendant's stock and thereby become a director in the defendant bank, so as to obtain a large and undeserved line of credit from the same, and that he (the plaintiff) would furnish all the money necessary to carry out this scheme of fraud and deception, and that all of this stock should be made out and issued in the name of Milton L. Shields and so remain upon the books of the concern issuing the same, but should at once be assigned to their real owner (the plaintiff) and sent out (187) of the State, so that the same could not be held liable for any of the debts contracted by his brother, and that this scheme should be kept a secret from the defendant bank and all others dealing with his brother."

The answer then goes at great length into different business transactions in which the bank extended to Milton L. Shields credit to a large amount, which he failed to pay, and demands judgment against W. S. Shields, the plaintiff, as an individual, for the amount M. L. Shields owed the bank, nearly $8,000; and also that the plaintiff surrender for cancellation the ten shares of capital stock in defendant's bank.

It will be noted that in the counterclaim the defendant is seeking no relief as creditor of M. L. Shields against the estate of M. L. Shields. The statement is that W. S. Shields, the plaintiff, entered into a conspiracy to cheat and defraud the defendant, and makes that a basis of substantive relief demanded against W. S. Shields as an individual.

At the close of the testimony the judge instructed the jury that if they believed the evidence the plaintiff could not recover his demand for the stock or the value thereof. Verdict and judgment were so entered, and the plaintiff excepted and appealed.

We have examined the entire evidence in this case and are utterly unable to perceive any testimony which proves or tends to prove that W. S. Shields ever entered into any conspiracy to cheat or defraud the

defendant, or which tends to support any demand against W. S. Shields as an individual. His brother, M. L. Shields, had failed as a business man in Tennessee, where he formerly lived, and there was evidence to the effect that he had proved himself improvident and incapable. Going to Greensboro, N. C., the plaintiff, who was his brother, furnished him money to buy an interest in a corporation carrying on a mercantile business, and also ten shares of stock in the defendant bank, and
(188) took a mortgage or assignment of the stock in each to secure the advance. There was nothing done by the plaintiff directly to mislead any one. The plaintiff's deposition taken in the cause was offered by the defendant and appears to be direct, frank, and full, and discloses the fact that he advanced his brother money to help start him in business, took an assignment of the stock as security, and was not aware that his brother's business enterprises were not prospering, until his death disclosed the fact that he was insolvent.

It may be that the act of the plaintiff was calculated to give M. L. Shields a business standing in the community, to which he was not entitled; but more than this is required to sustain the charges made in this answer. It must be proved as well as alleged that the plaintiff entered into a conspiracy to cheat and was a participant in a fraudulent purpose, either in the scheme or its execution, which worked injury to the defendant as a proximate consequence. *Brannock v. Bouldin,* 26 N. C., 61; *Stafford v. Newsom,* 31 N. C., 508.

As we have stated, there is nothing in the testimony supporting any such charge, and, on the admissions in the pleadings and proof of dividends due and unpaid, the plaintiff was entitled to the full relief demanded in the complaint, and, on plaintiff's appeal, there will be a New trial.

DEFENDANT'S APPEAL.

HOKE, J. There were two issues in this case, one addressed to the plaintiff's demand and the other to the defendant's counterclaim. The judge below charged the jury that if they believed the evidence, to answer the issue on the defendant's counterclaim "Nothing."

As we have said in the plaintiff's appeal, there is no evidence which sustains or tends to sustain the counterclaim of the defendant against W. S. Shields as an individual, and as the question of the de-
(189) fendant's rights against M. L. Shields' interest in the stock is not presented in this case, the verdict and judgment below on the counterclaim are

Affirmed.

CURRIE v. JONES.

(Filed 18 April, 1905.)

Shares of Stock—Injunction Against Transfer—Equitable Remedy.

An application for an injunction against disposing of shares of stock in a corporation differs from an application to restrain the transfer of ordinary personal property; the equitable remedy as to such property is more beneficial and complete than any the law can give, and the injunction should be continued to the final hearing, where necessary to fully protect the rights and interests of all parties.

ACTION by J. A. Currie and another against M. L. Jones, pending in the Superior Court of MONTGOMERY, heard by *Justice, J.*, by consent, at chambers, in the city of Charlotte, on 13 February, 1905. From an order dissolving a temporary restraining order and denying the motion of plaintiffs to continue the same till the final hearing, the plaintiffs appealed.

Adams, Jerome & Armfield and W. J. Adams for plaintiffs.
E. E. Raper and C. W. Tillett for defendant.

PER CURIAM: The plaintiffs bring this action for the recovery of 44,454 shares of the capital stock of the Iola Mining Company, now admitted to be in the possession of the defendant, as well as for an accounting for the dividends and profits accruing thereon. It appears that a restraining order was issued enjoining the defend- (190) ant from disposing of the shares of stock, which order was returnable on 13 February, 1905, before *Judge Justice*. At the hearing he dissolved the restraining order and denied the motion of the plaintiffs to continue the same till the final hearing.

The subject of the litigation, being shares of stock in a corporation, differs, in so far as injunctive relief is concerned, from ordinary personal property. 2 Story Eq., 907; 2 Dan. Ch. Pl. and Pr., 1652. In relation to such property the equitable remedy is more beneficial and complete than any the law can give. *Osborne v. U. S. Bank,* 22 U. S., 845.

We are of opinion that the present status of the shares of stock should be preserved pending the trial of the issues raised by the pleadings, so that in case of recovery by the plaintiffs their victory may not be a barren one. After a careful examination and consideration of the pleadings and of the several affidavits and exhibits in the record, we are of opinion that, in order to fully protect the rights and interests of all parties, the injunction should be continued till the final hearing, pro-

vided the plaintiffs execute and file a good bond in a sum sufficient to indemnify and save harmless the defendant from any damage accruing by reason of the continuance in force of the injunction order until the final hearing. The order should provide further that at any time, upon reasonable notice to the plaintiffs or their counsel, the defendant shall have the right to have the injunction order dissolved and the stock released from its operation, upon filing with the Clerk of the Superior Court of Montgomery County a good and sufficient bond, in such sum as the judge of the Superior Court may name, conditioned to pay such sum as the value of said stock may be ascertained and adjudged to be, in case the plaintiffs should recover the same, or to deliver said stock and account for any profits or dividends accruing thereon, and
(191) to abide by and fully perform and discharge the final judgment of the court in this action.

The cause is remanded to the Superior Court of Montgomery County, with leave to the parties to apply at once to the judge of the Superior Court, having jurisdiction, for the necessary orders in accordance with this opinion.

Let the costs of this appeal be taxed equally between the plaintiffs and the defendant.

Reversed and remanded.

ROUNSAVILLE v. INSURANCE COMPANY.

(Filed 25 April, 1905.)

Insurance—Contract to Renew—Agents—Undisclosed Principal—Right of Election—What Amounts to Election.

1. Where the evidence in an action to recover a fire loss shows that the plaintiff made an agreement with an agent, in his personal and not in his representative capacity, to renew a policy, and relied solely upon the agent's individual promise, the plaintiff has no claim against the defendant company for the agent's negligence in not renewing the policy.

2. When a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent, at his election. When, however, he comes to knowledge of the facts and elects to hold the agent, he cannot afterwards have recourse to the principal.

3. The assertion of a claim against one of them, without anything else of a more decisive character being done, or the bringing of a suit against either of them, is not sufficient; but if the claimant sues the agent to judgment,

after a disclosure of the facts, it will be a conclusive election on his part to hold the agent liable and to discharge the principal.

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

ACTION by W. H. Rounsaville against North Carolina Home (192) Insurance Company and O. W. Carr, heard by *Shaw, J.*, and a jury, at January (Special) Term, 1905, of GUILFORD.

This is an action by the plaintiff to recover for the loss of a storehouse by fire, which he alleges the defendant, through its agent O. W. Carr, under the name of O. W. Carr & Co., had agreed to keep insured for him. On 1 September, 1900, defendant, by its said agent, issued a policy on the storehouse for $300, which it is admitted contained the usual terms and conditions of a standard fire insurance policy, and provides that it may be continued by a renewal, in consideration of the premium for the renewal term. It appears from the certificate of appointment issued by the company to Carr, that he was authorized to receive applications for insurance against loss or damage by fire, and collect premiums therefor, to countersign, issue, and renew and consent to the transfer of policies of insurance, signed by the president and secretary of the company, conformably to its rules and regulations, and to such instructions as may be given from time to time by its proper officers. It was also provided that his commission as agent could be revoked at the discretion of the company.

The only testimony in the case was that of the plaintiff himself, which may be stated substantially as follows: "The policy was issued September, 1900, and was a renewal of a policy previously issued. In February, 1901, O. W. Carr spoke to me about the rates being lower on the storehouse. I told him I was glad to hear it, and to keep it renewed and running. He said he would. He called again two weeks after this. We had about the same talk. On 8 January, 1902, I went into the office of O. W. Carr & Co., at Greensboro. Carr was absent, but his son and clerk, Ernest Carr, was in the office. I said to him: 'How about my store at Thomasville?' He said: 'That's all right.' He then told me that the policy had been renewed last September (1901), and that the storehouse was insured for one year from that date. He gave me the amount of the premium, which I paid by check. The storehouse was burned 26 February, 1902, and on that day (193) O. W. Carr came into my store and told me of the fire. He said: 'Were you insured?' I said: 'Yes, sir.' He said: 'I know you ought to be, and should have been, but I am afraid Ernest neglected to attend to it.' He said: 'I stopped at the office and did not find your policies, and I am afraid Ernest neglected to renew it.' I said: 'I will have to hold you responsible for his negligence.' He said: 'Yes, we are responsible.' He went out and was to call again when I got my

mail. He came back, and I said: 'Professor, my house was burned.' He said: "I was afraid it was, and came here purposely to see you; I know you ought to have been insured and should have been'—and he again repeated that Ernest neglected to attend to it. I said. 'I can't be responsible for Ernest's negligence; I will have to hold O. W. Carr & Co. responsible'; and he said: 'We are responsible, and I will do what is right in the matter.' I told him that would be all right." (The declarations of O. W. Carr after the fire occurred were not insisted on as evidence against the insurance company.) The witness further testified: "I looked to O. W. Carr for the pay, but as he was the agent, I expected him to get it and pay it to me. I looked to him as agent. He promised me to renew the policy and keep it running, but did not say with what company, and I did not know with what company it was then running. He was my friend, and I intrusted it to him to put the insurance in a good company. I did not know what companies were good. He was agent for several companies, and I knew it. O. W. Carr never denied that he was liable for something. When he said that the failure to renew the policy was due to Ernest's neglect, I looked to O. W. Carr for my loss on account of the fire. I do not know when I ascertained that the insurance had been placed with the defendant company."

It appeared that the agency of O. W. Carr ceased 4 February, 1901, and that no policy was ever issued in renewal of the policy of 1
(194) September, 1900, and no premium was paid by plaintiff for the renewal of the insurance until long after the said policy of insurance had expired, and then paid to Carr when he was not an agent of the company. It further appeared that the plaintiff recovered judgment in this case against O. W. Carr for the amount he claimed to be due on the agreement to renew the policy in September, 1901.

At the close of plaintiff's testimony, the court, on motion of counsel of the insurance company, nonsuited the plaintiff as to the said defendant. Plaintiff excepted and appealed.

W. P. Bynum, Jr., G. S. Ferguson, Jr., and E. J. Justice for plaintiff.
Stedman & Cook and Busbee & Busbee for defendant.

WALKER, J., after stating the case: If it is conceded that O. W. Carr had the authority, as agent of the insurance company, to agree to renew the policy, we yet think it is clear that plaintiff made the agreement with him in his personal and not in his representative capacity, and relied solely upon Carr's individual promise for his protection. This is evident, not only from what occurred between them at the time of the agreement, but from the conversation they had after the fire, in which the plaintiff charged Carr with liability for his loss, and Carr admitted

it and agreed to answer for it. It further appears that plaintiff has sued Carr in this action and taken judgment against him.

If the agreement with the plaintiff to renew the policy was made by Carr as agent, and he was acting at the time, not for himself, but for and in behalf of the company, who was disclosed as his principal, and this was understood by both parties, the company would be solely liable, if Carr had authority to act for it, as the agreement would be its own and not that of its agent. *Meadows v. Smith,* 34 N. C., 19; *Bank v. Wright,* 48 N. C., 376; *McCall v. Clayton,* 44 N. C., 422; (195) *Potts v. Lazarus,* 4 N. C., 180; *Meekin v. Claghorn,* 44 N. Y., 349; *Silver v. Jordan,* 136 Mass., 319. In such a case we could not even infer that Carr intended to superadd his own liability to that of his principal, without sufficient words in the agreement to warrant such an inference. *Meeken v. Claghorn, supra.*

If we assume that he was acting for the company, the latter, as it appears, was an undisclosed principal, and in that view of the case the plaintiff may meet with another insuperable obstacle to his right to maintain his action against the company. The general principle is that when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent with whom he dealt, at his election. When, however, he comes to a knowledge of the facts and elects to hold the agent, he cannot afterwards have recourse to the principal. *Kingsley v. Davis* 104 Mass., 178. They are not jointly liable, as the obligation is in its very nature several, unless the agent has by contract or by his conduct added his own liability to that of his principal, which is not the case here. The only question, then, to be considered is, Has the plaintiff made such an election to hold the agent liable as will preclude his resort to the principal? There is some slight conflict of authority upon the question as to what is sufficient to constitute a binding election, as to either principal or agent, in such a case. It is generally agreed that the mere assertion of a claim against one of them, without anything else of a more decisive character being done, or the bringing of a suit against either one of them, is not sufficient; but it is established, we think, by the weight of authority that if the creditor or claimant sues the agent to judgment, after a disclosure of the facts, it will be a conclusive election on his part to hold the agent liable and to discharge the principal. This principle was announced in *Priestly v. Fernie,* 3 H. and C. (Exc.), 977, and it was approved in *Kendall v. Hamilton,* L. R., (196) 4, App. Cases, 504, in which it is thus stated by *Lord Cairns:*

"The person with whom he contracts may sue the agent, or he may sue the principal; but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result

in satisfaction of the debt"; and convincing reasons are then given in support of the principle. It seems to have received the approval of the text-writers and of the courts of this country. Pollock on Contracts (1 Am. Ed.), p. 230; 1 Addison on Contracts (8 Ed.), p. 89; *Sessions v. Block,* 40 Mo. App., 569; *Jones v. Ins. Co.,* 14 Conn. 501; *Kingsley v. Davis,* 104 Mass., 178. In *Tuthill v. Wilson,* 90 N. Y., 428, the Court, referring with approval to *Priestly v. Fernie,* and holding that suing the agent to judgment is a final and irrevocable election to look to him and not to the principal, says: "The vendor could not enforce his claim against both the principal, when discovered, and the agents who contracted in his behalf. Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of the agents, and yet not their contract, but that of the principal." When the creditor is called upon to elect as between the principal and his agent, is a question discussed and decided in the leading case of *Thompson v. Davenport,* 17 E. C. L., 335 (9 Barn. and Cress., 78), the *Chief Justice (Lord Tenterden)* delivering the opinion of the Court. That the plaintiff in this case, even if he did not contract with Carr without any reference to the company, and did not confide in him alone, was put to his election when he discovered the name of the alleged principal, is a proposition clearly sustained by the decision in that case. See, also, *Curtis v. Williamson,* L. R., 10 Q. B., 57; Reinhardt on Agency, sec. 331. After the course the plaintiff has (197) chosen to pursue, we are not prepared to hold that he can now recur to the alleged principal for the satisfaction of his claim.

We have not adverted to the fact that the plaintiff did not pay the premium for the renewal of his insurance at the time it was due, and did not until some time elapsed after it should have been paid, nor to the fact that he gave no notice to the company after he had failed to receive a renewal policy. When he paid the premium in January, 1902, he did not even ask for a new policy or a certificate of renewal. It is plain that by the terms of the policy it was contemplated that a new one should be issued at the time of renewal, or at least a certificate of some kind showing that the insurance had been continued. This matter was pressed upon our attention by the defendant's counsel, and the cases of *Croghan v. Underwriters,* 53 Ga., 109, and *O'Reilly v. C. L. Assn.,* 101 N. Y., 575, cited to show that under such facts and circumstances there can be no liability of the company to the plaintiff. The cases seem to sustain the contention of the defendant. It is sufficient, however, for our purpose to hold merely that there are not sufficient facts upon which to base a claim against the defendant, the entire transaction showing a manifest intention on the part of the plaintiff to rely on Carr individually, and not as the representative of the insurance company.

This decision renders it unnecessary to dicuss the contention of the plaintiff's counsel that it was the duty of the company to notify plaintiff of the termination of Carr's agency. As a general rule, that duty does devolve upon an insurance company, as was held in *Braswell v. Ins. Co.*, 75 N. C., 8; but, as we have shown, our case has not been brought within the operation of the principle of that decision. The question raised by the defendant as to the failure to file proofs is also necessarily excluded from our consideration by the reason for the conclusion to which we have come.

We have not been able to discover any error in the decision of the court below.

No error. (198)

Cited: Irvin v. Harris, 182 N. C., 653.

BULLIN v. HANCOCK.

(Filed 25 April, 1905.)

Deeds—Adverse Possession—Cotenants—Ouster—Color of Title.

1. A deed to the plaintiff's interest in land, executed in his name by another without any authority, passes no title to the grantee.
2. The possession of a grantee under a deed from the life tenants and all the remaindermen except one, could not become adverse as to the remainderman not joining in the deed, until the death of the life tenants.
3. An ouster of one tenant in common of land by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, not even when the possession is held under color of title.

PETITION for partition by George Bullin against Mary S. Hancock and others, heard by *O. H. Allen, J.*, at August Term, 1904, of SURRY, upon the following case agreed:

Nellie Holyfield, being the owner of the land in controversy in fee, by her last will and testament devised said land to Mima Keile and Sally Bullin for the term of their natural lives, with remainder in fee to the children of Sally Bullin. George Bullin, the plaintiff, is one of the said children, and was more than 21 years of age at the death of his mother, Sally Bullin, which occurred more than fifteen (199) years and less than twenty years before the commencement of this action. Before the death of Sally Bullin, to wit, on 17 September, 1879, her said children conveyed the land by deed, sufficient in form, to

John Hancock, ancestor of defendants, except the plaintiff George Bullin, and the same was executed as to him as follows: George Bullin, by L. J. Norman. That L. J. Norman and John Hancock are both dead, and no authority was given for L. J. Norman to sign George Bullin's name to the same. L. J. Norman was at that time clerk of the Superior Court of said county, and properly probated said deed as to all the grantors except "George Bullin, by L. J. Norman." As to him, L. J. Norman acknowledged the execution of the same to himself as clerk of the said court, and ordered the same to be recorded, which was done at or about the date of its execution.

On 27 February, 1880, Sally Bullin executed a deed in fee to the land to the said John Hancock, reserving a life estate in 50 acres of the tract (the whole tract consisting of 250 acres). John Hancock took immediate possession of the tract of land at the date of said deed, except said 50 acres, and he took possession of that at the time of the death of Sally Bullin, and remained in actual possession of the same to the time of his death; the defendants, his heirs at law, have been in possession ever since the death of their ancestor.

The deed first above referred to, executed by the children of Sally Bullin to John Hancock, has, since the beginning of this action, been probated as to all the grantors, and recorded the second time—the execution as to "George Bullin, by L. J. Norman," being shown by proving the handwriting of L. J. Norman.

The court adjudged that the plaintiff and the defendant are tenants in common of the land, the plaintiff being the owner of one-eleventh and the defendants the owners of the other ten-elevenths; ordered an actual partition of the land and adjudged that defendants be taxed with (200) the costs. They excepted and appealed.

W. L. Reece and Folger & Folger for plaintiff.
Carter & Lewellyn and Manly & Hendren for defendants.

WALKER, J., after stating the case: The only question in this case is whether the plaintiff is tenant in common with the defendants of the land prescribed in the petition. It was properly admitted by the defendants' counsel that the deed to John Hancock did not pass the interest of the plaintiff in the land, as it was executed in his name by L. J. Norman without any authority from him. This being so, the plaintiff upon the facts of the case owns an undivided one-eleventh interest in the land as tenant in common with the defendants, unless he has lost that interest by the adverse possession of the defendants and their ancestor, John Hancock, under color of title. It is stated in the case that the land

was devised by Nancy Holyfield to Mima Keile and Sally Bullin for the term of their natural lives, with remainder in fee to the children of Sally Bullin. The children, except the plaintiff, conveyed their estate in remainder to John Hancock, and Sally Bullin also conveyed her life estate to him, reserving a life estate in 50 acres. He took possession in 1880 of all the land except the 50 acres, and took possession of that part at the time of her death, and has held possession ever since. Sally Bullin died within twenty years next prior to the bringing of this action. The possession of John Hancock and his heirs could not become adverse, whether held with color of title or without it, until the death of Sally Bullin and Mima Keile. It does not appear that the latter is dead, but we will assume that she died more than seven years before the action was commenced, as the parties seem to have based their arguments upon that assumption. The possession of the defendants and their ancestors since the death of Sally Bullin has not continued for (201) twenty years.

Conceding that the deed to John Hancock is color of title as to the interest of plaintiff, the defendants must still fail in their contention, as seven years adverse possession by one tenant in common, even under color of title, will not toll the entry of his cotenants, and this is true although the person in possession claims the whole by virtue of his possession under a deed for the same from some of the tenants in common, the possession of one tenant in common being in law the possession of all. In *Day v. Howard,* 73 N. C., 1, it is said by *Pearson, C. J.* "If a tenant in common conveys to a third person, the purchaser occupies the relation of a tenant in common, although the deed purports to pass the whole tract and he takes possession of the whole; for, in contemplation of law, his possession conforms to his true and not to his pretended title. He holds possession for his cotenant and is not exposed to an action by reason of his making claim to the whole and having a purpose to exclude his fellow." There was no actual ouster of the plaintiff by the defendants and the law will not presume such an ouster of a tenant in common from an adverse possession by a cotenant for a time less than twenty years, when there has been no demand for rents, profits, or possession, not even when the possession is held under color of title. Though some doubt had been expressed in the earlier cases, it was held in *Cloud v. Webb,* 14 N. C., 317, that a possession of seven years by a tenant in common, even under color of title, was not sufficient to bar his cotenant, but that by long-continued possession (in that case thirty-six years) an ouster might be presumed, and that the statute would run upon a presumed ouster, although it was admitted that no actual ouster had ever taken place. The principle settled by that case has been followed ever since, and the time for the presumption of an ouster from ad-

(202) verse possession in such a case fixed at twenty years, which is the time prescribed by the statute in like cases for barring right. *Linger v. Benson,* 67 N. C., 150; *Covington v. Stewart,* 77 N. C., 148; *Neely v. Neely,* 79 N. C., 478. In *Caldwell v. Neely,* 81 N. C., 114, it was held following *Cloud v. Webb,* that the ouster of one tenant in common of land by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. That case is decisive of this one, and it has been approved many times since in cases presenting the same state of facts. *Ward v. Farmer,* 92 N. C., 93; *Hicks v. Bullock,* 96 N. C., 164; *Page v. Branch,* 97 N. C., 97; *Breeden v. McLaurin,* 98 N. C., 307; *Rascoe v. Lumber Co.,* 124 N. C., 42.

His Honor's ruling was in accordance with this well-settled principle, and was therefore clearly right.

Affirmed.

Cited: Whitaker v. Jenkins, post, 479; *Dobbins v. Dobbins,* 141 N. C., 217; *Rhea v. Craig, ib.,* 611; *Mott v. Land Co.,* 146 N. C., 526; *McKeel v. Holloman,* 163 N. C., 137; *Lumber Co. v. Cedar Works,* 165 N. C., 85; *S. c.,* 168 N. C., 350; *Alexander v. Cedar Works,* 177 N. C., 142.

EARP v. MINTON.

(Filed 25 April, 1905.)

Judgments—Collateral Attack—Fraud—Proper Remedy.

1. In an action to recover personal property, the plaintiff cannot collaterally attack for fraud in its procurement a judgment under which the defendant claims, and it was error to submit an issue as to such fraud.
2. When a judgment is attacked for fraud, the proper remedy is by a motion in the cause, if the action is pending; but if it has been ended by final judgment, an independent action must be instituted.

(203) ACTION by Dorinda Earp against L. L. Minton, heard by *W. R. Allen, J.,* and a jury, at June Term, 1904, of WILKES.

This was a civil action tried in the Superior Court upon appeal from the judgment of a justice of the peace. The plaintiff alleges that she is the owner of a cow, and that the defendant is in the wrongful and un-

lawful possession of her. The defendant admits the possession of the cow, but denies that his possession is wrongful and unlawful, and avers that he is an innocent purchaser for value. It appears from the record that the defendant purchased the cow from one Cranor, who came into possession of her by virtue of a judgment secured by him in an action brought before a justice of the peace against Dorinda Earp, the plaintiff in this action, to recover possession of the cow. In the present action this judgment was introduced and relied on by the defendant to establish his right to the possession of the cow.

The court submitted the following issues: (1) Is the plaintiff owner of the property in dispute? Ans: Yes. (2) What was the value of the cow? Ans.: $25. (3) Was the judgment upon which the defendant relies procured by fraud? Ans.: Yes.

From a judgment for the plaintiff, the defendant appealed.

No counsel for plaintiff.
Manly & Hendren for defendant.

BROWN, J. The defendant excepts to the submission of the third issue as to fraud in the procurement of the judgment in *Cranor v. Earp* and to the admission of certain testimony and parts of his Honor's charge relating to that issue. The defendant's ground of objection to the issue, the evidence, and the charge, is the same—that is, that a judgment cannot be collaterally attacked for fraud, but it must be impeached, if at all, by an independent action. We do not deem it necessary to consider these exceptions separately. We think that his Honor (204) committed error in submitting the issue to the jury, and it follows that the admission of evidence and his Honor's charge in regard thereto are likewise erroneous. It is well settled by this Court that it is not permissible for a party to attack a judgment in a collateral proceeding on account of fraud. When a judgment is attacked for fraud the proper remedy is by a motion in the cause, if the action is then pending; but if it has been ended by final judgment, an independent action must be instituted. *Carter v. Rountree,* 109 N. C., 29; *Smith v. Gray,* 116 N. C., 311; *Burgess v. Kirby,* 94 N. C., 575.

In the case before us the judgment is attacked for fraud in its procurement. At most, it is only *voidable* for an irregularity not apparent. It is not such an irregularity as to render the judgment absolutely void; hence, it cannot be attacked collaterally, but it must be impeached, if at all, by a separate proceeding instituted for that purpose. *Burgess v. Kirby, supra; Neville v. Pope,* 95 N. C., 346; *Brittain v. Mull,* 99 N. C., 483. If it is contended that the summons in the case of *Cranor v. Earp* was improperly or irregularly served, or that defendant was

sick and could not attend the trial, her remedy was to move in that cause before the justice to set aside the judgment.

We are of opinion that in submitting the issue as to fraud in the procurement of the judgment in *Cranor v. Earp* and admitting evidence and instructing the jury in regard thereto, his Honor committed error, for which there must be a

New trial.

Cited: Kelly v. Odum, 139 N. C., 281; *Levin v. Gladstein,* 142 N. C., 495; *Houser v. Bonsal,* 149 N. C., 58; *Rawls v. Mayo,* 163 N. C., 180.

WHITAKER v. WHITAKER.

(Filed 25 April, 1905.)

Services to Deceased—Implied Promise to Pay, When Rebutted—Grandchildren—Actions Against Executors—Costs.

1. Where the deceased did not stand *in loco parentis* to plaintiffs, and they were not members of his family, the presumption of an implied promise to pay for services rendered by them to deceased in his last illness is not rebutted by the fact that he was their grandfather.
2. Sections 525 and 527 of The Code, as to costs, are subject to the exception in section 1429 providing that no costs shall be recovered against an executor "unless it appears that payment was unreasonably delayed or neglected or that the defendant refused to refer the matter."
3. Where an action was brought against an executor within fifty-two days after his qualification, for services rendered to the testator, and there was no refusal to refer, and the recovery was only one-half of the demand, the defendant executor was not taxable with costs under section 1429 of The Code.

ACTION by D. M. Whitaker and another against Aaron Whitaker, executor of Isaac Whitaker, heard upon appeal from a justice of the peace by *McNeill, J.,* and a jury, at November Term, 1903, of SURRY.

From a judgment for the plaintiffs, the defendant appealed.

W. L. Reece and Watson, Buxton & Watson for plaintiffs.
Manly & Hendren and Carter & Lewellyn for defendant.

CLARK, C. J. The plaintiffs, two grandchildren of defendant's testator, began separate actions before a justice of the peace, for value of services rendered by them to said testator in his last illness. (206) On appeal to the Superior Court, the actions were consolidated,

without objection, a separate issue being submitted as to the claim of each plaintiff. The plaintiff D. M. Whitaker was a tenant of deceased and paid rent to him; he boarded at deceased's and paid for his board in work. The other plaintiff, M. A. Whitaker, lived a short distance from deceased, and was sent for when deceased was stricken with paralysis, went to his house and waited on him jointly with the other plaintiff (except for a few days), two attendants being needed, till his death. Neither of plaintiffs was living with testator as a member of his family. He did not stand to them *in loco parentis,* as in *Dodson v. McAdams,* 96 N. C., 149, nor were they "members of his family," as in *Callahan v. Wood,* 118 N. C., 52, and the presumption of an implied promise to pay for services rendered is not rebutted upon the evidence in this case from the mere fact that the deceased was their grandfather. It was, therefore, not error to refuse to charge that the plaintiffs, "being grandchildren, could not recover unless there was a contract to pay for their services, and there was no evidence of any contract."

The plaintiffs presented their claims to the defendant, who not paying them at once, they began action within fifty-two days after qualification of defendant as executor. The evidence of plaintiffs was that the defendant said he would not pay "until forced to do so by law." His testimony was that he replied that "he would see his counsel; that he had nothing in hand to pay then." The jury awarded each of the plaintiffs one-half of the amount he claimed. The defendant excepted to the refusal of the issue, "Were the claims of plaintiffs unreasonably delayed, and did defendant refuse to refer the same?" and also to the judgment taxing him with the costs, upon the ground that unreasonable delay had not been made in payment of the debt and the defend- (207) and had not refused to refer the claim.

The general rule, Code, sec. 525, states, "Costs shall be allowed, of course, to the plaintiff upon a recovery" in the following cases: (1) Judgments for recovery of real property; (2) of personal property; (3) in actions of which a justice of the peace has no jurisdiction; (4) The restrictions upon amount of costs laid by subsection 4 do not apply to this case. Section 527 embraces this case, however, as it provides: "In other actions costs may be allowed or not, in the discretion of the court." But all the cases, both those in sections 525 and 527, are subject (besides some other exceptions) to the exception in Code, sec. 1429, "No costs shall be recovered in any action against an executor, administrator, or collector unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy," in which events this section makes it discretionary with the court to award the costs either against the defendant personally or against the estate. Under the former system, when a judgment *quando,* i.e., a

judgment merely ascertaining the debt, was obtained, the plaintiff did not recover any judgment for costs. As all judgments against an estate are, since The Code, in the nature of judgments *quando,* to be paid ratably in their class (unless secured by a lien), The Code, sec. 1429, adopted the same general rule, "No costs shall be recovered in any action against an executor, administrator, or collector," subject to this exception, *"unless* it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy." The burden was upon the plaintiffs to show that they were entitled to recover costs by coming within the exception. They offered no evidence of a request by them, or refusal by defendant, to refer. *Prima facie,* this action having been begun in fifty-two days after qualification of the (208) defendant, payment was not "unreasonably delayed or neglected" (*May v. Darden,* 83 N. C., 239; *Morris v. Morris,* 94 N. C., 618), but if the claim was denied by defendant, then the plaintiff would have been entitled to bring action at once under Code, sec. 1427. This would have made it essential that the court should have submitted an issue upon the conflicting evidence as to such denial, but for the fact that the verdict of the jury giving the plaintiffs only one-half of their claim is conclusive that if the plaintiffs' version was correct, that the defendant refused payment, yet, nevertheless, there was not an unreasonable delay or neglect. The authorities are numerous that "Where there is a material reduction in favor of the defendant between the claims presented and the amount allowed on the trial, refusal to pay as prescribed is not regarded as unreasonable." See cases collected, 8 Eng. Pl. and Pr., 732. In this case the defendant only did his duty in protecting the estate against an unreasonable demand.

The judgment will be modified below by rendering judgment in favor of defendant against plaintiffs for the costs of the action. The costs of the appeal being in the discretion of the Court, Code, sec. 527 (2), each party will pay his own costs.

Modified.

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(209)

PARKER v. FENWICK.

(Filed 25 April, 1905.)

Sales—Breach of Contract—Waiver—Acceptance After Discovery of Defects—Action on Warranty—Proof—Measure of Damages.

1. A vendee in a contract for the sale of a machine of a specified quality is entitled to a reasonable time to investigate to discover any such defects

as are covered by the contract; but if, after discovering the defects, he accepts and uses the machine as his own for two years without any suggestion of a defect other than that discovered upon its receipt, making payments on the contract, he thereby waives any claim for damages for such defects.

2. A vendee may sue upon a warranty of soundness in a contract for the sale of personalty as collateral to the contract of purchase.

3. In an action on a warranty the vendee is required to prove nothing but the contract of warranty, breach thereof, and his damages.

4. The measure of damages for the breach of a contract for the sale of a machine is "the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty."

ACTION by C. W. Parker against J. B. Fenwick, heard by *Jones, J.*, and a jury, at December Term, 1904, of FORSYTH. From a judgment for the defendant, the plaintiff appealed.

Plaintiff, being a resident of Kansas, sold to the defendant, a resident of Forsyth County, in this State, one merry-go-round with attachments, for the sum of $2,000, defendant paying $1,000 cash and giving his promissory notes, payable monthly, for the balance. To secure said notes defendant executed a chattel mortgage on the property. A contract was made by correspondence between the parties, all of which is set out in the record. The property was shipped to the (210) defendant on 23 March, 1901, and received on 5 April. Defendant wrote plaintiff on 13 April, 1901, that the property had arrived, mentioned several defects, etc., in regard to which they had some correspondence. On 24 April defendant wrote to plaintiff: "The machine is running all right and the shooting-gallery draws out the best people in the city; am much pleased with it." On 5 May he wrote plaintiff inclosing $100 for note due June 1, and inquiring as to the lowest amount he would take for the ten notes unpaid. A correspondence was carried on between the parties in regard to the payment of the notes as they fell due. There was no suggestion in any of the letters of any defect in the machine until just before the date of the summons, 7 April, 1903. The defendant continued to make payments until they aggregated something over $1,400, leaving a balance due at the institution of this suit of $795. Defendant, by way of counterclaim, alleged that the plaintiff represented that the machine and its appurtenances were of the very best make and up to date—the best of its kind on the market, and that he was induced by such representations to agree to pay therefor the sum of $2,000. That it was not a good machine and up to date, but on the contrary, was old-fashioned and out of date and could not do the work as represented by plaintiff, and that by reason of the false representations made by plaintiff, defendant had been damaged in excess of the

balance due, in the sum of $500. To this counterclaim plaintiff filed a reply, denying the material allegations.

The court submitted the following issues to the jury:

1. What amount, if any, is defendant indebted to plaintiff upon notes sued on and described in complaint? Ans.: $795.06.

2. What amount, if any, is plaintiff indebted to defendant upon counterclaim set up in the answer? Ans.: $952.

3. What is the value of said property described in complaint now? Ans.: $200.

(211) 4. Is the plaintiff the owner and entitled to the possession of the property described in the complaint? Ans.: No.

The correspondence between the parties was put in evidence, and plaintiff testified that the machine was delivered according to contract and complied with the representations. Defendant testified in regard to the defects, which he said he discovered very soon after putting the machine to work. In his answer he says: "Soon after its arrival here, after the defendant had paid as much as $1,400 on the machine, being entirely ignorant of the operation of machines of this character, he ascertained it was an old-fashioned, out-of-date machine, which could not do the work that it was represented to him by the plaintiff to do, and that by reason of the fraudulent representations he was induced to part with his money." From a judgment on the verdict, the plaintiff appealed.

L. M. Swink for plaintiff.
Watson, Buxton & Watson for defendant.

CONNOR, J., after stating the facts: We have carefully read the correspondence which constitutes the contract between plaintiff and defendant. We fail to find any suggestion from defendant that the machine was not as represented by plaintiff, except that in his letter of 13 April, 1901, he mentioned that some injury was done to the organ by the movement of the engine on the cars; that there was no flag-pole or pulleys and that the outfit was short two tent poles. After mentioning these, he says: "I had great trouble in putting the machine up and getting it to run a track, but have overcome all that now, and do not expect any more trouble. You ought to make good all things that are short. I am pleased with everything but tent, which was torn in several places." He then proposed to act as agent for the plaintiff in the sale of these machines. He also said that as soon as he could do some business, he would want another shooting-gallery. In the same letter he says that his shooting-gallery is drawing out the best people, so far.

(212) Plaintiff promptly replied to this letter, noting the complaints

made, to which defendant responded on 24 April that the machine was then running all right and that he was much pleased with it. After these letters, we find no further complaint in regard to the matters referred to. The defendant did complain that he had been sick and had been prevented, by various causes, from doing a successful business. He made frequent remittances on the notes and asked for further time by reason of poor business, sickness, etc. We find nothing in the defendant's testimony inconsistent with his letters.

Plaintiff requested the court to instruct the jury that, "If the jury find from the evidence that the defendant ascertained that the machine did not come up to the representations made of it by plaintiff' but that defendant continued to use the machine with knowledge of the fact that it did not comply with the representations of plaintiff, and that defendant made payments on the contract, this would be a waiver of any warranty or representation, and they should answer the second issue 'Nothing.'" His Honor modified the instruction by inserting between the words "defendant" and "ascertained," the words "after having a reasonable time to investigate." To this modification plaintiff excepted. We are of opinion that in the light of defendant's testimony the instruction should have been given as asked. There can be no doubt that the general proposition involved in the instruction as given is correct. The defendant was entitled to a reasonable time to investigate for the purpose of discovering any such defects in the machine as were covered by the contract. The plaintiff was not converting this proposition, but was insisting that the defendant, on his own showing, had in fact ascertained—discovered—every alleged defect, and after such discovery had accepted and used the machine, paying a portion of the purchase-money. The only question of law presented upon this hypothesis, which we think was sustained by the evidence, was the (213) duty of the defendant after such discovery. Could he accept the machine, use it as his own for two years, during which time, according to his own testimony, its value was reduced to $200, and then refuse to pay for it, retaining the property and recovering damages for defects, which he admits were known to him almost, if not quite, at the time the machine was received? He is not setting up a counterclaim for a breach of an express warranty in respect to quality. He purchased from plaintiff and was entitled to demand "a merry-go-round of my (plaintiff's) manufacture . . . as good as was ever put on the market." It had been run thirty days at a street fair. Plaintiff was to "thoroughly repaint and varnish it" and to make it "as good as a new merry-go-round." Defendant does not allege that this was an express warranty as to quality of material, etc. The relative rights and duties of the parties is thus stated: "There is no dispute as to the rule of law touching the rights

of parties under an executory contract for the future sale and delivery of goods of a specified quality, in the absence of an express warranty. The quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. If he tenders an article of an inferior quality the purchaser is not bound to accept it. But if he does accept it, he is, in the absence of fraud, deemed to have assented that it corresponded with the description, and is concluded from subsequently questioning it. This imposes on the vendee the duty of inspecting before accepting, if he desires to save his rights in case the goods are of inferior quality." *Pierson v. Crooks,* 115 N. Y., 539.

Church, C. J., in *Dutchess Co. v. Harding,* 49 N. Y., 321, says: "The acceptance of the property under such a contract implies a consent or agreement on the part of the vendee that the quality is satisfactory, and is conclusive upon him. He is not bound to accept a different article from that contracted for, and he is entitled to an opportunity (214) for examination. The agreed quality is regarded as a part of the contract of sale itself, and not as a warranty or agreement collateral to it. In such a case the vendee must immediately rescind the contract and return, or offer to return the goods, or he will be foreclosed from all claim. He cannot retain the property and afterwards sue for damages on account of the inferior quality."

Danforth, J., in *Brown v. Foster,* 108 N. Y., 387, in discussing this question, says: "The plaintiff then became subject to the general rule that one who seeks to reject an article as not in accordance with the contract must do nothing after he discovers its true condition, inconsistent with the vendor's ownership of the property. He would, in such a case as the present, be entitled to a reasonable time for examination—long enough to put the machinery in operation and see it operate, and he might for that purpose do with it whatever was necessary, and if, after such examination, without dealing with it in any other way, or for any other purpose, he rejected it, acceptance could not be implied. . . . He used the machine in the prosecution of his business, and although complaining, it did not intermit defendant's use. Knowing the defects, he continued to run it. His intent in so doing may be gathered from his acts as well as from his words, and it could not be said as matter of law these acts did not afford substantial proof of an acceptance, not for the purpose of examination, but for use. . . . The continued use of the machine in the promotion of his own business interests, with knowledge of its imperfections, was an unequivocal act of acceptance which no words of his own could qualify."

In *Reid v. Randall,* 29 N. Y., 358, it is said: "In cases of executory contracts for the sale and delivery of personal property, the remedy of

the vendee to recover damages on the ground that the article furnished does not correspond with the contract does not survive the acceptance of the property by the vendee, after opportunity to ascertain (215) the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. . . . There is no intention that the defective article should be accepted, and that the vendee should rely upon the covenant for his indemnity. The latter is not bound to receive and pay for a thing that he has not agreed to purchase, but if the thing purchased is found on examination to be unsound or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by such contract."

The same principle is strongly stated in *Jones v. McEwen,* 91 Ky., 374, in which *Bennett, J.,* says: "Where there is a contract to deliver goods or chattels of a particular description or quality at a future day, and the vendor tenders goods not of the agreed description or quality in discharge of the contract, and the vendee, after inspecting them or having had a fair opportunity to do so, receives them in discharge of the contract, he cannot thereafter maintain an action against the vendor to recover damages for the defects in the description or quality." The learned judge states the proposition in another form: "If the vendee, after having inspected them, or after having had a fair opportunity to do so, receives them in discharge of the contract, although they do not, as to description or quality, comply with its terms, he thereby waives every defect, and he cannot recover damages on account of them."

This Court in *Mfg. Co. v. Gray,* 111 N. C., 87, by *Clark, J.,* says: "The purchaser of the machinery, by the terms of the contract, had a reasonable time after he received it to make known its defects. But he seems to have kept and used the machinery without com- (216) plaint for some length of time—indeed, until the plaintiff sought to recover under the contract because of failure to pay for it. If the objection was not made known within reasonable time, and the purchaser continued to use the machinery without objection, this was a ratification." The authorities may be found in the note to Benjamin on Sales (7 Ed.), 736-7. "When there has been an acceptance by the purchaser of the property it is, as a general rule, absolutely binding and conclusive upon him, and precludes him from alleging that the property is not of the character or quality called for by the contract, and he therefore,

as a general rule, has no remedy when the property is not of the character or quality required by the contract of sale." 24 A. & E. (2 Ed.), 1157. Of course, if there is controversy as to the unqualified acceptance, the fact should be submitted to the jury. The defendant relies upon the case of *Cox v. Long,* 69 N. C., 7, to sustain his right to sue for, or, as in this case, set up his counterclaim, notwithstanding the acceptance of the machinery. We have no disposition to bring that decision into question. It will be noted, however, that the decision rests upon the exceptional facts in that case. The shingles were paid for before delivery, or at least before the plaintiff discovered that they were not of the width and length contracted for. This was too late to enable the plaintiff to secure other shingles without immense damage to a new building then being erected. They could not be returned without loss to the plaintiff, both in respect to the price paid and the danger to the building. It will be further noted that the Court treated the contract as an express warranty. The case may be said to be an exception to the general rule. It is cited in *Austin v. Miller,* 74 N. C., 274, in which *Reade, J.,* referring to the general rule, says: "But if B has paid for the article, and by rejecting it he may lose the money and the arti-
(217) cle both, then the better way is for him to receive the article and to make the most of it and to sue A for the breach of the contract." This case can hardly be considered as settling anything more than the law upon the peculiar facts stated. It is again cited in *Lewis v. Rountree,* 78 N. C., 327. In that case there was an express warranty that the defendant should deliver "strained rosin." There can be no question about the right to sue upon an express warranty. The defendants did not deliver the thing contracted for. The rosin was paid for before it was discovered that it was not strained rosin. The real question in this case was whether the selection by the plaintiff of the barrels of rosin out of a large number of barrels containing more rosin of the description called for prevented a recovery upon the warranty.

In *Kester v. Miller,* 119 N. C., 475, there was an express warranty as to quality and finish of the engine; it appearing that there was a breach of the warranty, the defendants retained possession and used the engine at the request of the plaintiff. There were no such facts in this case. There is a class of cases in which the vendee has been permitted to recover because of fraud or of latent defects, or because the fact that the article sold did not correspond with the contract could only be ascertained by use, such as in cases of seeds sold for planting, guano sold for fertilizing.

Without undertaking to discuss or distinguish the large number of cases cited in the text-books, we are of opinion that upon the facts in this case, the defendant having, in a most unequivocal manner and after

inspection and discovery of such defects as are now complained of, accepted the machinery and used it for his own purposes for two years without any suggestion of a defect other than that discovered upon its receipt, he is deemed to have waived any claim for damages by reason of such defects. Any other rule than that, which we find to be adopted by the courts, would render all business transactions involving sales of personal property unsafe, and subject vendors to most grievous burdens. If a vendee wishes to be relieved of the duty of in- (218) spection and protected against all defects, he should demand a warranty of soundness. He may sue upon this as collateral to the contract of purchase. In such action, either instituted by himself as plaintiff for breach or set up by way of cross-action or counterclaim under The Code system, he is required to prove nothing but the contract of warranty, breach thereof, and his damages. Benjamin on Sales, sec. 610. We do not understand that the defendant claims that there was any express warranty collateral to the contract of purchase. We note that the form of the second issue does not very clearly present to the jury the question of fact to be decided. It assumes the very matter in controversy—whether the defendant had established any counterclaim. The jury were left to infer that the only question for determination was the damage. There was, however, no exception to the issue. The defendant was entitled to the instruction asked. We are further of opinion that there was error in the measure of damage laid down by the court. The true measure of damage is "the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty." *Mfg. Co. v. Gray,* 126 N. C., 108. We see no evidence of any fraud in this case. For the errors pointed out there must be a

New trial.

Cited: Mfg. Co. v. Oil Co., 150 N. C., 151; *Cable Co. v. Mason,* 153 N. C., 152; *Simpson v. Green,* 160 N. C., 303; *Robinson v. Huffstetler,* 165 N. C., 461; *Guano Co. v. Livestock Co.,* 168 N. C., 450; *Bland v. Harvester Co.,* 169 N. C., 420; *Cotton Mills v. Mfg. Co.,* 170 N. C., 671; *Winn v. Finch,* 171 N. C., 276; *Farquhar v. Hardware Co.,* 174 N. C., 372; *Sprout v. Ward,* 181 N. C., 375; *Fay v. Crowell,* 182 N. C., 534.

IN RE SPEASE FERRY.

(Filed 25 April, 1905.)

Ferries—Powers of Legislature Over—Franchises—Special Acts—Powers of County Commissioners.

1. Article VII, section 2 of the Constitution, giving the supervision and control of roads, bridges, etc., to the county commissioners, does not deprive the General Assembly of the power to pass an act authorizing the establishment of a public ferry at a certain point for a term of thirty years, and providing that it shall be unlawful for any person to establish any other ferry within one and one-half miles of said ferry.
2. The power to establish ferries is one of the attributes of sovereignty which is to be exercised by the Legislature itself, or by any agent whom that body may authorize to act for it.
3. An act granting a ferry franchise and making it unlawful to establish any other ferry within one and one-half miles thereof is a restriction upon the general power conferred upon county commissioners under section 2014 of The Code "to appoint and settle ferries," and the commissioners have no power to authorize a ferry within the prohibited distance.
4. Public ferries are not monopolies, but franchises granted in consideration of public services. They may be exclusive, but are simply licenses, revocable at will.

PETITION by Spease & Co., heard by *O. H. Allen, J.*, and a jury, at September Term, 1904, of FORSYTH.

This was a petition filed by Spease & Co. before the Board of Commissioners of Forsyth County, asking for a license to establish a ferry across the Yadkin River near Donnaha; to which petition Poindexter & Co. filed exceptions. The board of commissioners made an order granting the petition, from which Poindexter & Co. appealed to the Superior Court, and from the judgment of the Superior Court (220) affirming the commissioners' order, they appealed.

CLARK, C. J. By chapter 222, Laws 1895, Poindexter & Co. were authorized to establish a public ferry near Donnaha station on the Yadkin River, for the term of thirty years, "subject to the general law, rules and regulations governing such ferries." By section 3 of said act it is provided: "It shall be unlawful for any person to establish any other ferry within 1½ miles of said ferry." This is a petition by Spease to the county commissioners to allow him to establish a ferry within the forbidden distance, heard on appeal in the Superior Court.

There can be no question as to the power of the General Assembly to pass this statute. In *Barrington v. Ferry Co.*, 69 N. C., at p. 173, it was held that the Legislature, under the power of eminent domain,

has the power to grant the franchise of a ferry by a special act, as well as to exercise such authority by a general statute vesting the usual exercise of such power in the county commissioners, and that Article VII, section 2, of the Constitution, giving the supervision and control of schools, roads, bridges, etc., to the county commissioners, does not deprive the General Assembly of the power of special legislation over those subjects. For a stronger reason, this is so, since by the amendment to Article VII (section 14) in 1875 the Legislature is authorized to "modify, change, or abrogate any and all provisions" of that article, except sections 7, 9, and 13. "A ferry franchise may, of course, like any other franchise, be granted by a special statute." 12 A. & E., (2 Ed.), 1092. The power to authorize ferries resides in the Legislature, but it may, when it chooses, exercise it through county commissioners or other subordinate boards. *Carrow v. Toll Bridge Co.,* 61 N. C., 119; 12 A. & E., (2 Ed.), 1090, and cases in the notes thereto; 2 Farnham on Waters, sec. 290. "The grant of such right to an inferior tribunal does not deprive the Legislature of the right to exercise (221) the authority itself, if it wishes to do so." 2 Farnham on Waters sec. 290; 12 A. & E., (2 Ed.), 1093; *Wright v. Nagle,* 101 U. S., 791; *Chapin v. Crusen,* 31 Wis., 209; *Blake v. McCarthy,* 56 Miss., 654. "A very common restriction is to ordain that no ferry shall be established within a specified distance of an existing one." 2 Farnham Waters, sec. 291, and cases cited.

"Constitutional provisions against the granting of monopolies do not apply to the granting of such franchises, and the grant may be exclusive at the pleasure of the Legislature." 2 Farnham, sec. 305, citing *Charles River Bridge v. Warren,* 7 Pick., 344, and numerous other cases. The power to establish ferries "is one of the attributes of sovereignty which is to be exercised by the Legislature itself, or by any agent whom that body may authorize to act for it" (*Carrow v. Toll Bridge Co.,* 61 N. C., 119), the opinion going on to quote that under Revised Code, ch. 101, sec. 30, other ferries were forbidden within 10 miles (now 5 miles, Code, 2049), unless authorized by the county court (now county commissioners), which it can do, "no matter how near the former, when the public convenience may require, and of that the county court is the sole judge. *But this power of the court is necessarily subordinate to that of the Legislature, and wherever that body prohibits the grant of the franchise of a ferry or toll bridge by the county court at any particular place, it puts an end to the court's power of granting such franchise at that place.*"

The only remaining question is, whether the provision of section 3 of the act making it "unlawful for any person to establish any other ferry within 1½ miles" was a restriction upon the general power conferred

upon the county commissioners under Code, sec. 2014, "to appoint and settle ferries." If it was not, then the provision was a vain thing, for under Code, sec. 2049, no one could establish such ferry, without
(222) permission of the county commissioners, within 5 miles. The Legislative prohibition of any other ferry within a mile and a half of this ferry, established by itself, was a prohibition of any ferry by any authority, or it meant nothing. That the statute meant this is recognized in the above-cited case and in all others construing special acts, creating ferries. In *Robinson v. Lamb,* 126 N. C., at pp. 495, 497, where there was a similar special act, passed in 1873-4, conferring the right of a ferry upon the heirs of Samuel D. Lamb for thirty years, with a similar provision that "no other bridge, boat, or ferry shall be established within 3 miles of the one allowed by said act," the Court said: "The provision of the Legislature of 1873-4 that other ferries or bridges would not be allowed within 3 miles thereof was simply legislation restricting the general power of the county commissioners given by The Code, sec. 2014 (and previous legislation there summed up), to authorize public ferries wherever they saw fit."

That public ferries are not monopolies, but franchises granted in consideration of public services *(Smith v. Harkins,* 38 N. C., 619), and that there is the correlative duty devolved upon the grantees, as common carriers, to serve the public, and under public regulations of their charges and duties, has been uniformly held from the earliest times and in all jurisdictions. 2 Farnham, *supra,* sec. 283; *Taylor v. R. R.,* 49 N. C., 281, in which last the exclusive privileges of ferrymen are discussed by *Pearson, J.* No case has ever denied this. Such rights existed at common law. 3 Blk. Com., 219. There has been, at times, a contest whether, when the grant has been by special act and contained exclusive privileges, such grant was a contract or merely a revocable franchise. In *Bridge Co. v. Comrs.,* 81 N. C., 491, where the special act was passed prior to the Constitution of 1868, the Court doubted that the General Assembly had the power by an irrevocable grant or contract to deprive the State in any case of the benefit of increased
(223) facilities for transit over its public waters when required by an increase in trade and business, and held that an exclusive right of ferry, for 3 miles on each side of the ferry granted (which was opposite a large town), was revocable by the Legislature, else it would be a monopoly forbidden by the Constitution. To same purport, *McRee v. R. R.,* 47 N. C., 186. In *Robinson v. Lamb,* 126 N. C., 497, the Court held without any restriction that all special acts establishing ferries were "simply licenses, revocable at the will of the General Assembly," and not contracts. *Bridge Co. v. Bridge Co.,* 138 U. S., 287; *Williams v. Wingo,* 177 U. S., 601.

The General Assembly by the statute here in question, chapter 222, Laws 1895, conferred upon Poindexter & Co. the exclusive right to operate a ferry at Donnaha for thirty years, and provided, "It shall be unlawful for any person to establish any other ferry within 1½ miles" thereof. The county commissioners certainly could not make it lawful for any person to do so contrary to the statute. As to this matter, the General Assembly exercised its own judgment as to what the public interests required, and to the extent of this act abridged the general powers conferred upon the county commissioners. Such act is subject to repeal by any subsequent Legislature, but not by the board of county commissioners of Yadkin. Had the county commissioners, instead of the Legislature, granted the franchise to Poindexter & Co., it would have been exclusive (*Broadax v. Baker,* 94 N. C., 678) for 5 miles on each side, instead of 1½ miles, and would have been for all time instead of thirty years, unless and until a subsequent board of county commissioners (or an act of the Legislature) should discontinue it or establish another at a shorter distance. *Bridge Co. v. Flowers,* 110 N. C., 381. The only object of taking a legislative grant limited to thirty years and restricted to 1½ miles was protection against interference by the county commissioners, under their powers under the general statute, (224) Code, secs. 2014, 2038, 2049. While the act conferring a grant upon Poindexter & Co. specifies that the ferry "shall be in all respects a public ferry, and subject to the general law, rules and regulations governing such ferries," this could not mean to negative the grant by subjecting its duration or its distance from competing ferries to the general law. Those were the sole benefits sought for and conferred by the special statute, and are subject to repeal by the power that conferred them, but by that authority alone. The county commissioners had no jurisdiction to entertain the petitioners' proceeding to establish another ferry within the distance prohibited by the act of the Legislature, within the time prescribed by it.

Action dismissed.

Cited: Reed v. R. R., 162 N. C., 360; *Power Co. v. Power Co.,* 175 N. C., 677; *Kornegay v. Goldsboro,* 180 N. C., 451.

FISHER v. TRUST COMPANY.

(Filed 2 May, 1905.)

Pleadings—Joinder of Causes of Action and Parties—Demurrer.

1. A complaint which alleges that one of the defendants, W., conceived the design of defrauding plaintiff's intestate out of his property, and continuously pursued that design through a series of transactions from 1889 till intestate's death in 1903, the steps taken by W. to so defraud intestate being alleged, and the fraudulent connection with him of all those who allowed W. to involve them in his scheme being stated, and such persons so participating being made codefendants and asked to surrender so much of intestate's property as they fraudulently received, either for their own benefit or for that of W.: *Held*, that a demurrer for misjoinder of causes of action and of parties was properly overruled.
2. If the grounds of the complaint arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, it is not multifarious.

CONNOR and WALKER, JJ., dissenting.

WALKER, J., concurs in the dissenting opinion.

(225) ACTION by Isabella Fisher, administratrix of B. J. Fisher, and others, heirs at law of B. J. Fisher, against Southern Loan and Trust Company and others, heard by *Shaw, J.*, at February Term, 1905, of GUILFORD. From a judgment overruling the demurrer, the defendants appealed.

Brook & Thomson, King & Kimball, and E. J. Justice for plaintiffs.

W. P. Bynum, Jr., Scales, Taylor & Scales, and Pou & Fuller for defendants.

CLARK, C. J. The defendant demurred for misjoinder of causes of action and for misjoinder of parties, and appealed from a judgment overruling a demurrer.

Upon examination of the complaint, it differs somewhat from the recitals in the demurrer, and the first question is, What are the matters set forth as the plaintiffs' cause of action? *Parish v. Sloan*, 38 N. C., 610. They are, in substance, that in 1888 the defendant E. P. Wharton met B. J. Fisher, an Englishman who had not been long in this country; that Fisher was not a practical man and was of a convivial turn; that Wharton conceived the design of cheating and defrauding Fisher out of his property, and continuously pursued that design through a series of transactions from 1889 till the death of Fisher in 1903; the numerous steps taken by Wharton to cheat and defraud Fisher out of his property

are alleged in the complaint, and the fraudulent connection with him of all those who allowed Wharton to involve them in his scheme is stated, and such persons so participating are made parties to the action, and they are asked to surrender so much of Fisher's property as (226) they fraudulently received, either for their own benefit or for that of Wharton. Wharton, it is alleged, acted in person in this matter throughout, and also through the Southern Loan and Trust Company (formerly the Wharton-Worth Real Estate Company), a corporation under his control, and which was by his influence made Fisher's agent and representative with him. The steps taken to effect his purpose to cheat and defraud Fisher of his property, as alleged in the complaint, were: (*a*) that as agent for Fisher he sold the property in Greensboro known as the Benbow Hotel to a corporation in which he was interested, for less than its value, and immediately sold his interest at a profit of $1,000; (*b*) that Wharton caused the Southern Loan and Trust Company to lend to Fisher $8,600 when the latter was in financial distress and great need of money, with the view of acquiring the additional influence of a creditor over him; (*c*) that he took advantage of the fact that Fisher needed and was forced to have a large sum of money, and of the fact that Fisher had confidence in him as his trusted and confidential agent, and procured a contract by which the Southern Loan and Trust Company was to be the exclusive agent of B. J. Fisher, and sell all of Fisher's land at the unusual commission of 33 1-3 per cent, and that Fisher could not sell his property save through this company; (*d*) that he caused the Southern Loan and Trust Company to lend Fisher $36,000, which he was in great need of, with the purpose of tightening his coils about him; and, in addition to the exclusive right of sale of Fisher's property, further encumbered this property, which was worth from $150,000 to $200,000, by a deed of trust for $36,000; (*e*) that he falsely represented to Fisher that the Southern Loan and Trust lot and building were worth $60,000, when they were not in fact worth over $30,000; that it was a paying investment, and that the prospects of its greatly increasing in value were good, and that (227) he could and would sell the property for $75,000, when he knew all this to be untrue; and that by reason of his influence over him on account of the fact that he was Fisher's agent and trusted by him, and by his influence over him as a creditor, and by these false representations, he procured Fisher to enter into a pretended contract to purchase the Southern Loan and Trust Building and lot, and Fisher understood, and Wharton knew he had caused him to understand, that it was not a purchase, but that Fisher was taking the title to the property, and was to execute his note for $60,000, with the understanding that the note should not be paid until the property was sold by the Southern Loan and Trust

Company for $75,000, and that in the meantime the note of $60,000 should draw interest at 4½ per cent, and the Southern Loan and Trust Company should guarantee that $2,700, the amount of the interest on the said note, should be paid to Fisher as a net income from the building; and that, in order to perpetrate this fraud, Wharton and the Southern Loan and Trust Company bribed Fisher's attorney by paying him $200 to deceive his client, and thereby procured him to advise his client that the contract with regard to the sale of the Southern Loan and Trust building, which is attached as Exhibit "A" to the complaint, accomplished what it was understood between Wharton and Fisher should be accomplished, when it was well known to Wharton and the Southern Loan and Trust Company and Fisher's attorney, but was not known to Fisher, that it did not carry into effect the real contract as Fisher understood it, and as Wharton and the Southern Loan and Trust Company had represented it; (*f*) that with a view of placing Fisher's property out of his hands, and defrauding him of it, so that it could not be reached by him, Wharton and the Southern Loan and Trust Company sold to certain insurance companies, of which Wharton was the vice president and one of the active managers, and of which the other
(228) officers of the Southern Loan and Trust Company were also active managers, Fisher's property for much less than its real value, with the full knowledge by the grantees of the fraud being practiced, thereby violating the duties which Wharton and the Southern Loan and Trust Company owed to Fisher, thus taking advantage of Fisher's confidence in them as his agents, and using their position as creditors to coerce him; (*g*) that Wharton and the Southern Loan and Trust Company, by taking advantage of this same situation, and by the same breach of faith, by fraud, and by coercion when it became necessary, caused, renewals of the deeds of trust to be made from time to time; and by means of the same fraud and, during the latter years of Fisher's life, more often by coercing him as their debtor, caused Fisher to execute papers, renewal notes, and renewal deeds of trust to the Southern Loan and Trust Company, and finally to one of the defendant insurance companies, it having full knowledge of the fraud which had been practiced on Fisher from the beginning, and the fraudulent purpose of the Southern Loan and Trust Company and Wharton in having the renewal deeds of trust executed for the benefit of the said insurance company.

The alleged fraud and improper conduct of Wharton and the Southern Loan and Trust Company, and his dealings with Fisher and the other defendants with the design of cheating Fisher out of his property, which purpose, it is charged, was finally accomplished, is all told in the complaint as a connected story. If the fountain is tainted, so likewise, is the water that flows from it into all the streams. Wherever Wharton

placed Fisher's property, which he wrested from him by fraud and corruption, Fisher's widow and children can go and compel those having it, with knowledge of the fraud, to surrender it to them.

As to the alleged misjoinder of causes of action, there are many precedents overruling the demurrer on this ground, in cases like this, where the objection made was that separate and distinct causes of action were stated in the complaint. Among them is *Bedsole v. Mon-* (229) *roe,* 40 N. C., 313. In that case Elizabeth Ryals made herwill, bequeathing and devising certain property to various people, and among other things giving to her brother, Duncan Bedsole, and a friend, Malcomb Monroe, a negro named Dinah, certain other slaves and certain land, and making Monroe and Bedsole the beneficiaries of a residuary clause, and appointing them executors. Upon the death of the testatrix the will was probated by the executors. The bill was filed in 1848, and states that the plaintiff was ignorant and unlearned, and that the defendant was a shrewd business man, and it was agreed that the defendant should manage the estate, and that he took into his possession all the property, but failed to return an inventory, and that the defendant practiced "upon the ignorance of your orator, through fraud and misrepresentation induced your orator to make to the defendant a conveyance of all his interest in the said land," specifically devised, about June, 1847, the defendant representing that to be the will of the testatrix, and that this was false. The bill further states that the residue of the estate was considerable, and that the defendant had failed to pay off the pecuniary legacies. The bill seeks to set aside the deed as fraudulent and have an accounting of the personal estate, and require all legacies to be paid and the residue to be divided between the plaintiff and defendant, and that the negroes should be divided.

Ruffin, C. J., delivering the opinion, which held that the principle against misjoinder of causes of action cannot apply under certain circumstances, said: "It is obvious that the principle cannot apply when two things concur. First, when the different grounds of suit are wholly distinct, and, second, when each ground would, as stated, sustain a bill. If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing, and tending (230) to one end; if one connected story can be told of the whole, then the objection cannot apply." The Court held that the objection of the defendant there was not valid.

In *Hamlin v. Tucker,* 72 N. C., 502, the Court held that the plaintiff could maintain an action for (1) the harboring and maintaining of his wife: (2) the conversion of certain personal property to which he was entitled *jure mariti;* (3) inducing his wife, while harbored and main-

tained, to execute to the defendant a deed for land, under which he had received the rents; (4) for converting to the defendant's own use certain mules, farming utensils, etc., set out in the marriage settlement executed by the plaintiff and his wife. The Court held, *Pearson, C. J.*, delivering the opinion, that there was not a misjoinder of causes of action and that the case was covered by C. C. P., sec. 126, which is now section 267 of The Code, and said: "In our opinion the case is embraced by C. C. P., sec. 126. The plaintiff may unite in the same complaint several causes of action, whether they be such as may have heretofore been denominated legal or equitable, or both, when they all arise out of the same transaction, or transactions connected with the same subject of action, the purpose being to extend the right of the plaintiff to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, arising out of the same *subject* of action, so that the court may not be forced 'to take two bites at a cherry,' but may dispose of the whole subject of controversy and its incidents and corollaries in one action. Should the action become so complicated and confused as to embarrass the court in its investigation, the remedy furnished is, that the court may *ex mero motu* refuse to pass upon matters not germane to the principal subject of action."

The same principles apply in cases where there are more than one defendant, as will be seen from the authorities which follow; and, (231) in discussing the question as to whether there is a misjoinder of parties, the cases cited below are also authorities against the proposition that there is a misjoinder of causes of action, as will be seen from the quotations. In *Gaines v. Chew,* 2 How. (U. S.), 619, a bill was filed against the executors of an estate and all those who purchased from them, and the Court held that the demurrer, for multifariousness, should be overruled. *Mr. Justice McLean,* in delivering the opinion of the Court, said:

"The complainants have made defendants the executors named in the will of 1811 and all who have come to the possession of property, real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death. That a bill which is multifarious may be demurred to for that cause is a general principle; but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance."

After citing authorities, and quoting from them, the Court proceeds:

"The bill prays that the defendants, Relf and Chew, may be decreed to account for moneys, etc., which came into their hands as executors under the will of 1811, and that the other defendants who purchased from them real and personal property may be compelled to surrender the same, and account, etc., on the ground that they had notice of the fraud of the executors."

Further on, the Court, in speaking of the defendants, says: "They have a common source of title, but no common interest in their purchases. And the question arises, on this state of facts, whether there is misjoinder or multifariousness in the bill which makes (232) the defendants parties."

Further on, the Court says: "There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill.

"The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to the codefendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense."

The Court holds that there is not a misjoinder of causes of action, as the defendants claim under a common source, under the will referred to. The Court held that one defendant's claim under a different source was not properly joined, and ordered an amendment of the bill in that respect.

In *Oliver v. Piatt,* 3 How. (U. S.), 333, *Mr. Justice Story* delivering the opinion of the Court, used this language: "We are of the opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions that entire justice could scarcely be done, at least conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection, that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint."

In *Parish v. Sloan,* 38 N. C., 610, the plaintiff filed a bill alleging that Dixon Sloan, one of the defendants, was indebted, and executions were issued against him, and certain negroes were sold, and some of them were brought by the defendant Faison and the remainder by Daniel C. Moore; and on the same day Dixon Sloan sold other (233) slaves to Faison, upon the agreement that Faison should convey the negroes purchased at the sheriff's sale to David D. Sloan, in trust for the wife of Dixon Sloan during her life, and after her death to her

children, the other defendants. It was alleged this transfer was made in fraud of creditors, etc. It was further alleged that John C. Moore was security for Dixon, and held a mortgage from Sloan on several negroes to secure him, and that, later, Dixon Sloan mortgaged to John C. Moore other negroes to secure another creditor. It is then alleged that all the debts secured by the mortgage were paid by sale of some of the negroes conveyed to John C. Moore. The bill prays that the debts due plaintiff be paid out of the negroes mortgaged to John C. Moore, and if they are not sufficient, then out of the negroes conveyed to David D. Sloan in trust for Mrs. Dixon and children.

There was a demurrer filed to this bill upon the ground that it was multifarious, in that the slaves sold by Faison, sheriff, are in no way connected with the mortgage of the slaves to Moore. *Nash, J.*, overruling the demurrer, says: "But when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights, yet they may all be charged in the same bill, and a demurrer for that cause cannot be sustained."

Glenn v. Bank, 72 N. C., 626, was an action against an insolvent bank and the stockholders therein, and also against certain trustees. A demurrer was filed, upon the grounds that it was sought (1) to recover against the bank on notes; (2) to set aside a deed in trust, alleged to have been made by the bank to ascertain trustees: (3) to recover against certain stockholders, upon the ground that the bank was insolvent; and that each of said causes of action was a separate and distinct one. *Pearson, C. J.*, in delivering the opinion, says: "We incline to the opinion that the very liberal mode of procedure adopted by C. C. P., (234) in the sections referred to in the plaintiff's brief, meets the difficulties raised by the demurrer; and without deciding the points definitely, but allowing the defendants to have the benefit thereof at the trial, in analogy to the equity practice, by which the plea is overruled, but 'the equity is reserved until the hearing,' we have come to the conclusion that there was no error in the judgment of his Honor by which the demurrer is overruled and the defendants are required to answer."

In *Young v. Young*, 81 N. C., 91, it was alleged in the complaint that Seth Young, in 1856, permitted B. S. Young, his son, to take certain land as an advancement; and the latter sold it, with the approval of his father, to William Hutchins; and the former delivered his chain of title to the purchaser, and agreed to convey the land directly to him, and the purchase-money was to be paid to B. S. Young, the son, with the consent of the father. Subsequently, Ann Young, a daughter of Seth Young, married Josiah Young, who agreed to purchase said land from Hutchins for $225; and the said Seth Young agreed by parol to convey the land

to Josiah Young when the purchase-money was paid; that Josiah Young paid Hutchins the money and the latter delivered to the former the grants and *mesne* conveyances, and Josiah Young took possession of the land, but died before Seth Young, leaving surviving the plaintiff, Richmond Young, his only heir at law, and his widow, Ann Young, who returned to her father, Seth Young, who took possession of the lands and obtained possession of the grants and deeds aforesaid; that afterwards Seth Young, in violation of his parol agreement, and in fraud of the plaintiff's rights, conveyed the land of Zephaniah Young, who pretended to purchase the same, but did so with knowledge of the facts alleged; that the defendants Zephaniah Young and Seth Young fraudulently refused to convey the land, to plaintiff's great damage, to wit, $2,000; and that they and Hutchins refused to pay the plaintiff the sum of $225, the price paid for the land by Josiah Young, the plain- (235) tiff's father, and interest; that the defendant Zephaniah Young wrongfully withholds the possession of the land from the plaintiff, to his damage in the sum of $1,000. The prayer asked is (1) that Zephaniah Young be declared a trustee for the plaintiff's benefit, and compelled to convey the land to him, and for $1,000 damages; (2) for a decree that the defendants shall pay the plaintiffs the sum of $225 and interest.

There was a demurrer, because several causes of action were improperly joined; the one being to declare Zephaniah a trustee, and another a money demand against Hutchins and others for the $225 and interest, and a third for the recovery of real property, with damages for withholding it.

The Supreme Court, through *Ashe, J.*, said, overruling the demurrer:

"We find it held that if the grounds be not entirely distinct and unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealings, and all tending to one end; if one connected story can be told of the whole, the objection of multifariousness does not arise. Story Eq. Pl., sec. 271; *Bedsole v. Monroe,* 40 N. C., 313. And if the objects of the suit are single, and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject. *Salvidge v. Hyde,* 5 Mad. Ch., 138. The same doctrine was laid down by *Chancellor Walworth* in *Boyd v. Hoyt,* 5 Paige, 78. And in *Whaley v. Dawson,* 2 Sch. and Lef., 370, it was held that in English cases, demurrers, because the plaintiff demanded in his bill matters of distinct nature against several defendants not connected in interest, have been overruled, where there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct; and so it (236)

was held in *Dimmock v. Vixby,* 20 Pick., 368, that where one general right is claimed by the plaintiff, although the defendant may have distinct and separate rights, the bill of complaint is not multifarious. All of the cases were decided upon the principle of preventing a multiplicity of suits, which was the object of the 'clause' under consideration.

"Applying the principles enunciated in the cases cited to our case, we are of the opinion the causes of action in the complaint were properly united, and the first ground of objection taken by the demurrer cannot be sustained."

In *Bank v. Harris,* 84 N. C., 206, the plaintiff alleged that the defendant was indebted to it in the sum of $7,000, evidenced by two promissory notes, for money loaned under a contract prior to 3 February, 1874; that on 3 February, 1874; 4 May, 1874; 27 July, 1875, he made deeds to the respective defendants—Marsden Bellamy, Henry P. West, and John D. Bellamy—of separate lots of land, with false recitals of money considerations, with an understanding and agreement with each that they should reconvey to his wife, Julia Harris, which has been carried into effect, and with intent to defraud his creditors, and that he had fraudulently paid off $2,600 of judgments, and had them assigned to his wife; and that he owes debts exceeding $50,000, which all his property is insufficient to pay. The prayer is for judgment on the debts and that the several deeds be declared void.

There was demurrer because of misjoinder of causes of action and of parties, which was overruled. The Court, *Smith, C. J.,* delivering the opinion, citing *Glenn v. Bank,* 72 N. C., 626, said:

"It was there held to be competent to proceed against the insolvent debtor bank, and against the stockholders upon their individual habilities under the charter, in the same action. The last objection
(237) is to the joining of the several defendants, who are connected with different transactions, and are without any community of interest, and no combination among them is charged. The essential unity of the proceeding consists in the fact that the debtor's own property is alone sought to be appropriated to his own debt. If the conveyances are fraudulent, as for this purpose the demurrer admits, the title remains in Harris, and never was divested out of him. The aid of the court is asked to remove a cloud upon the title, by declaring the deeds void, so that the property may be sold under the direction of the court, and bidders be induced to give value for it. The defendants, other than Harris, are made parties because they by their deeds profess to have had an interest in the subject-matter, and section 61 of The Code requires they should be, in order that they may be concluded by the result, and the adjudication be final.

"These general views, we think, are in accord with the current of decisions in respect to the construction of the provisions of The Code, whose predominant purpose is to make one proceeding adjust and settle all controversies about its subject-matter. *Hamlin v. Tucker,* 72 N. C., 502; *Young v. Young,* 81 N. C., 90, and the authorities therein cited and reviewed."

In *King v. Farmer,* 88 N. C., 22, the complaint alleged that the plaintiffs, Mitchell King, Andrew Johnson, the defendant Farmer, and others, on 20 September, 1847, purchased a site for a hotel, under an agreement that one should be erected and be under charge of the defendant Farmer as long as the members of the joint stock company to be formed should agree, and that in the meantime he should have the privilege of buying their shares. Shares of the par value of $100 were subscribed for by the members of the joint stock company, the land was purchased, and a deed was executed to the plaintiffs King and Johnson, in trust for the shareholders, upon which a hotel was erected, and Farmer took possession as lessee, and has continued to hold possession, (238) appropriating the rents and profits to his own use. That in 1853 the original parties to the agreement, and the defendant Aiken, who was admitted as a shareholder, contracted with Farmer to sell him the property for $13,500 (less $1,608, the amount paid by Farmer), and the purchase price was to be paid in installments within three years, with interest, the title to be retained until the purchase-money was paid. That Farmer paid the first installment of $3,000, and has purchased the shares of some of the holders, but still owes part of the purchase-money and rents, the amount of which the plaintiffs are unable to ascertain. That Johnson is dead, and his representatives are parties plaintiff, and the other shareholders and the representatives of such as are dead are defendants.

The prayer is for (1) an adjudication of the rights of the plaintiffs and defendants: (2) an account of the purchase-money yet due, and to whom it should be paid; (3) an account of the rents and profits, and to whom this should be paid; (4) that if Farmer cannot be compelled to pay the amount found due, then for a sale of the premises, that the trust be closed, and the trustees discharged.

There was demurrer by Farmer, upon the grounds (1) that the other defendants were improperly joined with him in an action for specific performance; (2) that there was misjoinder of causes of action in that it is sought to have specific performance of the contract for the purchase of land, and to recover for rents and profits thereon, and against the defendants for a settlement of the affairs of the joint stock company.

The Court through *Judge Ashe,* who delivered the opinion, says: "But the several causes of action are such as (as will be hereinafter

(239) shown) may be and should be united, not only under the provisions of The Code, but according to the practice in former equity proceedings."

Again, the Court says: "As to the cause assigned for misjoinder of causes of action: Section 126 of The Code provides that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of the same transaction, or transactions connected with the same subject of action; and subdivision 7 of the section requires that the causes of action 'must affect all the parties to the action.'

"It was evidently the purpose of the Legislature, in enacting this section, to prevent a multiplication of actions, by uniting in the same action different causes of action, where they might be joined without subjecting defendants to the trouble and expense of making different and distinct defenses to the same action.

"No general rule has been or can be adopted with regard to multifariousness. It is most usually a question of convenience, in deciding which the courts consider the nature of the causes united, and if they are of so different and dissimilar a character as to put the defendants to great and useless expense, they will not permit them to be litigated in the same record; but where the different causes of action are of the same character, and between the same parties, plaintiffs and defendants, and none other, and no additional expense or trouble will be incurred by the joinder of the several causes, the courts, in the exercise of a sound discretion, on the ground of convenience, usually refuse to entertain an objection to the joinder."

Again, the Court says: "In our case the agreement between the parties to form a joint stock company to build a hotel, to purchase land for its site, the fact of purchase, the erection of the hotel, the lease first, and then the sale to Farmer—all constitute a series of transactions

(240) connected together and forming one course of dealing." The demurrer was overruled.

In *Heggie v. Hill,* 95 N. C., 303, the action was brought to recover of the defendants Hill and Watkins, in one aspect of the case, the rents described in the complaint; and, in another, the recovery from the Building and Loan Association the surplus of the proceeds of the sale of the same land, after satisfying the debt. The defendants demurred upon the ground that separate and distinct causes of action were united in one complaint against the Building and Loan Association, and also against the other defendants, which have no connection with each other.

The Court, through *Judge Ashe,* said, overruling the demurrer: "The Code, 267, subdiv. 1, provides, 'that causes of action may be joined when

they arise out of the same transaction or transactions connected with the same subject of action.' We do not think this section of The Code makes any substantial change in the rules of practice which obtained before the adoption of The Code, in the courts of Equity, with regard to multifariousness. *Whatever effect it may have had has been to enlarge the right of uniting in one action different causes of action.*"

Again, quoting Bliss on Code Pleading, sec. 110, the Court says: "When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause."

Again, quoting section 126 of Bliss, the Court says: "Not only under this class may all causes of action be united in one proceeding, that arise out of the same transaction, but also those that arise from different transactions, provided they are connected with the same subject of the action."

In *Benton v. Collins,* 118 N. C., 196, the defendant was sued for damages by reason of an assault made on plaintiff, and it was alleged that Collins, the defendant, had fraudulently conveyed (241) his property to the other defendants, and the plaintiff asked for judgment against Collins for damages, and against Collins and the others to set aside the conveyance as fraudulent. The defendants, other than the trustee in the deed of trust from Collins, demurred upon the ground that a cause of action arising out of a tort was joined with the action to set aside the deed from Collins to his codefendant as fraudulent, and, further, because the defendant sought to be subrogated to the surety of the defendant Collins' bond in arrest and bail proceeding, alleging that the surety had been indemnified by an additional conveyance of Collins' property. The Court overruled the demurrer.

In *Solomon v. Bates,* 118 N. C., 311, the plaintiff, a creditor of a bank, brought an action against the bank directors for gross negligence, whereby plaintiff was injured, and also because of the fraud and deceit of the directors in making false statements and misrepresentations, which induced the plaintiff to deposit with the bank, and asked that the corporation might also be joined with the defendants or not, as the plaintiff elected. There was a demurrer upon the ground that the several defendants were charged with an intent to defraud the public and the plaintiff, by holding out the Bank of New Hanover as solvent, when no conspiracy among the defendants was alleged.

The Court held that, "While breach of a duty imposed by statute or express contract is *ex contractu,* the breach of a duty imposed by law arising upon a given state of facts is a *tort.*" Again, the Court said: "There is the same 'subject of action' throughout, i.e., the plaintiff's loss of his deposit. If this ground of demurrer had been well founded, the

(242) remedy would have been, not to dismiss, but simply to divide the action, which would have caused a multiplicity of actions, with increased costs to the parties and the public as well, without any benefit, apparently, to the defendants."

In *Cook v. Smith,* 119 N. C., 350, the plaintiff brought an action against the defendants, alleging that the defendants, sheriff and sureties on his bond, were liable, and that a person who directed or procured such levy and sale to be made, together with those on an indemnity bond, which said person had given, were liable. There was a demurrer because there was an alleged misjoinder of causes of action. The Court held that there was no valid objection upon the ground of a misjoinder, and said in part:

"In the full discussion of this question at last term, in *Benton v. Collins, supra,* the authorities are reviewed, and it is pointed out that when the causes of action arise out of the same transaction they may be joined, though one should be for a *tort* and the other in contract; and such seems the manifest intention of section 267 of The Code. Suppose the demurrer for misjoinder were sustained, the Court could merely order the action divided into two (Code, sec. 272; *Pretzfelder v. Ins. Co., supra*), and then on the trial of each of those actions the same witnesses would be introduced, the same transaction proved, and the same questions of liability would arise, thus doubling the time and expense of the litigation, without any possible benefit to any one. It is to prevent this very state of facts that The Code, sec. 267, expressly provides that 'the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they arise out of (1) the same transaction, or transactions connected with the same subject of action.' "

In a still more recent case, *Daniels v. Fowler,* 120 N. C., 16, the Court cites nearly all of the above cases, giving brief extracts, and sums up in the language of *Ruffin, C. J.,* in *Bedsole v. Monroe,* 40 N. C., 313, that if the grounds of the complaint "arise out of one and the

(243) same transaction, or a series of transactions forming one course of dealing, and all tending to one end: if one connected story can be told of the whole," it is not multifarious. In this opinion we have gone over the same ground, only giving at length the facts in each case, and longer extracts from the same opinions, for which we are indebted to the plaintiff's brief. The three latest cases above quoted are cited with approval by *Walker, J.,* in *Reynolds v. R. R.,* 136 N. C., 347.

The above authorities are clear, full, and explicit. It is unnecessary for us to reiterate what has been so well said therein. The joinder of causes and parties in this action is fully justified by the precedents and

is in the interest of a full and fair investigation of the fraud charged. In overruling the demurrer there was

No error.

CONNOR, J., dissenting: As far back as 1879, in *Young v. Young,* 81 N. C., 91, *Mr. Justice Ashe* said: "While it was the object of the Legislature, by adopting section 126 of The Code (now section 267), to avoid a multiplicity of suits and prevent protracted and vexatious litigation, the first subdivision of the section has given rise to more unprofitable litigation and fine-spun disquisition upon its construction than any other section, not excepting section 343 (590)." After reviewing a number of decisions, he concludes: "And so complex, uncertain, and defiant of logic has the subject proved that the courts have failed to derive any aid from even the 'reason of the thing,' that *dernier* resort of some judges when all other resources have failed." With this uninviting introduction to the subject, one may well hesitate to enter upon its discussion. With all possible deference to the judges, an examination of the cases, since the words quoted were written, does not show any very marked progress in placing the subject on any satisfactory basis. A perusal of the very full briefs of counsel (244) in this case only tends to illustrate the truth that judges are not unlike doctors in their proverbial tendency to differ. It is not in this case a matter of very great importance whether the demurrer be sustained or overruled, and the usual reason which is advanced for writing dissenting opinions, that the decision of the Court is out of line with the precedents, does not exist, because it must be conceded, I think, that each brief contains decisions which fully sustain the respective views. If we attempt to follow the numerous decisions in the Code States, we will soon find ourselves in a labyrinth of ever-crossing paths leading to confusion worse confounded.

I cannot concur with the opinion of the Court, not because I think it is unsupported by authority, but because I think the weight of authority and the "reason of the thing" the other way, and that it is productive of confusion and probable injustice. A few general elementary propositions appear to be practically agreed upon. "A claim against two or more defendants cannot be properly united in the same bill with a separate claim against one only. Beach Mod. Eq. Pr., sec. 421. Causes of action which may be joined must affect all parties to the action. Therefore, when a complete determination to a cause of action, joined with others, requires parties not necessary to the other causes of action, held to be demurrable." *Logan v. Willis,* 76 N. C., 416. *Rodman, J.,* says: "The fifth cause of action is misjoined with the

others." C. C. P., sec. 126, says that "The causes of action which may be joined *must affect all the parties to the action.*"

"The defendants in each statement must be the same; *that is, the parties must be affected by each cause of action,* and it is a misjoinder (in equity pleading it is called multifariousness) to charge certain persons as respects one cause of action, and in another statement
(245) bring in another party or show another party is interested, or that some of the necessary parties in the former statements are not interested." Bliss Code Pleading, 123. If these propositions are correct, I am unable to see any "legal affinity" between the cause of action alleged against the Southern Loan and Trust Company and Wharton based upon alleged dealings with the plaintiff's intestate resulting in the conveyance to a trustee for the Trust Company which it is sought to cancel, and the cause of action against Wharton alone for alleged misconduct in the sale of the Benbow Hotel, in which, so far as I am able to perceive, the Trust Company has and can by no possibility have the most remote interest. A careful examination, with the aid of very able briefs and oral arguments, fails to discover any other connection between Wharton's dealing with Fisher in respect to the Benbow Hotel and the Trust Company building and the contracts relating thereto, than that which arises from the fact that two of the persons are parties to one and three of them to the other transaction. No judgment upon or in regard to the sale of the Benbow Hotel could possibly affect the Trust Company—therefore, by the test which this Court in *Logan v. Wallis, supra,* applied, they should not be joined; that the judgment "must affect all the parties to the action." While it would not be profitable to undertake to distinguish the many cases cited in the plaintiff's brief, and relied upon by the Court, from the one before us, it may be noted that in *Gaines v. Chew,* 2 How. (43 U. S.), 619, the Court held that in respect to one defendant there was a misjoinder, because she claimed under another source.

Mr. Justice McLean says in respect to another objection: "In the rendition of this account the other defendants have no interest, and such a matter, therefore, ought not to be connected with the general objects of the bill."

(246) In *Benton v. Collins,* 118 N. C., 196, the primary right sought to be enforced against Collins was redress for personal injury. It was alleged that for the purpose of obstructing the enforcement of this right he had made a fraudulent conveyance to the other defendants of his property. The joinder of the two causes of action was properly sustained. The question is thus stated by *Smith, C. J.,* in *Bank v. Harris,* 84 N. C., 206: "Why should a plaintiff be compelled to sue for and recover his debt, and then to bring a new action to enforce payment

out of his debtor's property, in the very court that ordered the judgment?" When the mind accepts the truth that the ultimate relief which the law gives to one sustaining a personal injury is the same as that given for failure to pay a debt—a final process against the defendant's property—it is clearly seen that there is no reason why obstruction to such relief may not be removed by the same judicial procedure in the one case as in the other. The proposition is stated: "When several persons, although unconnected with each other, are made defendants. a demurrer will not lie if they have a common interest centering in the point in issue in the cause." *Heggie v. Hill,* 95 N. C., 303. This is equally applicable to the decision in *Daniels v. Fowler,* 120 N. C., 14; *Hamlin v. Tucker,* 72 N. C., 502. It is said, however, that "if one connected story can be told of the whole, then the objection cannot apply." This phrase has been used by many eminent equity judges and, when kept within proper limitations, is a happy one. Happy phrases and epigrams, like analogies, may sometimes be overworked. In *Bedsole v. Monroe,* 40 N. C., 313, in which the expression is used by *Ruffin, C. J.,* there was but one defendant. The *Chief Justice* expressly notes the difference in the practice sustaining demurrers for multifariousness where two defendants are brought in and where only one is before the court. A man's entire business career is, in a certain sense, one connected story. Each part is interlinked with and in a measure dependent upon that which precedes it. Certainly, it is in no such sense that all persons with whom he deals or has business rela- (247) tions are correlated for the purpose of being joined in one civil action in courts of justice. There must be some "legal affinity" between persons and transactions to entitle him to bring them into court yoked together. A failure to observe this elementary principle in the law of procedure destroys that reasonable certainty and simplicity in the administration of justice which is so desirable, and produces confusion, uncertainty, and injustice. All reforms are endangered and often defeated by their advocates who, in turning their backs upon the past, rejecting its teachings based upon experience, plunge into unknown and untried fields, causing to come about the very evils which they vainly suppose they are avoiding. Any one at all conversant with judicial proceedings knows that substantive rights and liabilities are indissolubly connected with remedial rights and liabilities. Without further discussion of a subject which is not indebted to either text-writers or judges to any very great extent for clarification, I content myself with saying that I am unable to see in what way the several causes of action set forth in the complaint can be said to be "the same transaction or transactions connected with the same subject of action." If the plaintiff, as The Code requires, had stated separately the two or

more causes of action, the absence of legal relationship would have been more transparent. I think that the demurrer should have been sustained and such order made as The Code provides.

Cited: Oyster v. Mining Co., 140 N. C., 137; *McGowan v. Ins. Co.,* 141 N. C., 368, 9; *Settle v. Settle, ib.,* 564; *Hawk v. Lumber Co.,* 145 N. C., 50; *Ricks v. Wilson,* 151 N. C., 50; *Quarry Co. v. Construction Co., ib.,* 351; *Worth v. Trust Co.,* 152 N. C., 244; *Sherrod v. Dawson,* 154 N. C., 527; *Chemical Co. v. Floyd,* 158 N. C., 462; *Ayers v. Bailey,* 162 N. C., 212; *Lee v. Thornton,* 171 N. C., 213, 214; *Ingram v. Corbit,* 177 N. C., 322; *Sewing Machine Co. v. Burger,* 181 N. C., 257; *Taylor v. Ins. Co.,* 182 N. C., 122.

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HOLSHOUSER v. COPPER COMPANY.

(Filed 2 May, 1905.)

Foreign Corporations—Receivers—Probable Claims—License Fees as Preferred Debts—Effect of Foreign Statutes—States as Claimants—Comity.

1. Where a receiver of an insolvent foreign corporation was appointed under the corporation act of 1901, a claim by the State which chartered the corporation, for annual license fees, was provable, section 194 of The Code as to actions against foreign corporations not applying to this proceeding.
2. A statute of New Jersey, providing that the annual license fees required to be paid by corporations chartered by that State "shall be a preferred debt in case of insolvency," can have no extraterritorial force, and in insolvency proceedings in this State a preference for such claim will not be allowed.
3. A foreign creditor cannot, by the operation of any law of his own State, acquire any preference over resident creditors in the administration of assets which are situated here.
4. The fact that the claimant is a State does not modify the general rule of comity so as to confer upon her any greater right or privilege than is possessed by the ordinary suitor in our courts.

ACTION by J. A. Holshouser Company and others against Gold Hill Copper Company, heard by *Cooke, J.,* at September Term, 1904 of ROWAN.

This is a proceeding under Laws 1901, ch. 2, sec. 73, instituted by the plaintiffs as creditors of the Gold Hill Copper Company to have a receiver appointed to take charge of its assets and apply them under the orders and directions of the court to the payment of its debts. It is alleged in the complaint that the company has suspended its ordinary business for want of funds to carry it on; that attachments have been

levied upon its property, and sundry judgments have been (249) docketed against it, some of which are alleged to have been satisfied, though the fact does not appear upon the record; and that owing to the different dates and priorities of the liens and to the mixed character of the company's assets and the contest as to the payment of some of the aforesaid judgments, and generally to the complicated condition of its affairs, and the consequent difficulty of ascertaining the rights and preferences of creditors, it is necessary that a receiver should be appointed to preserve the property and save it from sacrifice by forced sale under executions. The answer denied some of the allegations of the complaint, but it is not necessary at present to do more than make a passing reference to the fact, as it does not affect the matter in dispute. The court appointed a receiver, and he has taken possession of the assets of the company, and, under an order of the court requiring him to do so, he has notified all creditors to come in and prove their claims, to the end that they may be passed upon and scheduled and then reported to the court. Numerous claims were presented and proved, and among others one in behalf of the State of New Jersey for the sum of $12,000 for what is called in its statute "a franchise or annual license fee" due for each of the years 1901, 1902, and 1903, that is, $4,000 annually. The defendant company was incorporated by the State of New Jersey, though it seems to have transacted all of its business in this State, where its assets are situated. A statute of New Jersey requires a corporation, receiving its charter from that State, to pay annually a license fee or franchise tax of a certain per centum on its capital stock, the amount in each case to be ascertained in the manner therein prescribed. It is further provided as follows: "Such tax, when determined, shall be a debt due from such company to the State, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency." The receiver refused to (250) allow this claim of the State of New Jersey, upon the ground that "as a matter of law the claim of said State for $12,000 and interest, imposed for taxes upon the Gold Hill Copper Company for the years 1901, 1902, and 1903, is not provable in this jurisdiction." Counsel for the State of New Jersey excepted. This exception came on to be heard by *Judge Cooke*, who reversed the decision of the receiver in principle and made the following ruling: "The court finds that the State of New Jersey is entitled to prove a claim of $8,000, with interest from the date of this judgment, and it is so ordered and adjudged, and this claim has no priority over other claims proved against this corporation."

The defendant, the Gold Hill Copper Company, and two of its unsecured creditors, James Phillips and Walter G. Newman, excepted to

this judgment upon the ground that the claim is not provable in this proceeding, it being a claim of a foreign creditor or nonresident against a foreign or nonresident corporation, and the court has no jurisdiction, as the cause of action did not arise and the subject of the action is not situated in this State, within the meaning of section 194 of The Code, forbidding such actions to be brought in the courts of this State.

The State of New Jersey excepted to the judgment, upon the ground that it was entitled not only to prove its claim and have it paid in this proceeding, but was also entitled to priority in payment out of the assets of the company over all of its creditors, whether holding liens by attachment, judgment, or otherwise, it being by the very terms of the statute a preferred debt.

Having thus excepted, the said parties appealed to this Court, the Copper Company and its two creditors above named uniting in their appeal.

T. F. Kluttz for creditors.

(251) *A. H. Price and J. H. Horah for State of New Jersey.*

APPEAL OF NEWMAN AND PHILLIPS.

WALKER, J., after stating the facts in both appeals: The Copper Company and the two creditors who have appealed contend that the claim of the State of New Jersey is not provable in this suit, as its cause of action did not arise in this State and the subject of its action is not situated here, and they rely on the provision of section 194 of The Code. We do not think that section applies in the way indicated by the appellants. The cause of action in this proceeding is that of the creditors of the Copper Company, and consists not only in the failure of the company to meet its obligations, but in the suspension of its ordinary business, which entitled the creditors to have its assets placed in the hands of a receiver for the purpose of being applied to the payment of its debts. This proceeding is equitable in its nature, and the jurisdiction of the court in respect to the claims of the creditors of the corporation must be determined, not by regarding it as a suit by each one of them for the purpose of recovering his debt, as if he had brought an ordinary civil action wherein the liability would be fixed by judgment and enforced by execution, but the cause of action must be considered as one belonging to the creditors, who have the right under the statute, if not on general principles of equity, to have all the assets of the concern placed in the possession of the court, through its duly appointed officer, to the end that the rights of all parties therein may be ascertained and distribution made accordingly. It has become the settled

rule in this country that the assets of an insolvent corporation constitute a trust fund for the payment of its debts, and the remedy of its creditors by action in the nature of a suit in equity, or by what is called a creditor's bill, to have the assets administered for their benefit, is firmly established. *Hill v. Lumber Co.*, 113 N. C., 173; *Bank v. Cotton Mills*, 115 N. C., 507. The cause of action is the right which arises out of the default of the corporation, thus to proceed against it for (252) the purpose of applying its property to the satisfaction of its debts, and the subject of the action is the assets themselves, which are taken into the custody of the court for the purpose of enforcing the equity of the creditors. It is not like an ordinary action for the recovery of a debt, in which the cause of action is the default of the debtor and the subject of the action is the claim or debt for which he sues. The latter cannot be maintained by a nonresident against a foreign corporation, under section 194, unless the cause of action arose in this State or the subject of the action has its *situs* here. So it has been held that, when an ordinary action for the recovery of a debt is brought by a nonresident against a foreign corporation, and the cause of action did not arise in the State of the forum and the subject of the action is not situated there, the court has no jurisdiction, though property in that State belonging to the debtor is attached, as the attachment is ancillary to the main action and the property upon which it is levied is in no sense the subject of the action. In our case, however, the proceeding is directed against the property as a fund held by the corporation in trust for its creditors, and though they have no lien upon the assets of the corporation, but a right of priority in payment over the stockholders, as explained by *MacRae, J.*, in *Bank v. Cotton Mills, supra*, their suit to subject the assets to the payment of thier claims is somewhat analogous to a suit in which it is sought to impress property with a trust in behalf of a creditor and to enforce payment of his debt out of it, and so far as the question now being considered is concerned, it is not in principle unlike a suit to foreclose a mortgage or to have administered in behalf of creditors any property or fund specially set apart by their debtor as a security for their claims. In all such cases, where the property is situated in this State, suit can be brought here under section 194 of The Code. In the case at bar, when the receiver was appointed and notice was issued under the order of the court to (253) creditors, those who came in and proved their claims joined with those who had originated the suit in one common cause against the defendant, and while in a certain sense the action may be considered as instituted for and in behalf of each of the creditors, it is nevertheless the joint action of all, and it would be strange indeed if the jurisdiction of the court in such a case could be made to depend upon what would

have been an inherent defect in the cause of action of any one of the creditors if his action had been prosecuted separately and solely for the recovery of a personal judgment to be enforced by an ordinary execution. We cannot adopt the construction suggested by counsel, but must hold, on the contrary, that in a case like this one the jurisdiction of the court must be determined by the general scope of the relief sought, without reference to the character of any particular debt which may be proved before the referee. In this connection, the language of the Court, speaking by *Danforth, J., in McKinney v. Collins,* 85 N. Y., 221, and construing similar words in The Code of that State, seems applicable: "It is therefore apparent that the phrases 'cause of action' and 'subject of action' are not used interchangeably or as synonyms. It is not easy to define their precise meaning, but it seems apparent they relate not to an action at law, though to one which formerly would have proceeded in equity; the object being to give some specific relief rather than a simple judgment against a person, as in an action to cancel a mortgage upon the ground of usury, or to enforce specific performance, or to attain such relief as by the rules of the common law was denied to the suitor in its forum—certainly not an action where the only relief sought was a judgment upon contract for the payment of money." We are not required to assent to the view that the words of the statute should be confined strictly to suits cognizable formerly by courts of Equity, as it is sufficient for our purpose that, in the case cited, the juris-
(254) diction of the court is conceded where a fund is brought under its control to be administered for the benefit of creditors, even if some of the plaintiffs are nonresidents.

The ruling of the court that the claim of the State of New Jersey is provable in this case was, in our opinion, correct.

No error.

APPEAL OF THE STATE OF NEW JERSEY.

WALKER, J. In this appeal the question is presented whether the State of New Jersey is entitled to priority or preference over the other creditors, and especially over the lien creditors, in the payment of the debts of the Copper Company out of its assets which are now in the hands of the receiver. When it was provided by the State of New Jersey that the "annual license fee or franchise tax" should be a preferred debt in case of insolvency, it was evidently the purpose that the words should apply only to such proceedings in insolvency as should be instituted in that State, for we must presume that the Legislature did not intend that the statute should have any force beyond the territorial limits of the State, its operation being restricted to those limits, except in so far as it may be given effect in another State by the law

of comity. *McLean v. Hardin,* 56 N. C., 294. We find upon examination of the laws of New Jersey that there is a statute there substantially like the act of 1901 (chapter 2, section 73), and strikingly similar in phraseology. It must be conceded that the State of New Jersey had no power to provide how the assets of a corporation situated in this State shall be distributed, or, by force of its statute, to confer any right of priority upon one of her own citizens or upon herself in respect to those assets. They are here, and always have been here, and are subject to the operation of the laws of the State, the *lex loci rei sitae,* or the law of the forum in which they have been sequestered for the benefit of the creditors of the corporation. *Hunt v. Gilbert,* 54 Ill.. (255) App., 491; *Kruger v. Bank,* 123 N. C., 16. It has been established by the great weight of authority, as a part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitae* prevails over the law of the domicile, with regard to the rule of preferences in the case of insolvent estates.

The laws of other governments have no force beyond their territorial limits, and if permitted to operate in other States, it is upon a principle of comity, and only when neither the State nor its citizens would suffer any inconvenience from the application of the foreign law. *Dunlap v. Rogers,* 47 N. H., 281; *Harrison v. Sterry,* 5 Cranch., 298; *Ogden v. Saunders,* 12 Wheat., 214.

The general rule is, beyond question, that one State cannot prescribe a rule of action for another, but each must exercise its sovereign power within its own sphere and without exerting any influence upon the course of procedure or the administration of the law in any other jurisdiction. When the courts of a State give effect to a foreign law, it is by courtesy, or, what we call in the law, comity, and such effect of the law results solely from the exercise of this act of favor, and not from any intrinsic extraterritorial force of the law itself, but because by comity we make it our law. *Alvany v. Powell,* 55 N. C., at p. 59. Discussing this question, Story in his Conflict of Laws (8 Ed.), sec. 414, says: "If there is in such cases a conflict between our own laws and foreign laws as to the rights of our citizens, and one of them must give way, our own laws ought to prevail. The most convenient and practical rule is that statutable assignments, as to creditors, shall operate intraterritorially only. If our citizens conduct themselves according to our laws in regard to the property of their debtors found within our jurisdiction, it is reasonable that they should reap the fruits of their diligence, and not be sent to a foreign country to receive such a dividend of their debtors' effects as the foreign laws allow. If each government (256) in cases of insolvency should sequester and distribute the funds within its own jurisdiction, the general result would be favorable to

the interest of creditors and to the harmony of nations. This is the rule adopted in all cases of administration of the property of deceased persons; and there is no real difference between the principle of those cases and of cases of bankruptcy."

A case very much like ours was presented in *Willitts v. Waite,* 25 N. Y., 577: "The acceptance of the charter," says the Court in that case, "with this provision for a distribution of its effects upon the happening of insolvency, cannot operate to give to the transfer the effect of a voluntary conveyance of the assets. The title of the trustees is a statutory title, and must defer to the lien acquired by the creditors attaching the property in this State. Creditors within this State, having acquired a lien under our laws upon property within the State, will not be deprived of their lien and sent to a foreign State to seek such portion of the insolvent estate as the laws of that State will, upon distribution, give them. The State will do justice to its own citizens so far as it can be done, by administering upon property within its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens." Many authorities could be cited in support of the principle thus stated. A few only will suffice. Smith's Eq. Rem. of Creditors, sec. 241; Jones on Liens (2 Ed.), sec. 111; 2 Thomp. Corp., sec. 7064, where the cases are collected in the notes. A good statement of the doctrine will be found in Minor's Conflict of Laws, p. 12, sec. 7. "It is natural," he says, "and not at all to be reprobated that the courts of the forum should result in injustice to their own people. The object of the enforce-
(257) ment of a foreign law in any case is to mete out as far as possible exact justice to all concerned, as well as to give due effect to the laws of other States. But the first and most important of these objects fails altogether when the enforcement of the 'proper law' would result in injustice and loss to innocent citizens of the forum. As between the latter and strangers, it is not remarkable that the courts should elect in a close case to decide the matter in accordance with the *lex fori,* thus giving their fellow-citizens the advantages conferred upon them by the law under which they live and ordinarily transact their business. The observance of comity towards other States cannot reasonably be expected at the expense of injustice to residents of the forum, for whose benefit the courts and law are primarily instituted. The existence of this exception to the enforcement of the 'proper law' is beyond dispute, though its limits are not yet precisely defined." In *Hornthal v. Burwell,* 109 N. C., 10; *Shepherd, J.,* thus states the principle: "The authority of such laws, however, is admitted in other states, not *ex proprio vigore,* but *ex comitate,* and hence it is now very gener-

ally held that when they clash with and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or the other of them must give way, those prevailing where the relief is sought must have the preference." The learned judge then discusses the matter at length, and shows what are the proper limitations of this law of comity in its practical application to the question there involved. The true principle was well expressed and illustrated in the case of *Olivier v. Townes,* 7 Martin (La.), 50; *S. c.,* 2 La. Term (N. S.), 93. "The municipal laws of a country," says the Court, "have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens; otherwise, justice would be sacrificed to courtesy; nor can the foreigner or stranger com- (258) plain of this. If he sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. *What the law protects it has the right to regulate."* So it is in this case. When the Copper Company was chartered and permitted to migrate from its domicile and conduct its business in this State, where it has acquired property under the protection and operation of the local laws, its assets should in all fairness be held subject to the provisions of those laws in favor of persons who have dealt with it here as a domestic corporation, which is virtually its true character, though in law it is considered as a corporation of New Jersey. *Goodwin v. Claytor,* 137 N. C., 224.

This Court said by *Shepherd, J.,* in *Armstrong v. Best,* 112 N. C., 62, quoting from *Bank of Augusta v. Earle,* 13 Peters, 519: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests." The same principle applies as between the States, as is shown in *Armstrong v. Best.*

The law of comity in its different phases was considered in the following cases: *McNeil v. Colquhoon,* 3 N. C., 24; *Moye v. May,* 43 N. C., 131; *Alvany v. Powell,* 55 N. C., 51; *Carson v. Oates,* 64 N. C., 115; *Findley v. Gidney,* 75 N. C., 395; *Hyman v. Gaskins,* 27 N. C., 267; *Stamps v. Moore,* 47 N. C., 80, and the early case of *Leake v. Gilchrist,* 13 N. C., at p. 85. They all lead us to the conclusion that a foreign creditor cannot, by the operation of any law of his own State, acquire any preference over resident creditors in the administration of assets which are situated here. The property now in the custody of the court has never been in the State of New Jersey, and her laws cannot

in any way affect its status or prejudice the rights of resident creditors of the corporation in respect to any liens thereon which they (259) may have acquired. *McNeil v. Colquhoon, supra.*

There is nothing in the sovereignty of New Jersey as a State which entitles her to any special favor in the consideration of the claim she now presents, or which modifies the general rule of comity so as to confer upon her any greater right or privilege than is possessed by the ordinary suitor in our courts. We will extend to her all possible courtesy in the prosecution of her claim, but we cannot be expected to contravene the settled policy of the State or to sacrifice the interests of our citizens in doing so. Their rights are fixed by the law, which we could not change if we would.

The ruling of the court in this appeal also was correct.

No error.

Cited: Blackwell v. Life Assn., 141 N. C., 122; *Hall v. R. R.,* 146 N. C., 352; *Edwards v. Supply Co.,* 150 N. C., 172; *Powell v. Lumber Co.,* 153 N. C., 56; *Silk Co. v. Spinning Co.,* 154 N. C., 426, 429; *Kelly v. McLamb,* 182 N. C., 163.

IN RE MORRIS ESTATE.

(Filed 2 May, 1905.)

Succession or Inheritance Tax—Constitutionality—Method of Collection.

1. A succession tax is a tax on the right of succession to property and not on the property itself, and is not void because exemptions are granted or discriminations made between relatives and between these and strangers, nor for lack of uniformity.
2. The right to impose an inheritance or succession tax does not depend upon the kind of property transferred, and the Revenue Act of 1903, imposing such a tax on personal property only, is constitutional.
3. The method provided in the Revenue Act of 1903, ch. 247, secs. 6-21, for the ascertainment, computation, and collection of an inheritance or succession tax, is constitutional.
4. The fact that the testator, in his will, directed his executors not to make any returns of his property, cannot nullify the statutory provisions as to the inheritance tax.

(260) PROCEEDING for the assessment and collection of the succession or inheritance tax on the estate of P. M. Morris, deceased, heard by *W. R. Allen, J.,* at October Term, 1904, of CABARRUS.

This is a proceeding instituted under the Revenue Act of 1903 for

the purpose of ascertaining and collecting the succession or inheritance tax on legacies bequeathed by the will of P. M. Morris. The court made the following order: "This cause coming on to be heard, the executors of P. M. Morris appear in answer to the order of *Judge G. S. Ferguson* and file a written motion to dismiss the petition, and upon consideration thereof it is ordered and adjudged that the motion be denied. It is further ordered that said executors within ten days file with the clerk of this court an account of their estate, showing the amount to which the distributees and legatees of said estate are entitled." From this order the executors appealed.

W. M. Smith for executors.
No counsel contra.

BROWN, J. We are inclined to think this appeal is premature, but as no appearance has been made or brief filed in this Court on behalf of the petitioner, the clerk of the Superior Court, and no such point made, we will pass on the matter of law presented in the brief of counsel for the executors.

1. It is contended that the act of 1903 is unconstitutional and void, for these reasons:

(*a*) Because it impairs the value of Mrs. Caldwell's legacy, she being a lineal descendant of the testator, in that under the will she was to receive $8,000, and if the tax collector is permitted to take a portion of this $8,000, then she will not receive all the money to which she was entitled.

(*b*) Because it exempts persons receiving less than $2,000, and (261) taxes persons receiving over $2,000.

(*c*) Because it exempts real estate and taxes personal property. In this case Mr. Morris's daughter, Mrs. Caldwell, although she only received $8,000, in truth and in fact, under the act as drawn, will have to pay a greater tax than either one of her brothers, although they receive many times as much as she does, because theirs is in real estate, and hers is in personal property.

(*d*) Because it exempts Mrs. Morris, the mother and taxes Mrs. Caldwell, the daughter.

The inheritance or succession tax is of very ancient origin. It is no new invention of the legislative power for the purpose of putting money in the public coffers. Gibbon, the historian, traces its origin to the Emperor Augustus, and says it was suggested by him to the Senate as a means of supporting the Roman army; that it was imposed at the rate of 5 per cent upon all legacies or inheritances above a certain value, but that it was not collected from the nearest relatives upon the

father's side, and that the tax was the most fruitful as well as most comprehensive. 1 Gibbon's Rome, 133; Ency. Brit. (8 Am. Ed.), 65, title "Taxation." It was called *"vicessima hereditatum et legatorum."* In this country the tax is variously called an inheritance tax, a legacy tax, a transfer tax, and a succession duty. It is defined as follows: "A burden imposed by government upon all gifts, legacies, inheritances, and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by deed or instrument made *inter vivos* intended to take effect at or after the death of the grantor." Dos Passos (2 Ed.), sec. 2.

This method of taxation has been long resorted to in European countries, and was introduced into Great Britain by Lord North and
(262) adopted in 1780. Of the States of the American Union, Pennsylvania was the first to adopt it in 1826, since which date it has been adopted as a means of govermental support by a great many other States. As a means of raising revenue, the method is generally commended by writers on political economy. Mills' Political Economy, book 5, ch. 62, sec. 3. It is generally conceded that no tax can be less burdensome and interfere less with the industrial agencies of society. Smith's Wealth of Nations, 683. *Mr. Justice Brewer* of the Supreme Court of the United States, in writing unofficially on the subject, says: "I have often urged this method of taxation as one of the most just, and, if it were graduated in proportion to the amount of property passing, I think it would be most beneficial. It would tend largely to prevent the accumulation of property in a family line and to work that distribution which is for the interest of all." The tax has been imposed by the Federal Government as a means of war revenue and sustained by our highest court. *Knowlton v. Moore,* 178 U. S., 41. The fallacy in the argument of counsel for the executors is in assuming that the tax is a tax upon property, and therefore should be uniform and levied in conformity with the requirements of the Constitution. If we conceded his premise, we should have no difficulty in arriving at his conclusion. The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. Should the supreme law abolish such rights, the property would escheat to the Government or fall to the first occupant. The authority which confers such rights may impose conditions upon them, or take them away entirely. Accordingly,
(263) it is held that the States may tax the privilege, grant exemptions,

discriminate between relatives and between these and strangers, and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation. Neither is it necessary to the validity of the tax that the State Constitution should contain a specific delegation of power authorizing the Legislature to impose such taxation. The power of the Legislature over the subject of taxation is absolute unless restricted by the Constitution of the State or Nation. Upon the grounds we have stated, inheritance or succession-tax laws have been uniformly held to be valid and to infringe no constitutional provisions, Federal or State. These decisions have been made by the Supreme Court of the United States and by all the highest courts in all States where such laws have been enacted. The authorities are collected in 27 A. & E., (2 Ed.), 338, and it is unnecessary to review them. They are all one way.

In our own State the constitutionality of an act similar in many respects to that of 1903 was sustained in an able opinion by *Justice Rodman. Pullen v. Comrs.,* 66 N. C., 361. The fact that the act of 1869-70 applied to real and personal property alike makes no difference. The right to impose the tax does not depend upon the nature or kind of property transferred. *Matter of Knoedler,* 140 N. Y., 377, and cases cited in 27 A. & E. (2 Ed.), 343.

2. The objections urged against the legislative method provided for the ascertainment, computation, and collection of this tax are equally untenable. The method provided is set out in Laws 1903, ch. 247, sects. 6 to 21 inclusive. No provision of the Constitution is violated in the remedy. The statutory provisions have been strictly followed in this proceeding, and under them his Honor had full power to make the order appealed from. The fact that the testator in his will directed his executors not to make any returns of his property cannot be permitted to have the effect of nullifying "the law of the land." (264) It is the duty of the executors to obey the order; otherwise, they would incur the penalties for contempt. It is the plain duty of the clerk to compute and adjudge the amount of tax due and to collect the same and pay it to the State Treasurer as required by law.

It is not proper or necessary for this Court on this appeal to adjudicate the amount of tax to be levied upon the legacies given in the will. It is the duty of the clerk to have the appraisement made, if necessary, under section 15 of the act and to ascertain and declare the amount of the tax to be paid. From a final order determining the same an appeal is provided for by the act.

Affirmed.

Cited: S. v. Bridgers, 161 N. C., 256; *Norris v. Durfey,* 168 N. C., 322; *S. v. Scales,* 172 N. C., 916; *Corp. Com. v. Dunn,* 174 N. C., 686.

TEETER v. WALLACE.

(Filed 2 May, 1905.)

Taxes—Remedy to Recover—Invalid State Taxes.

Where the plaintiff paid, under protest, to the defendant sheriff a State license tax, and thereafter sued the defendant to recover said tax: *Held*, that the action was properly dismissed, as the provisions of section 30, chapter 558, Laws 1901, that if the person claiming any State tax to be invalid shall pay the same to the sheriff, he may at any time within thirty days after payment demand the same in writing from the State Treasurer, and if the same shall not be refunded in ninety days he may sue the county in which such tax was collected, are mandatory and the statutory remedy exclusive.

ACTION by M. F. Teeter against N. W. Wallace, Sheriff of Mecklenburg County, heard by *O. H. Allen, J.*, and a jury, on appeal from a justice of the peace, at January Term, 1905, of MECKLENBURG.

(265) Plaintiff sued defendant before a justice of the peace to recover the sum of $25, the amount of taxes illegally collected by defendant as sheriff. From judgment against plaintiff, he appealed to the Superior Court. At the trial in the latter court plaintiff in his own behalf testified: "That in March, 1904, defendant as Sheriff of Mecklenburg County, demanded of him the sum of $25 license tax for carrying on the business of a dealer in horses and mules under section 35 of chapter 247, Laws 1903; he insisted that he was not liable for the tax, and thereupon the sheriff seized a mule, the property of the plaintiff, for the purpose of collecting the same; plaintiff, in order to secure the release of the mule, asked the sheriff if he would permit him to deposit the sum of $25, the amount claimed for the tax. That the sheriff consented thereto and received the sum of $25 upon the terms set out in the following receipt or paper-writing, to wit: '12 March, 1904. Received of M. F. Teeter $25. This money is left with me for the following purposes: I, as Sheriff of Mecklenburg County, have levied on one mule of the said M. F. Teeter for a tax known as the license tax for selling horses, etc., and the said M. F. Teeter pays the money under protest, reserving the right to test by law the validity of my requiring him to pay said tax. And I hereby consent to M. F. Teeter's reserving the right to test the validity of requiring him to pay this tax. N. W. Wallace Sheriff.'" The sheriff thereupon released the mule and turned him over to the plaintiff. The plaintiff then offered evidence tending to show that he was not engaged in dealing in horses or mules, and that he was not liable for the tax. Defendant objected to this evidence; the court sustained the objection, and the plaintiff excepted. It was ad-

mitted that the sheriff had paid the tax of $25 over to the State Treasurer before the commencement of this action.

Defendant demurred to the evidence. The court being of the opinion that the plaintiff could not recover, sustained the demurrer and nonsuited the plaintiff. Plaintiff excepted and appealed. (266)

Spence & Newell and T. C. Guthrie for plaintiff.
Burwell & Cansler for defendant.

WALKER, J., after stating the facts: We do not see upon what ground the plaintiff is entitled to recover in this action. That the money he paid to the sheriff should be refunded to him, if he was not liable for the tax, is admitted; but he cannot recover it otherwise than is provided by law. He must resort to the remedy which has been prescribed for his case, as it is sufficient for the purpose of vindicating his right. The tax imposed by section 135, chapter 247, Laws 1903, is a State tax, and is required to be paid to the State Treasurer, as other taxes of a like kind are paid. By section 87 the sheriff is given authority to levy upon real and personal property for the purpose of collecting the tax when the person liable therefor fails to pay the same, and by section 84, chapter 251, Laws 1903 (Machinery Act), he is required to make a return to the State Auditor the first of each month of all taxes or license fees received by him during the next preceding month, and within ten days thereafter to pay the same to the State Treasurer.

In conformity with the provisions of the law just recited, and for the protection of the sheriff or tax collector, it is provided by section 30, chapter 558, Laws 1901, that in every case, if the person or persons claiming any tax or any part thereof to be for any reason invalid shall pay the same to the sheriff, he may at any time within thirty days after such payment demand the same in writing from the Treasurer of the State, when it is a State tax, and, if the same shall not be refunded within ninety days thereafter, he may sue the county in which such tax was collected for the amount thereof, and if it is determined that the tax was for any reason invalid, he shall have judgment therefor, with interest, and execution to enforce its payment. This is a plain (267) and adequate remedy, and the provisions of the statute have been construed by this Court to be mandatory and the statutory remedy to be exclusive, so far, at least, as the recovery of the tax which has been paid is concerned.

Since the decision in *Huggins v. Hinson,* 61 N. C., 126, it has been held that taxes collected by a sheriff under a tax list, such as taxes assessed upon property, could not be recovered in a suit against him, though they may have been illegally exacted, as relief in such a case

must be sought from the statutory tribunal appointed to hear and determine such matters; but as to taxes collected by the sheriff under Schedule B, when it is left to his judgment to decide whether a tax is due or not in a particular case, and what amount is due, if he collects when no tax is due or collects more than is due, the remedy at common law was to pay under protest and recover back the amount so paid in an action for money had and received. The act of 1901 (and prior enactments) changed the law in this respect and substituted the statutory remedy for that of the common law, proceeding upon the just and reasonable ground that, as the sheriff is merely an agent in collecting the tax, and has no interest therein except the commission he receives for his services, the State and the county are really the only parties interested in defending the suit for the recovery of the taxes paid to the sheriff.

There is another good reason for the enactment of such a law. The sheriff is required to make regular monthly reports to the Auditor and regular monthly settlements with the Treasurer in respect to the license taxes or fees collected by him, and it would be manifestly unjust to expose him to a suit by the taxpayer after he had settled with the Treasurer. No harm will be done the taxpayer, as he can proceed under the act and have his money refunded to him, and the remedy thus afforded is quite as expeditious and effectual as would be a suit against
(268) the sheriff. It may be added that if the law should permit an action to lie against the sheriff, it would tend greatly to obstruct the State in the execution of the revenue laws. There is every reason, therefore, why we should give the act a liberal construction, it being remedial in its nature, and it is necessary to declare it to be mandatory in order to carry out the intention of the Legislature. The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must make the demand and bring his action as therein required. *Wilson v. Green,* 135 N. C., 343; *McIntire v. R. R.,* 67 N. C., 278; *Hilliard v. Asheville,* 118 N. C., 845. The subject is so fully considered in the cases of *R. R. v. Reidsville,* 109 N. C., 494, and *Hatwood v. Fayetteville,* 121 N. C., 207, that it is hardly necessary to prolong the discussion. In the former case the tax was alleged to be invalid, and in the latter the plaintiff claimed that he was not liable for the tax, as his property was not within the corporate limits of the town. He did not dispute the validity of the tax, but contended that he was not of the class upon which it could be imposed. That is precisely our case. In both cases it was held that the plaintiff could not recover. Even if the plaintiff had sued the county, as there is no proof that he made the necessary demand and brought his action within ninety days after the refusal of payment, he could not recover. *Chemical Co. v.*

Board of Agriculture, 111 N. C., 135. But the plaintiff must fail in the present suit, because the sheriff, as we have shown, is not liable to him upon the cause of action set forth in his complaint.

We cannot adopt the construction placed by the learned counsel of the plaintiff upon the receipt given by the sheriff to the plaintiff. He did not promise thereby to hold the money until the controversy as to his liability was settled, but the paper was given merely to save the rights of the plaintiff, and as evidence of his protest against liability for the tax and of his purpose to contest the same, not with the sheriff, but in the manner provided by law. It seems to have (269) been carefully worded for the purpose of expressing that idea, and clearly refers to the statutory remedy. There is nothing in it to indicate an intention that the sheriff should retain the money or that he would be sued for the same.

In any view of the case, the court below was right in nonsuiting the plaintiff.

Affirmed.

Cited: Blackwell v. Gastonia, 181 N. C., 379.

PARKS v. ROBINSON.

(Filed 2 May, 1905.)

Wills—Construction—Power of Disposal.

Where a testator died, leaving a widow and minor children, and by his will gave to his wife, "during her natural life and at her disposal, all the rest, residue, and remainder of his real and personal estate": *Held,* that the wife was given an estate for life, with a power to dispose of the property in fee.

CONTROVERSY without action by Mrs. Ann Parks against W. T. Robinson, heard by *W. R. Allen, J.,* at October Term, 1904, of MECKLENBURG.

This was a controversy submitted without action under section 567 of The Code. On 30 June, 1876, H. M. Parks duly executed his will, the material item of which is as follows: "After all my lawful debts are paid and discharged (if there be any), I give and bequeath to my beloved wife, Ann Parks, during her natural life and at her disposal, all the rest, residue, and remainder of my real and personal estate." He appointed his said wife executrix, and requested his friend, William M. Parks, to assist her in the execution of his will. At the time of his

(270) death the testator was seized and possessed of the land in controversy in fee simple, together with other real and personal property. At the time of the execution of the will he had five children, all of whom were minors. On ____ July, 1904, the plaintiff, widow of said testator, entered into a contract with the defendant, whereby she contracted to sell and convey to him a portion of the real estate devised to her for the sum of $2,235, which he agreed to pay upon delivery to him of a good and sufficient deed in fee simple. Pursuant to said contract, she executed and tendered to the defendant a deed sufficient in form to convey the said land, containing the following recital: "That whereas H. M. Parks, late of said county and State, by his last will and testament, dated 30 June, 1876, duly admitted to probate by the clerk of Superior Court of said county, and of record in the office of said clerk in book of Wills M., page 377, did empower said party of the first part to dispose of all of his said real and personal estate, and whereas the land hereinafter described is a part of the real estate of said testator, and the party of the first part deems it best to dispose of the same in order to make an equitable distribution of the proceeds to her children." The defendant refused to accept said deed, whereupon the parties agreed to submit the question of its validity to the decision of the court. His Honor being of the opinion that by the will of H. M. Parks the land in controversy is devised to the plaintiff for life, with general power of disposition, adjudged that the deed was effectual to convey the land in fee simple to the defendant, and that he pay the purchase money and accept the same in discharge of plaintiff's contract. The defendant excepted, assigning as error the ruling of the court that under the will of H. M. Parks, deceased, the land in controversy was devised to plaintiff with the general power of disposition. De-
(271) fendant appealed.

H. W. Harris for plaintiff.
Clarkson & Duls for defendant.

CONNOR, J., after stating the case: This case was submitted upon very full and well-considered briefs and oral argument by counsel for both sides, by which we have been aided in coming to the conclusion that his Honor correctly construed the will of Mr. Parks. It was conceded that the contract made by the plaintiff, the specific performances of which is sought to be enforced, is fair and just to all parties, and we think entirely consistent with the purpose and intent of the testator. The parties, however, very properly desire that any doubt in regard to the validity of the title conveyed by Mrs. Parks be removed by the decision of the Court. We are not called upon to say whether Mrs. Parks takes a fee simple in the property. In construing similar

language, the Supreme Court of Massachusetts, in *Cummings v. Shaw,* 108 Mass., 159, said: "This clause gives to the plaintiff either an estate in fee, on the ground that power to convey an absolute estate is an attribute of ownership, and carries with it a fee, or it gives an estate for life, with power to convey an absolute estate; and upon either construction the plaintiff is able to convey to the defendant a fee simple and thus perform his contract. If a question had arisen as to the validity of a devise over, it might be important to determine whether the plaintiff took an estate for life or in fee, but it cannot be so in this case." In that case the language was: "I give and bequeath . . . for and during his natural life, with right to dispose of the same as he shall think proper." The Court held that the words "the right to dispose of the same" referred to the property itself, and not merely to the estate in it. We think this construction applicable to the language used by the testator in the case before us.

This Court, in *Troy v. Troy,* 60 N. C., 623, construing language somewhat similar, said: "This is a power appurtenant to her life estate; and the estate which may be created by its exercise (272) will take effect out of the life estate given to her, as well as out of the remainder. A power of this description is construed more favorably than a naked power given to a stranger, or a power appendant, because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not affect the estate of the person to whom it is given." In *Wright v. Westbrook,* 121 N. C., 156, this Court held that where property was given to one during her natural life, "with full power to dispose of the same," with the permission of her husband, a deed executed by husband and wife conveyed a good and indefeasible title. These decisions appear to be in harmony with those made by other courts. In *White v. White,* 21 Vt., 250, the estate was given to the wife, "to have at her disposal during her natural life or so long as she remains my widow." This was construed to give her the power to dispose of the fee during her widowhood.

In *Underwood v. Cave,* 176 Mo., 1, the Court construed a devise to one absolutely during her natural life, to use and enjoy as she may see proper, as a life estate, coupled with it the power of disposal in fee. The defendant's counsel cites 2 Underhill on Wills, sec. 686, in which it is said: "If land be devised to a person expressly for life only, in certain and definite language, with a power of use or disposal, an estate for life only passes . . . and if the devisee dies without exercising the power, the reversion of the fee will descend to the heirs of the testator, or it will go to the devisee of the testatory as a contingent remainder or executory devise, if he has devised it over. In either

event, no estate in the land will pass under the power until it has been executed." This language in no way militates against the power of Mrs. Parks to convey the land. The author is discussing the question whether a power of disposal carries the fee by implication, which,
(273) as we have seen, does not arise in this case. The defendant also calls to our attention the case of *Smith v. Bell,* 6 Peters, 68. In that case an estate was given for life, with a power of disposition and a remainder over. The Supreme Court held that the power of disposal was restricted to the life estate. In *Gifford v. Choate,* 100 Mass., 340, *Hoar, J.,* noticing *Smith v. Bell,* says: "The authority of *Smith v. Bell* is somewhat impaired by the circumstances that no counsel were heard on behalf of the party against whom it was made, and the attention of the Court does not seem to have been drawn to the authorities in favor of the opposite conclusion. But the decision is made to rest upon the fact that the remainder was the only substantial provision made by the will for the testator's only child, and there were no words directly extending the wife's interest beyond her life." *Smith v. Bell* has been followed by the Supreme Court of the United States in *Brandt v. Coal Co.,* 93 U. S., 326; *Giles v. Little,* 104 U. S., 291.

We are of opinion that the more reasonable view—certainly, where there is no limitation over—is found in the decisions of this and other courts which we have cited. Read in the light of the condition of the testator's family, he having five minor children, we think it clear that his purpose was to give his wife an estate for life, with a power to dispose of the property in fee in such manner as she should deem best for the rearing, education, and settlement of her children. To restrict the power of disposal of her life estate would be to nullify its effect. She had such power incident to her life estate. To confine the power of disposal to such life estate would do violence to the rule of construction that every word used by the testator should be given force. We concur with counsel that "with such unlimited confidence in his wife, and such firm belief that she would be able to act more wisely than he could then direct, how can it be said that testator used the words 'at her disposal'
(274) in a restricted or limited sense? Under these circumstances, does not the presumption against intestacy, as to the reversion, become stronger, and does not the rule for a liberal construction of these words favor an unlimited power of disposition?"

The judgment of his Honor must be

Affirmed.

Cited: Herring v. Williams, 153 N. C., 235; *S. c.,* 158 N. C., 9, 17; *Chewning v. Mason, ib.,* 583; *Ripley v. Armstrong,* 159 N. C., 159; *Mabry v. Brown,* 162 N. C., 221; *Griffin v. Commander,* 163 N. C., 232;

Fellowes v. Durfey, ib., 312; *Satterwaite v. Wilkinson,* 173 N. C., 40; *Darden v. Matthews, ib.,* 188; *Makely v. Land Co.,* 175 N. C., 104; *Makely v. Shore, ib.,* 124.

BANK v. LEVY.

(Filed 2 May, 1905.)

Fraudulent Sales—Declarations of Vendor—Evidence—Bankruptcy—Issues.

1. Where a debtor sold a stock of goods, his declarations claiming the goods and inconsistent with an absolute sale, made after the date of the sale, but while he remained in actual possession and control of the goods, are competent against the vendee on the question of fraud, in an action against the vendee to recover said goods.
2. Under the Bankruptcy Act of 1898, sec. 67 (e), declaring void all transfers of property by a bankrupt, etc., "except as to purchasers in good faith and for a present fair consideration," the proper issue is, "Did the defendant purchase the goods in good faith, for a present fair consideration, and without knowledge of the fraud?"

ACTION by Piedmont Savings Bank, trustee in bankruptcy of N. D. Young & Co., against L. Levy, heard by *O. H. Allen, J.,* and a jury, at August Term, 1904, of SURRY.

This is an action by the plaintiff as trustee in bankruptcy of N. D. Young & Co. against the defendant for the recovery of possession of a stock of goods which the defendant had acquired from the bankrupt a short time prior to the bankruptcy. Upon the trial below the court submitted the following issues:

1. Was the conveyance of the stock of goods from Young & (275) Co. to Levy made with the intent and purpose on their part, or either of them, to hinder, delay, or defraud their creditors, or any of them? Answer: Yes.

2. Did the defendant purchase in good faith and without knowledge or notice of such fraudulent intent on the part of Young & Co., or either of them? Answer: Yes.

3. Is the plaintiff trustee the owner and entitled to the immediate possession of the property described in the complaint? Answer: _____

4. What was the value of said stock of merchandise at the time of the seizure by the defendant from said Young & Co.? Answer: _____.

5. Did the defendant unlawfully detain said property from the plaintiff, as alleged in the complaint? Answer: _____.

From a judgment for the defendant, the plaintiff appealed.

Louis M. Swink, Lindsay Patterson, and Watson, Buxton & Watson for plaintiff.

Manly & Hendren for defendant.

BROWN, J. Upon the trial of this action the plaintiff, for the purpose of proving fraud on the part of the transferrers, N. D. Young & Co., as well as the transferee, the defendant, offered in evidence certain declarations of John A. Stone, which were admitted by the court upon the first issue, but excluded as evidence against the defendant on the second issue. As this was erroneous and necessitates a new trial, we will notice no other exception.

The entire evidence tended to prove that John A Stone was the owner of the business, goods, and merchandise of Young & Co., at Pilot Mountain; that Young "loaned Stone the use of his name" and acted as clerk. It is contended by defendant that this stock of goods, which is the subject of the controversy, was purchased by the defendant from Stone on 6 April, 1903. There is no evidence that Young knew anything of such alleged purchase until 21 April, 1903.

(276) There is no evidence that the goods were taken possession of by defendant until after 21 April. The defendant himself testifies that he did not take possession until 21 April, when a deputy sheriff levied on the goods under an execution against N. D. Young & Co., but claims that Stone was to hold the goods for the defendant as his bailee. Defendant never notified Young that he claimed the goods or had any interest in them until 21 April. All the evidence shows that the goods were in the actual possession of John A. Stone and his clerk, Young, up to 21 April, and that the receipts from sales were paid over to Stone every day by Young and the business conducted just as it had been since its establishment in December, 1902.

The declarations of Stone, claiming the goods and inconsistent with an absolute sale, made to several persons at different times between 6 April and 21 April, are contended by plaintiff to be competent evidence upon the question of fraud as against the defendant, upon two grounds: (1) Because there is evidence tending to prove a conspiracy between Stone and Levy to defraud Stone's creditors; (2) because Stone remained in actual possession and control of the goods until 21 April, and there was no change in the conduct of the business until then.

As we think the evidence is clearly competent against the defendant upon the second ground, we will not consider the first. His Honor improperly limited the scope and effect of the evidence offered to the first issue.

It was once considered that when a debtor made an absolute sale of chattels and retained possession and control, the intent to hinder and delay creditors appeared conclusively upon the face of the transaction. "The donor continued in possession and used them as his own, and by reason thereof he traded and trafficked, defrauded and deceived others. It was done in secret, *et dona clandestina sunt semper suspiciosa.*" *Twyne's case,* 1 Smith's Leading Cases, 1. Since *Twyne's case* this doctrine has been relaxed. It is now competent to allow evi- (277) dence to be received to repel this inference of fraud, the burden being on the transferee to rebut it. "But," says *Judge Gaston,* "such a repugnance between the transfer and the possession yet raises the presumption of a secret trust for the benefit of the grantor, which, while it admits, also requires an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud." *Askew v. Reynolds,* 18 N. C., 368. The possession and control of the goods having been retained by the debtor, Stone, up to 21 April, and after his alleged sale to the defendant on 6 April, was sufficient of itself to impress upon the transaction a fraudulent character. It was incumbent upon the defendant to explain the character of that possession. The defendant offered his own evidence tending to remove the legal presumption of fraud and to prove that, without any knowledge upon the part of Young or any one else, the defendant left Stone in possession as defendant's agent and bailee. Was such possession of Stone in fact and truth the possession of a bailee of the purchaser, or was it merely colorable and a part of the machinery of fraud? The character of Stone's possession thus became a most material inquiry upon the second issue. This rule of evidence is the same in respect to real and personal property. Wigmore on Evidence, sec. 1083.

The general doctrine, as laid down by all the text-writers and innumerable adjudications, is that the declarations of the vendor made after sale may be given in evidence if the vendor continues to hold possession of the goods. The rule is often stated that the declarations of a party in possession either of real or personal property, explanatory of and characterizing his possession, constitute a part of the *res gestæ* and may properly be allowed in evidence. 9 A. & E. Enc. of Law (2 Ed.), page 12. In the 24th volume of this same work, page 688, many cases are cited to support that proposition, and volume 14, at page 497, gives cases from almost every State and Federal jurisdiction applying the rule to declarations of a fraudulent vendor remaining in pos- (278) session as evidence against the vendee. The underlying basic principle of the rule is, that the debtor's (transferrer's) intent being a necessary part of the issue of fraud, all his conduct and declarations while in possession of the property, real or personal, and dealings with

it, which indicate his intent, are receivable in evidence against him and his transferee, inasmuch as the conduct and utterances of a person are indicative of his knowledge, beliefs, purposes, or intent when they are facts in issue. Proof of the fact of continued possession of the vendor is always evidence to impeach the transfer. From this it follows that the conduct and declarations of the possessor are competent as indicating the purpose of and characterizing his possession. They are part of the *res gestæ*. *Kirby v. Masten,* 70 N. C., 541.

Mr. Wait, in his work on Fraudulent Conveyances, sec. 279 (3 Ed.), formulates the rule as follows: "So long as the debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may be given in evidence for the creditor against the claimant, by reason of the continuous possession which accompanied them." To the same effect is Bump on Fraudulent Conveyances (4 Ed.), sec. 600. See, also, *Willis v. Fairley,* 14 E. C. L., 366; *U. S. v. Griswold,* 8 Fed., 556; *Higgins v. Spahr,* 145 Ind., 167; *Bank v. Beard,* 55 Kan., 773.

In Wait on Fraudulent Conveyances, *supra,* the author, among a large number of cases, cites with approval *Kirby v. Masten, supra; Hilliard v. Phillips,* 81 N. C., 104; *Ward v. Saunders,* 28 N. C., 382;
(279) *Wise v. Wheeler, ib.,* 196, and other North Carolina cases, as sustaining this rule of evidence.

In *Askew v. Reynolds, supra,* which is a case on all-fours with this *Judge Gaston,* after stating that the possession of the slaves having been retained by the debtor after the execution of his bill of sale was sufficient to impress upon the transaction the character of a fraudulent transfer, unless from other facts and circumstances another character could clearly be assigned to it, decides that the declarations of the grantor, as evidence against the grantee upon the question of fraud, were competent and should have been received in evidence. This learned and accomplished jurist says: "Generally, the acts or declarations of a grantor, after the conveyance made, are not to be received to impeach his grant. The rights of the grantee ought not to be prejudiced by the conduct of one who at the time is a stranger to him and to the subject-matter of those rights. But the acts and declarations rejected in this case were those of the possessor of the property—were connected with that possession, and formed a part of its attendant circumstances. They were collateral indications of the nature, extent, and purposes of that possession. They were to be admitted, not because of any credit due to him by whom they were done or uttered, but because they qualified

and characterized, or tended to qualify and characterize, the very fact to be investigated."

Professor Wigmore, in his elaborate treatise on Evidence, sec. 1086, page 1300, quotes the larger part of *Judge Gaston's* opinion, and says: "This theory can hardly be impugned in its logic. Reduced to a rule, it admits the declarations when made during possession, whether or not the debtor is a party to the cause."

We have not only the high authority of *Judge Gaston* in support of our view, but we have the equally high authority of *Chief Justice Ruffin,* who says, in *Foster v. Woodfin,* 33 N. C., 339, after fully indorsing the opinion of *Judge Gaston:* "Where a man has conveyed (280) a personal chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyance, while he remains in possession, are evidence against the vendee or grantee on a question of fraud." In *Marsh v. Hampton,* 50 N. C., 383, it is decided that, where a party who is charged with making a fraudulent conveyance remains in possession of the property after the date of the conveyance, what he said about the nature of his possession is competent evidence to impeach the conveyance on the ground of fraud. That was an action of trover to recover a slave. In his opinion *Judge Battle* cites with approval the opinions of *Chief Justice Ruffin* and *Judge Gaston,* and says: "The principle of the decision is that the declarations of a party in possession are admissible to prove the character of the possession, as to whether he holds it for himself or for another, and in that view it is competent after a conveyance by the former owner, if he be permitted still to retain the possession."

There are a number of other cases in our own Reports which, with striking uniformity, sustain the view we have here presented. It would be a work of supererogation to add anything more to the weight of authority which we have invoked.

As there was much debate as to the competency and scope of the evidence offered, we have gone into the question more fully than we otherwise would.

Inasmuch as this case is to be tried again, we will call attention to the second issue, which in form is not determinative of the real facts at issue, because it omits entirely the necessary ingredient of a fair price. The Bankruptcy Act of 1898, sec. 67 (e), declares void all transfers of property by a bankrupt, etc., "except as to purchasers in good faith and for a present fair consideration." In view of this law, the proper issue, in lieu of the second one submitted by the court, would be as follows: "Did the defendant purchase the goods in good faith, for a present fair consideration, and without knowledge of the fraud?" (281)

New trial.

LAFFOON v. KERNER.

(Filed 2 May, 1905.)

Discharge in Bankruptcy—Effect—Burden of Proof—Appeal Bonds—Sureties—Discharge of Principal.

1. Where, in an action on contract, the defendant pleaded and exhibited a general discharge in bankruptcy, the burden was upon the plaintiff to show that his debt was not scheduled and that he had no notice of the proceedings in bankruptcy.
2. A judgment was rendered against the defendant before a justice, and he gave an undertaking on appeal, with sureties, as provided by section 884 of The Code, to pay any judgment rendered against him, and pending the appeal he obtained a discharge in bankruptcy from all his debts: *Held*, that the sureties on the undertaking were not liable.

ACTION by W. J. Laffoon against J. F. Kerner and others, heard by *Cooke, J.*, and a jury, at March Term, 1905, of FORSYTH.

Plaintiff obtained judgment against defendant Kerner before a justice of the peace for $200, from which judgment defendant appealed to the Superior Court. The judgment was duly docketed in the Superior Court of Forsyth County and execution issued and returned by the sheriff, "Executed 4 April, 1904, as to James F. Kerner, and by levying on the property of the Southern Woolen Mills. I herewith return execution, as the defendant has given appeal bond with J. M. Greenfield as surety."

Signed by the sheriff. For the purpose of staying the execution,
(282) the defendant executed a bond in the sum of $400, the condition of which is as follows: "That said appellant shall pay all costs and damages that may be awarded against him on such appeal; and do also undertake, pursuant to the statute, that if said judgment or any part thereof be affirmed, or the appeal be dismissed, the said appellant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which may be awarded against the appellant on such appeal." When the cause came on for trial in the Superior Court the defendant J. F. Kerner pleaded his discharge in bankruptcy and introduced a duly certified copy thereof bearing date 26 November, 1904, and declaring the said bankrupt discharged "from all debts and claims which are made provable by said acts against his estate and which existed on 23 April, 1904, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." It appeared from the return of the justice that the plaintiff complained for the nonpayment of money due by note for labor done. Upon appropriate

issues submitted to the jury, the following facts were found: That defendant J. F. Kerner was indebted to the plaintiff in the sum of $200. That he obtained judgment for said amount on 2 April, 1904, before a justice of the peace. That said judgment was docketed in the Superior Court on the same day; that by virtue thereof he obtained a lien on certain real estate belonging to said Kerner. That the defendants E. Kerner and J. M. Greenfield executed an undertaking on appeal. That the defendant J. F. Kerner filed his petition in bankruptcy on 23 April, 1904. That he was not insolvent on 2 April, 1904. Upon the foregoing verdict judgment was rendered against the defendant J. F. Kerner, which judgment was declared to be a lien upon the property and real estate owned by him at the date of the docketing (283) of said judgment, subject to the homestead rights of J. F. Kerner. It was further adjudged that the plaintiff recover of the defendants, sureties on the bond, the amount of said bond, to be discharged upon the payment of the judgment. From this judgment the defendants appealed.

Louis M. Swink and Sapp & Hasten for plaintiff.
Lindsay Patterson for defendants.

CONNOR, J., after stating the facts: No exceptions nor assignments of error appear in the record other than the general exception to the judgment. We are therefore called upon to say, whether, upon the facts established by the verdict, the judgment rendered is correct. In this Court two questions were argued by counsel. First, whether upon pleading and exhibiting his discharge in bankruptcy the defendant was entitled to have the action dismissed, or whether he was required to go further and show affirmatively that the plaintiff's debt came within the provisions of the discharge as a provable debt on 23 April, 1904, and was not within any of the exceptions named in the bankrupt law. In regard to the last phase of the question, it is clear from the record that the indebtedness was not within the exception. The return of the justice shows that the demand was for money due by note for labor done. "A debt founded upon a contract, express or implied, may be proved in bankruptcy." 5 Cyc., 325. The plaintiff insists, however, that a bankrupt is discharged only from such debts as he puts in his schedule, unless the creditor has notice or knowledge of the proceeding in bankruptcy; that the burden is upon the defendant to show that plaintiff's debt was scheduled, or that he had notice of the proceedings, and that in the absence of any proof of either fact the court should proceed to try the case and render judgment, disregarding the discharge.
The cases cited by plaintiff's counsel establish his contention (284)

that unless the debt is scheduled or the creditor has notice of the proceeding the discharge does not affect it. Collier on Bankruptcy, 200. It appeared in all of the cases cited that the debts had not been scheduled; but it does not appear how the fact was brought to the attention of the court. We have, with the aid of the very full briefs, made diligent search for some direct authority upon the question, without success. The nearest approach to it which we have found is the case of *Sherwood v. Mitchell,* 4 Denio, 435, in which it is stated that on the trial the plaintiff proved his debt and defendant pleaded his discharge in bankruptcy. The plaintiff insisted that defendant was bound to show that the debt did not arise out of a breach of trust. *Jewett, J.,* said: "The ground taken by the plaintiff is, that the defendant in his plea had alleged that the plaintiff's debt was provable under the bankrupt act, and that it was not created in consequence of any defalcation of the defendant as a public officer, or while he was acting in a fiduciary capacity he was bound to prove the averments, etc. . . . The discharge is presumptive evidence of all the facts asserted in it, and is conclusive until overthrown by evidence of some fraud which by the act avoids it. Debts arising out of a violation of an official or private trust are not affected by it, unless the creditor chooses to prove the demand under the bankruptcy proceedings. The discharge, it is true, is general in its terms and *prima facie* is a discharge of the bankrupt from all his debts. But the creditor may, notwithstanding, show that his debt is of the excepted class. The *onus,* however, is on him, and if he fails to make the proof, the debt will be taken to be of an ordinary character." This Court has uniformly held that the burden is on one claiming under an exception, in a grant or deed, to show that his claim comes within the exception. *McCormick v. Monroe,* 46 N. C., 13; *Batts v. Batts,* 128 N. C., 21. It seems that a failure on the part of the bankrupt to schedule a debt does not prevent the creditor from proving it. This is (285) evident from the provision that if he has notice of the proceeding he is bound by the discharge; hence, the plaintiff's debt was provable on 21 April, 1905. The fact that defendant was litigating its validity did not affect his right to prove it in bankruptcy. The plaintiff calls to our attention what is said in *Balk v. Harris,* 130 N. C., 381. It is true that the *Chief Justice* says that the petition to plead the discharge since the last continuance did not set out facts which made it the duty of the court, as matter of law, to allow it—for that it did not show that the debt was scheduled or that the creditor had notice of the proceedings, etc. The decision is based upon the ground that the allowance of the plea was within the discretion of the court, etc. The learned judge was not undertaking to decide the question now under discussion, and we cannot give to his words that effect. We are of the

opinion that the burden was upon the plaintiff to show that his debt was not scheduled and that he had no notice of the proceeding in bankruptcy. The plaintiff concedes that it is not proposed to enforce any lien upon the property belonging to the estate of the bankrupt. He insists, however, that it is within the province of the court to declare whether there is a lien, etc. We do not deem it proper to discuss or decide this question. If the docketing of the judgment creates a lien upon the property of the principal defendant, which is not affected by the discharge in bankruptcy, no proceedings can be had in the State court to enforce it—because it is conceded that the land owned by the plaintiff and referred to in the verdict has been allotted as his homestead. We do not perceive how any declaration of this Court at this time can affect the rights of the parties in that respect. It may be that other questions and defenses may arise before the homestead estate falls in. The only question presented for our decision is whether, assuming that the defendant J. F. Kerner is discharged from liability for plaintiff's debt, the defendants on his undertaking on appeal are bound. The undertaking is drawn in strict accordance with section 884 (286) of The Code. The plaintiff cites a number of cases decided by other courts in regard to the liabilities of sureties upon appeal bonds when the defendant appellant has been discharged in bankruptcy pending the appeal. The question is not free from doubt, but we prefer to place our decision upon the construction of our statute. The condition of the bond is to pay such judgment as may be rendered against the appellant. It would seem too clear for discussion that if no judgment can be rendered against the appellant because of a discharge in bankruptcy pending the appeal, the contingency upon which the sureties are liable can never arise. *Fontaine v. Westbrooks,* 65 N. C., 528. It is said by *Waite, C. J.,* in *Wolf v. Stix,* 99 U. S., 7 (8): "The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bond, and the like." The surety was held liable on the bond in that case because of its peculiar character. In *Goyer Co. v. Jones,* 79 Miss., 253, it was held that the sureties upon an appeal bond were not liable when the principal was discharged in bankruptcy pending the appeal. Collier on Bankruptcy, 187, thus states the law: "If the law of the State does not permit the discharge to be

pleaded in the appellate court, the discharge of the principal does not relieve the surety. If it may be pleaded in such court, no final judgment being possible against the principal, the surety is released." In *Knapp v. Anderson,* 71 N. R., 466, it was held that the sureties were (287) not released by the discharge of the principal debtor pending the appeal. The decision is based upon the ground that, notwithstanding the discharge, the court will proceed with the trial for the purpose of ascertaining the liability of the principal; that if the liability is fixed, the bond becomes absolute and the sureties bound. No execution can issue against the bankrupt. This condition of the parties would lead to the very strange result that upon an obligation of suretyship, the condition of which depended upon the liability of the principal, he is discharged and the surety is bound. To meet this difficulty the courts hold that when the sureties pay the judgment their right to sue for exoneration or for money paid to the use of the principal arises subsequently to the adjudication and is not affected by the discharge. The bankrupt is by this rather circuitous route made to pay a debt from which he is discharged. In this State the practice has been different. In a pending action upon a dischargeable debt, the defendant is permitted to plead his discharge since the last continuance, and, unless cause is shown to the contrary, the action is dismissed. *S. v. Bethune,* 30 N. C., 139; *Knabe v. Hayes,* 71 N. C., 109; *Blum v. Ellis,* 73 N. C., 293; *Withers v. Stinson,* 79 N. C., 341. We are of the opinion that upon the exhibition of the certificate of discharge, unless the plaintiff had shown that the debt was not scheduled and unless he had no notice of the proceeding in bankruptcy, the court should have dismissed the action. As we have said, we do not undertake to pass upon the effect of the docketed judgment as a lien upon the defendant's reversion in the land allotted as a homestead. The judgment must be

Reversed.

Dismissed On Writ of Error, 203 U. S., 579.

Cited: Walter v. Hedgepeth, 172 N. C., 314.

(288)

HESTER v. TRACTION COMPANY.

(Filed 2 May, 1905.)

Street Railways—Additional Servitude—Municipal Corporations—Streets—Sidewalks—Abutting Proprietor.

1. The construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied.
2. The rights, powers, and liability of a municipality extend equally to the sidewalk as to the roadway, for both are parts of the street, and the abutting proprietor has no more right in the sidewalk than in the roadway.
3. The rights of an abutting proprietor are simply that the street (including roadway and sidewalk) shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes.
4. Plaintiff owns a lot which occupies the apex of the acute angle at the intersection of two streets, on which street car tracks are laid, and under permission of the city the defendant laid a curved track around said angle. The curve does not touch the sidewalk, but the edge of the passing car for a few inches of distance slightly overhangs the edge of the sidewalk, and the ends of crossties are embedded under the sidewalk: *Held*, that the acts complained of were not unlawful, as plaintiff's right of ingress and egress to his lot was not interfered with by the curve.

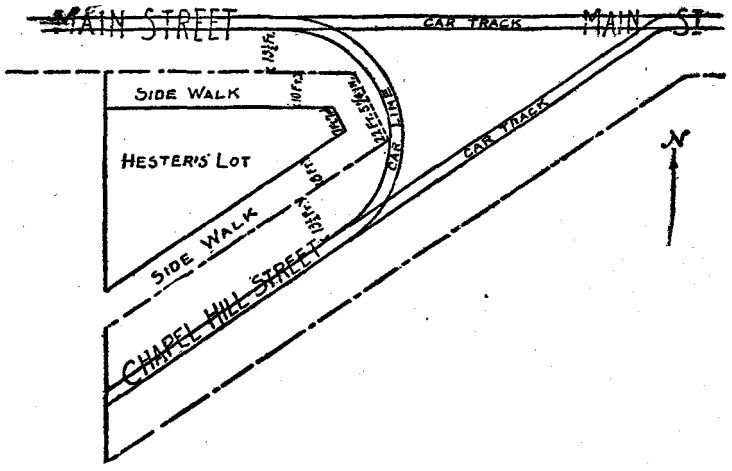
ACTION by W. D. Hester against Durham Traction Company, heard by *Bryan, J.*, and a jury, at October Term, 1904, of DURHAM. From a judgment in favor of the defendant, the plaintiff appealed.

Winston & Bryant and Fuller & Fuller for plaintiff.
Manning & Foushee for defendant.

CLARK, C. J. The plaintiff owns the lot which occupies the (289) apex of the acute angle which lies at the junction of Main and Chapel Hill streets in the city of Durham. The defendant, by permission of the board of aldermen of the city, laid a curved track to pass from one street to the other, as per below diagram.

This track was located and laid under the direction of the street commissioner, who made his report to the board of aldermen, the expenses of the work being borne by the defendant. This curved track was used in the summer, in the evenings from 6:30 until the cars went to the barn for the night, about 11 or 11:30. The curve was laid for the convenience of the public in going from West Durham to the Park and returning. Prior to its being laid, the passengers had to be transferred at that point (known as "Five Points") or else the West Durham car had to go down Main Street, and, reversing fenders,

seats, and trolley, run back to Chapel Hill Street. To avoid this great inconvenience to the public, the board of aldermen authorized this curve to be put in to run round the sharp angle at the junction of the
(290) two streets. Only passenger cars are used, no freight cars. On Main Street the nearest rail of the track is 15½ feet from the outside edge of the sidewalk and it is 13½ feet on Chapel Hill Street from



the nearest rail to curb. The curved track in rounding the point does not touch the sidewalk, but at the southeast corner, as the curve enters Chapel Hill Street, the edge of the car for a few inches of distance is slightly over the edge of the sidewalk. The complaint avers that the rear of the car does this; but this is evidently a mistake, for as the concave side of the curve is towards the plaintiff's lot, the rear of the car necessarily swings outward, not in. It is also in evidence that at the southeast corner of the sidewalk the cross-ties, extending 18 inches further than the rail, have their extreme ends under the sidewalk. They are not above the surface, but under, and as the cross-ties thus embedded, out of sight, cannot impede the use of the sidewalk, which is the property of the city, the plaintiff can have no possible ground of action on that account. The sidewalk on Main Street is 10 feet wide and that on Chapel Hill Street is 8 feet. The southeast corner where the passing car "overhangs" is diagonally distant about 11 feet from the southeast corner of the plaintiff's lot.

The plaintiff's cause of action depends upon whether he is injured in the use of his property by the slight overhanging of the pavement by the car for an instant of time as it passes the southeast corner where the curve enters (or leaves) Chapel Hill Street. The charter of the

city of Durham shows that, as usual, the city has the same right and title to the sidewalks as to the rest of its streets. The defendant's track was laid under authority of its charter, "permission being first had" of the city as required. The construction of a street passenger railway "does not impose any additional servitude upon the property fronting on the street so occupied." *Merrick v. R. R.,* 118 N. C., 1081, citing *R. R. v. Montgomery,* 167 Pa. St., 70, 27 L. R. A., 766; *Kennelly v. Jersey City,* 26 L. R. A., 281; Elliott R. and S., 558; Cooley (291) Const. Lim., 683; Dillon Mun. Corp. (4 Ed.), sec. 723. To the same purport, *R. R. v. R. R.,* 120 N. C., 523; *Smith v. Goldsboro,* 121 N. C., 350; *Tel. Co. v. R. R.,* 93 Tenn., 492, 27 L. R. A., 239; *R. R. v.* Higbee (Wis.), 51 L. R. A., 923; Booth Street Railways, sec. 83; Joyce on Elec., secs. 336, 339, 341; 27 A. & E. Enc. (2 Ed.), 27-29.

The authorities with singular uniformity concur that it is "now well settled that the use of the streets in cities or villages for a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the abutting property owner as a matter of right to compensation before such use can be made. . . . This rule is generally recognized, irrespective of the question whether, in the original laying out of the street, a mere easement was taken, leaving the fee simple in the abutting property." The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street. *Tate v. Greensboro,* 114 N. C., 392; 2 Smith Mun. Corp., sec. 1304; Elliott, *supra,* sec. 20. This is recognized by The Code, sec. 3803, and by the courts, which hold towns and cities to the same degree of liability for failure to repair sidewalks as to repair the other part of the street. *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 726; *Neal v. Marion,* 129 N. C., 345; *Wolfe v. Pearson,* 114 N. C., 621; 2 Dillon, *supra,* sec. 780, note 1, secs. 1008 and 1012.

In *Bunch v. Edenton, supra,* "It was the positive duty of the corporate authorities of the town to keep the streets, including the sidewalks, in proper repair." The charter of Durham gives the same powers over sidewalks and imposes the same liabilities upon the city for failure to repair the sidewalks as in regard to the other part of the street. In *R. R. v. Higbee,* 51 L. R. A., 929, it is said: "There (292) is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property."

The complaint avers three grounds of damage:

1. That 2 inches of the plaintiff's lot is covered by the defendant's track. But the evidence shows that the rail at the nearest point of the curve is 3 inches outside the curbing to the sidewalk and the pleadings admit that no part of the plaintiff's lot (inside the sidewalk) is overhung by the car in passing.

2. That vehicles have almost no approach to the lot. But the evidence is that between the outer edge of the sidewalk and the defendant's nearest rail there is 15½ feet on Main Street and 13½ feet on Chapel Hill Street. It is only at the apex, at the toe of the boot, so to speak, that the track approximates the outer edge of the sidewalk. There is ample evidence that the curve does not interfere with carriages standing on either street in front of the plaintiff's lot. As the "toe" of the plaintiff's lot is only 7 feet 7 inches, and being an acute angle it would be barely 4 feet perhaps at the edge of the sidewalk, a carriage could not stand there. The "toe" of the sidewalk (the cross sidewalk) is 22 feet 5¼ inches, but over 18 feet of this is "frontage," not of the plaintiff's lot, but caused by continuation of the two sidewalks, for if the plaintiff's lot were extended to the eastern edge of the sidewalk at that place, it would be narrowed, as already said, to a point with almost no front at all.

3. That cars frequently run off the track at that point. The only evidence is that they did run off the track three or four times when the curve was first used. There is no evidence of any injury to the plaintiff from this cause.

(293) The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 A. & E. Enc. (2 Ed.), 103; *Ottawa v. Spencer,* 40 Ill., 217 *Chicago v. O'Brien,* 53 Am. Rep., 640. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street (including roadway and sidewalk) shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes. *Moose v. Carson,* 104 N. C., 431; *White v. R. R.,* 113 N. C., 610. As said in *S. v. Higgs,* 126 N. C., 1014: "An abutting owner to a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public." Sidewalks are of modern origin. Anciently they were unknown, as they still are in Eastern countries and in perhaps a majority of the towns and villages of Europe. In the absence of a statute, a town is not required to construct a sidewalk. *Attorney-General v. Boston,* 142 Mass., 200. It is for the town to prescribe the width of the sidewalk. In the absence of statutory restriction it may widen, narrow, or even remove a sidewalk already established. *Attorney-General v. Boston, supra.* To widen a sidewalk narrows the roadway. To

widen the roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles respectively is in the sound discretion of the town authorities. Here, they might narrow the sidewalk at the "toe" of the plaintiff's lot by drawing in its outer edge, or they might make the outer-edge curving to correspond with the curve of the car track, and thus prevent the car overhanging the edge of the sidewalk. If so, they may, so far as the plaintiff is concerned, let the car overhang the corner instead of cutting off that corner from the sidewalk. If the sidewalk were so far narrowed as to impede the circulation of passers-by on foot, so as to hinder the ingress and egress to the plaintiff's building, he would have cause of complaint; but such is not the case here. If the overhanging of the car were to injure (294) any one walking on the sidewalk, such person might possibly have a cause of action against the city or the defendant, for the establishment and maintenance of the sidewalk are an invitation to pedestrians to walk anywhere thereon; but the plaintiff would not be injured thereby in his property rights to the lot, which is this cause of action. As to pedestrians, the city can protect itself by reducing the width of the sidewalk at the point, or, by condemning a few inches of the plaintiff's lot, it could make a cut-off at the outer corner without reducing the width of the sidewalk; but it should be remembered that that small space, occasionally overhung by a passing car, is at a corner of the street, and therefore the sidewalk, measured diagonally, is wider there than elsewhere, and would still be wider, though the little space "overhung" were cut off from the sidewalk, or the outer curbing of the sidewalk were drawn in and made curving at that point.

In holding that the acts of the defendant complained of by the plaintiff were not unlawful and did not constitute a cause of action, there was

No error.

Cited: S. v. Godwin, 145 N. C., 464; *Butler v. Tobacco Co.,* 152 N. C., 420; *Smith v. Hendersonville, ib.,* 620; *Green v. Miller,* 161 N. C., 30; *Sexton v. Elizabeth City,* 169 N. C., 390; *Crotts v. Winston,* 170 N. C., 28; *Bennett v. R. R., ib.,* 393; *Kirkpatrick v. Traction Co., ib.,* 478.

(295)

SUMMERS v. RAILROAD.

(Filed 9 May, 1905.)

Carriers—Delay in Transportation of Freight—Penalty—Party Aggrieved—Chapter 590, Laws 1903, Construed—Corporation Commission, Powers of.

1. In an action to recover a penalty, under chapter 590, Laws 1903, making it unlawful for any railroad to neglect to transport any goods for longer period than four days after receipt thereof, and providing a penalty for a violation thereof, to be forfeited "to the party aggrieved," the penalty is enforcible, independent of pecuniary injury, by the one whose legal right is denied.
2. Where the plaintiff returned goods to W. under an agreement that no credit for the returned goods was to be given till they were received by W.: *Held*, that the plaintiff was entitled to sue for the penalty given by statute "to the party aggrieved" for a delay in shipment.
3. The clause in chapter 590, Laws 1903, making it unlawful for a railroad to neglect to transport any goods received by it for a longer period than four days after receipt thereof, gives to the railroad four days free time at the point of shipment.
4. The clause in chapter 590, Laws 1903, making it unlawful for any railroad to allow any goods to remain at any intermediate point for a longer period than 48 hours, unless otherwise provided by the Corporation Commission, gives to the Commission the right to fix the time allowed as free time for intermediate points and to make reasonable regulations as to the time of transit.
5. The Corporation Commission has no power to change the time allowed as free time at the point of shipment, nor to alter the penalties fixed by chapter 590, Laws 1903.

ACTION by J. W. Summers against Southern Railway Company, heard on appeal by *Justice, J.*, and a jury, at March Term, 1905, of MECKLENBURG.

There was evidence tending to show that plaintiff, having an account with W. W. Ward & Son, of Charlotte, N. C., ordered a package
(296) of window sash to be shipped to him at Cornelius, N. C., a railroad station within 50 miles of Charlotte, which package duly arrived. Some of the sash were too large for plaintiff's purposes, and plaintiff requested Ward & Son that he be allowed to return those sash which plaintiff could not use, and Ward & Son agreed to give plaintiff credit on his account for any sash returned whenever the same should be received by them. That on 4 March, 1904, plaintiff delivered a part of the sash to defendant company for shipment at Cornelius, N. C., properly addressed and plainly marked to Ward & Son, Charlotte, N. C.,

and took a bill of lading therefor. There was also evidence that plaintiff, at the time of shipment, prepaid the freight and asked the agent of defendant to hurry up the shipment, telling him that he was anxious to get them back so he could get credit on his account with Ward & Son, and that several times thereafter and before the goods were shipped, plaintiff notified the agent that they had not been shipped and urged the agent to have them sent, as he was anxious to get the package to Ward & Son, as he could not get credit from them until that firm received the sash.

Plaintiff further testified that he had a running account with Ward & Son, and that he got credit for the sash returned, and Ward & Son made no difference in the credit by reason of delay. There was a delay of nearly thirty days in the shipment, and demand was properly made pursuant to the statute before bringing suit. Under the charge of the court there was judgment for the plaintiff for $1.50, and plaintiff excepted and appealed, claiming that according to the statute he was entitled to something like $80.

Clarkson & Duls for plaintiff.
W. B. Rodman for defendant.

HOKE, J., after stating the facts: Section 3, chapter 590, Laws (297) 1903, provides as follows: "That it shall be unlawful for any railroad company, etc., to omit or neglect to transport any goods or merchandise received by it, and billed to or from any place in this State for shipment, for a longer period than four days after receipt of same, unless otherwise agreed upon between the company and shipper; or unless the same be burned or otherwise destroyed; or to allow any such goods or merchandise to remain at any intermediate point more than forty-eight hours unless otherwise provided for by the Corporation Commission."

The section further provides "that each and every company violating the provisions of this section shall forfeit to the party aggrieved the sum of $25 for the first day and $5 for each and every day of such unlawful detention, in case the shipment is made in car-load lots; but in less quantities the forfeiture shall be $12.50 for the first day and $2.50 for each succeeding day."

Acting under the power conferred by section 3 of this act, the Corporation Commission made a regulation concerning these shipments which, in effect, reduced the time for delay allowed to the company, and fixed a lower penalty than that provided by the statute. According to the testimony, there was a delay in the shipment of something like thirty days, and the plaintiff sued for the penalty allowed by the

statute. The defendant resists any recovery, claiming that the plaintiff is not the party aggrieved, in that no pecuniary injury is shown, and, second, that the only person having the right to sue is Ward & Son, to whom the package is addressed.

The defendant contends further, that in any event the penalty received must be confined to that provided by the rule of the Corporation Commission, as the statute gave them power to change the penalty therein provided.

As to the position that no recovery at all can be had, the Court is of opinion that on the facts of this case the plaintiff is the party aggrieved, and the only person who had the right to enforce the penalty for
(298) delay. These penalties are not given solely on the idea of making a pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment. As said in *Grocery Co. v. R. R.,* 136 N. C., at p. 404: "The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public."

They are sometimes enforcible only by the State; sometimes they are given to any one who shall sue for them; and again the recovery is confined, as in this instance, to the party aggrieved, the person having a peculiar and special interest in enforcing the performance of the duty. In giving the penalty to the party aggrieved the statute simply designates the person who shall have a right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered.

The party aggrieved, in statutes of this character, is the one whose legal right is denied, and the penalty is enforcible independent of pecuniary injury. *Switzer v. Rodman,* 48 Mo., 197; *Qualls v. Sayles,* 18 Tex. Civ. App., 400; *Grocery Co. v. R. R., supra.* Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railway, the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son. It made no difference to this firm whether the goods were returned or not; they had their account against the plaintiff, and a fair interpretation of the agreement between the parties is that no credit was to be given till the goods came to hand. Until this occurred,
(299) the loss of the goods would have been the loss of the plaintiff, and he alone was interested in urging the shipment.

This case is not dissimilar to those where the penalty is im-

posed on a telegraph company for not forwarding a message, and the party aggrieved is held to be the sender. *Hadleigh v. Tel. Co.*, 115 Ind., 191.

In reference to the regulation by the Corporation Commission, the statute provides that it shall be unlawful for a railroad company . . . doing business in this State to neglect or omit to transport any goods or merchandise received by it and billed to or from any place in this State, for a longer period than four days, unless otherwise agreed upon between the parties. This is a separate, distinct clause, and in *Walker v. R. R.*, 137 N. C., 163, this Court has held that in the absence of any express contract concerning it, such clause gives to the railroad four days free time, at the initial point.

Then follows another clause: Or to allow any goods or merchandise to remain at any intermediate point for a longer period than forty-eight hours, unless otherwise provided by the Corporation Commission. We think this clause gives to the Corporation Commission the right to fix the time allowed as free time for intermediate points, and by fair interpretation confers on the Commission the power to make reasonable regulations as to the time of transit. Such a rule has been made and was introduced in evidence, and we hold the correct construction of the statute as modified by the rule to be, that, in the absence of any express contract, the railroad company is allowed four days' delay at the initial point and three additional days of free time for the first 50 miles of transit and one day for each additional 25 miles or fraction thereof, to the point of destination. The Commission is given no power to change the time allowed as free time at the point of shipment, nor to lessen nor otherwise alter the penalties. These are fixed by the statute, and can only be changed by the Legislature. *Everett v.* (300) *R. R., ante,* 68.

The Court is of opinion that on the facts of this case the plaintiff is the party aggrieved and the action is well brought in his name; that the time allowed as free time is four days at the point of shipment and three additional days in transit, and the penalty is that provided by the statute. There will be a new trial and the cause proceeded with in accordance with this opinion.

New trial.

Cited: Stone v. R. R., 144 N. C., 229, 232; *Cardwell v. R. R.*, 146 N. C., 220; *Rollins v. R. R., ib.*, 156; *Davis v. R. R.*, 147 N. C., 70; *Factory v. R. R.*, 148 N. C., 422; *Mfg. Co. v. R. R.*, 149 N. C., 262; *Reid v. R. R.*, 150 N. C., 765; *Lumber Co. v. R. R.*, 152 N. C., 74; *Buggy Corporation v. R. R., ib.*, 121; *Elliott v. R. R.*, 155 N. C., 237; *Withrow v. R. R.*, 159 N. C., 226; *Ellington v. R. R.*, 170 N. C.,

37; *Horton v. R. R., ib.*, 386; *Whittington v. R. R.*, 172 N. C., 505; *Trading Co. v. R. R.*, 178 N. C., 181.

PUMP COMPANY v. RAILROAD.

(Filed 9 May, 1905.)

Railroads—Overcharges on Freight—Evidence.

1. In an action to recover a penalty for overcharge on freight, under chapter 590, Laws 1903, whether there is or is not an overcharge depends upon evidence as to the rate exacted for transportation and the rate fixed by the tariff of the company or by the law, and the court erred in admitting the unsworn declarations of an agent that there was an overcharge.
2. In an action to recover a penalty for an overcharge, the jury having found that the shipment of goods was made upon a connecting line on a bill of lading which accompanied the goods, and that the defendant collected only the rate specified in the bill of lading, the plaintiff cannot recover.

ACTION by Latta-Martin Pump Company against Southern Railway Company, heard by *Webb, J.*, and a jury, at February Term, 1905, of CATAWBA.

This was a civil action brought to recover a penalty under sections 1 and 2, chapter 590, Laws 1903, for making overcharges on freight. The court submitted the following issues:

1. Did defendant demand, collect, and receive from plaintiff an overcharge of freight on shipment of iron fittings delivered to plain-
(301) tiff by defendant on 29 August, 1903? Answer: Yes.

2. Did plaintiff file with the agent of defendant company a written demand supported by a paid freight bill and the original bill of lading or a duplicate thereof on 31 August, 1903? Answer: Yes.

3. What is the amount of penalty which plaintiff is entitled to recover of defendant? Answer: $100.

4. Were the goods for which freight was charged and paid over, for which overcharge is claimed, shipped from Chicago, Ill., over the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company and other connecting lines to the city of Hickory, N. C.? Answer: Yes.

5. Was said shipment of goods on bill of lading issued by the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, specifying said shipment as 1,260 pounds, at a specified freight rate of $1.06 per 100 pounds? Answer: Yes.

6. Did the defendant collect only at said rates at $1.06 per 100 pounds? Answer: Yes.

7. Did the goods come to the hands of defendant as one of said common carriers at some intermediate point and did defendant transport same to Hickory, N. C., and deliver same to the consignee, the plaintiff, upon payment by plaintiff of the amount specified in the bill of lading issued by the P. C. C. and St. Louis Railway Company? Answer: Yes.

From a judgment for plaintiff, the defendant appealed.

Self & Whitener for plaintiff.
S. J. Ervin for defendant.

BROWN, J. The goods on which it was contended there was an overcharge of $6.30 consisted of 1,260 pounds of iron valves shipped from Chicago, Ill., to the plaintiff at Hickory, N. C., on a bill of lading issued at Chicago by the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, which specified the weight of the shipment at 1,260 pounds and the freight rate at $1.06 per 100 pounds, making a (302) total charge of $13.35. These goods were transported over the line of this road and other connecting carriers, came into the hands of the defendant company at some intermediate point, and were transported by the defendant to Hickory, N. C., and there delivered to the consignee, The Latta-Martin Pump Company, upon payment of the amount specified in the bill of lading issued at Chicago. The plaintiff contended that there was an overcharge of $6.30. Why there was an overcharge, how, or in what respect, does not appear. There was no testimony as to the amount of the overcharge, no tariff of any road being offered and no statute fixing the rate. The only evidence offered on this point was the declaration of the agent at Hickory that there was an overcharge. This was objected to on the ground that it was incompetent; that it was a mere opinion; that the printed tariff of rates was the best evidence. The defendant also contended that chapter 590, Laws 1903, should not be so construed as to apply to the facts of this case, and if so construed as to apply to shipments from other States it would amount to a regulation of commerce among the States and is void under the Constitution of the United States, Art. I, sec. 8.

It is unnecessary for us to pass upon the doubtful competency of the agent's declarations. It is sufficient to hold that they are a mere expression of opinion as to a matter which may be a question of law and fact. Under the act of 1903 the question whether there was an overcharge depended upon the fact whether the amount exacted for the transportation of the goods was in excess of the "rates appearing in the printed tariff of said company or more than is allowed by law." The printed tariff or the law fixing the rate, if there be any, is therefore the best evidence as to whether there has been an overcharge or not. The

declaration of the agent was a mere opinion, and proves nothing. The question whether there is or is not an overcharge depends upon
(303) evidence as to the rate exacted for transportation and the rate fixed by the printed tariff or the law. From such evidence the law infers that there was or was not an overcharge. The court permitted the unsworn declarations of the agent to decide this matter, which was the very question to be determined by the jury under the first issue. In this there was error. Under the fifth issue the jury have found as a fact that the shipment of goods was made originally upon the Pittsburg, Cincinnati, Chicago and St. Louis Railway, upon a bill of lading which accompanied the goods, specifying the shipment as 1,260 pounds at a specified freight rate of $1.06 per 100 pounds; and in response to the sixth issue the jury have found that the defendant collected only the freight rate specified upon the bill of lading which accompanied the goods from Chicago. We are of opinion that there is no evidence presented in the record upon which the plaintiff can recover.

It is unnecessary for us to determine the interesting constitutional question so ably and elaborately discussed in the brief of defendant's counsel.

New trial.

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(304)

MOORE v. INDUSTRIAL COMPANY.

(Filed 9 May, 1905.)

Judgments for Labor Performed—Mortgages—Liens—Code Section 1255.

A judgment obtained against the defendant for services rendered by the plaintiff, which consisted in superintending the conduct of its milling operations, conducting a commissary store and keeping the books of the corporation, does not come within the terms of section 1255 of The Code, which provides that mortgages of incorporated companies should not have power to exempt their property from execution for the satisfaction of judgments obtained for "labor performed."

ACTION by C. P. Moore against the American Industrial Company and another, heard by *McNeill, J.*, and a jury, at November Term, 1904, of CALDWELL.

This was a civil action for the recovery of a tract of land and to remove an alleged claim or mortgage held upon the same by the defendant Samuel Newman. The defendant company owned the tract of land

in controversy, and had executed a mortgage on 20 December, 1895, to Samuel Newman, securing a debt for $6,000 and conveying three tracts of land, which is the land in controversy in this action. A jury trial was waived and the court found the facts. From his Honor's findings of fact it appears that the defendant company became indebted to the plaintiff for certain services rendered by him in the sum of $164.90, for which plaintiff recovered judgment on 14 August, 1896. Execution was issued, and under it the sheriff sold the land in controversy on the first Monday in February, 1902, at which sale the plaintiff became the purchaser and received a deed therefor from the sheriff of Caldwell County. From the judgment rendered the plaintiff appeals.

W. C. Newland and S. J. Ervin for plaintiff. (305)
Lawrence Wakefield for defendants.

BROWN, J. It is contended by the plaintiff as follows: (1) That the mortgage was improperly executed; (2) that the defendant Samuel Newman was an incorporator and stockholder of the defendant company; and (3) that the mortgage was void as against the plaintiff's debt under section 1255 of The Code, because the plaintiff's judgment was obtained for "labor performed" for the defendant company.

We agree with his Honor that the words "labor performed," as used in section 1255 of The Code, do not embrace such services as were rendered by the plaintiff to the defendant company and for which he recovered judgment set out in the record and under which the land was sold. The findings of fact by his Honor necessary to a determination of this appeal are as follows: "Fourth. I further find that in the early part of 1896 the plaintiff, C. P. Moore, was employed by the said corporation as its superintendent or agent, and that as such agent or superintendent the plaintiff employed hands for it and operated its sawmill in the manufacture of lumber, conducting a commissary where the hands were supplied with goods; that the said Moore kept the books of the corporation and had the general oversight and management of said hands and of the conduct and management of the said business of said corporation at said lumber plant, but did not work with his hands or perform any manual labor, having merely the control and direction of the hands." The word "labor" in legal parlance has a well defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. "Labor may be business, but it is not necessarily so, and business is not always labor. In legal significance labor implies toil, exertion producing weariness; manual exertion of a toilsome nature." *Bloom v. Richards,* 2 Ohio State, 387. In (306)

English statutes, and in the construction placed upon them by the English courts, this term is generally understood to designate a servant employed in some manual occupation. In *Cook v. Tramway Co.*, 18 Q. B. Div., 684, in speaking of the definition of a laborer as used in the English Employer's Liability Act, *Smith, J.*, says: "The expression used, it should be noted, is not manual work, but manual labor. Many occupations involve the former, but not the latter; for instance, telegraph clerks, bookkeepers, and all persons engaged in writing." According to the findings of fact made by the court below in the case before us, the services rendered by the plaintiff consisted in superintending the conduct of the milling operations of the defendant company, conducting a commissary from which the hands were supplied, and keeping the books of the corporation. He did not work with his hands or perform any manual labor, having merely the control and direction of the employees of the defendant company and the general management of its business. The word "laborer" has a definite and fixed meaning in the Constitution and legislation of this State. In Article IV, section 4, of the Constitution, it is provided that the General Assembly shall enact suitable legislation for the purpose of giving to mechanics and laborers an adequate lien on the subject-matter of their labor, and in pursuance of this provision the Mechanic's and Laborer's Lien Law, The Code, chapter 41, was enacted by the General Assembly. Words used in legislation which have a technical meaning are supposed to be used in that sense. Worcester defines a laborer to be one who labors; one regularly employed at some hard work. Webster defines a laborer to be one who labors in a tiresome occupation; one who does work that requires little skill, as distinguished from an artisan. In Georgia a laborer has been adjudicated to be one who performs manual labor.

(307) *Adams v. Goodrich,* 55 Ga., 335. To the same effect is *Hebener v. Chave,* 5 Pa. St., 117. These cases are cited and approved by this Court in *Whitaker v. Smith,* 81 N. C., 340. See, also, *Cook v, Ross,* 117 N. C., 195. A bookkeeper is not a laborer and does not come within the act giving a laborer a lien for his services. *Nash v. Southwick,* 120 N. C., 459. A clerk or bookkeeper is not a laborer. *Cole v. McNeil,* 99 Ga., 250; Epps v. Epps, 17 Ill., 196. One who acted as general manager, superintendent, and bookkeeper and clerk is not a laborer. *Wakefield v. Fargo,* 90 N. Y., 214; *Coffin v. Reynolds,* 37 N. Y., 640. There are innumerable cases in which the terms labor and laborer have been confined to such services as were rendered by manual labor. *Trinity Church v.* U. S., 143 U. S., 464; *Winder v. Caldwell,* 14 How. (N. Y.), 434; *Parker v. Bell,* 7 Gray (Mass.), 429; *Brockway v. Inniss,* 39 Mich., 47; *Wildner v. Ferguson,* 42 Minn., 112; *Farinholdt v. Lockhard,* 90 Va., 938.

We are of opinion upon the facts found by the court below that the plaintiff is the owner of the land in controversy, subject to the lien of the mortgage of the defendant, Samuel Newman, which is the first lien thereon. It appears that in the judgment of the court provision is made for the foreclosure of the mortgage; therefore, the cause will be remanded to the Superior Court of Caldwell to the end that the said decree may be enforced, and unless the plaintiff pays the mortgage, as required therein, a decree will be entered appointing a commissioner, who will proceed to sell the land in accordance with the decree of his Honor, *Judge McNeill.* If upon a sale of the property it should bring more than the mortgaged indebtedness, so far as now appears to us from this record, the surplus, after payment of all costs and expenses of sale, will belong to the plaintiff. The cause is remanded and the judgment of the Superior Court is

Affirmed.

Cited: Cox v. Lighting Co., 152 N. C., 167; *Stephens v. Hicks,* 156 N. C., 241; *Iron Co. v. Bridge Co.,* 169 N. C., 514.

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(308)

HOLDER v. MANUFACTURING COMPANY.

(Filed 9 May, 1905.)

Demurrer to Evidence—Discharge of Employee—Procurement by Third Person—Corportions, Liability of—Same Officers.

1. Where the defendant demurred to the evidence and at the conclusion of the entire testimony renewed the motion to dismiss, these motions presented every phase of the case arising upon the plaintiff's evidence, and it was not necessary to again present them by prayers for instructions.
2. In an action against the defendant for procuring plaintiff's employer to discharge him, plaintiff cannot recover where his contract of employment was only to work by the day.
3. The fact that the defendant company and plaintiff's employer had the same officers does not make the defendant liable for acts done by its officers in the discharge of their duties towards the other company, though they act in that respect by reason of information derived in the discharge of similar duties as officers of such company.

PETITION to rehear. For former opinion, see 135 N. C., 392.

W. G. Means and Shepherd & Shepherd for petitioner.

Montgomery & Crowell, M. B. Stickley, and Busbee & Busbee in opposition.

CONNOR, J. This cause is before us upon a petition to rehear and review the decision made at February Term, 1904. The writer of this opinion was then joined by *Mr. Justice Walker* in a dissenting opinion. The majority of the Court, after hearing a second argument upon the petition to rehear, are of the opinion that there was error in the former decision, and that a new trial should be ordered. In the opinion
(309) written by *Mr. Justice Montgomery* it was said: "Upon Barnhardt's testimony the defendant could have asked the court to instruct the jury that as the contract between the plaintiff and defendant was indefinite as to time, the defendant company would not be responsible for the discharge of the plaintiff because of knowledge of the character of the plaintiff and of his conduct at the defendant's mill, acquired by Barnhardt as assistant manager of both mills. But no such request for instruction was made by the defendant." It will be observed that the plaintiff testified: "At Gibson Mill they had a right to discharge me at night. I worked by the day." The defendant at the conclusion of the plaintiff's testimony demurred to the evidence and at the conclusion of the entire testimony renewed the motion to dismiss. These motions presented every phase of the case arising upon the plaintiff's evidence. It was not necessary, therefore, to again present them by prayers for instruction. There was nothing in defendant's evidence aiding the defect in plaintiff's case in respect to the terms of employment. If, as testified by plaintiff, the Gibson Mill had the legal right to discharge him at night, that his contract was to work by the day, it is not easy to see how he sustained any actionable wrong by any conduct of the defendant. He could not have sued the Gibson Mill for discharging him at the end of the day; how, then, can he sue the defendant company for procuring the Gibson Mill to do something which it had the legal right to do? The case comes clearly within the principle announced by this Court in *Richardson v. R. R.*, 126 N. C., 100. "Persuading or inducing a man, without unlafwul means, to do something he has a right to do, though to the prejudice of a third person, gives that person no right of action, whatever the persuader's motives may have been." Pollock on Torts (6 Ed.), p. 317. In *Haskins v. Royster*, 70 N. C., 601, *Rodman, J.*, quoting the opinion in *Walker v. Cronin*, 107 Mass.,
555, says: "One who entices away a servant or induces him to
(310) leave his master may be held liable in damages therefor, provided there exists a valid contract for continued service known to the defendant." The plaintiff does not allege any special damage other than

loss of wages. As he had no contract right with the Gibson Mill, it is clear that, conceding his allegation that defendant company procured his discharge, it did him no actionable wrong, because there was no interference with any legal right. He does not aver that he was prevented from renewing his contract of service by any conduct of the defendant, and if he had, it would seem that no right of action accrued therefor. "A recent decision of the Court of Appeals that procuring persons, not to break a contract, but not to renew expiring contract or make a fresh contract, may be actionable if done 'maliciously,' without any allegation that intimidation or other unlawful means were used, is now overruled." Pollock on Torts, 316; *Temperton v. Russell,* 1 Q. B., 715, 62 L. J. Q. B., 412. *Clark, J.,* in *Richardson's case, supra,* says: "Upon the plaintiff's own showing his discharge was within the right of the defendant, and not wrongful, and malice disconnected with the infringement of a legal right cannot be the subject of an action." *S. v. Van Pelt,* 136 N. C., 633.

We are also of the opinion that there is a total absence of evidence that any agent or servant of the defendant company acting as such and within the scope and sphere of his duties, procured the discharge of the plaintiff. The case is peculiar in that the defendant company and the Gibson Mill had the same officers. Certainly, this cannot have the effect of placing upon the defendant company liability for acts done by its officers in the discharge of their duties towards the Gibson Mill, although they may have pursued a line of conduct in that respect by reason of knowledge or information derived in the discharge of similar duties as officers of such mill. A corporation acts only by and through its agents, and before it can be held liable, the alleged wrongful act must be traced to its agents while acting within the scope (311) of their employment. We do not find any evidence in this case that Barnhardt, in his action respecting the plaintiff, was acting as the agent of the defendant mill. There is not, as was said in the dissenting opinion heretofore, any evidence that any officer, servant, or agent of the defendant company wrote any letter to the Gibson Mill in regard to discharging the plaintiff. For the reasons given, the petition must be allowed and a new trial awarded.

Petition allowed.

HICKORY v. RAILROAD.

(Filed 9 May, 1905.)

Nonsuit—Effect of First Trial—Rights at Second Trial.

1. In an action to enjoin the erection of certain structures, plaintiff, at the first trial in the Superior Court, in deference to an adverse intimation upon the evidence and certain findings by the court, submitted to a nonsuit and appealed. Upon appeal, this Court found error and remanded the case. At the second trial, the court, upon the certificate of this Court, entered judgment according to the prayer of the complaint: *Held*, that the plaintiff was not entitled to judgment without a new trial by a jury.
2. Where a nonsuit is taken in deference to an adverse ruling, which is reversed on appeal, a new trial is awarded, and at the next trial the parties must start even, each having an equal right with the other to present his entire case *de novo*, unaffected by the proceedings on the first trial and appeal, except so far as the legal principle settled by this Court is applicable to the facts as established at the next trial.
3. Where the first trial has, by consent of parties, been by the court, the second trial must be by a jury, unless there be a new agreement that the court may try.

(312) ACTION by city of Hickory against Southern Railway Company, heard by *Webb, J.*, at February Term, 1905, of CATAWBA.

This is an action by the city of Hickory against the Southern Railway Company for an injunction to restrain it from erecting a platform or any other structure on the land in said city, the boundaries of which are described in a deed from Henry W. Robinson to the Western North Carolina Railroad Company, dated 10 March, 1880, which deed was executed as a substitute for a prior lost deed of the same purport, dated 26 May, 1859, the contention of the plaintiff being that by the terms of the said deeds the Western North Carolina Railroad Company, predecessor of the defendant, held the said land in trust for the uses and purposes specified therein. A trial of the case was had before *Judge Neal* at May Term, 1904, at which much testimony, both oral and documentary, was introduced. The court submitted without objection to the jury the following issues:

1. Is the defendant in this action a trustee for the plaintiff of the land described in the complaint, and does it hold the same in trust not to be built upon or occupied by either party?

2. Is the defendant's claim to the land described in its alleged deed and not actually occupied by the defendant barred by the statute of limitations?

3. Is the defendant in the lawful possession of the land covered by the platforms described in the fifth paragraph of the complaint?

4. Does the defendant so maintain its present freight depot as to constitute a nuisance to the plaintiff's citizens and the public generally?

5. If the defendant is permitted to enlarge the present depot as contended by the plaintiff, will such enlargement and extension constitute a nuisance to the plaintiff and the public generally?

It was agreed by counsel as follows: "In order to save the submission of a great number of issues and at the same time present the cause for intelligent decision, it is agreed that the court may find certain facts deemed necessary by the parties." The presiding judge (313) thereupon found certain facts, which are set out in the former case and the substance of which is stated in the report of the case at a former term (137 N. C., 189). Briefly stated, these findings were as follows: (1) The location of the Western North Carolina Railroad in 1859 at the place where Hickory now is and the continuous use and possession of the station-house and the operation of the road ever since that time. (2) The sparse settlement of the place at that time and the incorporation and growth of Hickory as a town. (3) The execution of the deed by Robinson to the railroad company in May, 1859, registered 13 May, 1904, which conveyed the land to the latter "for the purpose of a public square around the depot for the free and common use of both the railroad and the town of Hickory, not to be built upon or exclusively occupied by any one to the exclusion of the public as a free common." (4) The execution of the deed of 10 March, 1880, in place of the former deed, which had been lost, registered 17 April, 1880, including the defendant's roadbed and station-house now in controversy. (5) Indorsement of James W. Wilson, president of the railroad company, namely, "The original deed having been destroyed without record, this deed is accepted in lieu thereof." (6) Minute-book of the railroad company of March, 1870, to May, 1880, showing that there had been no authority conferred on Wilson to accept the deed and no ratification of his act. (7) The charter of the railroad company (Laws 1854-5, ch. 228).

Upon the evidence (and upon the findings, also, as we suppose, though it is not so stated), the plaintiff prayed for certain instructions to the jury, which were refused. The court then intimated adversely to the plaintiff upon the evidence, findings, and issues, in deference to which intimation the plaintiff submitted to a nonsuit and appealed. At the last term of this Court the case was heard and the contentions of the parties were fully discussed by *Justice Douglas* in an opinion written (314) for the Court. We then decided that there was error, and remanded the case. At the last trial in the Superior Court the plaintiff, upon the certificate of this Court, moved for judgment according to the prayer of the complaint, which motion was granted and a judgment entered perpetually enjoining the defendant "from erecting any building,

platform, or any other structure whatsoever or any part thereof" on the said land. Defendant excepted and appealed.

T. M. Hufham, Self & Whitener, and E. B. Cline for plaintiff.
S. J. Ervin for defendant.

WALKER, J., after stating the case: We are unable to see upon what ground the plaintiff was entitled to judgment in the court below in the then state of the cause, without a new trial by a jury. When the court intimated an opinion which was adverse to the plaintiff, and it withdrew from the court by submitting to a nonsuit, if there was error in the intimation, there was only one way this Court could correct it and restore the plaintiff to its right, and that was by granting another trial, when the trial must be *de novo*. All that was done up to the time of the nonsuit goes for nothing and the case must be retried from the beginning. This was evidently the view we took of the matter at the former hearing in this Court, as the concluding words of *Justice Douglas* show. "As the facts are now presented to us" the plaintiff was entitled to the relief demanded, which clearly implies that the facts might be presented differently at the next trial, and this is utterly inconsistent with the plaintiff's present contention that it was entitled to judgment according to the prayer of the complaint, upon the certificate of this Court and without any trial at all, because the judge had made certain findings which were in themselves sufficient as the basis of such a judg-
(315) ment. Counsel have cited us to no authority to sustain the contention, and we are quite sure that the matter has been decided the other way, as will presently appear. "Whenever in the progress of a cause the plaintiff perceives that the judge or the jury are against him or that he will, on a future occasion, be able to establish a better case, he may elect to be nonsuited." *Bank v. Stewart,* 93 N. C., 402. Plaintiff chose to withdraw, rather than risk the judgment of the court or test the correctness of its opinion upon the law of his case by exception thereto and an appeal to this Court. When it refused to prosecute the cause any further, it thereby agreed that all that had been done should be annulled, with the reservation of the single question as to its right in law to reënter the court and prosecute its action anew, and subject to the opinion of this Court upon that point alone. The law will not give the plaintiff two chances. When the court gives an intimation which he thinks imperils his success, and he wishes to have the court reviewed and its error corrected, he may withdraw by submitting to be nonsuited, so that he will not be concluded by a judgment upon the merits, and may come back into court again and present a better case; but he forfeits thereby all right, if the judgment is reversed, to have

the new trial commence where the court left off. In order to avail himself of any such privilege, he must try his case upon the merits to final judgment, and not even then will he be entitled in all cases to that advantage. When a nonsuit is taken in deference to an adverse ruling, which is reversed on appeal, a new trial is awarded and at the next trial the parties must start even, each having an equal right with the other to present his entire case *de novo* in a better light. It has been said that "a nonsuit is but like the blowing out of a candle, which a man at his own pleasure may light again." This is an apt illustration, but it does not mean that the plaintiff may reënter the court when he has once abandoned the further prosecution of his case, and avail himself (316) of what had already been done at the former trial. That he will be entitled to the full benefit of the legal principle settled by the appellate tribunal, if he has been driven to a nonsuit and appeals, and that his adversary will be concluded by it so far as it is applicable to the facts as established at the next trial, is undeniable; but this is all he has accomplished. He cannot enjoy any greater advantage otherwise than if he had taken a voluntary nonsuit and brought a new suit for the same cause of action. It was at one time a question whether the plaintiff could submit to a nonsuit and appeal; but this has been settled in his favor, with the limitation, however, that upon a reversal of the trial court he is only entitled to a trial of the whole case *de novo*. But we think the very question presented in this case has been decided by this Court contrary to plaintiff's contention. In *Benbow v. Robbins,* 71 N. C., 338, plaintiff brought his action to have defendant enjoined from using an easement in excess of his rights therein. The parties waived a jury trial and consented that the court might find the facts, which was done. The court, upon its finding of facts, decided that plaintiff's cause of action was barred by the statute of limitations, and he excepted and appealed. This Court reversed the ruling and judgment, certifying only to the court below (as in our case) as follows: "There is error. Judgment reversed." At the next trial in the court below the plaintiff contended that the case should not be tried anew, but "that the parties were bound by the finding of facts at the former trial, which were in favor of plaintiff." The court was of this opinion and gave judgment for plaintiff. Defendant excepted and appealed. This Court held that the court below erred in its ruling. The Court says: "Whether a trial of facts is by a jury or by the court, if it appears that the finding was influenced by misdirection or misconception of the law, a new trial will be granted by this Court on appeal. And in such case the former trial goes for nothing. And where the first trial has, (317) by consent of parties, been by the court, the second trial must be by jury, unless there be a new agreement that the court may try." *Ben-*

bow v. Robbins, 72 N. C., 422. The Court then directed that a *venire de novo* be awarded. Two cases, the one we have cited and the case at bar, could scarcely be more alike in their facts and in the crucial point involved. *Benbow v. Robbins,* as reported in 72 N. C., 422, was cited and approved in *Isler v. Koonce,* 83 N. C., 55, upon a substantially similar state of facts. The difference in the two cases is that in *Isler v. Koonce* the court below overruled the plaintiff's motion for judgment and granted a trial *de novo,* and even allowed new parties to be made, whereas in our case the court granted plaintiff's motion for judgment. The ruling in that case was sustained by this Court, which held that where judgment is reversed the parties are remitted to their original right to have a trial by jury, although the parties had at the former trial waived a jury and agreed that the judge might try the case. Referring to *Benbow v. Robbins, supra,* the Court, by *Justice Dillard,* says:

"There, after the reversal of a judgment in favor of the defendant on a trial of the facts and law by the court, the plaintiff, conceivng himself entitled to stand upon the advantage of the facts which had been found by the judge, procured judgment to be entered in his favor, and on appeal to this Court that judgment was reversed, as reported in 72 N. C., 422. And, then, after setting forth the grounds on which the judgment in that particular case was held erroneous, the Court lays down the general rule that, 'Where the first trial has by consent been by the court, the second trial must be by a jury, unless there be a new agreement that the court may try.' This sustains the judge below on the first point of error assigned by the appellant, and precludes the necessity of any further discussion as to that matter." The principle of these cases was approved in *McMillan v. Baker,* 92 N. C., 110, and (318) also asserted in *Mitchell v. Bannon,* 10 Ill. App., 340, citing *Chickering v. Falls,* 29 Ill., 294. See, also, *Gott v. Judge,* 42 Mich., 625; *Dows v. Swett,* 127 Mass., 364. The cases cited by the learned counsel for the plaintiff in the argument before us are not in point. They might perhaps have applied if the case had been tried upon its merits to a final determination and an appeal taken from the judgment of the court, but such is not the case here. The plaintiff did not ask for judgment upon the facts found, even if this is a case where he was entitled to such judgment, but he withdrew his case from the court, and the only remedy for the correction of any error committed by the court below is a new trial, when the plaintiff will be permitted to prove its case by the same or by other and more convincing testimony (if such is needed), and the defendant will have the same privilege in respect to its defense, the rights of the parties being equal and reciprocal. The court below will proceed with the trial of the issues raised

by the pleadings just as if there had been no trial before the court and a jury, applying the law of the case as settled by this Court in its former opinion, so far as it may be applicable to the case as newly developed. It may be that the next trial, in view of our decision at the last term, should lead to a particular result, as argued by the plaintiff's counsel, but we cannot see that it certainly will do so without knowing what the facts will be, as then found by the jury or by the court, if a jury trial is again waived, and we have no right to conjecture as to what they will be. *McMillan v. Baker, supra.* New and essentially different proof may be introduced by the respective parties and the legal aspect of the case may be entirely changed.

Our conclusion in this appeal accords with the result we reached at the last term, as will clearly appear, we think, from the opinion of the learned justice who spoke for the Court. (319)

There was error in the ruling of the court. The judgment will be set aside and a new trial awarded.

Error.

Cited: Hayes v. R. R., 140 N. C., 134; *Chandler v. Mills,* 172 N. C., 368.

HICKS v. MANUFACTURING COMPANY.

(Filed 9 May, 1905.)

Admissions of Attorneys—Proximate Cause—Disobedience of Orders—Duty of Employer—Defective Appliances—Assumption of Risk—Contributory Negligence—Issues—Continuing Negligence.

1. Admissions of fact by an attorney only bind a client when they are distinct and formal and made for the express purpose of dispensing with proof of a fact on the trial. Therefore, admissions at a former trial which amount only to counsel's opinion adverse to his client on facts reported to him are incompetent.
2. An instruction which left it to the jury to determine whether plaintiff's disobedience of orders was the proximate cause of his injury, was erroneous, where there could be no two opinions among fair-minded men as to the result if he had obeyed the orders and stopped the machine while cleaning it.
3. An employer of labor is required to provide for his employees a reasonably safe place to work and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places

of like character, and to keep such machinery in a reasonably safe condition.

4. An employee will not be deemed to have assumed the risk from the fact that he works on in the presence of a known defect, unless the danger be obvious and so imminent that no man of ordinary prudence and acting with such prudence would incur the risk which the conditions disclose.

5. It must be left largely to the discretion of the trial judge whether or not the two defenses of contributory negligence and assumption of risk, where they are open to the defendant on the evidence, shall be submitted to the jury under separate issues.

6. In an action by a mill employee for damages for personal injuries, an instruction that if the jury should find that the negligent failure to furnish proper appliances in general use was the proximate cause of the injury, then the defense of contributory negligence was not available, was erroneous—the doctrine of continuing negligence as declared in *Greenlee* and *Troxler cases* not being applicable.

(320) ACTION by Joseph Hicks against Naomi Falls Manufacturing Company, heard by *Shaw, J.*, and a jury, at the January (Special) Term, 1905, of GUILFORD.

The plaintiff had formerly instituted a suit on the same cause of action in the Superior Court of Randolph, in which a nonsuit had been taken, and subsequently instituted this action in the Superior Court of Guilford, and this second action is the subject of the present appeal.

Four issues were submitted to the jury: 1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? 2. Did plaintiff voluntarily assume the risk involved in cleaning the mote box while the lapper was in motion, as alleged in the answer? 3. Did plaintiff by his own negligence contribute to his own injury? 4. What damage is plaintiff entitled to recover?

There were allegations and evidence by the plaintiff tending to show that he was employed in the defendant's mill and operating a certain machine, known as a lapper, and while operating it his hand was severely and permanently injured by being caught in the wheels and knives of the lapper; that this injury was caused by the negligence of the defendant in failing to provide the plaintiff with safe appliances and machinery for his use while he was in its employ as aforesaid—the negli-

(321) gence alleged against the defendant being that the lapper was unskillfully and dangerously made, because of the fact that underneath the lapper the wheels and knives of the machine were unprotected and exposed; whereas, in all properly constructed lappers, approved and in general use, such wheels and knives were protected and covered; that in the proper use of the machine the trash and motes continually collected underneath it, and it was necessary for the plaintiff to keep that cleaned out in the proper working of the machine;

that the plaintiff, in the exercise and performance of his labor as operator of this machine, thrust his hand under the same for the purpose of cleaning out the motes and trash which had collected there, and while carefully endeavoring to perform this duty, believing that said knives and wheels were properly protected, and unaware of the dangerous condition of the machine, the knives and wheels of the lapper, which were negligently left uncovered and unprotected by the defendant, caught and mangled his hand.

The plaintiff further alleged and testified that the defendant negligently failed to furnish him any appliances, such as were approved and in general use, for cleaning out the lapper without using his hand underneath the machine and in close proximity to the knives and wheels of the same, by the operator thereof, and that but for such negligent acts and conduct of the defendant his injuries would not have occurred.

The defendant denied these allegations and offered evidence to show that the machine is in every way properly constructed, was a standard machine in general use in cotton manufacturing, was erected by a responsible and competent party, and in every way fitted for the work to be done by it, and in no way defective or out of repair, and that all appliances furnished were approved and in general use for the proper working of the machine. The defendant further offered evidence to the effect that the plaintiff assisted in putting up the machine and was fully aware of the alleged defect of which he complains, and of alll the dangers incident to its operation. There was further evi- (322) dence on the part of the defendant to show that the plaintiff was guilty of contributory negligence, in that he attempted to clean the machine while in motion, contrary to the express directions of the superintendent; that by reason of his assumption of risk and of contributory negligence the plaintiff was barred of recovery.

His Honor explained the contentions of the parties upon the evidence, and on the law he charged the jury as follows: On the first issue, in substance, that if the defendant failed to furnish the plaintiff with machinery and appliances reasonably safe and suitable for the work in which he was engaged and such as were approved and in general use, and this failure was the proximate cause of the plaintiff's injury, they would answer the first issue "Yes." But if the machinery and appliances were of this kind, there would be no negligence, and the jury would answer the issue "No." His Honor further charged the jury as to the first issue: Or if you find from the evidence that the superintendent of the defendant's mill instructed the plaintiff to stop the lapper while cleaning it out, and that the plaintiff disobeyed such instruction, and was cleaning out the mote box while the lapper was running, and that

the plaintiff was injured while so doing, in violation of his instruction, and that such failure to obey the instruction was the proximate cause of the plaintiff's injury, then the court charges you that you should answer the first issue "No."

On the second issue, after declaring the law ordinarily applying to assumption of risk, his Honor charged the jury as follows: "But when the master is guilty of continuing negligence, as in furnishing defective machinery or in failing to furnish his servant with appliances in general use, the servant in using such defective machinery, or in attempting to discharge his duties without implements in general use, will (323) not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety."

On the third issue his Honor charged the jury that if they answered the first issue "Yes," they would have found the defendant guilty of continuing negligence, and that they should answer the third issue "No."

Under the charge of the court there was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

R. C. Strudwick for plaintiff.
W. P. Bynum, Jr., and P. H. C. Cabell for defendant.

HOKE, J., after stating the facts: On cross-examination of the plaintiff, the defendant's counsel proposed to ask the witness if his attorney, on the trial of the former case in Randolph County, and who is not now appearing for the plaintiff, had not said in open court that if the evidence was as stated by defendant's witnesses, the plaintiff had no case, and further, whether such counsel at said former trial had not suggested that each side select a man to go to the factory and examine machines, and if found to be as claimed he would take a nonsuit, and, on return of the men selected, his then attorney had not taken the nonsuit. The evidence in the proposed testimony was held incompetent by the trial judge, and the defendant excepted. These declarations were not made at a place nor under circumstances where the plaintiff could be expected or permitted to protest or reply, and derive no force, therefore, from the fact that the plaintiff may have been present when the statement was made. If held competent, it must be on the ground that the plaintiff is bound in this instance by the admissions of his attorney.

Admissions of fact by an attorney only bind a client when they are distinct and formal and made for the express purpose of dispens- (324) ing with proof of a fact on the trial, and less formal admissions

of counsel at a former trial are not evidence against a client at a subsequent trial. Admissions which occur in mere conversation, though they relate to matters at issue in the case, cannot be received in evidence against a client. Weeks on Attorneys, sec. 223, citing *Wilkins v. Stidger,* 22 Cal., 230; *Treadway v. County,* 40 Iowa, 526; 1 Greenleaf Ev., sec. 186. The admissions sought to be introduced in this case, however, can hardly be considered admissions of fact at all, but amount only to the attorney's opinion adverse to his client on facts as reported to him, and are clearly incompetent. *Voorhees v. Porter,* 134 N. C., 591, 598.

Recurring, then, to the charge of the court, and it is to this that the remaining exceptions of the defendant are addressed, his Honor properly stated to the jury the obligation of the employer to furnish appliances, etc., reasonably safe and suitable, but in charging the jury in reference to the plaintiff's disobendience of his employer's orders, we think there was error to the defendant's prejudice, which entitles it to a new trial.

These orders were said to be that the plaintiff must never clean out the mote box without first stopping the machine, and his Honor left it to the jury to determine whether there was disobedience of such orders, and also whether the same was the proximate cause of the injury.

It is the law in this State that where on the facts admitted or established, the question of the existence or absence of actionable negligence, is clear, so that there can be no two opinions among fair-minded men in regard to it, then the court must say whether it does or does not exist; and this rule extends and applies not only to the question of negligent breach of duty, but also to the feature of proximate cause. Where a negligent breach of duty is established, the question of proximate cause is almost in all instances for the jury, but it is not always (325) or necessarily so. In this case there can be no two opinions as to the result if plaintiff had obeyed the orders said to have been given him. Every man would say without question, if the plaintiff had obeyed the order and stopped the machine he could have cleaned out the box in perfect safety. There was conflict of testimony in regard to whether such orders had been given, and whether the plaintiff at the time of the injury was acting in violation of them, and this the jury must decide. But if this is established, then the court should declare and so charge the jury that this was the proximate cause of the injury, and in failing to do this there was error as stated. This entire matter as to disobedience of orders and its effect should more properly be submitted under the issue of contributory negligence where the burden of proof can be placed on the defendant as required by the statute.

But on either issue, if it is established that the plaintiff was injured

by reason of disobedience of orders in cleaning out the mote box while the machine was in motion, this, as a matter of law, would be a negligent breach of duty which was the proximate cause of the injury, and the court should so tell the jury. It would be concurrent negligence of the plaintiff, contributing to the injury at the time of impact, which would bar a recovery.

As there is to be a new trial and the parties plaintiff and defendant have presented radically different views as to the true rule for determining the rights of the parties, on the two issues of assumption of risk and contributory negligence, and the questions are raised by exceptions properly entered, we deem it right to say further that it is accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employees, in the exercise of proper (326) care, a reasonably safe place to work and to supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Witsell v. R. R.,* 120 N. C., 557; *Marks v. Cotton Mills,* 135 N. C., 287.

True, the employee is said to assume all the ordinary risks incident to the employment, but it is as well established that dangers attributable to the negligence of the master, when material to be considered, are usually classed under the head of extraordinary risks, and these the employee does not assume.

The last principle applies in full force where the conditions of increased hazard, attributable to the master's negligence, are not known to the employee or could not be discovered in the exercise of reasonable care. The employee ordinarily has a right to assume that the employer has done his duty. This assumption is not absolute, however, nor held to obtain in the face of real and established facts, and where the defects and dangers attributable to the master's negligence have become known to the employee, and the risks appreciated under certain circumstances, these conditions may be classed with the ordinary risks which the employee does assume.

So far as railways are concerned, their position in reference to assumption of risk by employees has been made the subject of statutory enactment (Private Laws 1897, ch. 56), and their rights and liabilities in this respect are dependent largely upon the proper construction of the statute, and are not considered or in any way determined in this appeal. But where there has been no legislation, as in the class of cases

we are now considering, it has been declared in this State in (327) several well-considered decisions that where such employer of labor has been negligent in failing to supply his employees with appliances, tools, etc., reasonably safe and suitable for the work in which they are engaged and such as are approved and in general use, and such negligence is the proximate cause of the injury to the employee, such injured employee shall not be barred of recovery by the fact that he works on in the presence of a known defect, even though he may be aware to some extent of the increased danger.

To such effect, that is, to bring the knowledge of such observed conditions of increased hazard imputable to the master's negligence into the class of ordinary risks which the employee is said to assume, the danger must be obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would incur the risk which the conditions disclose. Labatt on Master and Servant, sec. 279a, 296, 297, 298, 298a; Beach on Cont. Neg., sec. 361; *Sims v. Lindsay,* 122 N. C., 678; *Lloyd v. Hanes,* 126 N. C., 359; *Patterson v. Pittsburg,* 76 Pa. St., 389; *Kane v. R. R.,* 128 U. S., 95.

In *Lloyd v. Hanes, supra,* it is held that the distinction is wide between mere knowledge of danger and voluntary assumption of risk. "Assumption of risk is a matter of defense analogous to contributory negligence to be passed on by the jury, who are to say whether the employee voluntarily assumed the risk. It is not enough to show merely that he worked on knowing the danger, but further, it is only where the machinery is so grossly and clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk."

In *Sims v. Lindsay, supra,* it is held "that an operative, by not declining to work at a machine lacking some of the safeguards which he has seen on other similar machines, does not thereby waive all claim for damages from a defective machine, unless it be so plainly defective that the employee must be deemed to know the extra (328) risk.

And in *Patterson v. Pittsburg, supra,* it is held: "(*a*) The master is bound to furnish and maintain suitable instrumentalities for the duties required of his servants, and if he does not he is liable for injuries from his negligence. (*b*) If the instrumentality by which the servant is to perform his duty is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master is not liable for resulting damages, the servant being in this case guilty of concurrent negligence. (*c*) When the servant, in obedience to the master, incurs the risk of machinery which though dangerous is not so much so as to threaten immediate injury or it is reasonably probable

may be used safely by extraordinary caution, the master is liable for the resulting injury." In several of the recent decisions the standard in such cases is said to be that these risks are never assumed unless the act itself is obviously so dangerous that the inherent probabilities of danger are greater than those of safety.

This is a correct and satisfactory formula sanctioned by the decisions referred to, and in applying the rule to practical litigation the test is whether or not, under the facts and attendant circumstances, including the nature of the defect and danger, the risk is one which a reasonable man should incur by continuing to work under existing conditions, and when the matter is for the jury to determine it may be well to submit the case in terms by that standard.

In this connection may be considered, if they existed, assurances of safety by the master as to the particular defect, promises of change reasonably relied upon, special orders given by a superior, apprehensions of discharge, etc., in determining whether this particular risk may be classed as a risk assumed, which will bar a recovery. While this question, under conditions stated, is thus referred to the principles governing contributory negligence, it must not be considered that all dis-
(329) tinction in these features of actions for negligence are done away with. This is neither intended nor to be desired. These are actions for negligence other than those we are now considering in which assumption of risk is a distinct defense, and in cases like the present there may be other sources of contributory negligence imputable to the plaintiff which would bar his recovery, not embraced in the question of assumption of risk. The employee is not absolved, in cases of this sort at least, of all obligations to have a proper care for his own safety and to work with prudence in the presence of known and observed danger, nor is he free to disobey his employer's orders where such disobedience becomes the proximate cause of the injury, either sole or concurrent. Therefore, it may be and frequently is necessary and desirable that these two defenses, where they are open to the defendant on the evidence, should be submitted to the jury under separate issues. This matter must be left largely to the discretion of the presiding judge. It is only where the sole default imputable to the employee arises from the fact that he has continued to work in the presence of a known defect and observed danger that the question is immaterial and may be submitted under the one issue or the other.

In his charge on the third issue, his Honor stated that if the jury answered the first issue "yes" they would have found the defendant guilty of continued negligence, and in that event they would answer the third issue "no." In this there was error. It is not true as an abstract proposition, nor is it the law of this case, that the defense of contribu-

tory negligence is not available to the defendant in an action of this character. As we have just said, an employee in cases of the kind we are now considering is not absolved from all obligation to behave with reasonable prudence and discretion, and if he is negligent, and such negligence is declared to be the proximate cause of the injury, he is barred of recovery.

In charging the jury, on the third issue, that the defense of contributory negligence was not permissible in case the jury should find in response to the first issue that the negligent failure of the de- (330) fendant to furnish proper appliances in general use was the proximate cause of the injury, his Honor below who tried this case was no doubt misled by the opinion in *Orr v. Tel. Co.*, 132 N. C., 691, in which the principle of *Greenlee's case* and *Troxler's case* is apparently extended to all cases where there was a negligent failure by the employer to furnish proper tools and appliances. In *Orr's case* there were the issues of negligence, contributory negligence, and assumption of risk. The only negligence imputed to the defendant was in not furnishing proper appliances with which to do hazardous work, and the only default imputed to the plaintiff by way of defense was in going on with the work with such appliances as he had and with every opportunity to know and observe the defect and the danger. Under a proper charge, the court, on the issue as to assumption of risk, gave the defendant the benefit of the only phase of this defense which was open to him on the testimony, and having done this, there was no call to make any further ruling on the question of contributory negligence.

If, however, it was intended by *Orr's case* to decide that in any and every instance where there is a defective appliance negligently furnished by the employer, which becomes the proximate cause of an injury, the defense of contributory negligence is thereby withdrawn, then the court does not think that the case in this respect was well decided. There is nothing here said which must in any way be construed as indicating a doubt as to the wisdom and correctness of the *Greenlee* and *Troxler cases,* or a desire to modify or question them. They were both cases where there was a failure on the part of the railroad company to supply automatic couplers for the operation of their trains. The occupation was one of imminent peril, which these automatic couplers well-nigh entirely remove, and at a moderate cost. The failure to supply them was causing extended and ever-increasing disaster. Thou- (331) sands of men throughout all portions of the country were being killed or maimed for life, and conditions were so alarming as to become a matter of National concern and the subject of National legislation. In the presence of such conditions the Supreme Court of North Carolina, in advance of the operative effect of the National statute, an-

nounced the principle in *Troxler's case* as follows: "Reason, justice, and humanity, principles of common law, irrespective of Congressional enactments and Interstate Commerce Commission regulations, require the employer to furnish the employee safe modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb, and the failure to do so, upon injury ensuing to the employee, is culpable continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow-servant, such failure being the *causa causans.* It is negligence *per se* in any railroad company to cause one of its employees to risk his life and limb in making couplings which can be made automatically without risk."

These opinions could be well justified and upheld on the ground that a failure to correct an evil of this magnitude when it could be accomplished so effectually at an insignificant cost, was such a reckless and wanton disregard of the lives and safety of employees as to amount to an intentional wrong, against which contributory negligence is no defense. They have, however, been approved and accepted as decisions eminently just and proper in applying the principles of the law of negligence to new and changing conditions, and can be upheld and supported both by reason and precedent.

A notable incident of like kind will be found in the case of *Smith v. Baker,* House of Lords Appeal Cases (1891), at page 325, in which it was declared, contrary to the generally accepted doctrine at (332) the time, that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give him warning, did not preclude the employee from recovering, and the evidence would justify the finding that the plaintiff did not voluntarily undertake the risk of the injury and that the action was maintainable. While these decisions are fully approved, and will no doubt be further applied in cases of like peril and circumstances, it was never intended to hold that the principles therein declared were to be applied to any and every failure of employers to provide safe and suitable appliances to such an extent as to shut off all consideration of contributory negligence on the part of employees.

In the case we are now considering and in all cases of like kind, the correct way to determine the rights of parties litigant is to submit the case of the defendant's obligation and responsibility on the issue of negligence and under the law as here declared. If defense is made that the injured employee has assumed the risk by working on in the presence of a known defect and observed danger, but in the honest effort to discharge his duty, this of itself shall not bar his recovery unless the in-

strumentality or appliance or machine is so obviously and immediately dangerous that no man of common prudence would continue in the work and incur the risk, in which case the risk may be said to have been assumed, and the question is to be determined on the principle of concurrent, contributory negligence, and can be submitted either on the issue as to assumption of risk or contributory negligence, as may be most desirable. In case there is other negligence attributable to the plaintiff which may be the sole or concurrent proximate cause of his injury, as when he acts in disobedience of his employer's orders in cases where obedience would have prevented the injury, this can be submitted under a separate issue of contributory negligence, and under proper rulings addressed to questions of this character. (333)

The defendant is always entitled to have both phases of defense presented when there is evidence to justify it, except where changed by legislation or in cases like those of *Greenlee* and *Troxler, supra;* and whether they shall be presented under one or two issues must be left largely to the legal discretion of the presiding judge.

There were several specific prayers for instruction made by the defendant, in which it was contended that assumption of risk should be considered as conclusively established in all cases where there was knowledge of a defective machine and the danger incident thereto, and some of the authorities cited would seem to support that contention. As we have endeavored to show, the position is not well taken, and we think the correct way to try this case is in accordance with the rules herein declared.

For the error above pointed out there must be a new trial, and it is so ordered.

New trial.

WALKER, J., concurring: A new trial is awarded in this case because it is apparent, as a matter of law, that if the plaintiff disobeyed the order to stop the machine when cleaning it, the proximate cause of the injury was his failure to observe instructions. In this view of the case I fully concur. But it is my opinion that the presiding judge was right in submitting this question to the jury under the first issue. If the plaintiff was told that he must not clean the machine while it was running, and he did clean it in violation of this instruction while it was in motion, and was injured, his own wilful act in disobeying the order was not only the proximate cause of his injury, but the sole efficient cause thereof. When the defendant forbade him to clean the machine while it was running, and directed him to stop it before attempting to clean it, it provided for him a perfectly safe method for performing his work, and if he chose to disregard the order of his (334)

employer and to do the work in a way not only dangerous, but which had been forbidden, his employer is in no legal sense responsible for his conduct. Where is there any act of negligence or any omission of duty on the part of the employer? He cannot be said to have been negligent at all, unless there was a breach of some duty owing by him to his employee. The fact that a slat was missing did not render the cleaning of the machine dangerous if the employee had obeyed instructions, and the law will not hear him allege that the machine was defective and dangerous when it was his own wrongful act that made it so. No man will be permitted to take advantage of his own wrong, is a maxim of the law of universal acceptance and application. The master must provide for his servant a reasonably safe place, appliances, and methods for performing his work, and when he has done this he has fulfilled his duty; and if the servant then chooses to reject the provision thus made by the master, and adopts some method of his own for doing the work, which proves to be dangerous, and he is injured thereby, it is impossible to see how the master has failed in his duty in any respect so as to impute the injury of the servant to his negligence as in any degree its cause, or as even a contributing cause. The fault lies solely with the servant. He is to blame for doing that which he was forbidden to do and which caused the injury. He was not required to put his hand between the slats when operating the machine, nor was he required to do so when cleaning it while it was in motion. His master gave him a perfectly safe way to clean it, and he deliberately chose a dangerous one. In such a state of the facts I am unable to see that the defendant was at fault. It is not a question involving contributory negligence, for that presupposes negligence of the master. The case turns upon whether the master was negligent. If he gave the instruction
(335) and it was violated by the servant, the latter was not injured by the master's negligence. If the instruction was not given to the servant, then the master's negligence caused the injury, if the machine was defective and the injury resulted therefrom, and the servant was himself free from any negligence which proximately contributed to his injury.

The majority of the Court in *Mason v. R. R.*, 111 N. C., 482, and 114 N. C., 718, took this view of the question, as will appear from the concurring opinion of *Shepherd, C. J.* (111 N. C., at p. 499), and the concurring opinion of *Burwell, J.*, in the same case when again before this Court (114 N. C., at p. 724). In that case, it is true, the defect was in bumpers, and the principle as applied to that class of cases was somewhat modified in *Greenlee v. R. R.*, 122 N. C., 977, and *Troxler v. R. R.*, 122 N. C., 902, and 124 N. C., 189; but so far as it applies to the class of cases with which we are now dealing, it remains to this day unim-

paired. If we insert the word "slats" where the word "bumpers" appears in the two opinions just referred to, the application of the principle to our case is made perfectly plain. *Chief Justice Shepherd* said: "In the decisions cited, where a recovery was had for negligence in not furnishing bumpers, there was either no regulation like that in the present case or such regulation had been waived. I cannot understand how it was the duty of the defendant to provide against an accident which could not possibly have happened but for a violation of its reasonable regulations. However negligent, then, as to others, the defendant may have been in not seeing that the cars were provided with bumpers, such negligence was not actionable by this plaintiff if his injuries were caused by his disobedience of an existing regulation (known and agreed to by him) forbidding him from going between the cars under any circumstances for the purpose of coupling." *Mason v. R. R.*, 111 N. C., 499. *Justice MacRae* concurred generally with the *Chief Justice* in his opinion. *Justice Burwell* said: "I see in the case no evidence whatever of negligence on the part of the defendant and abund- (336) ant evidence of negligence on the part of the plaintiff. The rule of the defendant company, of which the plaintiff had full knowledge, and which, out of abundance of caution, he had been required specially to promise to obey, prohibited him from going between the cars for the purpose of coupling or uncoupling them, 'under any circumstances,' when they were attached to an engine. . . . The rule was notice to the plaintiff that he should expect no provision for his safety when the cars were pushed together by the movement of the engine, for he was expected not to go between them." *Mason v. R. R.*, 114 N. C., at p. 724.

It is impossible to see how the master can be said to be guilty of any negligence when the servant committed the only wrong in violating a rule adopted for his own safety, and especially when it clearly appears that the accident could not have happened if he had kept and observed the implied promise he made to his master not to clean the machine when in motion. He had a perfectly safe way to do his appointed work, but, instead of pursuing it, he chose a different one and thrust his hand into a place where he must have known there was danger, because he had been warned against the use of that method in doing the work. With respect to the plaintiff, the machine was not defective, because he had a safe way with which to do his work, and if he had confined himself to that way he would not have been hurt. Besides, the master was not obliged to anticipate his servant's disobedience of orders and provide against its consequences. It follows that the defendant owed no duty to the plaintiff, and therefore could not have been guilty of any negligence, if he gave the order and it was disobeyed.

BROWN, J. I concur in the opinion of *Mr. Justice Walker.* The slats at the top of the mote box, between that and the lapper, were used solely to protect the operative from injury when cleaning (337) out the mote box while the lapper was running. When the lapper was at a standstill, the slats were useless. It was not negligence, therefore, to leave one or all the slats off if the operative is commanded to clean out the mote box only when the lapper is at a standstill, and to stop the lapper for that purpose.

Cited: Marks v. Cotton Mills, post, 406; *Pressly v. Yarn Mills, post,* 414, 431; *Tanner v. Lumber Co.,* 140 N. C., 478; *Horne v. Power Co.,* 141 N. C., 56; *Fearington v. Tob. Co., ib.,* 82; *Moore v. R. R., ib.,* 113; *Ruffin v. R. R.,* 142 N. C., 126; *Holland v. R. R.,* 143 N. C., 439; *Hairston v. Leather Co., ib.,* 517; *Bradley v. R. R.,* 144 N. C., 558; *Horne v. Power Co., ib.,* 380; *Boney v. R. R.,* 145 N. C., 251; *Phillips v. Iron Works,* 146 N. C., 217; *Blevins v. Cotton Mills,* 150 N. C., 498; *Helms v. Waste Co.,* 151 N. C., 371; *House v. R. R.,* 152 N. C., 398; *Rich v. Electric Co., ib.,* 691; *Flanner v. Cotton Mills,* 154 N. C., 397; *Walters v. Sash Co., ib.,* 325; *Norris v. Mills, ib.,* 483; *Boney v. R. R.,* 155 N. C., 112; *Eplee v. R. R., ib.,* 295; *Russ v. Harper,* 156 N. C., 450; *Hamilton v. Lumber Co., ib.,* 524; *Pritchett v. R. R.,* 157 N. C., 102; *Walker v. Mfg. Co., ib.,* 135; *Patterson v. Nichols, ib.,* 414; *Rogers v. Mfg. Co., ib.,* 485; *Brazille v. Barytes Co., ib.,* 459; *Worley v. Logging Co., ib.,* 497; *Cook v. Furnace Co.,* 161 N. C., 41; *Mincey v. R. R., ib.,* 469; *Kiger v. Scales Co.,* 162 N. C., 136; *Horton v. R. R., ib.,* 447; *Tate v. Mirror Co.,* 165 N. C., 184; *Mace v. Mineral Co.,* 169 N. C., 146; *Deligny v. Furniture Co.,* 170 N. C., 203; *Horne v. R. R., ib.,* 659; *Wright v. Thompson,* 178 N. C., 90, 93; *Dunn v. Lumber Co.,* 172 N. C., 136; *Orr v. Rumbough, ib.,* 758; *Howard v. Wright,* 173 N. C., 341; *Brown v. Scofields Co.,* 174 N. C., 7; *Atkins v. Madry, ib.,* 188; *Hines v. Lumber Co., ib.,* 296; *Lynch v. Dewey,* 175 N. C., 158; *Horton v. R. R., ib.,* 487; *Grant v. Bottling Co.,* 176 N. C., 259; *Wallace v. Power Co., ib.,* 561; *Thompson v. Oil Co.,* 177 N. C., 282; *Clements v. Power Co.,* 178 N. C., 56; *Beck v. Tanning Co.,* 179 N. C., 125, 126; *Jones v. Taylor, ib.,* 298.

ABERNETHY v. YOUNT.

(Filed 9 May, 1905.)

Orders Granting New Trials—When Reviewable—Duty of Judge—Verdicts—Witness—Handwriting Expert—Evidence—Comparison of Signatures.

1. Where a verdict was rendered in favor of the plaintiff, and the trial judge declined to set it aside because of insufficient evidence, but granted a motion for a new trial, without any suggestion of a reason therefor: *Held*, that it was the duty of the judge to put upon the record whether he granted the motion in the exercise of his discretion or as a matter of law, and the plaintiff's exception to the refusal to enter judgment on the verdict is sustained.
2. The verdict of a jury is a valuable right of which a person may not be deprived, except in accordance with the law, and the action of a judge in setting it aside will not be ascribed to discretion unless he plainly says so, or there be no other explanation of his conduct.
3. A witness who testified that he was a stenographer and typewriter, had studied penmanship, and was assistant to the clerk of the court, was qualified to testify as a handwriting expert.
4. A paper containing an admitted genuine signature need not be put in evidence to authorize its comparison by an expert with a signature the genuineness of which is in issue.

CLARK, C. J., and HOKE, J., dissent.

ACTION by A. S. Abernethy against D. E. Yount, heard by (338) *McNeill, J.*, and a jury, at July Term, 1904, of CATAWBA.

The plaintiff brought suit in a justice's court against the defendant for the recovery of a note for $53.20. Upon appeal the cause was tried in the Superior Court upon the following issue: "Did the defendant execute and deliver the alleged note set out by the plaintiff as the cause of action?" The plaintiff testified that he bought the note from one A. S. Satterthwaite, and before it fell due paid full value for it; that no payment had been made thereon and that the defendant's name was signed to it; that he bought it without notice of any defense thereto. The defendant testified that he did not sign any note to Satterthwaite; that he signed an application for insurance; that Satterthwaite did not ask him to sign a note—nothing whatever was said about a note; that he never saw a note until the magistrate's trial. His application for insurance was turned down and he never received any policy. He admitted he signed an application for insurance which was shown him.

There was other testimony tending to show that the plaintiff purchased the note for value and without notice.

The plaintiff introduced LaFayette Huffman, who testified that he was a graduate of Lenoir College, had studied penmanship, and was as-

sistant to the clerk of the court. The witness was shown the application for insurance, which the defendant admitted he had signed, and testified under the defendant's objection: "I think the signatures on the two papers are the same; it is the same handwriting, to the best of my knowledge." To this testimony the defendant excepted, for that (1) the witness had not been shown to have been an expert, (2) that the paper used as a standard of comparison should be first introduced in evidence, and (3) that the proposed standard of comparison was not a proper standard. The objection was overruled, and the defendant excepted.

On cross-examination the witness said: "I never saw the defend-
(339) ant write; will not swear that the defendant signed the note; it was possible that the signature on the note could have been forged."

The jury having answered the issue in the affirmative, the defendant moved to set aside the verdict as being against the weight of evidence. Motion refused, and defendant excepted. Motion by defendant for new trial, which motion was allowed, and the plaintiff excepted, assigning as error his Honor's order allowing the defendant's motion for a new trial and refusing to enter judgment on the verdict. Plaintiff appealed.

Self & Whitener for plaintiff.
No counsel for defendant.

CONNOR, J., after stating the facts: The Code, section 412, provides that the judge who tries the cause may in his discretion entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages. We understand the first cause "upon exceptions" to refer to exceptions made upon the record during the trial, as for admitting or rejecting testimony, giving or refusing to give instructions, or other action of the judge. For granting or refusing to grant such motion, "involving a matter of law or legal inference," an appeal lies to this Court. *Thomas v. Myers,* 87 N. C., 31. For granting or refusing a motion to set aside the verdict, or granting a new trial for insufficient evidence or excessive damages, no appeal lies. This can be done only during the term. It is held in *Benton v. Collins,* 125 N. C., 83, that power is given the judge by this section to set aside a verdict and grant a new trial for inadequacy of amount of damages. He may also exercise the power to set aside the verdict and judgment under the provisions of section 274. This may be done during the term or within one year thereafter. *Quincey v. Perkins,* 76 N. C., 295.

(340) In addition to these causes, the judge may in his discretion

set aside a verdict and order a new trial during the term for any cause which casts suspicion upon the verdict, such as misconduct of jurors or other officers of the court or the parties or witnesses. After enumerating the causes which entitle a party aggrieved to have the verdict set aside as a matter of right, *Bynum, J.*, says: "All other circumstances of suspicion address themselves exclusively to the discretion of the presiding judge in granting or refusing a new trial. He is clothed with this power because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial give him over any other forum." *Moore v. Edmiston,* 70 N. C., 471. The line which divides the cases in which the party aggrieved may as a matter of right demand that a verdict be set aside, from those in which the question rests in the discretion of the judge, was marked, after full discussion, by those two eminent and learned sages of the law, *Ruffin* and *Gaston,* in *S. v. Miller,* 18 N. C., 500. The view of the majority of the Court in that case has been uniformly adopted and followed by this Court. *S. v. Tilgham,* 33 N. C., 513; *Moore v. Edmiston, supra.* We have no disposition to question its soundness or limit its operation further than is done in that and other cases. We fully recognize the necessity, and therefore the wisdom, of vesting in the presiding judge the power to so regulate the proceedings of the court over which he presides that such order, decorum, and observance of the fixed rules of procedure be enforced as becomes the dignity of the court and secures fair and impartial trial of causes.

We think, however, that it is in no degree inconsistent with or unduly restrictive of such power to hold that when the judge exercises it as a matter of discretion, as distinguished from a conclusion upon a "matter of law or legal inference," he so states on the record, to the end that parties may be advised respecting their right to have (341) his action reviewed. An examination of many cases which have been before this Court shows such to have been the practice. Referring to the provisions of section 412 (4), *Bynum, J.*, says: "Heretofore it has been the practice of Superior Courts, in granting new trials, not to put upon record the facts or reasons moving them thereunto, and we know of no rule of law requiring it to be done. But, now, to give parties the benefit of the above section of The Code, the courts should and no doubt will, on exceptions taken by the parties aggrieved, put upon the record the matters inducing the order granting as well as refusing a new trial. The appellate court can thus see whether the order presents a matter of law, which is the subject of review, or a matter of discretion, which is not. In this way only, it is conceived, can the full benefit of that provision of The Code be secured to suitors." *Moore v. Edmiston, supra.* It is stated in the opinion that the facts

upon which the new trial is granted are set out. In *Smith v. Whitten,* 117 N. C., 389, it is said that it is the duty of the judge, upon request, to state upon the record the facts moving him to refuse or grant a new trial. A new trial was refused in that case. It would seem from the language of the Court that if no request was made, his failure to do so may not be made a basis of exception. It is not very clear from the report whether the motion was based upon section 412 (4). In *Carson v. Dellinger,* 90 N. C., 226, it appeared that the motion was made to set aside the verdict to enable the mover to introduce on another trial newly discovered testimony. This was clearly within the discretion of the judge. The cases cited fully sustain the conclusion. In *S. v. Braddy,* 104 N. C., 737, the "headnote" is misleading in stating, in general terms, the power of the court to grant a new trial. The language of *Merrimon, C. J.,* is: "If, through inadvertence or mistake, he was about to suffer injustice, it lay in the sound discretion of the judge (342) who presided at the trial to grant a new trial." It was refused in that case. In *Jones v. Parker,* 97 N. C., 33, the motion was refused, the judge stating his reasons therefor. In *S. v. Boggan,* 133 N. C., 761, the facts were found by the judge; also in *S. v. Daniels,* 134 N. C., 761. In *Brink v. Black,* 74 N. C., 329, the motion was made and granted because the verdict was against the weight of the evidence. In *Redmond v. Stepp,* 100 N. C., 212 (219), the motion to set aside the verdict was because of insufficient evidence and newly discovered testimony; so in *Edwards v. Phifer,* 120 N. C., 406.

In *Breaid v. Lukins,* 95 N. C., 123, the record states that upon the return of the verdict a motion was made to set aside "because the verdict was irregular." The court refused judgment and the plaintiff excepted. The court set aside the verdict and granted a new trial. *Merrimon, J.,* said: "Now, in the case before us it does not appear upon what ground the learned judge places his decision. He may have thought that the verdict was against the weight of the evidence, or that the price allowed for the lumber was excessive, or some other like cause may have prompted his action. The defendant, it is true, moved to set the verdict aside because it was irregular, but it does not appear that the court placed its decision upon that ground." In *Bird v. Bradburn,* 131 N. C., 488, the judge expressly states that in the exercise of his discretion he refused to set aside the verdict. It cannot be denied that the practice of the judges in this respect is not uniform, although in a large majority of the cases which we have examined the ground upon which the judge proceeded is set out; especially is this so where the power is exercised. In this connection we are impressed with the wisdom of the language of *Judge Gaston* in his dissenting opinion in *S. v. Miller,* 18 N. C., 540: "I see no alternative between a steady ad-

herence to the law, which vitiates a suspected verdict, or leaving the question of its validity or invalidity to depend on the discretion of the presiding judge. To the adoption of the latter branch (343) of the alternative I have insuperable objections. It would be oppressive to the judge, dangerous to the community, and at variance with the settled principle of our law. It is impossible, indeed, not to confide discretion to judicial magistrates; but I am sure that, while every enlightened friend to free government holds unnecessary discretion to be tyranny, every conscientious judge will say that of all his duties none are so distressing as those wherein he can find no certain rule, but is left to his own notions of fitness and expediency. . . . The trial by jury—justly considered as the strongest security to the liberties of the people which human sagacity ever devised, as well as the happiest contrivance for cherishing among all an affectionate attachment to the laws, in the administration of which they act so important a part—must be kept under the protection of law, and not left under the patronage of its ministers. If the old rule be disregarded, new ones must be devised. To proceed wholly without rule would be intolerable; and the courts, for their own convenience as well as for the public order, would be obliged, as it seems that the judges in New York have done, to make rules." We are quite sure that his Honor was inadvertent to the right of the plaintiff to have him state whether he exercised the power to order a new trial as a matter of discretion or because of law or legal inference. If it be conceded that the practice in this respect has not heretofore been uniform, we think it should be made so in justice both to suitors and judges. We are quite sure that no judge desires to exercise his discretion when he can base his action upon fixed rules of law and legal procedure.

His Honor declined to set aside the verdict because of insufficient evidence, and, without assigning any other ground, a motion is made generally for a new trial, and granted. The plaintiff is thus deprived of his verdict, which by necessary implication from his (344) Honor's action is, in his opinion, justified by the evidence, without the slightest suggestion of any reason therefor. We cannot think this consistent with either the principles upon which our judicial system is founded or the practice of our courts. We do not question his Honor's power—if in the exercise of his sound discretion there had been on his part, or on the part of any other person connected with the case or the court, any irregularity or inadvertence, or any other like reason, by which the defendant had suffered injustice—to set the verdict aside. Nor do we suggest that such action would have been reviewable in this Court. We do think that his Honor should have informed the parties, and put upon the record, whether he granted the motion in the exercise

of his discretion or as a matter of law or legal inference. The verdict of the jury obtained after, and as the result of, a judicial investigation, is a valuable right of which a person may not be deprived except in accordance with the law. *Wood v. R. R.,* 131 N. C., 48. Arbitrary discretion is not a favorite in a system of jurisprudence and procedure based upon judicial precedent and written law. Of necessity, discretion must rest somewhere in the administration of the law, but it should be confined to the narrowest possible limits consistent with necessity.

We are not required in this case and, appreciating the delicacy of the question with which we are dealing and desiring to say no more than is necessary, we do not intend to say that when a judge exercises his discretion he must state the facts upon which his action is based. We simply hold that he should say, if the fact be so, that his act is controlled only by his discretion. This is but fair to the parties, just to the judge, and consistent with sound legal principles and precedent. *Bird v. Bradburn, supra.*

We are of opinion, however, that the learned and conscientious judge, who, we are sure, is duly sensible of and sensitive to the rights of litigants, did not grant a new trial as a matter of discretion. We do not think that the action of a judge should be ascribed to discretion
(345) unless he plainly says so, or there be no other explanation of his conduct.

In this case we find that the defendant excepted to the introduction of testimony, and we conclude that upon reflection his Honor was of opinion that he had committed error in admitting such testimony. His Honor's action, viewed in this way, is appealable and subject to review. *Wood v. R. R., supra.* Rulings upon the trial are frequently brought here for review in this way. Was there error in the admission of the testimony? Huffman was examined as an expert; he said he was a stenographer and typewriter, had studied penmanship, and was assistant to the clerk of the court. The defendant contended that he was not qualified as an expert. It certainly would have been more in accord with the practice if his Honor had examined the witness regarding his competency as an expert and found the facts before permitting him to testify. Such finding is final, if there is any evidence to support it. *S. v. Wilcox,* 132 N. C., 1120; *S. v. Secrest,* 80 N. C., 450. We think the statement of the witness as to his opportunity for forming an opinion in regard to handwriting, sufficient under the ruling of this Court in *Yates v. Yates,* 70 N. C., 146; 1 Wigmore Ev., 570. It is further excepted for that the application for insurance, admitted to have the genuine signature, was not put in evidence. We do not think it was necessary to do so. His Honor's ruling is sustained by the decision in *Fuller v. Fox,* 101 N. C., 119, and other cases following.

We find no error in any of the rulings excepted to by the defendant. We have noticed the only exceptions which appear in the record. The charge of his Honor is not set out. If the defendant made other exceptions he should have had them put in the record. In their absence it will be presumed that the rulings of his Honor were satisfactory. We have examined the entire record with care, and see nothing to suggest error. The only issue submitted was in regard to (346) the execution of the note; that was found for the plaintiff. It seems to have been conceded, or at least there was no evidence to the contrary, that the plaintiff was the purchaser for value and without notice. If the defendant, however, by reason of the action of his Honor, had other exceptions in the record which he desires to have presented, we take it that he would be entitled upon a proper application to the writ of *certiorari* in lieu of an appeal.

His Honor did not, in terms, set aside the verdict, although he granted a new trial. The plaintiff was entitled to judgment. The Superior Court of Catawba County will proceed to render judgment on the verdict.

Error.

CLARK, C. J., dissenting: The judge below granted a new trial, without saying whether he did so as a matter of discretion or because he found he had committed an error of law in the trial, and he was not asked to state upon what ground he had granted a new trial.

The presumption always is in favor of the correctness of the trial below, and he who alleges error must assign and show error. This is elementary. If this new trial was granted as a matter of discretion, there could be no error. If it was granted for error in law which the judge thought he had committed, it would be a reviewable question to decide whether or not there was error committed by him. As it does not appear upon which ground the court put its action, and appellant's counsel did not ask that it should be stated, it will be presumed that there was no error and that the judge did what he had a right to do, and granted the new trial in his discretion.

Besides, if the new trial was granted for error in law, committed by the judge, it is absolutely necessary that the judge find the facts; otherwise, it cannot be seen whether he did or did not in fact commit an error of law. To reverse the judgment, without such (347) finding, is to order a final judgment below against the appellee when, not appealing, he had no chance to file exceptions. He has had no showing on this appeal, no day in court. When the judge puts his ruling upon the ground that he committed an error of law, he finds the facts, and the alleged error of law is presented. This has been the

case in every instance where an appeal has been taken because the judge below granted a new trial upon a matter of law. *Wood v. R. R.*, 131 N. C., 48; *Thomas v. Myers*, 87 N. C., 31; *Gay v. Nash*, 84 N. C., 333; *Bryan v. Heck*, 67 N. C., 322.

Two cases (and two cases only) have presented the precise point herein, as to the effect of an appeal from an order granting a new trial without stating whether it was granted in the discretion of the court or for error of law, and in both, by a unanimous Court, it was held that the new trial must be taken to have been granted in the discretion of the court, and in both the appeal was dismissed. In *Breaid v. Lukins*, 95 N. C., 125, *Merrimon, C. J.*, says that when the court below "grants a new trial, without specifying the matters that induced it to make the order, and these do not appear with sufficient certainty in the record, it must be taken that the court granted the new trial in the exercise of its discretionary power. The presumption is that the order was properly made for good and sufficient cause, nothing to the contrary appearing. . . . The defendant, it is true, moved to set the verdict aside because 'it is irregular,' but it does not appear that the court placed its decision upon that ground. The judge was familiar with the law, and if he had intended to decide upon the ground that the verdict was irregular and void, thus raising a question of law, he would most probably have stated the grounds of his decision, so as to give the appellant the benefit of an appeal. In that case, as we have seen, he ought to have stated what induced his decision. The burden rests upon
(348) the appellant to show sufficient grounds for the appeal and to show error." It is not sufficient ground, as in this case, to show merely that the new trial was granted, without showing that it was not granted in the discretion of the court.

In *Breaid v. Lukins, supra, Merrimon, C. J.*, further says that when the new trial is granted below for an error of law "the court should state upon the record the facts and considerations that induced it to make the order granting or refusing a new trial. This is necessary to enable this Court to see and determine whether or not the order or judgment presents *questions of law*, the subject of review, or whether it was made in the exercise of discretionary power, and therefore not reviewable." In the last decision of this Court, and a very recent one *(Bird v. Bradburn*, 131 N. C., 488), the same ruling is made dismissing the appeal. The Court said: "The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done, it is his duty to set aside the verdict. . . . It is only when a new trial is granted as matter of law that such action is

reviewable, and then the facts should be found. When the verdict is set aside as a matter of discretion, it is not necessary to find the facts, *Allison v. Whittier,* 101 N. C., bottom of page 494; and no appeal lies, *Breaid v. Lukins,* 95 N. C., 123; *Jones v. Parker,* 97 N. C., 33; and *if no reason is given, it is presumed that the new trial was granted as a matter of discretion, and the appeal will be dismissed. Breaid v. Lukins, supra; S. v. Braddy,* 104 N. C., 737." The Court further says that if the grant of a new trial "was not in the exercise of the judge's discretion it is reviewable, and therefore his reason should be given, *if asked.*"

Here, the judge's reasons were neither asked nor given, and the above cases settle that it must be presumed that he acted in his discretion. This Court will not presume error below. It must affirma- (349) tively appear. The court below refused to grant a new trial "because against the weight of evidence," and then granted it without giving any reason. It does not follow that it must have been for some error of law which the judge had made. There might be a hundred reasons (some of which are suggested in *Bird v. Bradburn, supra*) why the judge in his discretion thought that in the interest of justice there should be a new trial. None of these was he required to set out in the record, and in most cases they ought not to go upon the record, to prejudice persons or another trial (as where the judge has a suspicion, but not legal proof, that the jury was tampered with, and many other cases). To summarily order a judgment, here, upon a verdict which the court below has set aside without giving its reasons (and therefore, presumably, in its discretion) would be unjust to the defendant. It was incumbent upon the appellant, the plaintiff, to ask the judge to give his reasons.

If, contrary to above precedents, the failure of the judge, unasked, to state his grounds for granting a new trial does not raise a presumption that he acted in his discretion and committed no error, certainly it could not raise the opposite presumption, that he acted, not in his discretion, but for reason of error in law committed in the trial, still less can there arise the further presumption that he erred in finding that he had committed error. There may have been an error in his charge or in a remark to the jury, or in the remarks of counsel, or in the composition of the jury, or other legal errors which do not appear in the record, because no facts are found. The defendant appellee is not to be punished by a judgment without a hearing because the judge did not *ex mero motu* find the facts and state his reason for granting a new trial. If it was error to fail to do this, at most the case should be remanded, that the judge may state his grounds and find the facts. If, however, it could be presumed that the judge granted the new trial for error of law com- (350)

mitted by him, the presumption is that he ruled properly that there was such error, and it was incumbent on the appellant, the plaintiff, to have the fact found. But what ruling of law is presented when no facts are found? The verdict against the defendant being set aside, he is not appealing. He could not, on this record, with no facts found, allege errors in the judge's ruling. It is the plaintiff who is appealing, and he assigns no error save that the new trial was granted. To order judgment against the defendant is not only to presume that the judge granted the new trial, not in his discretion, but is to deprive the defendant of opportunity to show that in fact error of law was committed on the trial, for no facts were found, as should, be done when the new trial below is granted by the judge for his own error.

If the judgment below stands, there is no harm done, for on the new trial which was granted by the judge the costs will follow the final verdict. But it will be depriving the defendant of his day in court to direct judgment against appellee if the judge granted the new trial in the exercise of his discretion in the interest of justice—as in the presumption—or to hold (if the new trial is presumed to have been granted for error of law committed) that the judge granted a new trial when no error had been committed, when the facts are not found, upon which alone the errors of law would be presented, and the appellant, upon whom it devolved, did not ask the facts to be found.

But if the judge, *ex mero motu* and unasked by the appellant, should have stated whether the new trial was granted in his discretion or for error of law, the defendant appellee should not be punished for the judge's error by our putting in force a judgment as to which
(351) the appellee has had no opportunity to file his exceptions or have them passed upon.

Upon reason and the precedents the appeal should be dismissed and the truth of the matters determined by the new trial below.

HOKE, J., concurs in the dissenting opinion.

Cited: Jarrett v. Trunk Co., 142 N. C., 468, 469; *Billings v. Observer,* 150 N. C., 543; *Shives v. Cotton Mills,* 151 N. C., 294; *Drewry v. Davis, ib.,* 298; *Ferrall v. Ferrall,* 153 N. C., 179; *Rangeley v. Harris,* 165 N. C., 362; *S. v. McKenzie,* 166 N. C., 297; *Settee v. Electric R. R.,* 170 N. C., 367.

COLEMAN v. RAILROAD.

(Filed 9 May, 1905.)

Railroads—Schedule of Trains—Rights of Passenger—Misinformation by Agent—Burden of Proof—Damages—Impeachment of Witness—Evidence.

1. Under section 1963 of The Code, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has a right to be transported by the first train stopping at his destination.
2. If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses.
3. Where the plaintiff missed his train, by reason of incorrect information furnished by the ticket agent at the time he applied for a ticket, an announcement made later in the waiting-room did not cure the misinformation given to the plaintiff, unless the correction was brought to his knowledge.
4. Where a ticket agent of the defendant gave misinformation which misled the plaintiff, and refused to sell him a ticket, the burden was upon the defendant to show that he gave the plaintiff correct information in time to enable him to take the train.
5. The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, can recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train.
6. It is competent, to impeach the plaintiff, to show by him that he had been convicted of forcible trespass.
7. The plaintiff's denial that he had been charged with larceny is conclusive, and it is incompetent to introduce contradictory evidence.

ACTION by Charles Coleman against the Southern Railway (352) Company, heard by *O. H. Allen, J.,* and a jury, at January Term, 1905, of MECKLENBURG. From a judgment of nonsuit, the plaintiff appealed.

A. B. Justice for plaintiff.
W. B. Rodman for defendant.

CLARK, C. J. On 5 February, 1905, about 8:30 a.m., the plaintiff went to the defendant's station in Concord to take the southbound train for Harrisburg. Two southbound trains were, according to schedule, expected soon thereafter; the first (which had been due since 7:23), No. 33, was a through train which did not stop at Harrisburg; the other, No. 11, due at 9:10, was a local passenger train which did stop there.

The paintiff went to the ticket window and asked for a ticket; the agent told him the through train was ahead and he could not sell him a ticket on the local train till the through train passed. The plaintiff then went out and looked at the bulletin-board and found that the local train would come in first. He went back and told the agent, who replied that the bulletin was wrong and that the through train had gotten ahead. The agent testified that "When I saw No. 11 come in first I stepped out of my office door and 'hollered' out that No. 11, the local train, was ahead, and stepped back in my office and got my mail (353) to put in the baggage car. There wasn't any one at the ticket window." He further said that the plaintiff was not present at that time. He does not testify that he made any effort to find the plaintiff and correct his refusal to sell him a ticket by the train first arriving. The plaintiff testified that he went out on the platform and was there when the train arrived; that the agent was then in three feet of him, but gave him no information that this was the local train, and relying upon the twice given information that this was the through train, and having no ticket, he did not try to get aboard; but he and the agent both say that as soon as the first train left the plaintiff went to the agent again to buy a ticket, when he was told that the local train had passed. He was told that he could get a ticket to Harrisburg by the local freight train, but he could not learn what time it would leave, but it did leave about 12:30. About 10:30 the agent closed the station and put the plaintiff out (though he asked to be allowed to remain) and he stood around in the cold on his crutch and cane till the 12:30 train left, on which the plaintiff went to Harrisburg. The plaintiff's positive testimony that he was thus put out is not denied by the defendant's witnesses, for Kimball swore that "he did not remember the occurrence of that morning" and was not ticket agent at that time and "did not know anything about the facts that Coleman had testified to, of his own knowledge," and Carson, when asked if he put Coleman out, replied, "Not that I remember," adding, he thought he would have recollected it. He also says that he closed the office and left after the 10:30 train passed going north, and that the plaintiff applied to him again for a ticket after No. 11 had passed. He bought his ticket before the office was closed. Neither of these witnesses could recall the weather that day. Other witnesses for the defendant, on cross-examination, corroborated the plaintiff as to his being on crutches and complaining at the time of the refusal to sell him a ticket. There is evidence that he had (354) a burn on his leg, necessitating the use of the crutch and cane, in which sore he took cold by reason of being turned out of the station and suffered serious injury from his exposure and great pain for many weeks.

It goes without saying that this is a case of grave disregard of the rights of one of the traveling public. The defendant is not a person or private corporation which can do business when and with whom it pleases, but it is in the enjoyment of a very profitable public franchise which it can only exercise by reason of a grant from the public of the right of eminent domain and subject to control of its rates and management by the State, and even to a repeal of its franchise at the will of the Legislature. The Constitution, Art. VIII, sec. 1. The Code, sec. 1963, provides that "every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation . . . and shall be liable to the party aggrieved in an action for damages for any neglect or refusal."

It was not optional with the defendant whether and when it should transport the plaintiff, like a merchant selling goods. The printed schedule is an offer which was accepted by the plaintiff when he asked for a ticket, and he had a legal right to be transported by the first train stopping at Harrisburg. If the train arrives after schedule time or misses connection, or delivers a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for his loss of time and actual expenses. This has been often held. *Purcell v. R. R.*, 108 N. C., 417, cited and affirmed in *Hansley v. R. R.*, 117 N. C., 570, 571. "He can recover loss of time and expenses, such as hotel bills, incurred in waiting for the other train." 2 Sedg. Dam., sec. 862; (355) 2 Harris Dam., sec. 545; *R. R. v. Carr*, 71 Md., 135; *Yonge v. S. S. Co.*, 1 Cal., 353; Bishop Noncont. Law, secs. 74, 1059. Indeed, "the mere inconvenience" is ground for damage. *R. R. v. Carr, supra,* and cases there cited. In *R. R. v. Birney*, 71 Ill., 391; *Heirn v. McCoughan*, 32 Miss., 17, and *Purcell v. v. R. R., supra,* the plaintiff recovered damages because the train, scheduled to stop at the station, ran by without stopping. In *Sears v. R. R.*, 94 Mass. (12 Allen), 433; *R. R. v. Bonaud*, 58 Ga., 180, and *Denton v. R. R.*, 5 Ellis and B., 860, the plaintiff recovered damages because he went to the station to take a train scheduled to leave at that hour, but which did not go out. There are many similar cases. 5 A. & E. (2 Ed.), 585.

In the present case, the plaintiff twice applied for a ticket by that train, and was refused. We are not called upon to question the rule that tickets should be sold only for the next train. Here, the agent refused to sell the plaintiff a ticket for the "next train." It is immaterial to him whether this was the negligence and indifference of this

particular agent or whether he was misled by the negligence of some other agent of the defendant. The plaintiff had a right to rely upon his representation. *R. R. v. Atchison,* 47 Ark., 74; 1 Fetter on Passengers, sec. 305.

There is no evidence that the agent tried to seek out the plaintiff and correct the error, nor that the plaintiff heard the announcement (if made) in the waiting-room. Indeed, the announcement, according to the agent's testimony, was only made after he saw the train come in, and he did not go back to the ticket window, and there was no opportunity for the plaintiff to get a ticket if he had been present.

The testimony of the defendant is that the plaintiff went off towards Cannon's Mill; but this apparently was after he was refused a ticket by the second train. Both the plaintiff and the agent concur that
(356) immediately after No. 11 left, the plaintiff a third time applied for a ticket. The agent testified that the plaintiff was not present when he made his hurried announcement that No. 11 had arrived. There was no reason he should be, after the agent's statement that he could not get a ticket "till the next train had passed," and it is admitted that immediately after the first train passed he did come up and ask for a ticket "by the next train."

The charge of the court that "if afterwards the agent made the announcement (that No. 11 had arrived) in the station where passengers had a right to be at that time, and the plaintiff either did not hear him or was absent, and did not apply for a ticket accordingly after his announcement was made, then the defendant would not be guilty of negligence," was clearly error. The plaintiff was not required to be in the waiting-room, since he could not get a ticket till after the first train passed, and an announcement then could not cure the misinformation given to the plaintiff unless the correction was brought to his knowledge. The agent's testimony is that it was not, for he says the plaintiff was not there.

The court further erred in telling the jury that the burden upon this point was upon the plaintiff. He charged immediately after the above quotation: "So that it becomes important, in the beginning, to ascertain how it was. The burden is upon the plaintiff; the burden is upon him to show this by the greater weight of the evidence." The agent having upon his own testimony given the misinformation which misled the plaintiff, and refused to sell him a ticket, the burden was upon the defendant to show that he gave to the plaintiff correct information in time to enable him to take the train.

Further, when the agent had knowledge that the plaintiff had thus missed his train, the plaintiff had a right to remain in the station and he kept comfortable till the next train left. It was brutality against

the plaintiff's protest, to turn him out in the cold with a recent (357) wound, when the agent saw he was leaning on his crutch and cane and knew that by his misinformation the plaintiff had been left there, more especially, if it is true, as the plaintiff testified, that the freight depot was also closed, and the doors of the passenger coach on the local freight train were locked, and not knowing when it would leave, he could not go on his crutch and cane back to the town, which is some distance off, for shelter. For such tort he is entitled to reasonable and just damages for any injury of which such conduct was the proximate cause, and the plaintiff is entitled upon the defendant's own testimony to have this inquired of by a jury.

The plaintiff may be an humble individual and the damages may or may not turn out to be slight. But in the history of English law many important rights have been declared in instances of obscure complainants, and where the wrong was not of great note by reason of its effect in that particular case.

For this disregard of the right of the plaintiff to be transported by the first train, and to be turned out into the inclement weather from the defendant's waiting-room after having been thus misled by its agent into losing his train, he has no remedy but in the courts of his country. It is the good fortune of the defendant that its liability for the misconduct of its agent in turning out a passenger entitled to its protection should be declared in a case where the consequences of such misconduct did not prove more serious, as in many cases they might be, as where the delayed passengers are infirm, feeble, or women and children. The traveling public have an interest in knowing clearly what are their rights when detained beyond schedule time by delays of the train, and they have a right to know that their comfort while waiting for the next train is protected by the law.

"Where a station building has been erected by a railroad company to which passengers are invited while waiting for trains, a common-law duty rests on the company to provide reasonable ac- (358) commodations for those who accept its invitation." 1 Fetter Carriers of Passengers, sec. 250. This Court, while holding that thirty minutes before the time scheduled for the arrival of a train might be a reasonable time to open a waiting-room, added that the case would be different with through passengers and delayed trains. *Phillips v. R. R.*, 124 N. C., 123. It is neglect of duty to allow the waiting-room to become uncomfortably cold (2 Wood Railroads, 1165) or to fail to keep it lighted. Bishop Noncontract Law, sec. 1086. In *R. R. v. Cornelius,* 10 Texas Civ. App., 125, where the plaintiff was detained at the station by the train being delayed, the Court held that she could recover for injury to her health caused by the fire being permitted to go

out. The railroad company is liable to passengers waiting for a train for injuries sustained from failure to keep its waiting-room comfortably heated. *Boothly v. R. R.*, 66 N. H., 342. For a stronger reason, the plaintiff who missed his train by misdirection of the defendant's agent and his refusal to sell him the ticket can recover for any injury proximately caused by being put out of the station, into the cold weather, while waiting for the next train, and possibly for the indignity of such treatment, under these circumstances, also.

The plaintiff was not afforded an opportunity to have his testimony either credited or "discredited" by the jury, for when the judge told them that if, after refusing to sell the plaintiff a ticket, the defendant's agent announced the arrival of the train at the station, and "the plaintiff either did not hear him or was absent" (neither of which the plaintiff denied), and accordingly did not buy a ticket, that "the defendant could not be guilty of negligence," he effectually withdrew the case from the jury. This is the chief error, that the jury was not allowed to pass upon the controversy, by reason of the erroneous instruction.

(359) It was competent, to impeach the plaintiff, to show by him that he had been convicted of forcible trespass. His denial that he had been charged with larceny was conclusive, and it was incompetent to introduce contradictory evidence. The defendant's brief opens with reference to the plaintiff having received the burn on his leg while drinking. This could hardly have been competent to impeach his veracity, and still less was it competent (as the prominence given it seems to indicate) as a defense of the wrong done him by the defendant in turning him out, regardless of the weather, to hobble around on his crutch and cane. The State had punished him for his violation of law, and possibly the burn was punishment enough for the drinking. Certainly, the defendant had no jurisdiction to add further punishment by exposure to the weather. He was not outlawed. He had offered and paid his money for transportation over the defendant's road and was entitled under the law to as good treatment at its hands as any one else.

Reversed.

WALKER, J., concurring in result: Plaintiff went to the station of defendant at Concord, intending to take the southbound local train for Harrisburg. He applied to the agent for a ticket, when he was told that he could not get one at that time, as tickets would not be sold for the local train (No. 11) until the fast train (No. 33), which would arrive first, had passed. Plaintiff called the agent's attention to the time of arrival of the two trains as stated on the bulletin-board, and was told

that the time of arrival was not correctly stated there, and that the fast train would come in first. The agent testified that when he saw No. 11 coming he announced the fact in the waiting-room, but the plaintiff was not there at the time, and there was testimony introduced by the defendant which tended to show that plaintiff left the station after he had asked for a ticket and failed to get one, and did (360) not return until after both trains had passed. Testimony was introduced by the plaintiff which tended to show that he did not hear the announcement of the agent, if it was made; that he was on the platform when the local train arrived, but supposed it was the fast train, as he had been told it would be the first train to come, and that the agent was within three feet of him and gave him no information. That he went back to the office when the train had left the station and asked for a ticket, when he was told that the local passenger train had passed and that he could only get a ticket for Harrisburg on the local freight train, but the agent could not tell him when it would leave. It did not leave until 12:30 o'clock. The agent put the plaintiff out of the building and locked the door. Plaintiff's leg was sore from a burn and he had to use a crutch and cane in walking. The day was very cold, and by reason of the exposure while waiting at the station for the freight train, the sore on plaintiff's leg became inflamed and he suffered great pain and inconvenience for many weeks. Testimony introduced by the defendant tended to contradict plaintiff's version of the facts. Verdict and judgment for defendant.

There was much testimony introduced by the respective parties, but I have stated only so much thereof as is deemed necessary to present the question upon which, in my opinion, the case should turn, at least in this appeal. The charge of the court, in an important particular, was erroneous, for that it must have left the jury in doubt as to the burden of proof, and, more than this, it was calculated to impress them with the belief, that, in a certain phase of the case, the burden was upon the plaintiff, whereas in law it rested upon the defendant. That part of the charge to which reference is made was substantially as follows:

1. Now, upon the first issue, "Was the plaintiff injured by default and negligence of defendant, as alleged in the complaint?" That involves the question as to whether the defendant through its agent was guilty of negligence in its dealings with the plaintiff. 2. If (361) the jury find from the evidence that the defendant failed to inform the plaintiff as to just when the train would arrive at Concord, and in consequence thereof it refused to sell him a ticket, and thereby, as a reasonable consequence, made it necessary for him to remain at or near the depot at Concord several hours, until the departure of another train, if that is found by the jury by the greater weight of the evidence,

then they will answer the first issue "Yes." 3. On the contrary, if the jury find that the defendant's agent gave the plaintiff the wrong information as to how the trains would arrive, that is to say, if he first informed him that the trains would arrive at Concord according to the regular arrangement—the fast train first and the local train coming about ten minutes afterwards—and that that was the way in which they would arrive, and that afterwards he made the announcement at the depot where the passengers had the right to be at that time, that the trains would not come in that order on that day, and that the plaintiff either did not hear him or was absent, and did not apply for a ticket accordingly after this announcement was made, then the defendant could not be guilty of negligence; so that it becomes important right in the beginning to ascertain how that was. The burden is upon the plaintiff Charles Coleman; the burden is upon him to show this by the greater weight of the evidence.

It is apparent from the third paragraph of the instructions that there are certain facts therein recited which the defendant was required to prove, and as to them, therefore, the burden of proof rested upon it. The burden was surely not upon the plaintiff to establish all the facts stated in the second branch of the charge as above set forth. It was incumbent on the plaintiff, it is true, to satisfy the jury by the greater weight of the evidence that he had been injured as a result of (362) the defendant's negligence; but when he had shown that the agent had made a mistake and given him wrong information as to the time of the arrival of the two trains, the defendant was then required to show any facts which would exonerate it from liability for this act of negligence on the part of its agent, and the error consists in the failure so to present the case to the jury that they could understand, with reasonable certainty at least, how to apply the rule of law as to the burden of proof in weighing the evidence.

The case was not settled by the judge who tried it, and it may be that through inadvertence, sometimes unavoidable, the remarks of the court upon the burden of proof are not properly placed, or perhaps not correctly stated in the charge as set out in the case; but, as it now appears, the jury must at least have been left in doubt as to where the burden of proof rested. In a case like this one, a charge which requires the plaintiff to carry a greater burden than the law imposes upon him may have seriously prejudiced him in the trial of his cause, and indeed may have turned the scales against him.

When the court charged that the "burden is upon the plaintiff to show this by the greater weight of the evidence," it should in some way have indicated to the jury to which branch of the charge it referred, and should have stated how the plaintiff in respect to the issue was affected by

the rule with regard to the burden of proof. It may be that the jury did misunderstand the charge; at least, it does not appear to us that they did not. For this error I think there should be another trial.

If the plaintiff, after being told that he could not buy a ticket until the fast train had passed, left the premises of the defendant before No. 11 arrived, and went to the Cannon mill or elsewhere and did not return until after both No. 11 and the fast train had passed, it seems to me that he cannot recover, as by his conduct he lost the rights of a passenger (*Quantz v. R. R.*, 137 N. C., 136), and the agent was (363) not bound to look for him beyond the company's yard limits in order to correct any mistake he had made as to the order in which the trains would pass. But whether the plaintiff so acted as to deprive himself of the rights of a passenger was a question peculiarly within the province of the jury to decide upon all the evidence under proper instructions from the court. The testimony is apparently conflicting on this point, though it does not clearly appear that the witness Kress and witness Ritch saw the plaintiff going towards the Cannon Mill before No. 11 had passed. As the plaintiff returned to the office and asked for a ticket and was told that his train (No. 11) had gone, it would appear that the defendant's witness saw him leaving the yard after No. 11 had passed and before No. 33 arrived. This may be made plain at the next trial, when the duty of the defendant toward the plaintiff, after he had been misled by the agent, may be more clearly defined by the court.

BROWN, J., concurring in result: This case appears to me to have been fairly presented to the jury, and I can find no error which I think is of sufficient importance to warrant a new trial. But a majority of my brethren thought that the judge below inadvertently misled the jury upon the burden of proof as pointed out in the opinion, and for such reason that there should be another trial. On that ground I am willing to yield my judgment to theirs.

The opinion of the Court seems to assume as a fact that the plaintiff was ruthlessly and brutally turned out of the waiting-room about 9 o'clock a.m., into inclement weather. It is well to observe that this was denied by Kimball, the agent, and Carson, the ticket seller.

The defendant offered evidence tending to show that the plaintiff was not at the station when the local train came, and was not there when the waiting-room was closed, and made no request to be permitted to remain in it. Further, the defendant offered evidence tending to prove that, before either train came, the plaintiff was seen going in the direction of the Cannon Mill, and that after both trains had passed the plaintiff was seen returning from the same direc- (364)

tion. The tendency of the cross-examination was to show that the plaintiff had been detained only two hours; that the weather was not so very inclement, and to show that the plaintiff's estimate of damage was exaggerated.

It also appeared from the plaintiff's own admissions, as affecting his veracity and credibility as a witness, that he was a bad character, had been convicted of crime, had been indicted for larceny and plead guilty to a forcible trespass, had been sentenced twice for six months each to a chain gang, and had burned his leg by getting drunk and lying down before the fire.

The jury appears to have discredited the plaintiff's own testimony and decided the issue in favor of the defendant.

In view of the evidence, I cannot agree that the plaintiff, upon the defendant's own evidence, is entitled to recover substantial or punitive damages. Although the plaintiff may be an "humble individual," he is nevertheless required to establish his allegations to the satisfaction of a jury.

Cited: Daniels v. Homer, 139 N. C., 272; *Hutchison v. R. R.,* 140 N. C., 127; *Power Co. v. Whitney Co.,* 150 N. C., 32; *R. R. v. Oates,* 164 N. C., 172.

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CAMERON v. POWER COMPANY.

(Filed 9 May, 1905.)

Contracts—Effect of Intoxication—Test.

1. A contract made by a person so destitute of reason as not to know the nature and consequences thereof, though his incompetence be produced by voluntary intoxication, is void, and he may plead his own disability to defeat the alleged contract.

2. In order to invalidate a contract on the ground of intoxication, the jury must find that at the time of signing, the person was so intoxicated that he could not understand the nature of the transaction and the effect of what he was doing. Mere imbecility of mind or inability to act wisely or discreetly is not sufficient to invalidate a contract.

ACTION by Cameron-Barkley Company against Thornton Light and Power Company, heard by *Neal, J.,* and a jury, at May Term, 1904, of CATAWBA. From a judgment for the defendant, the plaintiff appealed.

T. M. Hufham for plaintiff.
E. B. Cline and S. J. Ervin for defendant.

WALKER, J. This action was brought to recover damages for the breach of a contract whereby the plaintiff agreed to sell and the defendant to buy a Corliss engine. The case was heard at a former term (137 N. C., 99) upon a petition for a *certiorari*. We ordered the writ to issue so that the plaintiff's exceptions and assignments of error could be more accurately stated. The judge who tried the case has made a very full and satisfactory return to the writ, and has given the plaintiff the benefit of every exception which could possibly be taken to the rulings of the court. The defect in the original case appears now to have occurred through no fault of the judge, who was exceedingly liberal and accommodating towards counsel, agreeing for their (366) convenience to appoint a place in the district to settle the case.

The defendant in its answer admitted that its president had signed a contract, and pleaded specially that at the time of signing it he was so drunk that he did not have sufficient mental capacity to contract with the plaintiff for the engine. The court, without objection, submitted only one issue to the jury, which is as follows: "What damage, if any, is the plaintiff entitled to recover of the defendant?" The jury answered "Nothing." Judgment was entered accordingly.

The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the plaintiff's agent and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract which a man *non compos mentis* makes is voidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts. *Beverly's case,* 4 Rep., 123. And Coke, as appears in his Institutes, was of the same opinion: "As for a drunkard who is *voluntarius daemon,* he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." Co. Litt., 247a. But Blackstone observes that this doctrine sprung from loose authorities, and he evidently agrees with Fitzherbert, who rejects the maxim as being contrary to reason. 2 Blk., 291. Whatever was the true principle of the common law as anciently understood, there can be no doubt that since the reign of Edward III, if not since the time of Edward I, it has been settled according to the dictates of good sense and common justice that a contract made by a person so destitute of reason as not to know the nature and consequences of his contract, though his incompetence be produced by intoxication,

(367) is void, and even though his condition was caused by his voluntary act and not procured through the circumvention of the other party. Mere imbecility of mind is not sufficient as a ground for avoiding the contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding. 2 Kent, 451. This Court has adopted Coke's definition that a person has sufficient mental capacity to make a contract if he knows what he is about. *Moffit v. Witherspoon,* 32 N. C., 185; *Paine v. Roberts,* 82 N. C., 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its full extent and effect. *Cornelius v. Cornelius,* 52 N. C., 593. The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and if one of them has not "the agreeing mind" the contract cannot be formed. In *Hawkins v. Bone,* 4 F. and F., 311, *Chief Baron Pollock* said: "But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and if a man has no mind to agree, he cannot make a valid contract;" and the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing. So far as the legal incapacity is concerned, it can make no difference from what cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards,

(368) and not the causes that produced it. If from any cause his reason has been dethroned, his disability to contract is complete. *Bliss v. R. R.,* 24 Vt., 424. The Master of the Rolls *(Sir William Grant)* in *Cook v. Clayworth,* 18 Vesey, 15, said: "As to that extreme state of intoxication that deprives a man of his reason I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." *Lord Ellenborough* in *Pitt v. Smith,* 3 Camp., 33, thus states the doctrine: "You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed of *non concessit* to a grant, and of *non assumpsit* to a promise."

The authorities sustaining the view of the law we have stated and

adopted are quite numerous. Clark on Contracts (2 Ed.), p. 186; Parsons on Cont. (9 Ed.), p. 444; *Matthews v. Baxter,* L. R. Exch., 132; *Webster v. Woodford,* 3 Day, 90; *Van Wyck v. Brasher,* 81 N. Y., 260; *Barsinger v. Bank,* 67 Wis., 75; *Bush v. Breinig,* 113 Pa. St., 310; *Bates v. Ball,* 72 Ill., 108; *Wright v. Fisher,* 65 Mich., 275; 14 Cyc., 1103; 17 A. & E. (2 Ed.), 399.

It was held in *King v. Bryant,* 3 N. C., 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it; and to the same effect is the decision of the Court in *Gore v. Gibson,* 13 M. and W. (Exch.), 623—opinion of *Parke, B.* In the latter case *Pollock, C. B.,* said: "Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears (369) to me to be in accordance with reason and justice."

We have examined the charge of the court with care and cannot find that his Honor said anything not in strict accordance with the law, as we now declare it to be. He charged the jury as follows: "The mere fact that the defendant's president was drinking was not sufficient, but the jury must find that he was so intoxicated that he could not understand the nature and scope of what he was doing. If the jury find from the greater weight of the testimony that the agent was drinking, it would not be sufficient to invalidate the contract, but if the jury find that the defendant's president, at the time he signed the contract or order for the engine, was so drunk as to be incapable of knowing the effect of what he was doing, then the contract or order would not be binding upon the defendant. Whether or not he was so intoxicated as to render him incompetent to contract is a question for the jury upon all the evidence." We think this was a clear and sufficient exposition of the law applicable to the facts of the case. What the judge said in his reference to the nature of the transaction in which the agent was engaged and its importance or magnitude, was not calculated, in our opinion, to confuse the jury or lead them away from the real question involved in the issue, but was evidently intended to point what he had already said as to the true test of mental capacity, and to impress upon them, as an essential condition of the validity of the contract, that the agent of the defendant at the time he signed the paper must have been sober enough to understand the nature of the transaction and the effect or consequence of his act, and not that he must have been able to act with wisdom or discre-

tion. The particular transaction, and what the party did in respect to it, may have furnished some evidence of his mental condition. The effect of that part of the charge to which the plaintiff ex-
(370) cepted was to leave the whole transaction, with the evidence as to the agent's intoxication, to the jury, and in doing so no reversible error was committed. His Honor told the jury that they must find that the agent was so intoxicated that he did not understand the nature and scope of the transaction, and that this was a question for the jury upon all of the evidence, a part of which necessarily was the transaction itself, whether in its nature large or small. Even if the illustration, as argued was not a very apt one, it did no harm that we can discover.

No error.

Cited: Sprinkle v. Wellborn, 140 N. C., 175, 181; *Bond v. Mfg. Co.,* ib., 384; *Daniel v. Dixon,* 161 N. C., 381; *Burch v. Scott,* 168 N. C., 604; *Lamb v. Perry,* 169 N. C., 443; *In re Craven, ib.,* 567; *In re Ross* 182 N. C., 481.

BOLICK v. RAILROAD.

(Filed 9 May, 1905.)

Action for Wrongful Death—Pleadings—Amendment—Abatement—Action for Personal Injuries—Merger.

1. As a cause of action for death by wrongful act cannot accrue till the death, it cannot be set up by an amendment to an action instituted by the deceased himself for injuries which subsequently resulted in his death.
2. A cause of action for personal injuries abates upon the death of the plaintiff, though the injury subsequently results in death.
3. When death occurs pending an action for personal injuries, such cause is merged in the action for the death, and the only remedy is that given under section 1498 of The Code.

ACTION by Frank Bolick against the Southern Railway Company, heard by *McNeill, J.,* at July Term, 1904, of CATAWBA. The court granted defendant's motion that the action abate by reason of the death of the plaintiff, and the administrator of plaintiff appealed.

(371) *Self & Whitener and T. M. Hufham for plaintiff.*
S. J. Ervin for defendant.

CLARK, C. J. This was an action begun in May, 1903, for personal injuries sustained by plaintiff by reason of the alleged negligence of the

defendant. The plaintiff died in April, 1904, and at May Term following, his administrator asked to be substituted as party plaintiff and allowed to prosecute the action, alleging that the personal injuries sued for caused the death of his intestate. The defendant moved the court that the action abate by reason of the death. This last motion was allowed, and the administrator appealed.

The action for personal injuries was maintainable at common law and abated upon the death of the plaintiff. The right of action for death caused by the wrongful neglect or default of another was first conferred by Lord Campbell's Act, 9 and 10 Victoria, which begins by expressly reciting that at common law action for such cause could not be maintained. With some variations that statute has been adopted in probably every State of the Union. It has been uniformly held that such statutes confer a new right of action which did not previously exist. 8 A. & E. (2 Ed.), 858. In this State an action for death by wrongful act was first given by chapter 39, Laws 1854, which now, with some modifications, is The Code, secs. 1498, 1499, and 1500. The history of this legislation and summary of decisions is fully given in *Killian v. R. R.*, 128 N. C., 261.

As the cause of action for the wrongful death could not accrue till the death, it could not be set up by an amendment to this action, which was instituted by the plaintiff himself. *Gilliam v. Ins. Co.*, 121 N. C., 369; *Powell v. Allen*, 103 N. C., 46; *Bynum v. Comrs.*, 101 N. C., 412.

It is equally clear that the cause of action for personal injuries abated upon the death of the plaintiff, though "the injury subsequently resulted in death." *Killian v. R. R., supra.* In *Harper v. Commrs.*, 123 N. C., 118; *Scarlett v. Norwood*, 115 N. C., 286, (372) and *Hannah v. R. R.*, 87 N. C., 361, it was held that a cause of action for a personal injury did not survive the death of the injured party, the Court in the latter case saying that *Peebles v. R. R.*, 63 N. C., 238, did not apply since the adoption of The Code, sec. 1490. It is provided by section 1491: "The following rights in action do not survive. . . . 2. Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party." "Where such injury does not cause" means simply "unless such injury shall cause" the death of the injured party. The appellant argues that inasmuch as the expression "where such injury does not cause the death of the injured party," and death here resulted ultimately from such cause, that this action did not abate. But we are of opinion that such inference cannot be drawn and that the statute meant no more than that the action for personal injury could not be maintained after the death of the injured party unless the injury caused the death, in which case an action could be brought

under section 1498. If an action could be maintained, notwithstanding the death, for the injuries resulting in death, there would be two actions for the death, one accruing to the administrator, the recovery wherein to be applied as general assets, and the other, also by the administrator, the recovery in which would be applied "not as assets," but would go in distribution to the next of kin. In the first case the death would be the proof, and the climax of the injuries sustained, and we should have two actions by the same party, the administrator, to recover upon substantially the same cause of action.

Nor do we see any reason why if the injured party die, from other causes, the action for personal injuries should abate (as is admitted), but if he ultimately die from the injuries it should not abate. We understand the words in Code, sec. 1491 (2), providing for the abatement of actions for injuries to the person "where such injuries do not
(373) cause the death of the injured party," not as a provision by implication that such actions survive, but as a recognition that (under The Code, sec. 1498) in case of the death of the injured person from such injuries an action is now expressly given by statute. Such other action, counsel stated, has been brought and is now pending. In that action appropriate relief can be had.

The plaintiff relies upon *Schlicting v. Wintgen,* 25 Hun, 626, in which it was held: "It is no defense to an action to recover for the wrongful killing of the intestate that he had in his lifetime recovered a judgment against the same defendant for the personal injuries which resulted in his death." We think this was correctly held, for there the death was a cause of action accruing subsequent to the judgment; but when the death occurs pending an action for personal injuries, of which the death is the greatest, we think such cause is merged in the cause of action for the death, and that the only remedy, under our statute, is that given under section 1498, and that the pending action for the lesser injuries abates.

No error.

Cited: Whitehurst v. R. R., 160 N. C., 2; *Broadnax v. Broadnax, ib.,* 433; *Watts v. Vanderbilt,* 167 N. C., 568; *Renn v. R. R.,* 170 N. C., 150; *Edwards v. Chemical Co., ib.,* 556, 557; *Gurley v. Power Co.,* 172 N. C., 695; *Dowell v. Raleigh,* 173 N. C., 200.

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COVINGTON v. FURNITURE COMPANY.

(Filed 16 May, 1905.)

Master and Servant—Contributory Negligence.

1. Where there is a safe and a dangerous method available for the performance of a servant's work, and he selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover for injuries sustained.
2. Where the plaintiff was experienced in operating a machine and knew that the chances were a person would get hurt unless he waited a few minutes until the machine could reassert itself when other machinery was attached, yet he took the chances and was hurt: *Held*, that he was guilty of contributory negligence.

ACTION by D. A. Covington against Smith Furniture Company, heard by *Peebles, J.*, and a jury, at February Term, 1905, of GUILFORD.

Action to recover damages for injuries sustained by plaintiff while working in defendant's employment. Plaintiff alleged that he was injured in operating a jointer. That he began work in July and continued till September, 1903; that he had been engaged at work on similar machines in other factories some five or six years; that he was an experienced man in such employment; that at the time he was injured he was running two pieces of dry oak timber about 15 inches long and 7 inches wide over the jointer; that the piece of timber resting under his hand had a knot in it; was hard and curly where knives struck it about one inch at the end of the board. The jointer, together with other machines, was operated by the steam engine; that the speed of the machine upon which plaintiff was at work was affected when the heavy planer near to it was attached. That lumber is worked through the machine, the operator putting his hand on top of it. The knives struck the corner and knocked it out from under plaintiff's hand. The speed of the machine was about 8,000 revolutions of the roller (375) on which the knives were set per minute. When plaintiff was hurt, another planer was put in operation by the operator throwing the belt on it and starting it to running. This reduced the speed of the machine and caused it to throw the piece of timber back, knocking it out of plaintiff's hand and bringing his hand in contact with the knives. Plaintiff testified that the engine had not sufficient power to run all of the machines in the shop. That when the heavy planer was attached it reduced the speed of the machine operated by him for as much as five minutes until the engine could reassert itself. That just before he put the board on the machine he saw them couple up with the planing machine. That was just before he started the board on it. That

he had seen them do that before, and knew that the speed of this machine would slacken for a while; that he knew it made it more dangerous, that he had not realized how dangerous it was; that he had boards to jump out before when the blades of the knives hit a knot or hard place in the board, and when the board was pushed over while the speed of the engine was checked, the board would kick; that the machine slackened before putting the board on it, and he had been cautioned about the careless manner in which he was running the timber across the machine; that he knew, about two months before the accident, that the engine was insufficient to run all the machines in the shop.

J. B. Hassell, witness for plaintiff, testified that he was running the planer and threw the belt on his planer and started it in motion while the plaintiff was working at his jointer; that he had observed that this machinery would slow down when his was attached, and in a short time after throwing the belt on, the plaintiff came to him with his hand injured; that he examined the piece of wood the plaintiff was working, and it looked as if it had started over the knives before the jointer
(376) slowed up; that the engine was an 80-horse power and not in good order, and should have been 100-horse power to run all the machinery in the factory; that throwing the planer on would slacken the speed of the engine; it would catch up its speed after a while; most of them in the shop knew it; it required about five minutes to reassert itself; after it checked, any one could see that it was not running at its usual speed, and its speed slowed when the witness put on the planer. After the injury the engine ran the jointer all right. He stated that there was more danger in getting cut when the jointer was running slow; that it would knock out the plank oftener when running slack—the chances were that the person would get hurt.

There was no evidence that any complaint was made to the owners or managers of the defendant company in regard to the engine. At the conclusion of the plaintiff's testimony the defendant moved for judgment of nonsuit. The motion was allowed, and the plaintiff appealed.

E. J. Justice, W. P. Bynum, Jr., and G. S. Ferguson, Jr., for plaintiff.
Brooks & Thomson for defendants.

CONNOR, J., after stating the facts: The correctness of the judgment of nonsuit depends upon the application of some well-settled principles of law. Taking the plaintiff's evidence and all inferences to be drawn therefrom most favorable to his view, the question arises whether there was any breach of legal duty on the part of the defendant in respect to the engine and its relation to the machine which he operated. He says that it did not have sufficient capacity to move steadily and

without variation all of the machines in the shop; that when the heavy planer was attached it slackened the speed of the machine which he was operating for a few minutes. One witness says that in five minutes the engine would reassert itself. This condition was known to the plaintiff for two months prior to his injury. Without con- (377) ceding, as a matter of law, that this condition constituted negligence on the part of the defendant, but assuming for the sake of the argument that it did, we proceed to consider the duty which arose on the part of the plaintiff. He says that he knew the effect produced upon his machine and the increased danger when the heavy planer was attached. He further says that on the occasion upon which he was injured he saw the belt thrown upon the heavy planer and saw his machine slacken. Notwithstanding this, he continued to push the board upon the knives, which, he says, he knew was dangerous, although he did not realize the full extent of the danger. He says that in this condition a person would get hurt oftener, or that the chances of getting hurt were greater than of not getting hurt. There is no question involved in this case in respect to the duty of the plaintiff to quit the employment upon discovery of the incapacity of the engine. What was his duty when he saw the condition by which he was confronted and knew that it was dangerous? If he had waited for a few minutes, not exceeding five, before pressing the board upon the knives, the engine, reasserting itself, would have moved steadily. Was it not his duty in the exercise of ordinary care and prudence to have done so? The general rule of law is "that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care. . . . This rule is especially applicable when the danger does not arise from the defective condition of the (378) permanent ways, works, or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not well be anticipated, but must be ascertained by the observation at the time." Labatt, 333.

The same principle may be stated in the usual formula, that where there is a safe and a dangerous method available for the performance of the work in hand, and the servant selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover. We think

that an application of these well-established rules to the evidence sustains the judgment below.

Without entering upon the many and difficult questions arising out of cases involving assumption of risk, contributory negligence, and proximate cause, we think that but one conclusion can be drawn from the evidence in this case. A very slight consideration upon the part of the plaintiff, especially in view of his knowledge of the conditions and his experience in operating that machine, would have suggested retaining the plank for a few minutes until the machine could reassert itself and the danger pass away. *Carter v. Lumber Co.*, 129 N. C., 203. His witness states that there was more danger in getting cut when the jointer was running slow, that the chances were a person would get hurt. This the plaintiff knew. He should not have taken chances in the presence of an obvious, apparent, and well-known danger; if he did so and was hurt, he cannot cast upon his employer the blame or responsibility. *Elmore v. R. R.*, 132 N. C., 865. There is

No error.

Cited: Shaw v. Mfg. Co., 146 N. C., 240; *Beck v. R. R., ib.*, 470; *Dermid v. R. R.*, 148 N. C., 183; *Warwick v. Ginning Co.*, 153 N. C., 265; *Simpson v. R. R.*, 154 N. C., 53; *Bryan v. Lumber Co., ib.*, 489; *Mincey v. R. R.*, 161 N. C., 461; *Horton v. R. R.*, 169 N. C., 115; *Mace v. Mineral Co., ib.*, 146; *Hinson v. R. R.*, 172 N. C., 649; *Brown v. Scolfields Co.*, 174 N. C., 7; *Atkins v. Madry, ib.*, 189; *Clements v. Power Co.*, 178 N. C., 56; *Williams v. Mfg. Co.*, 180 N. C., 66.

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RAYBURN v. CASUALTY COMPANY.

(Filed 16 May, 1905.)

Accident Insurance—Waiver of Conditions—Term of Policy—Effect of Delivery—Contract, How Construed.

1. A provision in an accident policy, that "it shall not take effect unless the premium is actually paid previous to any accident under which claim is made," is waived by the delivery of the policy by the defendant's authorized agent with full knowledge of the fact that the insured had been injured subsequent to the date of the application and the receipt of the premium at the time of the delivery and its retention by the defendant.
2. An insurance policy takes effect from its date, unless it is stated that it shall only take effect upon certain conditions, and upon such conditions being met, if it is delivered, it takes effect as of the day of its date.

3. In the absence of fraud, the delivery of an insurance policy is conclusive proof that the contract is completed, and is an acknowledgment that the premium was properly paid during good health.
4. Where insurance is applied for, and afterwards a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the company assumes the risk after the date of the policy.
5. An accident policy which stated that it was for the term of one year, beginning on 23 October, 1901, and ending on 23 October, 1902, is a continuing contract and is binding for one year from 23 October, though it was not delivered and the premium was not paid until 30 October, the delivery being made with full knowledge of the fact that the insured in the meantime had been injured.
6. Where a contract of insurance is reasonably susceptible of two constructions, the uniform rule is to adopt that which is most favorable to the insured.

ACTION by S. C. Rayburn against Pennsylvania Casualty Company, heard by *Neal, J.*, and a jury, at November Term, 1904, of RUTHERFORD. From a judgment of nonsuit the plaintiff ap- (380) pealed.

McBrayer & McBrayer for plaintiff.
Gallert & Carson for defendant.

BROWN, J. The motion of the defendant to amend the transcript of appeal by inserting the amended answer is allowed, and the appeal has been considered and determined by us with the amended answer in.

The action is brought to recover upon an accident policy issued by the defendant to the plaintiff and dated 23 October, 1901. The plaintiff was injured on 27 October, 1901.

The plaintiff testified that he made due application in usual form through Mills, the defendant's agent, for the policy on 21 October, 1901, and at that time offered to pay the premium. Mills refused the money and said that was not the time and that the plaintiff could pay the premium when he (Mills) brought him the policy. The agent delivered the policy to the plaintiff on 30 October, 1901, and then received the premium. At the time he delivered the policy, Mills said to the plaintiff that "he understood I was already hurt in the arm and shoulder, and that although being hurt, he would deliver the policy." The plaintiff made claim in due form and in apt time, and received from the home office at Scranton, Pennsylvania, the necessary blanks for making proof, dated 2 January, 1902. The plaintiff's notice of injury, sent to the defendant, states he was hurt on 27 October, 1901. Again on 25 February, 1902, the defendant's manager at Charlotte, N. C., sent another set of proofs to the plaintiff to be executed.

The policy recites that it is issued in consideration of an annual payment of a premium of $10, and states that "this insurance is for the term of one year, beginning at noon on 23 October, 1901, and
(381) ending on 23 October, 1902." The policy contains a provision that it shall not be valid until countersigned by the agent at Charlotte. This was done on 23 October, 1901. It is further declared that it shall not take effect unless the premium is actually paid previous to any accident under which claim is made.

It is contended by the plaintiff that the evidence tends to prove a waiver of this latter provision, and that the case should have been submitted to the jury upon a proper issue with appropriate instructions. In this view we concur.

The general rule is well-settled that the policy takes effect from its date, unless it be otherwise stated that it shall only take effect upon certain conditions. It is also held that upon such conditions being met, if the policy is delivered, it takes effect as of the day of its date. May on Insurance, sec. 400.

The delivery of the policy in this case was made by the defendant's authorized agent with full knowledge of all the facts. He received the premium and it has been retained by the defendant. There is no suggestion, much less evidence, of fraud or imposition. On the contrary, the delivery was the voluntary act of the defendant's agent, without even an importunity upon the part of the plaintiff. It has been held in a recent case in this Court that where the policy is delivered, there being no allegation or proof of fraud, the delivery is conclusive proof that the contract is completed and is an acknowledgment that the premium was properly paid during good health. *Grier v. Ins. Co.,* 132 N. C., 542; *Kendrick v. Ins. Co.,* 124 N. C., 315.

The further principle is applicable to this case, that where insurance is applied for and afterwards a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the company assumes the risk after the date of the policy. *Grier's case, supra.*

(382) We are not inadvertent to the *Ormond case,* 96 N. C., 159, or the *Whitley case,* 71 N. C., 481, so earnestly pressed on our attention by Mr. Gallert in his well-considered argument. The syllabus in each case fails to show that the policy was delivered by the agent with full knowledge of the facts. A careful reading of the facts and the opinions leads us to conclude that those cases are not in conflict with the conclusions we have reached in this. It must also be remembered that this contract does not terminate because one injury is inflicted. It is a continuing contract and the duration of its binding force, as explicitly stated in it, continued until noon 23 October, 1902. The construction

contended for by the defendant, that the contract began on 30 October, 1901, when the policy was delivered, is inconsistent with a contract for twelve months and which by its own express limitation expires 23 October, 1902.

If a contract of insurance is reasonably susceptible of two constructions, the uniform rule in all courts is to adopt that which is most favorable to the insured. *Bank v. Ins. Co.*, 95 U. S., 673.

Upon the evidence presented in this record, if believed, the plaintiff was entitled to a verdict in accordance with the terms of the contract, and the court below erred in giving judgment of nonsuit.

New Trial.

Cited: S. c., 141 N. C., 430; *Waters v. Annuity Co.*, 144 N. C., 670; *R. R. v. Casualty Co.*, 145 N. C., 118; *Perry v. Ins. Co.*, 150 N. C., 145; *Annuity Co. v. Forrest*, 152 N. C., 625; *Powell v. Ins. Co.*, 153 N. C., 138; *Hardee v. Ins. Co.*, 154 N. C., 438; *Pender v. Ins. Co.*, 163 N. C., 102; *Gardner v. Ins. Co., ib.*, 373; *Britton v. Ins. Co.*, 155 N. C., 152; *Underwood v. Ins. Co.*, 177 N. C., 336.

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JONES v. WATER COMPANY.

(Filed 16 May, 1905.)

Contract to Supply Water Construed—Fires.

An instruction that "it was the defendant's duty, under its contract with the city of Durham, to supply at all times water and pressure sufficient for the extinguishment of fires in said city," correctly stated the test of the defendant's duty to the plaintiff as decided on the former appeal.

ACTION by R. M. Jones against Durham Water Company, heard by *Peebles, J.*, and a jury, at January Term, 1905, of DURHAM. From a judgment for the defendant, the plaintiff appealed.

Manning & Foushee and Boone & Reade for plaintiff.
Winston & Bryant and Fuller & Fuller for defendant.

CLARK, C. J. This case was before us at a former term, 135 N. C., 554. On the second trial the court charged the jury: "It was the defendant's duty under its contract with the city of Durham to supply, at all times, water and pressure sufficient for the extinguishment of fires in said city." This was in accordance with what was said in our former

opinion, in which it was further said that the provision as to furnishing more than five streams, thrown to "a height of 100 feet in still air," upon four minutes' notice, was simply a test of pressure and capacity to determine the rental which the city should pay. The test of the defendant's duty to the plaintiff was correctly stated, as above, by the judge, and did not require four minutes' notice nor 100 feet of elevation. At all times it was the defendant's duty to furnish a supply of water and, of course, with adequate pressure to put out fires, for it was not a "supply of water to extinguish fires" unless there was pressure sufficient to make the water available for that purpose. This was the (384) measure of the defendant's duty, and not "100 feet in still air." Water thrown to such height might more easily put out fires. but if the supply and pressure actually furnished were adequate (as the jury find), that was a compliance with the contract.

The case was properly submitted to the jury, and they have found that the defendant did its duty, as above specified. There are numerous exceptions, but upon examination we deem them without merit and that they are not such as require any further discussion. Whether the cause of the loss of the plaintiff's building was that the fire had gotten too great headway, or that the fire companies were not as efficient as usual, or because there was loss of time in putting on another stream, during which delay the stream playing on the fire was allowed to "die down," or to whatever other causes, the jury have found under proper instructions that the plaintiff's loss was not due to failure of the defendant to furnish water and pressure sufficient to extinguish fires. The defendant did not insure the plaintiff's house against fire.

No error.

ST. JAMES v. BAGLEY.

(Filed 16 May, 1905.)

Trusts—Grants, How Construed—Trusts, How Created—Construction of Deed.

1. When it is doubtful whether language in a grant operates as the declaration of trust, the court will examine the entire deed, the relation of the parties, etc., to enable it to gather the intention of the grantor.
2. A grantor can impose conditions and can make the title conveyed dependent upon their performance; but if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive.

3. In order to create a trust, it must appear that the words were intended to be imperative; and when the property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence.
4. The recital in a deed conveying land to the vestry and wardens of a church, that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title.

CLARK, C. J., dissenting.

CONTROVERSY without action by the Wardens and Vestry of St. (385) James Parish against Thomas P. Bagley, heard by *O. H. Allen, J.*, at April Term, 1905, of NEW HANOVER.

This is a controversy without action under section 567 of The Code. The plaintiff is a corporation—Wardens and Vestry of St. James Parish —organized and existing under the laws of North Carolina, with full power to take, hold, and dispose of real and personal property.

On 29 March, 1867, Dr. A. J. DeRosset and wife executed and delivered to the plaintiff a deed in words and figures as follows: "This indenture made this 29 March, 1867, between Armand J. DeRosset and Eliza J., his wife, of the city of Wilmington, State of North Carolina, of the first part, and the Vestry and Wardens of St. James Church, in the town of Wilmington, of the second part: witnesseth, that the said parties of the first part, for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated by the said parties of the second part, and in further consideration of $1 to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and do by these presents (386) grant, bargain, and sell to the said parties of the second part, their successors and assigns, all those lots or parcels of land situate in the city of Wilmington aforesaid, between Orange and Ann streets and Eighth and Ninth streets, being the whole of block 133, according to the plan of the town of Wilmington, surveyed and prepared by L. C. Turner in 1856, together with all and singular the improvements, privileges, and appurtenances to the same belonging or in any way appertaining. To have and to hold the said described lots or parcels of land to the said parties of the second part and their successors and assigns forever. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written."

Said deed was duly proved and recorded on 10 May, 1867, in the office of the Register of Deeds of New Hanover County. It being suggested that the probate was informal, it was again submitted to pro-

bate on 10 March, 1905, and again recorded in said county. Upon the execution of said deed plaintiff corporation took possession of the said property and used it for a considerable time for charitable purposes, having thereon a building which was used as a home for elderly women and a school was conducted in connection therewith until 5 April, 1896, when the buildings were destroyed by fire, and the plaintiff was unable to replace them; for the last several years it has been inconvenient and impracticable for the plaintiff to use it for any purpose. The land is now vacant, unused, and of little value to plaintiff. Since the execution of said deed the plaintiff has had continuous, open, actual, and adverse possession of the said land, claiming it as its own against all parties.

Some years ago and subsequent to the burning of the buildings situated on said land some question was made as to whether the plaintiff
(387) had a title in fee absolute with the power to dispose of the property or any portion thereof. The matter being brought to the attention of Dr. DeRosset, the grantor of said deed, he wrote to the Rev. Dr. Strange, the rector of the parish, a letter, a portion of which is as follows: "Wilmington, N. C., 22 March, 1895. . . . As the donor of the property 'St. James Home,' I have nothing to say except that it is absolutely the property of the vestry, and may be disposed of as they think proper, without regard to any trust, real or implied, which any one may think is binding upon the vestry in considering the propriety or advisability of alienating the whole or any part of it."

At a meeting of the Wardens and Vestry of St. James Parish, held on 14 March, 1905, the following resolution was passed: *"Resolved,* that the sale of the property lying between Orange and Ann streets and Eighth and Ninth streets, it being known as Block 133, according to the plan of the city of Wilmington, to Thomas P. Bagley for the sum of $12,000 be confirmed, and it is ordered that the deed for said property be made; that the corporate seal be attached thereto by Thomas D. Meares, senior warden, J. Victor Grainger, junior warden, and William L. DeRosset, member of the corporation."

The Wardens and Vestry of St. James Parish, the plaintiff, have constituted and established a trust fund, of which the proceeds of the sale of the aforesaid property is to constitute a large portion, for charitable and religious objects in connection with St. James Parish, and at a meeting held on 9 March passed the following resolution: "Moved by Mr. Calder, that the net proceeds, together with the amount now standing to the credit of 'St. James Home Fund,' be placed to a fund to be designated as the 'Armand J. DeRosset Memorial Fund,' which, with the income derived from the same, is to be used for the
(388) promotion of charitable and religious objects. Carried."

It is further agreed between the parties hereto, that if the plaintiff has and can convey to the defendant a good and indefeasible title, free from all trusts and equities, judgment is to be entered compelling a specific performance of the contract by the defendant and requiring him to pay the purchase price, upon the execution by the plaintiff of a proper deed to him, and for costs of the action; but if the plaintiff holds the property in trust and cannot convey a good title, then judgment is to be entered against the plaintiff for costs of the action.

Attached to the facts agreed is the affidavit in accordance with the provisions of The Code.

The controversy having been submitted to *Judge Allen,* the following judgment was rendered: "It is adjudged that the deed from Dr. A. J. DeRosset and wife, dated 29 March, 1867, conveyed to the plaintiff a good and indefeasible title in fee, free from all trusts and equities, and the plaintiff now has and is able to convey an absolute and indefeasible title to the defendant for the following described property. And it is further adjudged that the contract of purchase of said property by the defendant from the plaintiff be specifically performed, and that the plaintiff tender to the defendant a good and sufficient conveyance in fee of said property. And it is further adjudged that the defendant pay to the plaintiff or its attorneys the sum of $12,000, with interest thereon from 18 March, 1905, the purchase-money named in the contract herein set forth, and the costs of action." From this judgment the defendant appealed.

Rountree & Carr for plaintiff.
W. B. McKoy for defendant.

CONNOR, J., after stating the facts: There can be no doubt (389) that the grantee is a corporate body with capacity to take and hold the legal title, for purposes consistent with its creation and existence, of the land conveyed by Dr. DeRosset. Code, sec. 3665; *Lord v. Hardie,* 82 N. C., 241. It is equally clear that the legal title to the land passed to and vested in the plaintiff corporation by virtue of the deed of 29 March, 1867. Whether the deed operates as a bargain and sale sustained by a valuable consideration, or as a feoffment by virtue of our registration laws, Code, sec. 1245, it is effectual to pass the legal title to the plaintiff. *Hogan v. Strayhorn,* 65 N. C., 279; *Ivey v. Granberry,* 66 N. C., 223; *Morris v. Pearson,* 79 N. C., 253. Certainly, there is nothing in the deed to indicate a purpose on the part of the grantor to retain any right, title, or interest in or control over the land or the uses to which it should be put. It is suggested that the language expressing

the purpose which moved the grantor to convey the property should be interpreted as the declaration of a trust for the objects referred to as appealing to his generosity. It is further suggested that these purposes are so indefinite that they are incapable of enforcement and that a resulting trust is raised whereby the plaintiff holds the legal title in trust for the grantor or his heirs. The successful maintenance of this conclusion, so contrary to the benevolent purpose of the grantor, is dependent upon the truth of the proposition that a trust is declared and impressed upon the legal title. It must be conceded that it is not necessary for the valid declaration of a trust that any peculiar language be used. Bispham Eq., 71. When it is doubtful whether language in the grant operates as the declaration of trust, the court will examine the entire deed, the relation of the parties, etc., to enable it to gather the intention of the grantor. "The effect of a deed must depend upon the effect of the language used. A grantor can impose conditions and can make the title conveyed dependent upon their performance. But (390) if he does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive." 2 Devlin on Deeds, sec. 838; *Mauzy v. Mauzy,* 79 Va., 537. Formerly, the rule in England was that whenever property was given, coupled with expressions of request, hope, desire, or recommendation that the person to whom it is given will use or dispose of the same for the benefit of another, the donee will be considered a trustee for the purpose indicated by the donor. Such expressions were regarded as *prima facie* imperative. "But within the last few years the doctrine has changed and the English rule is, now, that precatory words are *not* to be regarded as imperative, unless it is plain from the context that the testator so intended them. *Prima facie,* a mere request, or an expression of hope or confidence, or expectation does not import a command." Bispham Eq. (6 Ed.), 117. Mr. Pomeroy says: "Judges have for some time shown a disposition against the doctrine of precatory trusts and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds; many of the earlier decisions would not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although with some caution and reserve, and they all exhibit the modern tendency to limit rather than enlarge its scope. . . . Whether or not a trust has been created in any particular case is entirely a question of interpretation and construction. The intention must be sought for not only in the precatory words themselves, but also in the terms and qualifications of the gift, the powers of disposition and enjoyment conferred upon the first taker, the nature of the property, the description

of the supposed beneficiaries, and all the other context." 2 Pomeroy Eq., 1015-1016. In *Lamb v. Eames,* 6 Ch. App. Cases, 596, *James, L. J.,* speaking of an attempt to impress a trust upon the title to property given by a man to his wife, said: "I am satisfied that no such trust was intended, and that it would be a violation of the (391) clearest and plainest wishes of the testator if we decided otherwise." In *In re Adams* and the *Kensington Vestry,* L. R. (1884), Ch. Div., 394, *Cotton, L. J.,* said: "I have no hesitation in saying myself that some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. . . . Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of the particular words, but, considering all the words which are used, we have to see what is their true effect and what was the intention of the testator as expressed in his will." *Lindley, L. J.,* in the same case, said: "I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." The same learned judge in *In re Hamilton v. Hamilton,* 2 L. R., Ch. Div. (1895), after reviewing the cases, expressly approved what is said in *In re Adams, supra,* and says: "I say in this case we are bound to see that the beneficiaries are not made trustees, unless intended to be made so by the testator. . . . You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." In *Hill v. Hill,* 1 L. R. (1897), Q. B. Div., 483, the authorities are again reviewed and those cited approved, when *Chitty, L. J.,* said: "In the case before us the word 'trust' does not occur. A trust may undoubtedly be created by any apt words; but the circumstance that the well understood and obvious term 'trust' is not used seems to me to be worthy of some consideration when the question is whether a trust is or is not intended to be created. Now, it is incumbent on those who claim that there is a trust, whether created by precatory words or otherwise, to point out with reasonable (392) certainty who are the objects of the trust. These objects must be ascertained from the words used, construed reasonably." We have cited at some length the opinions of the learned English judges to show the uniform current of thought upon the subject. The English and American cases are reviewed by *Mr. Justice Matthews* in *Colton v. Colton,* 127 U. S., 300, in which he adopts the rule as generally followed in the several States, stated by *Gray, C. J.,* in *Hess v. Single,* 114 Mass., 56: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty,

or recommendation that he will apply it to the benefit of others, may be held to create a trust if the subject and object are sufficiently certain. Some of the earlier English cases had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases, in this and in all other cases of the interpretation of wills, the intention of the testator as gathered from the whole will controls the court. In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when the property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence." *Bigelow, C. J.*, in *Warner v. Bates,* 98 Mass., 274, says: "That to create a trust it must clearly appear that the testator intended to govern or control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee." "The question in all cases is whether a trust was or was not intended to be created, or, in other words, whether the testator designed to leave the application or nonapplication of the subject-matter of the bequest to the designated object entirely to the dis-
(393) cretion of the donee, or whether his meaning was that his language should be deemed imperative and that such discretion should be excluded. This is usually considered by the best authorities to depend upon three things: First, upon the general terms of the will; second, upon the certainty of the object, and, third, upon the certainty of the subject. . . . The determination of the question whether or not discretion has been excluded often depends upon the degree of certainty with which the objects of the supposed bounty are pointed out. If, for example, a gift is bestowed coupled with a suggestion or recommendation that it be applied by the donee to objects which are vaguely and imperfectly described, this vagueness will be regarded by the court as tending to show that the application or nonapplication of the gift was to be left to the option of the donee. . . . There is, however, this difference between trusts created by technical words and those raised by expressions of recommendation and request: In the former, if the trust fails for want of certainty in the objects, the trustee will not hold beneficially, but there will be a resulting trust in favor of the donor or his estate; in the latter this uncertainty will, in many instances, take away entirely from the gift its fiduciary character and cause it to vest beneficially in the donee. In the one case a trust is created, but fails for want of certainty in its object; in the other the want of certainty is evidence to show that the donor never intended to create a trust." Bispham, 74, 75. In *Morice v. Bishop of Durham,* 10 Ves., 536, the *Lord Chancellor* said: "If neither the object nor the subject are cer-

tain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the deed; and the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee whether he would take upon himself that which is technically called a trust."

"It seems clear that, when the expression or desire in the will is ever so strong, it will not be construed to create a trust for others, when the will contains an expression that the devisee is neverthe- (394) less to be free to act in his own discretion." Redf. on Wills, 418; *Giles v. Anslow,* 128 Ill., 187. Professor Pomeroy states the rule: "In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms in the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner." Pom. Eq., 1016. *Stead v. Mellor,* L. R., 5 Chan. Div., 225; *Bryan v. Milby,* 6 Del., ch. 208; *Harrison v. Harrison,* Ex. 2 Grat., 1, 44 Am. Dec., 365; *Post v. Moore* (N. Y.,) 73 N. E., 482. We have given the question a thorough examination because we find no case in our Reports in which it has been discussed, and it is of much importance to the parties in this action that our opinion be sustained by the best considered modern authorities. The amount to be paid for the property is considerable, and it is stated in the case that its value consists in the fact that it may be divided into town lots. It would be unfortunate if any cloud shall hang over the title when it becomes the home of persons who may purchase and improve it. With the aid of the general principles which we find uniformly adopted for ascertaining the intention of the donor, we entertain no doubt that it was the intention of Dr. DeRosset to convey the property to the Vestry and Wardens of St. James Parish and their successors, with full confidence that they would use it, or dispose of it and use the proceeds for the benevolent and pious purposes which moved him to make the donation. We may take notice of the fact that Dr. DeRosset was a gentleman of more than ordinary intelligence, and we may see from the language used that he was deeply interested in the welfare of the parish and the purpose for which it existed. He evidently knew how to use language declaring a trust. The order in which the language expressing his motive or purpose in making the deed is found, in the recital, rather (395) than following the habendum, where declarations of trust are almost uniformly found, indicates that it was his purpose to avoid expressing a trust, preferring rather to leave the manner of disposing and using the property to the discretion of those in whom he reposed confidence. We also note that Mr. Wright, an eminent and learned member

of the bar, is a witness to the deed. We may reasonably infer that he either wrote or was consulted in regard to the deed. The fact that no trust is declared is convincing proof, in the light of the other circumstances stated, that none was intended. He doubtless knew that the property was of value in "aid" of the objects in which he felt an interest, and that the extent of its value in those respects depended largely upon giving to the vestry and wardens an unlimited discretion. The letter to Dr. Strange shows his deep interest in the welfare of the parish. It would be doing violence to all rules of interpretation to find in the language used an intention to create an express trust, which by reason of its uncertainty would be void, thereby defeating the will and intention of the donor. The very uncertainty of the terms used, which it is said furnish evidence of a purpose not to create a trust, would thus be relied upon to destroy the purpose and place the donor in the singular position of declaring a purpose and, in attempting to effectuate it, destroying the power of the donee to do so by creating a resulting trust for himself. By all of the canons of construction and the rules laid down by the courts for ascertaining the intention of the donor, we are brought to the conclusion that no trust is created by the language in this deed. In saying that no trust is created, we, of course, mean no other trust than is imposed upon all property held by the trustee or official body representing a religious society pursuant to the provisions of section 3665 of The Code. The plaintiff held the property for the use of the congregation, consisting of the members of the church organized
(396) as St. James Parish, with the right and power to appropriate it to such uses and purposes as the said congregation, acting through its organized agencies, may direct. There is no suggestion that the disposition of the property, or the use to which the proceeds are to be put, is in any manner inconsistent with the provisions of the statute or the wishes of the congregation; on the contrary, it appears that the plaintiff is acting in strict accordance with the wishes of the donor in the establishment of a trust for charitable and religious objects in connection with St. James Parish. While the letter of Dr. DeRosset to the rector of the parish is set out in the case agreed and fully sustains the construction which we have given the deed, we have not called it in aid of our conclusion. The cases which we have found in our investigation generally arose upon the construction of wills. We see no reason why, in the interpretation of language in a deed, the same rules of construction should not apply. We, of course, recognize the fact that more latitude is taken by courts in construing wills than deeds, but in both the purpose is the same—to ascertain and effectuate the intention of the testator. While the language used by the donor is not, strictly speaking, precatory, but rather expressive of motive, the same interpre-

tation should be given it. The real test is whether the language is imperative or leaves the use and disposition of the property to the discretion of the donee. We note, also, that the heirs, or, if he left a will, the devisees of Dr. DeRosset are not parties to this controversy. We have no doubt that the plaintiff and defendant may without joining any other parties submit the controversy, by complying as they have done, with the provisions of The Code, and that they will be bound by the judgment. It is advisable, however, that in cases involving the title to real property all persons having, or who may have, an interest in the subject-matter be brought in, so that the title may be quieted. We may not refuse to decide a controversy when properly presented because of the failure to make such parties. We conclude that the (397) judgment of his Honor was correct.

We have refrained from discussing the effect of the language used in the deed which it is supposed creates an express trust, or expressing any opinion as to its validity if construed into a declaration of trust, for the manifest reasons set forth in the opinion. To prevent any possible misconception, we desire to say that we do not concur in the suggestion that the language if so construed would not be valid as the declaration of an enforcible trust. One of the elements of a religious or charitable trust is its uncertainty. The courts have endeavored to sustain and give effect to the intention of the donors in such cases and prevent a failure of their benevolent purposes. The case of *Tilden v. Green,* 130 N. Y., 29, was decided by a divided court, three of the seven judges joining in a very strong dissenting opinion. The opinion of the majority has been criticised, and the Legislature of New York has since passed a statute to prevent a failure of a trust so declared. We simply decide that there is no declaration of trust in the deed made by Dr. DeRosset to the plaintiff, that the language sought to be construed into a trust is expressive only of his motive and purpose in conveying the property to the plaintiff, and, in our opinion, expressly excludes the idea of attaching a trust thereto.

No error.

WALKER, J., did not sit.

CLARK, C. J., dissenting: The defendant declines to take the deed and pay $12,000 purchase-money, alleging a defect of power in the plaintiff to execute a good title. The burden is on the plaintiff to show that it can, and it is not relieved of that burden because this is a "controversy submitted without action." *McKethan v. Ray,* 71 N. C., 165.

The conveyance from the late Dr. A. J. DeRosett and wife to the plaintiff states that the parties of the first part, "for the purpose

(398) of aiding in the establishment of a Home for Indigent Widows and Orphans, or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated . . ." execute the conveyance to the trustees of St. James Parish. This is not the expression of a motive, but of the purposes, the uses to which the property "may be appropriated," and besides, is not merely a specific purpose, but a consideration and object of the deed. The doctrine of *cy pres* does not prevail in this State, and the trustees must carry out the trust. If they do not, or if the above trust "in the promotion of any charitable or religious objects" is so vague and uncertain that a court cannot decree the specific performance of such trust, then there is a resulting trust in favor of the grantors, or, since they are dead, in favor of their heirs at law or devisees. It affirmatively appears that the property for years past has not been used for a "Home for Indigent Widows and Orphans," and the proceeds of its sale, if collected, are to be used "for the promotion of charitable and religious objects."

The heirs at law or devisees of the grantors are not parties to this proceeding, and cannot be bound by any decree herein, and as the defendant contends that upon the record it cannot be adjudged that the plaintiffs can make him an indefeasible title, he ought not to be compelled by the court to pay down $12,000, when, if the defendant's contention as to the construction is correct, the parties entitled to the property are not parties to this action. The cause should be remanded that proper parties may be made. The defendant in his brief relies upon *McKethan v. Ray, supra,* which holds that upon a case agreed the court is not authorized to pass upon the validity of a title without making the heirs at law and devisees parties to the action, and that an action submitted without controversy has no other or further effect than to dis-
(399) pense with summons and pleadings.

Until the heirs at law and devisees are made parties, it can serve no purpose to discuss the language of this deed. In *Finlayson v. Kirby,* 121 N. C., 106, this Court *ex mero motu* remanded the case, that additional parties should be made, saying that it would be useless to pass upon the matters of law "until all interested persons have had an opportunity to be heard." It, however, has been held in many cases in this State, some of which are cited in *Keith v. Scales,* 124 N. C. (relied on by defendant), at pp. 515, 516, that such a trust as herein stated is void for uncertainty, as among others, *Holland v. Peck,* 37 N. C., 255, where the property was given "to be disposed of by the Conference, as they shall in their Godly wisdom judge to be most expedient or beneficial for the increase and prosperity of the gospel." This was held too indefinite to be executed. But it was far more

definite than the words here used—"or in the promotion of any charitable or religious objects." Besides other cases cited in *Keith v. Scales,* the whole matter is so fully and thoroughly discussed in the famous *Tilden Will Case (Tilden v. Green,* 130 N. Y., 29) that it is unnecessary now to cite others, especially as our decision cannot possibly guarantee the defendant a good title, in the absence of all the parties really in interest. The defendant is not seeking protection against the plaintiffs. Their deed would be an estoppel upon them. He wishes a decree that would give him a good title against the heirs at law and devisees of their grantor.

In *Tilden v. Green,* 130 N. Y., 29 *(s. c.,* 14 L. R. A., 1), the purpose expressed was that if, as here, the first purpose named was not executed, the trustees were authorized to apply the fund "to such charitable or educational purposes" as they might deem "most widely and substantially beneficial to mankind." It was held that the whole gift was uncertain and invalid because not enforcible at the suit of any beneficiary.
This cause attracted universal attention from the profession (400) and the public, being the construction of the will of Samuel J. Tilden, who had been an eminent lawyer and candidate for the Presidency; the amount involved was very large; the decision was by one of the most eminent courts in the country, the Court of Appeals of New York, affirming the court below; and the cause was argued by a large number of the leading lawyers of the Union, among them, James C. Carter, Joseph H. Choate, Smith M. Wood, Lyman D. Brewster, and George D. Comstock. Among the judges were Rufus W. Peckham (now upon the United States Supreme Court) and Alton B. Parker. There was a most thorough research and discussion, no authority nor argument being omitted by the counsel and the court. No research could possibly add to the light thus shed, upon the point before us, by the discussion and decision in that case. By the rulings there sustained as settled law, the deed in the present case is necessarily void, because "there is no beneficiary who by suit can enforce execution of this trust" for the "promotion of any other charitable or religious objects."

In that opinion it is said (at p. 45): "If there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement is void; and the objection is not obviated by the existence of a power in the trustees to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power. The equitable rule that prevailed in the English courts of chancery, known, as the *cy pres* doctrine, and which was applied to uphold gifts for charitable purposes when no beneficiary was named,

has no place in the jurisprudence of this State." And the same is true in North Carolina. The subsequent letter of Dr. DeRosset, as to the legal effect of his deed, can have no effect. Mr. Tilden would (401) likewise have said his gift was valid, and so would any other grantor whose grant, gift, or devise has been held invalid because against the above well-settled principles and policy of the law. We must administer the law and not our desire for the maintenance of a laudable but defectively expressed gift or devise for "charitable purposes."

Tilden v. Green is very generally recognized as conclusive authority, and is so cited by this Court in *Keith v. Scales,* 124 N. C., 515.

Cited: Hayes v. Franklin, 141 N. C., 601; *Church v. Bragaw,* 144 N. C., 134, 135; *McLeod v. Jones,* 159 N. C., 78; *Carter v. Strickland,* 165 N. C., 72; *College v. Riddle, ib.,* 217; *Hardy v. Hardy,* 174 N. C., 507; *Laws v. Christmas,* 78 N. C., 362; *Waldroop v. Waldroop,* 179 N. C., 676; *Springs v. Springs,* 182 N. C., 487.

MARKS v. COTTON MILLS.

(Filed 16 May, 1905.)

Negligence—Rule of Prudent Man—Change of Rules—Assumption of Risk—Contributory Negligence—Question for Jury.

1. In all cases involving the question of negligence the standard by which to measure the conduct of the employer and the employee is the standard of conduct followed by the ideal prudent man.
2. When the facts are admitted, and but one inference can be drawn from them, the court will find by the standard of the ideal prudent man, as a matter of law, the existence or nonexistence of negligence. When the facts are not admitted, or when more than one inference may be rasonably drawn. the question is submitted to the jury to find whether or not there is negligence.
3. The fact that a mill ran short of hands is no legal excuse for changing a rule and requiring the machinery to be cleaned while in motion, if doing so unreasonably increased the hazard.
4. Where the defendant made a rule requiring the plaintiff to clean his machine while in motion, the question of defendant's negligence should have been submitted to the jury under proper instructions, to inquire whether it was a reasonably safe and prudent method of doing the work.
5. An employee who continues to work when he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he

entered the service, does not as a matter of law voluntarily assume it by merely remaining in a place which is rendered unsafe by his employer's fault.

6. When an employer adopts a dangerous method, the question whether the employee assumes the risk by continuing the work depends upon whether said danger was so obvious and so well known to and appreciated by him or should, by the exercise of reasonable care, have been so known and appreciated that a prudent man under like conditions would have continued the service; and this is for the jury to determine.

ACTION by W. H. Marks against Harriet Cotton Mills, heard (402) by *Bryan, J.*, and a jury, at October Term, 1904, of DURHAM.

This is an action for the recovery of damages for personal injuries. The plaintiff testified that he was 24 years of age, was working for the defendant at Henderson, N. C., October, 1901, was a speeder hand, running an intermediate machine which had cogwheels on it and was about 15 feet long and 5 feet high. There were 25 or 30 machines in the mill about 2½ feet apart; he was injured in October, 1901; had to run it and get work off on it; cog gear on front and back; had worked the machine four or five months. When he first went there the rule was to stop at 5 o'clock to clean up. In about three months the defendant got behind and was running short of hands; he was ordered to clean up while running; the usual custom was to stop while cleaning; was hurt while running. The boss told the hands what to do and they had to obey; the second boss told him to clean the machine; he was carrying out the orders of the overseer; thought he could do it safely; was wiping off with waste; cogwheels struck hand and cut off finger; set-screw knocked hand; could not see set-screw and did not know it was there—was not cautioned about it; order to clean while in motion had not been on long; it was a new machine. "I was the first (403) person to rope this machine; had cleaned it off a few times; could stop my machine without stopping other machines; took about 15 minutes to clean it; the set-screw is about one-third as large as the cap on a buggy wheel, was a necessary part of the machine; 300 or 400 set-screws on machine. I run a speeder at Roanoke Mills; did not use lever to stop machine, because I would get a discharge if I did not obey orders; I had to get on my knees to clean it."

At the conclusion of the evidence defendant moved for a judgment of nonsuit. The motion was sustained, and plaintiff appealed.

Guthrie & Guthrie for plaintiff.
Winston & Bryant and P. H. C. Cabell for defendant.

CONNOR, J., after stating the facts: When the plaintiff entered into the defendant's employment as a speeder hand, for three months there-

after it was the rule of the mill to stop at 5 o'clock and clean up. The defendant getting short of hands, the plaintiff with other employees was ordered to clean up while running. "The usual custom was to stop while cleaning." Without much knowledge of the construction and operation of the speeder, it would seem manifest that cleaning while standing still was absolutely safe, whereas doing so while the machine was in motion was more or less dangerous. The measure of duty imposed by law upon the master in respect to the use of machinery is that, assuming the appliance to be free from defects, he shall furnish his employee a reasonably safe place in which to work and that the machine shall be operated in a reasonably safe manner. This may be regarded as elementary. It is not always easy to establish the standard by which to measure the conduct of the employer and employee. Judges and text-writers have endeavored to do so, it must be confessed,
(404) without marked success. The learned counsel in his well-considered brief says: "Neither a court nor a jury can set up a standard of their own, and be allowed to say how a machine shall be operated, whether it shall be cleaned standing or in motion." We concur with counsel in the proposition that courts and juries are not to set up a standard of their own; but when we do so, but little progress has been made in solving the question, "Who shall set up the standard, and what shall it be?" Probably the employer and employee would not concur in fixing a standard. They differ radically in this case. Yet this is but one of many constantly coming up in this and other courts, demanding that a standard shall be set so that both parties may "live up to it." After long and anxious consideration, and much conflict of opinion, this Court, coming into harmony with many of the ablest courts of the Union, including the Supreme Court of the United States, adopted in all cases involving the question of negligence the standard of conduct followed by the ideal prudent man.

When the facts are admitted and but one inference can be drawn from them, the court will find, by this standard, as a matter of law, the existence or nonexistence of negligence. When the facts are not admitted or when more than one inference may be reasonably drawn, the question is submitted to the jury to find whether or not there is negligence. *Russell v. R. R.*, 118 N. C., 1098; *Marks v. Cotton Mills*, 135 N. C., 287. This, we think, the safest and most workable rule.

While it is true, in the case before us, the facts are admitted by the motion to nonsuit, it is not clear that but one inference can be drawn from them. The rule for cleaning the machine while in motion certainly must have increased the hazard and subjected the employee to danger of injury. Why the change was made is only shown by the plaintiff's testimony that the mill ran "short of hands." This would not

be any legal excuse for making such change, if doing so un- (405) reasonably increased the hazard. There is no evidence as to the custom of mills in respect to the cleaning of machines, whether standing still or in motion. We find that in England certain persons are prohibited from cleaning a machine in motion impelled by mechanical power. In *Gideon v. Enoree Co.*, 44 S. C., 442, it is stated that the testimony on the part of the plaintiff showed that the universal practice in other mills in that section of country was to have the machinery fanned while running, and not to stop it for that purpose, and there was no evidence tending to show that such a practice was dangerous. It is true that the evidence in this case is slight, consisting of the fact that the usual custom was to stop while cleaning. Whether this was because it was regarded as prudent to do so is not stated, but we think that it is not an unreasonable inference that such is the case.

We are of opinion upon the whole testimony that the question of the defendant's negligence should have been submitted to the jury under proper instructions, to inquire whether it was a reasonably safe and prudent method of doing the work. Of course, it is open to both parties to introduce all competent and relative testimony to aid the jury in measuring the defendant's conduct by the standard fixed by the law.

The defendant, however, insists that, admitting this to be true, the plaintiff is barred of a recovery because he assumed the risk. The defendant's counsel says that the plaintiff was an experienced hand, familiar with this machine and its operation, aided in putting it up and was the first man to "rope and work it," and had operated it for five months; that he made no complaint or objection, suggested no danger, but went back to the same machine and renewed his work. It is true that many cases hold that this conduct would bar the plaintiff's action upon the theory of his having assumed the risk incident to the mode of cleaning. This Court in *Sims v. Lindsay,* 122 N. C., 678, however, said: "It is not to be held as a matter of law that operatives must decline to work at machines which may be lacking in some (406) of the improvements or safeguards they have seen upon other machines, under penalty of losing all claims for damages from defective machinery. It is the employer, not the employee, who should be fixed with knowledge of defective appliances and held liable for injuries resulting from their use. It is only where a machine is so grossly or clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk." In *Lloyd v. Hanes,* 126 N. C., 359, this Court, adopting the principle announced in *Smith v. Baker,* App. Cases L. R., 891, held that the employee was not required to surrender his employment by reason of a defect in the machine unless such defect was so obvious and the danger

incident to the operation of the machine so manifest that a prudent man would not continue to operate it. In this case a mode of operation was entirely safe when the plaintiff took employment. If the defendant seeks to avoid the result of its negligence in changing its mode of operation by fixing the plaintiff with the assumption of the risk incident to the change, then it must go further than simply show a knowledge of the change and an appreciation of the danger, and also show that a reasonably prudent man would not, under like circumstances, have operated the machine; and this would be a question for the jury.

If, as is sometimes said, the employee's continuance in the employment after the discovery of the conditions, resulting in the injury is contributory negligence, the same principle would apply because, in order to constitute contributory negligence, the plaintiff must show a course of conduct inconsistent with that of an ideal prudent man under like circumstances. *Hicks v. Mfg. Co., ante,* 319.

The duty of the employee, when a change in conditions respecting his safety arises after the contract of employment, has under-
(407) gone much discussion in the courts during the past twenty years. The doctrine has to some extent been modified as industrial conditions have changed. In *Mahoney v. Dore,* 155 Mass., 513 (30 N. E., 356), *Knowlton, J.,* said: "In a very recent case in England *(Smith v. Baker,* App. Cases, 325) it has been held by the House of Lords that a servant who continues to work when he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not as a matter of law voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault. We are not aware of any adjudications in this Commonwealth which are necessarily inconsistent with this just and reasonable doctrine, although different opinions have been expressed on this point by eminent judges both here and in England. Most of the cases in this State, which relate to a servant's assumption of a risk, refer to risks assumed on entering the service. . . . The tendency of recent decisions is to hold that in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to."

Mr. Labatt is of the opinion that in later cases the Massachusetts court repudiated the English rule. Labatt on Master and Servant, 376. However this may be, and without undertaking to reconcile the numerous cases in other jurisdictions, this Court in *Lloyd v. Hanes,*

Sims v. Lindsay, and *Hicks v. Mfg. Co., supra,* has adopted and followed the rule laid down in *Smith v. Baker,* certainly so far as it applies to the facts in this case.

The question whether the plaintiff assumed the risk or, as it may be stated, was guilty of contributory negligence, was peculiarly for the decision of the jury. In the decision of it they are entitled to have all of the testimony throwing light upon the inquiry (408) whether the danger was so obvious and the risk so imminent and so well known and appreciated by the plaintiff, or should by the exercise of reasonable care have been known and appreciated, that a prudent man under like conditions would have continued the service. This rule applies to the employer and employee alike and is fair to both.

Smith v. R. R., 129 N. C., 173, is pressed upon our attention. It must be conceded that language is used by the Court in that case not easily reconcilable with that used in the other cases cited herein. The Court was of the opinion that upon the plaintiff's evidence the danger involved in the method of doing the work was so obvious and admittedly known and appreciated before the work from which the injury resulted was undertaken as to bar his action. We do not reach the same conclusion upon the facts in this case. In *Ausley v. Tobacco Co.,* 130 N. C., 34, there was no change in the method of operating the machine after employment. In *Turner v. Lumber Co.,* 119 N. C., 387, it is true that *Mr. Justice Avery* lays down the general proposition cited in the defendant's brief. The plaintiff in that case recovered and the judgment was affirmed. There was no question of a change in the method of working after the contract of employment. The principle announced there has been modified by the later cases cited.

When this case was before us upon the former appeal (135 N. C., 287), the question now considered was not presented. It was there claimed that the danger to the employee was increased because the cogwheels were not boxed. A new trial was awarded because of the admission of incompetent testimony.

To prevent misconception, we desire to say that our decision in this case, based upon the admitted facts, is simply that the allegation of negligence in ordering the machine to be cleaned while in motion should be submitted to the jury; that if they find the issue for (409) the plaintiff, the question of assumption of risk or contributory negligence, alleged to arise out of his remaining in the service, should also be submitted to the jury.

We have noted the many cases cited in the defendant's well-considered brief. Most of them arose out of injuries sustained while operating the machine. We find no evidence in this record of any defect in the construction or condition of the machine, nor do we think the size,

condition, etc., of the set-screws indicate any defect. If the plaintiff had, upon his testimony, been injured while operating the speeder, we should be unable to find any evidence of negligence. The two questions are:

1. Whether the change in the manner and time of cleaning unreasonably enhanced the danger and risk, or whether thereby the defendant failed in its duty "to take care that ordinary risks and perils of the employment are not increased by any omission on its part to provide for the safety of its employees," and whether such omission was the proximate cause of the injury. *Marks v. Cotton Mills, supra.*

2. Whether, if the method adopted was dangerous, such danger was so obvious and so well-known to and appreciated by the plaintiff, or by the exercise of reasonable care should have been so known and appreciated that a reasonably prudent man, under like conditions, would have continued in the employment.

The legal rights and liabilities of the parties will depend upon the facts as found by the jury upon these controverted questions. There must be a

New trial.

Cited: Jones v. Warehouse Co., post, 553; *Shaw v. Mfg. Co.,* 143 N. C., 136; *Sibbert v. Cotton Mills,* 145 N. C., 312; *Holton v. Lumber Co.,* 152 N. C., 69; *Norris v. Mills,* 154 N. C., 483; *Eplee v. R. R.,* 155 N. C., 296; *Ensley v. Lumber Co.,* 165 N. C., 696; *Howard v. Wright,* 173 N. C., 341; *Smith v. R. R.,* 182 N. C., 297.

(410)

PRESSLY v. YARN MILLS.

(Filed 16 May, 1905.)

Master and Servant—Appliances—Contributory Negligence—Continuing Negligence—Assumption of Risk—Harmless Error.

1. It is the duty of an employer to supply his employees with appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use.
2. While an employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective appliances due to his employer's negligence, unless such defect is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks.
3. An instruction, in an action for injuries to an employee, that if the injury would not have happened if the employer had supplied the machine with

a shifter, and this was the proximate cause of the injury, this would be "continuing negligence," and the issue as to contributory negligence should be answered in favor of the plaintiff, though he may have been negligent in the use of the machine, was erroneous, as the employee in cases of this kind is not absolved from all duty to act with reasonable care and prudence.

4. Where there is no evidence of contributory negligence, apart from the fact that the plaintiff continued to work on after knowing of the existence of the defect which caused the injury, and this question, under a proper charge, was submitted to the jury on the issue as to the assumption of risk, an erroneous charge on the issue of contributory negligence is not reversible error.

5. The principle which holds the employee to an equality of obligation and responsibility with his employer in regard to defective machinery and appliances is unsound and unjust.

BROWN, J., dissents.

ACTION by J. M. Pressly against Dover Yarn Mills, heard by *O. H. Allen, J.*, and a jury, at January Term, 1905, of MECKLENBURG.

This was an action for damages for negligence, tried upon the (411) following issues:

1. Was plaintiff injured by the negligence of defendant?
2. Did plaintiff by his own negligence contribute to his own injury?
3. Did plaintiff voluntarily assume the risk?
4. (As to damages.)

There was evidence on the part of the plaintiff tending to show that at the time of the injury he was the employee of the defendant, working in the spinning-room; that his position was that of section-hand and his duties were the overhauling and repairing the spinning frames, of which there were 18 in the room; that his wages were $1 a day, and he worked in the charge and under the control of one Michael, who was the overseer of the spinning and carding-room; that while engaged in the performance of his duty his hand was seriously injured by reason of a defective appliance which the defendant had negligently furnished —the defect complained of being the lack of a shifter on the spinning frame. These frames were some 25 or 30 feet long, driven by mechanical power, and the same was applied at one end of the frame by means of a belt running on a pulley. There were two of these pulleys on a rod, one tight and the other loose. When the belt was applied to the tight pulley the machine was put in motion for its work, and when it was desired to stop the machine the belt was moved to the loose pulley, in which case the power was withdrawn from the machine. These shifters were a mechanical appliance, a structural part of the machine, approved and in general use, by which this belt was pushed from one pulley to the other, and it also would hold the belt to the pulley where it was placed.

On the machine in question the shifter was off. The same appliance was wanting in three other frames in this room. The plaintiff had discovered the absence of the shifters on this machine and called it to the attention of Michael, the overseer, and told him there were some
(412) shifters needed, and the overseer replied that they needed many things they didn't have. On the day of the injury, being informed by the operator that the machine was out of fix, he got a wrench and was in the act of fixing the gearing at the opposite end of the machine from the pulleys where the power was applied, and while so engaged, the machine unexpectedly started and the plaintiff was injured. The start was caused by the belt shifting from the loose to the tight pulley, and this would not have occurred if the shifter had not been lacking.

The defendant in its answer admitted that there was no shifter on the machine, but denied the allegation of negligence, and also, by way of defense, alleged contributory negligence and assumption of risk. The defendant offered no testimony.

The court charged the jury in substance on the first issue that it was the duty of defendant to furnish appliances reasonably safe and suitable, such as were approved and in general use, and if there was default in this respect and it was the proximate cause of the plaintiff's injury, they would answer the first issue "Yes"; otherwise, they would answer it "No." On the issue of contributory negligence, the judge told the jury in substance that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with the shifter, and that was really the proximate cause of the injury, this would be a continuing negligence, and they should answer the second issue "No," though the plaintiff may have been negligent in using the machine. On the issue as to the assumption of risk, the third issue, the court charged the jury that if they should find from the evidence that the plaintiff knew, or by the exercise of ordinary care he ought to have known, at the time of the injury, that the spinning frame which he was repairing was not provided with a shifter and therefore the belt was liable to slip from the loose to the
(413) tight pulley, and should further find from the evidence that the act of the plaintiff in so attempting to repair the spinning frame was obviously so dangerous that in its performance the probabilities of danger were greater than those of safety, as where the machinery is so grossly and clearly defective that the plaintiff knew he was taking an extra risk, then he assumed the risk and cannot recover; and if you should find that his conduct was of that character in continuing to work there, and he was working with a machine clearly so dangerous that he must have known he was taking an extra risk, then you will find that he did assume the risk; but if you find it was not of that character, then you

will find that he did not assume the risk, and answer the issue accordingly.

Under the charge of the court the jury answered the first issue "Yes," and the second and third issues "No," and awarded damages. There was judgment on the verdict for the plaintiff, and the defendant excepted and appealed.

Burwell & Cansler for plaintiff.

Charles W. Tillett and Shepherd & Shepherd for defendant.

HOKE, *J.*, after stating the facts: In charging the jury on the first issue, the judge below properly stated the obligation of the employer to supply his workmen, in plants of this character, with machinery and appliances safe and suitable for the work in which they are engaged, and such as are approved and in general use. He charged in substance that if there was any negligent default in this respect, and this negligence was the proximate cause of the injury, they should answer the first issue "Yes." *Witsell v. R. R.*, 120 N. C., 557; *Marks v. Cotton Mills*, 135 N. C., 287.

The charge on the third issue as to assumption of risk is also supported by well-considered adjudications of this Court. *Sims v.* (414) *Lindsay*, 122 N. C., 678; *Lloyd v. Hanes*, 126 N. C., 359.

In *Hicks v. Mfg. Co., ante*, 319, the Court has held that while the employee assumes all the ordinary risks incident to his employment, he does not assume the risk of defective machinery and appliances due to the employer's negligence. These are usually considered as extraordinary risks which the employees do not assume, unless the defect attributable to the employer's negligence is obvious and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks. This is, in effect, referring the question of assumption of risk, where the injury is caused by the negligent failure of the employer to furnish a safe and suitable appliance, to the principles of contributory negligence; but it is usually and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk, as was done in this case. When the matter is for the jury to determine on the evidence, it may be well to submit this question to their consideration on the standard of the prudent man, in terms as indicated above. The charge on the third issue substantially does this, and the language used is sanctioned by the authorities. *Coley v. R. R.*, 129 N. C., 407; *Marks v. Cotton Mills, supra.* There is no error in the charge of the court as to assumption of risk.

On the second issue, that addressed to the question of contributory negligence, the judge charged the jury in substance that if they should find from the evidence that the injury would not have happened if the defendant had supplied the machine with a shifter, and this was the

proximate cause of the injury, this would be continuing negligence, and they should answer the second issue "No," though the plaintiff may have been negligent in the use of the machine. As we have held in *Hicks v. Mfg. Co., supra,* this is not a correct position as to every negligent failure on the part of the employer to furnish a safe appliance by reason
(415) of which the injury occurs, and is not the law in cases of the character we are now considering. The employee is not in such instances absolved from all obligation to act with reasonable care and prudence and if there is negligence on his part, concurring as the proximate cause of the injury, the plaintiff cannot recover. The charge, therefore, on this issue would be reversible error but for the fact that in the opinion of the Court there is no evidence offered which shows or tends to show contributory negligence, apart from the fact that the plaintiff continued to work on after knowing of the existence of the defect which caused the injury. This question, as we have seen, was under a proper charge submitted to the jury on the third issue, and the defendant has had the benefit of every position which was open to him in the charge of the court addressed to that issue. The only default imputed to the plaintiff, apart from the fact that he continued to work on, was that he failed to push the belt entirely off both pulleys. But this, we think, is no such evidence of negligent default that it should be submitted to the jury as an additional defense.

The plaintiff (who was the only witness examined, except as to character) testified that it was a very troublesome matter to replace the belt when it had been taken entirely off, sometimes requiring as much as one-half hour; that he had never been told by any one to take it entirely off, and it was not usual to do it, and that he had never seen the machine start that way. And we do not think that, by any reasonable standard of conduct on the evidence in this case, the plaintiff was required to move the belt entirely from the pulley. The only defense, therefore, available to the defendant on the facts of this case, after its negligent default was established by the verdict on the first issue, was the fact that the plaintiff had gone on doing his work in the presence of a known defect; and this, as we have said, was submitted
(416) to the jury under a correct charge on the issue as to assumption of risk.

We are not called on to determine whether any difference exists in principle between the cases where the defect complained of was known when the plaintiff entered on the service and those where the knowledge was acquired afterwards. While many of the authorities draw such a distinction, there seems to be none in reason. But the facts of the present case do not require such decision, and many of the authorities, therefore, relied upon by the defendant do not apply.

The plaintiff testified that he entered on the service of the defendant in October, 1903, and was given a place in the spinning-room, his duty being to overhaul the machinery, or spinning frames. He worked at that for five or six weeks, when he became a section-hand, working in the same room, his duties being to overhaul the machinery, repair it, and look after the hands in that room. At the time the plaintiff became a section-hand there was evidently an increase of authority, but the occupation was at the same place and very similar in character, and there was no change in the contract of service or wages paid, so far as the testimony now discloses. So that, whether the knowledge of the defect came to the plaintiff before or after he became a section-hand, it certainly came to him after he entered on the service, and it is fair to consider the case in that aspect.

It is suggested that if a negligent failure to furnish a shifter is declared to be the proximate cause of the injury on the part of the employer, by that same token the employee, working on when aware of the defect, is also negligent, and such negligence should be held to be concurrent, and to hold otherwise would require the master to take more care of the servant than the servant takes care of himself. This position finds support in some of the decided cases, but the Court does not think it is in accord with the better considered adjudications on the subject. The position had its origin in some of the older decisions rendered when the employment of labor was (417) much more restricted, and the implements and appliances were comparatively simple and attended with little danger. At that time it was considered of little consequence what the employee assumed, and as a matter of fact he assumed the risk of almost everything that happened to him. As business enterprises, however, were enlarged and extended and machinery became more complicated, and larger numbers of men were being employed in its operation, it was found that the position here contended for was not a proper one by which to determine the relative rights and duties of employer and employee in regard to defective machinery and appliances. It was based upon an entirely erroneous conception, that there was a perfect equality of position between the two in respect to such defective appliances; but nothing is further from the fact, and for the reason, chiefly, that the employer controls the conditions in which the employees do their work. His duty to furnish machinery and appliances reasonably safe and suitable, such as are approved and in general use, in the exercise of a reasonable care, is absolute. As a rule, he buys the machinery from the manufacturer or dealers, who are experts, and can change when he desires; he selects and employs a superintendent and the skilled labor, and has the time and opportunity to inform himself

as to the character of the machinery he buys and the hazards incident to its use; and, accordingly, the principle which holds the employee to an equality of obligation and responsibility in the respect suggested is unsound and unjust, and has been rejected in the more recent and better considered cases. Beach on Cont. Neg., sec., 372; *Lloyd v. Hanes, supra; Patterson v. Pittsburg,* 76 Pa. St., 389; *Kane v. R. R.,* 128 U. S., 91; *Smith v. Baker,* Appeal Cases (1891), 325.

Again, it is urged that this man was injured in repairing the machine, and in that aspect must be considered to have assumed the risk.

In support of this position we are referred to *Spinning Co.* (418) *v. Achord,* 84 Ga., 14. In that case the plaintiff was stated to be a skilled machinist and carpenter who had put up machinery, knew all about its conditions and defects, called attention to the lack of certain appliances which threatened its safety, and remonstrated about its condition in this respect. The machinery having gotten out of order, the plaintiff was sent to repair the defect, and was injured while so engaged. The injury was caused in part by the very defect he was called on to repair, and it might well be determined that it was one of the ordinary risks in the work he had undertaken to perform. But no such facts existed in the case we are now considering: The plaintiff was no skilled machinist, but an ordinary hand, working at $1 per day under an overseer in the same room (a sort of machinist, he called himself in one place). His duty seems to have been to tighten bolts and adjust the gearing, as might be required from the ordinary wear of its work. "As good as the average man engaged in such work," he says of himself. He was not endeavoring to repair the defect which caused the injury at all. This was beyond his skill and not within the line of his duty. He had notified the employer, or its representative, that four shifters were wanting, and the same had not been supplied, and he was unable to make or supply them himself. This was done, it seems, not so much because he anticipated injury as because he was overlooking the machine and considered it his duty to inform the employer of existing conditions. His duty called on him to work day by day in the presence of this defect and subject to its consequences, and which the jury, on the first issue and under proper instructions, have found to be an appliance which the employer negligently failed to furnish and which was the proximate cause of his injury. While engaged in his duties in adjusting some gearing at the end of the machine opposite the point where the power was applied, and by reason of the absence of the shifter, the belt was in some way shifted from the loose to the tight pulley, (419) and he was injured.

The jury have by their verdict declared that the defendant

was negligent in failing to provide the proper appliance, and such negligence was the proximate cause of the injury, and that the plaintiff did not assume the risk. There was no evidence of contributory negligence imputable to the plaintiff, except what might exist from working on in the presence of an observed danger, and this the jury have determined against the defendant on the issue as to assumption of risk.

The Court is, therefore, of opinion that there is no error in the record, and the judgment below is

Affirmed.

CLARK, C. J., concurring: The doctrine of "assumption of risk" is of comparatively recent origin, and when first introduced the decisions of the courts were far from uniform, and in some cases illogical. With fuller discussion and clearer analysis, the doctrine has been repudiated that mere knowledge on the part of the servant of defective appliances, when taking employment or afterwards, is an assumption of risk which relieves the employer of the duty of furnishing reasonably safe appliances and a reasonably safe place in which to work. That rule ignored the fact that the employee was not on equal terms with the employer. It ignored the duty of the State to protect the welfare of a deserving and meritorious class of its citizens, who should not be exposed to unnecessary risks in the search for bread, and cynically made the necessities of the laborer condone and pardon the neglect of duty on the part of the employer.

There has been at times a confusion of ideas as to assumption of risks, in not discriminating between "risks necessarily incident to the employment," which is all the laborer can be justly held to assume, and "risks not so incident, but arising from the circumstance that the danger was a known one—as a defective machine or an unsafe place." *R. R. v. Keller,* 33 Tex. Civ. App., 358. This last the (420) employee does not assume. To so hold was simply to maintain that the master was liable for negligence for failure to furnish safe appliances and a safe working place so long as he had no employees to be injured, but so soon as he obtained employees that fact removed his liability, as they assumed the consequences of his negligence. All that the courts can justly hold is that when the defect in the machinery is so patent that it is reckless disregard of danger to take employment, then the employee is recklessly negligent. But in such case his recklessness is contributory negligence, not assumption of risk. Hence, in *Rittenhouse v. R. R.,* 120 N. C., 546, this Court properly said, "Reckless assumption of risk has always been taken in our courts as embraced in the issue of contributory negligence," citing cases.

This proposition is stated by Labatt Master and Servant, sections 2 and 3, in somewhat different terms, but to the same effect. Section 2: "Risks resulting from the master's negligence are not assumed by the servant." Section 3: "Risks not resulting from the master's negligence are assumed by the servant." These last are necessarily the ordinary risks of the particular employment when furnished with reasonably safe appliances and a reasonably safe working place. "Assumption of risk" means that an employee takes upon himself the ordinary risks necessarily incident to any business, however dangerous or hazardous, upon which he enters. *Volenti non fit injuria.* As pithily stated by *Reade, J.,* in *Crutchfield v. R. R.,* 76 N. C., 320, the employee assumes the risk of injury "from accidents, but not that resulting from negligence of the employer." The employee does not assume any risks which are added to the operation of such business by the neglect of the employer to furnish suitable and proper appliances, though the employee may know, when he accepts employment, that such appliances are lacking. If he did, the maxim would read *scienti non fit*
(421) *injuria,* which is not law. The difference between *scienti* and *volenti* has been recently and fully discussed. *Lloyd v. Hanes,* 126 N. C., 359.

Assumption of risk, as appears from that case and in the English cases therein cited, extends beyond the above limits only to the case where a particular machine has become defective, of which the employee has knowledge and the employer has not. In such cases, if the employee works on, he assumes the extra risk, but if he reports the defect and is told to keep on, and does so for fear of losing employment, there is no voluntary assumption of risk, and the liability for injury caused thereby is on the employer. It was so held in the leading English case, *Yarmouth v. France,* 19 Q. B. D., 660, cited in *Lloyd v. Hanes, supra.*

In *Crutchfield v. R. R.,* 78 N. C., 300, *Bynum, J.,* says: "The farthest the courts have ever gone in such case is this: if the servant remains in the master's employ with knowledge of defects in machinery he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects"—evidently meaning defects that have come to light during the employee's operation of the machine, for, of course, he need not notify the employer of the absence of suitable and proper appliances when their absence is or should be already well known to the employer and he is chargeable with negligence for not having supplied them.

Judge Caldwell, than whom no abler judge has sat upon the United States Circuit Bench, says in a recent opinion: "Dangers which need-

lessly imperil human life and which can be remedied at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the company to remove. The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But the employer does (422) not obtain a license to kill his employees with impunity by proclaiming his purpose to subject them to unnecessary and needless perils —to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this. Moreover, the State has an interest in the lives of her citizens, and will not permit an employer needlessly to imperil the lives of employees. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at a slight expense. Notice (to employee) of the unnecessary peril in such case goes for nothing. As long as the needless peril is maintained, the employer is guilty of culpable negligence; and when, by reason of such needless peril, an employee is killed, the law presumes he was exercising due care to escape the peril, and the employer is responsible for his death, unless he can prove affirmatively that the employee was guilty of negligence. In such case the death of the employee testifies that he was in the faithful discharge of his duty and in the exercise of due care, and that his death is the result of the needless peril to which he was subjected." Upon this decision a very learned law writer, the author of Thompson on Corporations, says: "It is hard, very hard, to understand how humane judges can balance the question of a slight, very slight, expense to the railroad company against the mangling and death of meritorious laboring men, the tears and agony of their widows, and the beggaring of their orphaned children."

What these eminent judges have said as to injuries causing death should apply equally when maiming, disabling, and pain are the result of the employer's failure to furnish safe appliances. Indeed, the public conscience has caused the enactment of the statute here and in many other states which, while repealing the "fellow-servant" doctrine as to railroad employees, incidentally forbids "assump- (423) tion of risk" as to defective appliances and ways when railroads are the employers. *Coley v. R. R.*, 128 N. C., 534; same case, 129 N. C., 407. This last was really unnecessary, for no employee assumes such risks unless by such reckless disregard of them as amounts to contributory negligence. *Greenlee v. R. R.*, 122 N. C., 978; *Troxler v. R. R.*, 124 N. C., 191. The State cannot afford to be unjust to its laboring element. Public policy, recognizing that the employees are not on

equal ground with the employers in large establishments using powerful machinery, driven by steam or other power and revolving at high speed, requires that such employers shall furnish its operatives safe machines and a safe place in which to work. The test of safety is the use of approved appliances in general use. *Witsell v. R. R.,* 120 N. C., 557. Failure in this or furnishing such machines in defective condition is actionable negligence. The employee "assumes the risk" of such business when furnished such appliances and a safe place in which to work. He assumes nothing more. *Lloyd v. Hanes* 126 N. C., 359.

No one would look to the House of Lords in England for a decision that is biased either in favor of labor or against capital. In that Court, as elsewhere, the earlier decisions somewhat confuse the doctrine of the laborer's assumption of the ordinary risks of the employment, with the totally different doctrine of his assumption of risk from the employer's known negligence in not having furnished safe appliances. But the Court "righted itself," as this Court and others have done on fuller discussion and consideration, and has placed the responsibility for defective appliances upon the employer, who could have done his duty by the employee, but did not. In several cases in that high tribunal, already quoted by us with approval in *Lloyd v. Hanes,* 126 N. C., 363, it is said that *"volenti non fit injuria"* is not to be read *"scienti non fit injuria,"* for that knowledge of a defective ap-
(424) pliance by a needy employee seeking bread to maintain himself and family is not to be tortured into a voluntary and free release of the employer from liability for his negligence and the assumption of that liability by the employee.

The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age and broadens "with the process of the suns." The doctrine of *Crutchfield v. R. R.,* 78 N. C., 300, and two or three like cases decided not long after it and before the subject was fully discussed and viewed in all its bearings, has been long quietly ignored by this Court in all the more recent cases, and practically overruled. It has been resurrected and used only in the decision rendered in favor of the American Tobacco Company in *Ausley v. Tobacco Co.,* 130 N. C., 34, by a bare majority of the Court and contrary to all the more recent decisions, and it may be noted that *Ausley's case* has not been since cited with approval in any instance. The uniform rulings of this Court in the later cases, for many years, have been to the contrary.

Could there be greater mockery than to assert that the employer is culpably negligent and pecuniarily liable, if dangerous and defective appliances are furnished, and then to hold that if the laborer is mangled

or killed there is no liability, because by accepting employment the laborer has released the employer from liability? Labor is the basis of civilization. Let it withhold its hand and the forests return and grass grows in the silent streets. We are told in that excellent little work by some of the leading lawyers in England, "The Century of Law Reform," which every lawyer should read, that not so long since, in England, labor unions were indictable as conspiraces, and the wages of labor were fixed by officers appointed by capital, and it was indictable for a laborer to ask or receive more. There was no requirement that employers should furnish safe appliances, no limitations as to hours of labor, no age limit. With the era of more just legislation in both this country and England, and elswhere, shortening the hours of labor, forbidding child labor, requiring sanitary provisions (425) and safe appliances, labor has been encouraged and the progress of the world in a few years has more than equaled that of all the centuries that are dead. Justice to the laborer has been to the profit of the employer. The courts should not be less just than the laws.

BROWN, J., dissenting: I cannot concur in the judgment or opinions in this case. The facts are few and simple and are all taken from plaintiff's evidence, who, with the exception of two character witnesses, was the only witness examined. Plaintiff was employed by the defendant as a skilled machinist. He was first employed as an overhauler and cleaner of machinery, and was then promoted to section-man. As overhauler he cleaned spinning frames and put spindles on them. As section-man he had charge of eighteen spinning frames, and it was his duty to repair them and to oversee and look after the hands. While he was an overhauler and cleaner he discovered that four of these machines lacked a shifter. A spinning frame is about 25 feet long and is operated by a shaft running through it. On one end of this shaft are two pulleys, close to each other and of the same size. The one nearest the spinning frame is tight on the shaft, and when the belt is placed on it the spinning frame is put to work. The other pulley is loose, and when the belt is shifted from the tight pulley to it the machine is stopped and the belt revolves the loose pulley around the shaft without turning the shaft. The plaintiff testifies that a shifter is for the purpose of shifting the belt from the tight to the loose pulley and pushing it back to the tight pulley again. It is used for the purpose of starting and stopping the spinning frame and prevents the belt from slipping back to the tight pulley and giving the machine a sudden start. In the absence of the shifter, the belt can be pushed from the tight to the loose pulley, and *vice versa*, "by using the hand or a (426) bobbin, or something to push the belt off." The travis gear is a part of the spinning frame and is on the opposite end from the two

pulleys. While plaintiff was overhauling he called the superintendent's attention to the absence of shifters on four of the machines in his care. The superintendent did not promise to furnish the machines with shifters. On 23 December, 1903, the plaintiff was called upon by an operative to repair a spinning frame. Upon examination, he found the travis gear out of order. He stopped the machine by taking a bobbin and transferring the belt to the loose pulley. By some unknown means the belt got back on the tight pulley while plaintiff was at work on the spinning frame and started it going and cut off plaintiff's thumb. At the conclusion of the evidence defendant moved to nonsuit. I think the motion should have been granted, for these reasons: 1. Because there is no evidence of negligence. 2. Because the plaintiff was guilty of negligence, which caused his injury. 3. Because plaintiff assumed the risk.

1. The very foundation of the doctrine of negligence, in its relation to the injurer and injured, is duty. What duty one owes to the other is to be determined by their relations to each other. The duty the defendant owed to an operative, operating the spinning frame, differs materially from that which it owed to a skilled mechanic, who fully understands the construction of the machine and knows its defects, while engaged in repairing it. The operative has a right to rely upon the diligence and care of the master in furnishing a safe machine to work and a safe place to operate it in, but the master is not and never has been declared to be an insurer of the lives or limbs of his employees, although the law holds him to a high degree of care in the discharge of his duty. If an operative working the spinning frame had been injured by reason of the absence of the shifter, in shifting the belt
(427) and stopping or starting the machine, I should say he would be entitled to recover, unless his own carelessness at the time directly caused his injury. I gather clearly from the plaintiff's evidence that the shifter was a most convenient attachment and used for the sole purpose of transferring the belt from one pulley to the other. While its construction was such that it would necessarily hold the belt on the pulley to which it had shifted it, it was not designed or intended as a protection to the operator of the spinning frame. It was not primarily a safety device. I am sure it was never thought of as a necessary or reasonable protection to a machinist engaged in repairing the spinning frame, and that this plaintiff nor any other machinist ever so regarded it. It was used for starting and stopping the machine. The plaintiff was not injured while transferring the belt for this purpose. So far as the evidence discloses, it is perfectly safe to transfer the belt with the hand or a bobbin, but not so convenient, and according to the plaintiff it is the only time he ever knew the belt to slip. The negligence of the

defendant is to be determined by this rule: Could the defendant by the exercise of great diligence and care have reasonably foreseen that this skilled mechanic would have been injured while repairing that spinning frame, because of the absence of a shifter? The plaintiff, a skilled mechanic, who says he understood the machine and his trade as well as the average machinist, could not foresee it. How, then, could the master foresee it? It may have been negligence of his duty to operatives upon the part of the superintendent not to get the shifters and have plaintiff put them on, but could any reasonable person foresee that the absence of the shifter might cause this particular injury, not to an operative, but to a skilled machinist, who knew of the defect and how to render it harmless, while repairing the machine? The plaintiff says he worked in the defendant's mill over ten weeks before he was hurt. All that time he knew the four spinning frames had no shifters. He says he was called "to repair these four particular frames (428) every day," and again says "on an average every other day." On these occasions he pushed the belt on and off with his hand. He states that at all times when he repaired these four machines he would take his hand or a bobbin and push the belt over on the loose pulley while he was working on the machine. "Did the belt ever slip from the loose to the tight pulley while you were working on these machines?" he was asked. He answered: "No, sir." "Did you ever see it happen?" "No, sir. I knew the shifter was off when I went to repair this spinning frame (on 23 December, when he was hurt), but I did not think about it at the time." "Suppose you had thought about it, would you have been afraid to work on it?" "No, sir." "Why?" "Because I had never seen one start up like that." Plaintiff further states that he could have easily thrown the belt off both pulleys and thereby prevented all possible injury. "I never had thrown the belt off the two pulleys before going to work on the frame, except when I was an overhauler, and did it then to keep from wearing the bushing off." "And you never had an accident before?" "No sir."

I am at a loss to find any logical theory upon which it can be held that the defendant owed to the machinist-repairer any duty to furnish a shifter for this machine. Why did paintiff notify the superintendent of the absence of the shifters? For the reason that he was charged with the duty of keeping these machines in perfect repair. Plaintiff made the report in the line of his duty and for the convenience of the operatives, not for his own safety. He admits that he knew how to stop the machine without a shifter, and that by the easy, simple, and obvious method of pushing the belt off both pulleys, he states, he could not possibly be hurt while repairing it. So, I think the conclusion is irresistible that, inasmuch as plaintiff was a repairer and not an operator,

(429) and knew a perfectly safe, easy, and obvious method of rendering the machine entirely harmless without a shifter, while engaged in the work of repairing it, the defendant owed him no duty to put a shifter on the spinning frame, although the defendant may have owed such duty to one regularly engaged in operating the machine. What may have been negligence to one employee is not necessarily so to another employee. Consequently, I am of opinion that there is no evidence of actionable negligence so far as this plaintiff is concerned.

2. Assuming the defendant was negligent, the plaintiff was guilty of contributory negligence.

There are two facts necessary to constitute contributory negligence: (*a*) A negligent act upon the part of the injured; (*b*) Such negligent act must be the proximate, nearest, most immediate cause of the injury. The plaintiff admits that he was guilty of a negligent act. He is a skilled machinist and knew the construction of the machine and the use and effect of shifters. He knew a perfectly safe and easy method of repairing the machine without running the slightest risk from the absence of a shifter. He knew that the shifter was off, and as a skilled machinist he knew every possible consequence that might follow. What was his duty under the circumstances to his master? Plainly, to use the safe method. He was careless and negligent in not doing so. Where there is a perfectly safe method of doing a thing and another which is not so safe, it is the duty of the servant to the master, as well as to himself, to take the safe method. If he fails to do so and is injured, he cannot recover. Labatt on Master and Servant, sections 391-392. The fact that plaintiff says he forgot to do it, and did not think of it, does not absolve him from negligence. It is the very essence of negligence to forget to perform a duty which the law imposes. If plaintiff had been ignorant of the absence of the shifter, or ignorant of its uses and purposes, this would not apply. Notwithstanding the master's neg-

(430) ligence in not remedying the defect in a machine, if the defect is known to the servant, and the latter can, by the exercise of ordinary care and prudence, save himeslf from injury, it is his duty to do it. If he fails to do it, he is guilty of contributory negligence. This doctrine is applied every day to railway accidents, and it is applicable to the relation of master and servant. Where the servant is employed upon work, concerning which he has equal knowledge with the master, and the latter is negligent in his duty to the servant, and the servant is injured, he cannot recover, if he himself has been guilty of negligence and could by reasonable care have avoided the injury. Wood on Master and Servant, section 328. "The servant is himself bound to exercise proper care and cannot claim indemnity from the master for an injury resulting to him which might have been prevented if he

had himself been reasonably diligent." Wood on Master and Servant, *supra.* It is useless to cite more authority for this. The author is sustained by all other text-writers and adjudications with which I am acquainted, and cites many authorities in his support. See, also, *Crutchfield v. R. R.,* 78 N. C., 300. The doctrine is founded upon the broad and reasonable principle that, notwithstanding another's negligence, if the injured person has the opportunity by the exercise of ordinary prudence to avoid injury from it, and he fails to do so, he is himself guilty of negligence which is contributory, because it is the proximate cause. This is the foundation of the so-called doctrine of the "last clear chance," as first declared in *Davies v. Mann,* 10 M. and W., 546. All persons are expected to exercise ordinary care and prudence in their dealing with their fellows; consequently, he who has the last clear chance to avoid and prevent an injury, and does not exercise reasonable care and prudence to do so, is himself responsible for it, for his negligence is the immediate or nearest cause. As is well said by *Shepherd, C. J.,* in *Smith v. R. R.,* 114 N. C., 728, the principle of *Davies v. Mann* simply furnishes a means of determining whether plaintiff's negligence is a remote or proximate cause of the injury. This suggestion of (431) *Judge Shepherd* is commented on with approval by the annotator to 55 L. R. A., 419. The plaintiff had the last opportunity to render his master's negligence absolutely harmless. Had he exercised ordinary care and used the knowledge he possessed, he would have pushed the belt off both pulleys. It was a simple, easy method of obviating the danger from the need of a shifter, so far as plaintiff was concerned, and he knew it. A prudent mechanic exercising his wits would thus have entirely disconnected the machine from the motive power of the mill. Then he would have been absolutely safe. But he forgot it; did not think of it. The plaintiff had the last clear chance to avoid the injury by exercising ordinary care. He failed to do it. It is negligence and the proximate cause of the injury. If he had done what he should have done under the circumstances, the injury could not have been inflicted.

There was something said in the argument of this case about the failure to supply the shifter being "continuing negligence" and barring the defense of contributory negligence. The answer to this is very fully and clearly stated by *Justice Hoke* in *Hicks v. Mfg. Co., ante,* 319. I think the expression "continuing negligence" is a misnomer, a misapplication of terms. In using it in the *Greenlee case,* the present *Chief Justice* did not refer to it as a "doctrine of the law of negligence." He evidently meant to charge the railway company with a "continued neglect" of a statutory duty of so grave and flagrant character that it shut out entirely any consideration of the negligence of the injured brakeman. All negligence is continuing, whether that of the injurer or injured. It

must be existent and potential at the moment the injury is inflicted or it is not negligence.

(432) 3. The plaintiff assumed the risk of any injury from the absence of the shifter.

I will sum up the facts pertinent to this defense: Plaintiff is a machinist of six years' experience; was an overhauler and cleaner; knew then of the absence of the shifters; called superintendent's attention to it; he failed to supply them. After that, plaintiff accepted the superior position of section-man and contracted specifically to repair these particular machines, with full knowledge of the defect. Why was plaintiff willing to assume this risk? Because he knew an easy and safe method of guarding against all possible danger to himself from absence of the shifters, and therefore he ran no risk. *Volenti non fit injuria.* Why does he fail to use such method? Because he forgot it; did not think of it, and because in all his experience he had never known the belt to shift back before this occasion. Upon such facts, I hazard the statement, no court in this country or England has permitted a plaintiff to recover.

The servant, upon hiring to the master, assumes all the risks and hazard incident to the business. He assumes the risk of all plainly obvious dangers and all that he personally knows of at the time he enters into the service. 20 Am. and Eng. Enc. (2 Ed.), 110, and the many cases cited. Forgetfulness of the risk by the servant is no excuse. *Ibid.,* p. 120. It is his duty to think. Our present *Chief Justice* has defined assumption of risk as follows: "That when a particular machine is defective or injured, and the employee, knowing it, continues to use it, he assumes the risk. The doctrine has no application where the law requires the adoption of new devices (automatic couplers) and the employee is ignorant of that fact or expecting daily compliance." In this case the shifter was no new device required by statute to be used, and the superintendent had refused to furnish them before plaintiff contracted as section-man to repair the machines. The definition of the *Chief Justice* is supported by the overwhelming weight of au-

(433) thority. He evidently had in mind and followed *Crutchfield v. R. R.,* 78 N. C., 300, for it expressly holds that where the servant knows of the defect when he enters into service, or remains in service with full knowledge, he cannot recover. *Crutchfield's case* was decided by a Court of great ability, and the opinion written by *Judge Bynum,* conceded to be a law writer of great accuracy and clearness. He says, where the servant has equal knowledge with the master, he takes the risk. This servant knew of the defect before he accepted the place, the duties of which required him to repair the machine, and he knew how to obviate any danger. *Crutchfield's case* is cited and approved in *Johnson*

v. R. R., 81 N. C., 453; *Cowles v. R. R.*, 84 N. C., 309; and *Porter v. R. R.*, 97 N. C., 66. The same principle is stated in *Cowles' case*, decided by *Smith, Ashe and Ruffin*, who succeeded the Court which decided *Crutchfield's case*. It is again stated with clearness by *Merrimon, J.*, in *Pleasants v. R. R.*, 95 N. C., 196. The same identical principle is stated by *Avery, J.*, in *Hudson v. R. R.*, 104 N. C., 502, citing and approving the previous cases which I have named. In *Ausley v. Tobacco Co.*, 130 N. C., 34, the same principle is stated by *Judge Furches:* "Where an employee knows all about the machinery and its defects before entering upon the work, he assumes the risk incident thereto." This reasonable and just principle has become imbedded into the jurisprudence of this State by repeated adjudications from 1878 to 1903, made by many able judges, whose opinions all of us should respect. The decisions of the New York court are in line with those I have quoted. *Mull v. Curtice*. 77 N. Y., *Supp., Schultz v. Rohe*, 149 N. Y., 132; *Hartwig v. Co.*, 118 N. Y., 664; also, in Indiana, *Salem Stone Co. v. O'Brien*, 12 Ind. App., 217, and cases there cited. *R. R. v. Brown*, 142 Ind., 659, is a strong case from that court. "In a case where the servant is mature and experienced, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes, ears, and ex- (434) perience to avoid danger." The Massachusetts Court has rendered many decisions uniformly sustaining these views. In *Ward v. Connor*, 182 Mass., 170, that Court says: "Further, it would seem, notwithstanding some things in the plaintiff's testimony, as though he must have been familiar with the operation of the machine, and that the risk of attempting to mend the belt in the manner in which he did was or ought to have been obvious. But if it was not, it would at least seem that he was wanting in due care in attempting to mend the belt in the manner in which he did, without taking any precautions to see whether the machine was liable to start."

Not only are the adjudicated cases in the best courts in line with these views, but so are the text-writers. Dresser, ch. 8, sections 87-88. This writer substantially says that the servant assumes all risks from defective machinery known to him or which ought to have been known to him at the time he contracted to operate or repair it. Section 92. "When the servant uses machinery he knows to be defective he is bound to use special precautions, and if he fails to do so and is injured, he cannot recover." Bailey Master's Liability, p. 169. The author cites cases from many states in support of his statement. To the same effect are the decisions of Illinois, Michigan, and Iowa. The same author lays down the proposition that when there is a perfectly safe method known to the servant, and he pursues one less safe for his own conven-

ience or from carelessness, he assumes the risk and cannot recover for an injury received. Page 169, citing numerous cases. Thompson on Negligence states the law as Dresser and Bailey declare it to be. Section 4610. *Justice Hoke,* in *Hicks v. Mfg. Co., ante,* 319, states his conception of the rule to be as follows: "The employee, ordinarily, has a right to assume that the employer has done his duty. This as-
(435) sumption is not absolute, however, nor held to obtain in the face of established facts, and where the defects and dangers attributable to the master's negligence have become known to the employee and the risks appreciated under certain circumstances, these conditions may be classed with the ordinary risks which the employee does assume."

The rule laid down in *Sims v. Lindsay,* 122 N. C., 678, by *Clark, J.,* is reiterated by him in *Lloyd v. Hanes,* 126 N. C., 362, and taken in connection with the definition given by the same learned judge in *Greenlee's case,* above quoted, shows plainly that he is consistent in holding that the servant assumes the risk where (as in this case) he knew of the defective character of the machine and should have known the extra risk.

Measured by the rule laid down by either of my learned brothers, this plaintiff ought not to recover, because he knew of the defect, and he knew of the possibility of the belt's shifting itself in consequence of such defect. He was a skilled machinist and knew the connection between the pulleys and the travis gear, and knew his danger if the machine suddenly started. He also knew of a simple and easy method of rendering the machine absolutely safe so far as he was concerned, notwithstanding the defect, and he negligently failed to take the proper precaution to prevent a sudden start. In the recent case of *R. R. v. McDade,* 191 U. S., 69, *Justice Day,* speaking for the Court, after stating the general rule as to the assumption of risk, says: "This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect or it is plainly obvious, so that he may be presumed to know it, and continues in his master's employ without objection, he is taken to have made his election to continue in the employ of the master notwithstanding
(436) the defect, and in such case cannot recover." This decision is in line with nearly all the cases in this Court from 1878 to 1903.

The only case in our Reports which militates against the views I have attempted to express, so far as I can see, is *Orr's case,* 132 N. C., 691. The force of that case, however, is destroyed, because in this and *Hicks v. Mfg. Co., supra,* the Court repudiates the idea that the

principle enforced in the *Greenlee* and *Troxler cases* has any application to cases like this.

For the reasons I have given, I think this Court should reverse the ruling of the Superior Court.

Since the opinion of the Court and my dissenting opinion in this case were written, a concurring opinion has been filed. As the concurring opinion does not discuss the facts of the case at all, I am ignorant as to its purpose. The definition of assumption of risk formulated in the opinion of *Clark, J.*, in *Greenlee's case* is the definition I applied to the conduct of this plaintiff. I have seen no express repudiation of it by any one until now, and, therefore, felt at liberty to use it. I fully concur in the general principles and humane ideas so beautifully expressed in the concurring opinion of the *Chief Justice.* I think, however, the ordinary rule as to assumption of risk does not apply to the facts of this case. As before stated, if the plaintiff had been an operative injured, without serious fault on his part, because of the defect in the spinning machine, I should say without hesitation he should recover damages. But this is the case of a skilled machinist sent to repair this very machine, who himself states that he knew of the defect and knew an easy method of guarding against any possible danger from the defect, and "forgot" to use it and did not think it "worth while." To apply the ordinary rule as to assumption of risk under such circumstances is practically to make the manufacturer an insurer of the machinist whom he employs to repair the defective machine. When the machinist is engaged in repairing one defect, it is his duty to guard against injury from any defect in (437) the same machine, especially when, as in this case, he knew it, and knew an easy and obvious method of doing it. He should not be measured by the same yardstick as the operative running the machine in his daily occupation.

Cited: Tanner v. Lumber Co., 140 N. C., 478; *Horne v. Power Co.*, 141 N. C., 56; *Moore v. R. R., ib.*, 113; *Mathis v. R. R.*, 144 N. C., 164; *Britt v. R. R., ib.*, 256; *Free v. Fiber Co.*, 150 N. C., 737; *Helms v. Waste Co.*, 151 N. C., 372; *Bissell v. Lumber Co.*, 152 N. C., 125; *Walters v. Sash Co.*, 154 N. C., 326; *Reid v. Rees*, 155 N. C., 234; *Eplee v. R. R., ib.*, 295; *Russ v. Harper*, 156 N. C., 449; *Pettit v. R. R., ib.*, 139; *Pritchett v. R. R.*, 157 N. C., 102; *Pigford v. R. R.*, 160 N. C., 97; *Ainsley v. Lumber Co.*, 165 N. C., 126; *Tate v. Mirror Co., ib.*, 284; *Sasser v. Lumber Co., ib.*, 243; *Walters v. Lumber Co., ib.*, 392; *Deligny v. Furniture Co.*, 170 N. C., 203; *Wright v. Thompson*, 171 N. C., 93; *Howard v. Wright*, 173 N. C., 341; *Atkins v. Madry*, 174 N. C. 192; *Ware v. R. R.*, 175 N. C., 506; *Wallace v. Power Co.*, 176

N. C., 561; *Thompson v. Oil Co.*, 177 N. C., 283; *Clements v. Power Co.*, 178 N. C., 56; *Beck v. Tanning Co.*, 179 N. C., 126; *Jones v. Taylor, ib.*, 297; *Smith v. R. R.*, 182 N. C., 298.

JANNEY v. BLACKWELL.

(Filed 23 May, 1905.)

Vacant Lands—Grants—Entries—Registration—Priority—Rights of Grantees.

1. Under section 2751 of The Code, all vacant and unappropriated lands belonging to the State, with certain well-defined exceptions, may be entered and grant taken therefor.
2. By making the entry as prescribed by law the enterer does not acquire any title to the land, but only the right to call for a grant upon compliance with the statute, and the grant when issued relates to the entry and vests the title in the grantee.
3. If a person lay an entry upon and procure a grant for land covered by a grant, he acquires no title thereto, as the State by the senior grant parted with its title.
4. If land be opened to entry and a grant be issued therefor, such grant cannot be attacked collaterally for fraud, irregularity, or other cause; but if the land be not subject to entry, the grant is void and may be attacked collaterally.
5. Under chapter 40, Laws 1893, extending the time for the registrations of grants, with a proviso that nothing therein contained shall have the effect to divest any rights, titles, or equities in or to land covered by such grants, acquired by any person from the State by any grants issued since such grants were issued, the plaintiff who claimed under a grant issued in 1875 and registered in 1878 acquired no right, title, or equity in the land as against a grant issued to the defendant in 1848 and recorded in 1895, where neither grantee had actual possession of the land.

(438) CONTROVERSY without action by Joseph W. Janney and others against Nannie G. Blackwell, heard by *Webb, J.*, at February Term, 1905, of CALDWELL.

This is a controversy without action submitted to the Court upon facts agreed for the purpose of settling the matters in difference between the plaintiffs and the defendant under section 567 of The Code. The plaintiffs claim the land in controversy under grant No. 883 to W. D. Sprague for 640 acres dated 29 December, 1875, and registered in the office of the Register of Deeds of Caldwell County, 31 October, 1878, and by *mesne* conveyances making a complete chain of title to

the plaintiffs, all of which are in due form and registered. The defendant claims title to the land under Grant No. 265 to Wilson Foster for 100 acres, dated 23 December, 1848, and registered in the office of the Register of Deeds of Caldwell County, 5 April, 1895, and by *mesne* conveyances making a complete chain of title to the defendant, all of which are in due form and registered. It is admitted that both grants covered the land in controversy, and it is also agreed that neither the plaintiffs nor the defendants nor those under whom they claim title have ever held any possession of the land in controversy, or any part of it, included in either of the said grants, except the recent entry by the defendant for the purpose of cutting trees therefrom.

The court being of opinion that upon the facts agreed the plaintiffs ought not to recover, rendered judgment for the defendant. Plaintiffs excepted and appealed.

L. D. Lowe for plaintiffs.
Mark Squires for defendant.

CONNOR, J., after stating the facts: The statutes in force in (439) this State for more than a century have permitted "all vacant and unappropriated lands belonging to the State" with certain well-defined exceptions, to be entered and grants taken therefor. Code, section 2751. "To be subject to entry under the statute, lands must be such as belong to the State and such as are vacant and unappropriated." *Hall v. Hollifield,* 76 N. C., 476; *S. v. Bevers,* 86 N. C., 588. By making the entry as prescribed by law the enterer does not acquire any title to the land, but only a "preëmption right," or, as it is sometimes called, an "inchoate equity," or right to call for a grant upon compliance with the statute. The grant, when issued, relates to the entry and vests the title in the grantee. The land when granted is no longer subject to entry—as "vacant and unappropriated lands." *Featherston v. Mills,* 15 N. C., 596; *Hoover v. Thomas,* 61 N. C., 184; *S. v. Bevers, supra; Newton v. Brown,* 134 N. C., 439. It follows, therefore, that if one lay an entry and procure a grant for land covered by a grant, he acquires no title thereto, for the reason that the State has by the senior grant parted with its title. *Stanmire v. Powell,* 35 N. C., 312. If the land be open to entry and a grant be issued therefor, such grant may not be attacked collaterally for fraud, irregularity, or other cause. This can be done only by the State or by pursuing the provisions of section 2786 of The Code. But if the land be not subject to entry, the grant is void, and may be attacked collaterally. Prior to 1885 the statutes provided that all grants, deeds, etc., be registered in the county wherein the land was situated within two years

from the date thereof. With one or two omissions, the Legislature uniformly extended the time for registration for two years. This Court with equal uniformity held that such instruments, when registered within two years from their date or within the extended period, were good and valid for all purposes from their date by relation. Referring to grants, it was said in *Hill v. Jackson,* 31 N. C., 333, that "the passage of the acts . . . prolonging the time within which grants shall be registered in the county has practically the effect of rendering
(440) nugatory that clause in them. . . . The grants, then, may be registered at any time, if at that time there be any law authorizing the act. . . . If the registration of the grant was legal, then it must have the effect of relating back; this is a necessary consequence and daily recognized in our practice." The same doctrine prevailed in regard to deeds. *Walker v. Coltraine,* 41 N. C., 79; *Phifer v. Barnhart,* 88 N. C., 333. At the session of 1885 the Legislature enacted a statute which worked a radical change in regard to the registration of deeds. Chapter 147, Laws 1885, declares that no deed, etc., shall be valid at law to pass any property, as against creditors or purchasers for value, but from registration. No time was fixed within which such instruments were to be recorded. From that time it became unnecessary to pass the usual act extending the time for registration of deeds. The Legislature at that session and until 1893 failed to extend the time for registering grants. In *Wyman v. Taylor,* 124 N. C., 426, this Court held that chapter 147, Laws 1885, did not apply to grants; hence, from 1885 until 1893 there was no statute in force in this State authorizing the registration of grants after the expiration of two years from their date. By section 2779 of The Code they were required to be registered within two years. During the period between 1885 and 1893 there was no statute in force permitting the plaintiff to register the grant. By chapter 40, Laws 1893, it was provided that grants theretofore made which were required to be registered "may be registered in the counties in which the lands lie respectively at any time or times within two years from the first day of January, 1894, next ensuing, notwithstanding the fact that such specified times have already expired, and all such grants heretofore registered after the expiration of such specified time or times shall be taken and treated as if they had been registered within such specified time or times: Provided, that nothing herein contained shall be
(441) held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants, or any of them, acquired by any person or persons from the State of North Carolina, by or through any entry or entries, grant or grants, made or issued since such grants were respectively issued, or of those claiming through

or under such subsequent entry or entries, grant or grants." The plaintiffs insist that the language of the proviso prevents the operation of the senior grant from relating back to its date, and gives the grant of 1876, under which they claim, priority. The question is thus presented: What "right, title, or equity" did the grant of 1875 confer upon the grantee? As we have seen, the land at the time of the issuing of the grant was not subject to entry, and therefore the grantee acquired no right, title, or equity in the land as against the prior grantee. It is well settled that where language is used in a statute which has a well-defined legal meaning, the Legislature will be presumed to have used the language with reference to such meaning. The plaintiff must, therefore, establish the proposition that he had some legal right or title to the land or some equity therein, by virtue of his grant. It is not to be doubted that the Legislature had the power to impose upon the persons registering their grants after the time provided therefor had expired, the condition that they should do so subject to junior grants which had been registered. The registration of a grant is not necessary to give it validity for the purpose of passing title. 24 A. and E. Enc. (2 Ed.), 116. It will be noted that there is a marked difference in the language of the statute requiring the registration of deeds (section 1245 of The Code and Laws 1885, ch. 147) and that requiring the registration of grants. The first declares that "no deed shall be good and available . . ." whereas the second directs that the grant be recorded.

We therefore conclude that in view of the facts set out in the record the plaintiff had not, at the time of the registration of the grant of 1848, acquired by the grant of 1875 any "right, title, or equity" as against the senior grant which gave it priority. Neither (442) grantee had actual possession of the land. The legal title vesting in the first grantee drew the constructive possession, which continued until there was an ouster. It appears that the plaintiff had never taken possession; therefore, the possession is by operation of law in the defendant by virtue of the senior grant. It may be suggested that the construction which we have placed upon the proviso of the act of 1893 practically emasculates it—gives it no operative force. If the defendant had gone into actual possession of the land, thereby ousting the senior grantee, and remained in possession for seven years, he would have acquired title. However this may be, we are not at liberty to give to the words of the proviso any other or larger operation than they have in the law. The act does not profess to confer any right, title, or equity, but to protect such as the junior grantee had at the time of its passage. As he had none as against the senior grantee, he does not come within its provisions.

We are of opinion that the judgment of the court below was correct, and must therefore be

Affirmed.

Cited: McAden v. Palmer, 140 N. C., 260; *Berry v. Lumber Co.,* 141 N. C., 394; *Dew v. Pyke,* 145 N. C., 301, 305; *Johnson v. Lumber Co.,* 144 N. C., 718; *Anderson v. Meadows,* 159 N. C., 407; *Westfelt v. Adams, ib.,* 421; *Waldo v. Wilson,* 173 N. C., 691.

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HUET v. LUMBER COMPANY.

(Filed 23 May, 1905.)

Corporations—Sale of Stock—Injunction—Receivers—Stockholder's Rights.

1. Where the directors of a corporation, being authorized to issue and sell stock, not exceeding the amount authorized by the charter, made a sale and issued the stock, it is too late for interference by injunction.
2. A solvent corporation cannot be placed in the hands of a receiver to enable a stockholder who has deposited his stock with the corporation, as collateral for a debt, to have an account of its assets.
3. A stockholder has no property in the assets of a corporation, in the sense that he may control it otherwise than as the charter directs.

ACTION by William C. Huet against Piedmont Springs Lumber Company and others, pending in the Superior Court of BURKE, heard, by consent, by *Neal, J.,* at Salisbury, on 17 February, 1905, upon a motion to continue to the hearing an injunction and restraining order theretofore granted.

The plaintiff entered into a partnership with the defendants, Birdsall and Coolbaugh, for the purpose of manufacturing and selling timber. They afterwards organized a corporation chartered as The Piedmont Springs Lumber Company. The property of the partnership was conveyed to the corporation—shares being issued to the parties, representing the interests of the members of the partnership. There were issued to the plaintiff 21 shares, and in addition thereto 49 shares, in payment of which he executed his note to the corporation for $4,900, depositing his holdings of 70 shares as security therefor. There was an agreement by the terms of which the plaintiff was employed as superintendent at a fixed salary. At a meeting of the stock-
(444) holders, the directors were authorized to sell additional stock,

not exceeding the amount of capital stock authorized by the charter. The plaintiff alleges that the 49 shares for which he gave his note were paid out o fthe profits of the business. Thi sis denied by the defendants. After maturity of the note, the directors held a meeting in the city of Philadelphia and abolished the office of superintendent. At the same meeting the secretary was directed to notify the plaintiff that the corporation would sell the stock so hypothecated, at a time and place named, for the payment of the note of $4,900.

The directors also sold to the defendants, A. L. and F. Lueker, 140 shares of the capital stock of the corporation of the par value of $100 per share for the sum of $10,000. To this the plaintiff objected. The defendants admit the sale of the stock and allege that the property conveyed to the corporation was overvalued by the plaintiff and that the stock was not worth par; that the corporation was in need of money and that efforts were made to sell stock at par without success; that the sale to Lueker had been consummated, the money paid, and the stock issued prior to the beginning of this action. The plaintiff avers that corporation is amply solvent and that his share of the profits from the business, as shown by a schedule of its assets, are sufficient to pay the note of $4,900. The defendants admit solvency, but deny that the assets are of the value alleged, and set out at much length the history of the dealings between the plaintiff and the corporation, the reasons which induced the directors to abolish the office of superintendent, etc. The plaintiff prays that the sale of the stock to Lueker be declared void and enjoined; that the sale of his stock be enjoined until he can have an account of the assets of the corporation taken, and that a receiver be appointed. From an order vacating the restraining order and refusing an injunction the plaintiff appealed.

John T. Perkins for plaintiff.
Avery & Ervin for defendants. (445)

CONNOR, J., after stating the facts: His Honor states that he finds by an examination of the affidavits that whatever equity it set out by the plaintiff is fully met and negatived by the defendants and the proofs offered. We have examined the affidavits in the record and concur in this opinion.

In regard to the issue of the 140 shares of stock to the defendants, Lueker Bros., it appears that it is a fact accomplished. The money has been paid and the stock issued. The directors were authorized to issue and sell stock not exceeding the total amount of authorized capital stock. It is doubtful whether this express power conferred by the resolution authorized the sale at less than par. 10 Cyc., 763; Womack Pr. Corp., 208. However this may be, the sale having been

made, it is too late for interference by the injunctive power of the court. If the plaintiff wishes to attack the issue, he is in a position to do so when the cause shall come on to a hearing. 1 Cook on Stock and Stockholders, 30-44; 26 Am. and Eng. Enc. (2 Ed.), 842. If he desires to enjoin its transfer, pending the litigation, he may by motion in the cause, for good cause shown, do so.

We can see no reason why the operation of a solvent corporation shall be stopped and its affairs put into the hands of a receiver to enable the stockholder, who has deposited his stock as collateral for a debt, to have an account of its assets. It is elementary learning that a stockholder has no property in the assets of a corporation, in the sense that he may control it otherwise than as the charter directs. If he gives his note to the corporation in payment of his stock, it is a debt due the corporation, which, until paid, is an asset. Womack Pr. Corp., 197. If the assets of the corporation are as valuable as the plaintiff avers, he has the benefit of them in the enhanced value of his stock, which he may redeem or, if sold, obtain a large (446) price therefor. We are unable to perceive why he should be permitted to have the court place the corporate property in the hands of a receiver. It would seem that the appeal is a fruitless venture. The court having refused the injunction, there is no legal reason why the corporation should not proceed with the sale. We forbear expressing any opinion upon the merits of the controversy. The judgment is

Affirmed.

Cited in Re Parker 177 N. C., 468.

CHEEK v. WALKER.

(Filed 23 May, 1905.)

Wills—Contingent Remainders, Conveyance of—Contingencies.

1. Where a father devised to his son (the plaintiff) certain property, and by a codicil provided if his son "dies unmarried or leaving no children" the property shall go to certain relatives: *Held*, that deeds executed by said relatives and by the children of such as were dead, conveying to the plaintiff "all the right which they now have or may hereafter have" in said property, vest in him an indefeasible title.
2. Contingencies, which import a present interest of which the future enjoyment is contingent, are devisable and descendible, and may be the subject

of release in certain cases, operating as an estoppel on the heirs and effectual as a valid conveyance.

CONTROVERSY without action by Thomas Edgar Cheek and wife against John B. Walker, heard by *Peebles, J.,* at May Term, 1905, of DURHAM.

This is a controversy without action, submitted upon an agreed state of facts, under Code, section 567. J. W. Cheek, being the owner in fee of the *locus in quo,* executed his will in due form and died during 1875. The will was duly admitted to probate. He (447) devised the land described in the deed attached to the record, together with other real estate, to his son, the plaintiff, T. E. Cheek. He executed a codicil 20 May, 1875, in the following words: "If Thomas Edgar dies unmarried, or leaving no children, I wish two-thirds of his property to go to my brothers and sisters, and the other third to his mother." The plaintiff was at the time of his father's death 9 years of age. He is now married and has one child.

J. W. Cheek left surviving his widow, Rebecca H., who has since intermarried with A. D. Markham. He also left surviving one brother and several sisters—some of whom have died leaving children. The mother of plaintiff, together with her husband; the living sisters, together with their husbands, and the children of the deceased brother and the deceased sisters, have all executed deeds to the plaintiff, reciting the execution of the will, the terms of the codicil, and in consideration of $10 conveying, releasing, confirming, and quitclaiming all the right which they now have or may hereafter have in and to the lands devised as aforesaid. Said deeds are duly proven and recorded. On 10 March, 1905, the plaintiff contracted to sell to the defendant a portion of the land devised to him as aforesaid for a full and valuable consideration. Pursuant thereto he, together with his wife, has executed and tendered a deed, with full warranty and in proper form, conveying to him said land. The defendant declined to accept said deed for that plaintiff cannot make a good and indefeasible title, etc. The question submitted for the decision of the Court is whether, upon the facts agreed, the deed does convey a good and indefeasible title. His Honor being of the opinion that it did, rendered judgment accordingly, to which defendant excepted and appealed.

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

(448)

CONNOR, J., after stating the facts: The plaintiffs contend that by a proper construction of the will of John W. Cheek and codicil thereto, the word "or" should be read "and," so that the contingency upon

which the title to the land should vest in the mother and brothers and sisters would be both dying unmarried and leaving no children. If this view should be adopted, Thomas Edgar having married and had issue, the title has become absolute. It is suggested that the word "unmarried" primarily means never having been married. There seems to be authority to support the contention, and in view of the fact that the plaintiff was only 9 years of age at the date of the will and the death of the testator, and was his only child, it is more than probable that such was his intention. It is hardly probable that he intended to tie up, during his life, the title to his inheritance, consisting of houses and lots, tobacco factory lot and cotton gin lot, in a growing town, for the benefit of his (testator's) brothers and sisters and his widow. This view is strengthened by the fact that he gives, in the event of his (Thomas Edgar's) death, one-third to his mother. He could hardly have intended that this limitation should extend through the lifetime of his son for the benefit of his mother, who was many years his senior. The same may be said of his intention respecting the interest given his brothers and sisters. Authority may be found to sustain the suggestion that the primary intention of the testator would be effectuated by reading the word "or" as "and." Underhill on Wills, 448; 30 Am. and Eng. Enc., 691; *Turner v. Whitted,* 9 N. C., 613. We do not deem it necessary, however, to pass upon the question, because in our opinion the deeds executed by those who, in the event of the death of Thomas Edgar, unmaried or without leaving children, would take, vest in him a good and indefeasible title.

(449) Approving *Whitfield v. Garris,* 134 N. C., 24, we are of opinion that Thomas Edgar took a fee, defeasible on condition that he dies unmarried and leaving no children, in which event the mother and brothers and sisters would take. We considered the effect of the conveyance by those who will in the event provided for take in *Kornegay v. Miller,* 137 N. C., 659. We do not deem it necessary to review the authorities.

The appellant does not call to our attention any authority in conflict with our conclusion in that case. He suggests that a decision of this Court cannot "bind unborn generations, who may and no doubt will some day contest defendant's title if they can." Undoubtedly, no court can, otherwise than by declaring the law as it understands it in a cause brought before it for adjudication, bind unborn generations. We can only adjudge rights as they are presented to us. The stability of our decisions must rest upon the reasons upon which they are based, the value of the authorities cited, and the well-settled principle that courts will not lightly or save upon overpowering necessity unsettle decisions which have become rules of property upon which

people have relied and invested their money. We gave the subject in *Kornegay v. Miller* a careful and we think thorough investigation. While we reviewed the decided cases in this Court and endeavored to gather and declare the principle upon which they are founded, we brought none of them into controversy, unsettled no conclusion reached nor disturbed any right acquired under them. We declared as the conclusion to be drawn from them that the deeds executed by those entitled to the contingent remainder passed to and vested in the grantee or assignee a perfect title, operating not simply by way of an executory contract or estoppel, but as an executed contract, and that in the absence of fraud or imposition the Court would not inquire into the adequacy of the consideration. We think this conclusion in accordance with the latest authorities and "the reason of the thing," and see no reason, upon further consideration, to doubt the sound- (450) ness of that decision.

There is, however, another view of the subject which we overlooked in the opinion, which strengthens and sustains our view. In *Wright v. Wright,* 1 Ves. Sen., 410 (27 Eng. Reprint, 111), *Lord Chancellor Hardwicke* said: "This is a claim by an heir at law against the act of his ancestor, done for what this Court calls a valuable consideration in the second degree by way of provision or advancement for a younger child. There are two questions. Whether Robert had such a contingent interest, right, or possibility in the lands in question as by any act in the consideration of this Court he could convey, assign, or dispose of. Secondly, supposing he had such a contingent interest as a possibility is properly described to be, whether in fact he has conveyed it by the deed he has executed." After discussing the terms of the will under which Robert took, the *Lord Chancellor* says: "But still it was an executory devise, not a remainder on a fee given before. . . . But that is still in contemplation of law a possibility, which, though the law will not permit to be granted or devised, still it may be released, as all sorts of contingencies may, to the owner of the land. The reasons for the law not allowing such a disposition, which this Court will, are mostly very refined, and as *Lord Cowper* says in *Thomas v. Freeman* (2 Vern., 563), would not have prevailed now." His Lordship at some length discusses the reason and history of the law, and concludes a review of the authorities by saying: "This is the same thing, though not in that shape; the court not laying weight on the manner, but the substance." He answers the second question by saying that though the grantor had left out the word possibility in the deed, "It is true, he had no immediate claim or demand; but the word claim may describe it *in presenti* or *futuro,* etc." Blackstone (2 Com., 290) says: "Yet reversions and vested remainders may be granted; because

(451) the possession of the particular tenant is the possession of him in reversion or remainder; but contingencies and mere possibilities, though they may be released or devised by will or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest." We find a note in Lewis' Blackstone, 290, which so clearly expresses our view and fully sustains our decision in *Kornegay v. Miller,* 137 N. C., 659, noting the distinction, sometimes overlooked, between contingent interests where the person is certain, but the event upon which he will take uncertain and mere possibilities, that we quote it at length: "Mr. Ritson remarks that, independently of thus confounding contingencies and mere possibilities, as if they were in *pari ratione* (the same reason, *i.e.,* under the same rule)—which they certainly are not—there is here a great mistake: first, in describing mere possibilities to be such as may be released or devised by will, etc., and, secondly, in supposing devisable possibilities to be incapable of being assigned to a stranger. For, in the first place, there is this wide difference between contingencies (which import a present interest of which the future enjoyment is contingent) and mere possibilities (which import no such present interest), namely, that the former may be released in certain cases, and are generally descendible and devisable, but not so the latter. Suppose, for instance, lands are limited (by executory devise to A in fee, but if A should die before the age of 21, then to C in fee) this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a present interest, although the enjoyment of it is future and contingent. But where there is no such present interest, as the hope of succession which the heir has from his ancestor in general, this, being a mere or naked possibility, cannot be released or devised."

The learned counsel for appellant says: "We grant that the deeds executed by the present brothers and sisters of J. W. Cheek bind them, and if the present *status quo* remains until the death of Thomas (452) Edgar the defendant's title will be perfect and indefeasible. But how is it possible for the deed of a brother of J. W. Cheek to operate as an estoppel upon his heir, when as a matter of fact such brother never owned the property in dispute, was never in possession and never had any interest in it until the happening of a certain event, to wit, the death of Thomas Edgar?"

The answer to the suggestion is, we think, manifest. The brothers and sisters of J. W. Cheek owned such an interest as was devisable and, if not parted with, descended to their heirs. As we have seen, without any controversy, this interest was the subject of release to the owner of the land—which would in any event operate as an estoppel on their

heirs—and, as we hold, is equally effectual as a valid conveyance. We have in deference to the evident doubts entertained by the learned counsel given the question a careful reëxamination, with the result stated herein. While we adhere to what was said in *Kornegay v. Miller,* in any aspect of this case the deed of the plaintiff, Thomas Edgar, conveys a good and indefeasible title, either by way of a conveyance or a release. The judgment must be

Affirmed.

Cited: Smith v. Moore, 142 N. C., 299; *Elkins v. Seigler,* 154 N. C., 375; *Ham v. Ham,* 168 N. C., 492; *Bowden v. Lynch,* 173 N. C., 208; *Shuford v. Brady,* 169 N. C., 227.

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COMMISSIONERS v. STAFFORD.

(Filed 23 May, 1905.)

Counties—Bonds for Necessary Expenses—Statutes—Amendments.

1. The Legislature has the power to pass an act authorizing a county to issue bonds for the purpose of raising funds to discharge an indebtedness incurred for necessary expenses.
2. When an act has been passed in accordance with Article II, section 14, of the Constitution, an amendment, which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly.
3. An amendment to a bill authorizing county commissioners to issue bonds, which struck out a provision permitting the commissioners to purchase, at the end of five years and annually thereafter, one-fifth of the bonds, does not materially affect the original bill.

ACTION by the Board of Commissioners of Chatham County against F. M. Stafford & Co., heard by *Long, J.,* at May Term, 1905, of CHATHAM.

This is a civil action submitted to the court upon the following agreed statement of facts: "The Legislature of North Carolina, at its session of 1905, passed an act, set out in the record, authorizing the Commissioners of Chatham County to issue and sell bonds in the sum of $20,000, redeemable in the following manner, $2,000 ten years from the date of issue and $2,000 annually thereafter until the whole amount should be paid, said bonds to bear interest at 5 per cent. Said bonds were authorized to be issued to pay the outstanding indebtedness

incurred for the necessary expense of said county prior to 1 January, 1905, which fact appears in the body of the act, and is an admitted fact. The bill was originally introduced in the Senate, contain-
(454) ing a provision permitting the board of commissioners of the said county, after the expiration of five years from the date of issue, to purchase, at their discretion, annually, an amount not exceeding one-fifth of the whole of said issue. This provision was contained in section 2 of said original bill. The bill in this form passed the Senate in strict compliance with the requirements of Article II, section 14, of the Constitution of North Carolina; was sent to the House of Representatives, and passed that body in the constitutional manner upon its first and second readings, when an amendment was offered, striking out the said section 2, and the bill as thus amended was passed in the House of Representatives in the way and manner prescribed by the said article and section of the Constitution; it went back to the Senate, which body concurred in the amendment. The bill was then properly ratified as required by law. The plaintiffs, after the ratification of the bill, passed an order, as appears on their minutes, authorizing the issue and sale of the $20,000 worth of bonds authorized in the act, the same to be sold at the courthouse in Pittsboro on 10 March, 1905. The said sale was advertised in accordance with the provisions of the act, and the bonds exposed to public sale at the said time and place. Several bids were offered, and F. M. Stafford & Co., the defendants, were the highest bidders at the sum of $20,900, and the bonds were awarded to them; the written bid, the acceptance of the same by the board, which was then in session, became a part of the minutes of the said board. The defendants have been furnished with a statement from the clerk of the board of commissioners showing the minutes of the board, which are satisfactory to them; also the certified copy from the Secretary of State of North Carolina giving copy of the journals of both Houses of the Legislature as above stated. The purposed issue of bonds is for the indebtedness of the county incurred prior to 1 January, 1905, which indebtedness was incurred for
(455) the necessary expenses of the county. It is agreed that if the court shall be of opinion that the said bonds are, or will be when issued, valid, then the defendants shall be ordered by judgment of the court to comply with their bid, pay the money and take the bonds; but if it shall be of opinion that the bonds issued under this act are not valid, then judgment shall be entered against the plaintiffs."

The court being of opinion that the bill was duly passed and ratified in accordance with the Constitution, rendered judgment that the defendants take and pay for the bonds in accordance with their bid. Defendants excepted and appealed.

R. H. Hayes for plaintiff.
W. D. Siler for defendant.

CONNOR, J., after stating the facts: It is conceded, and so recited in the statute and the record, that the bonds authorized to be issued are for the purpose of raising funds with which to discharge an indebtedness incurred for necessary expenses. That the Legislature had the power to pass the act is settled by numerous decisions of this Court. *Smathers v. Comrs.*, 125 N. C., 480; *Jones v. Comrs.*, 137 N. C., 579.

It is equally well settled that, when the act has been passed in accordance with the provisions of Article II, section 14, of the Constitution, an amendment which does not increase the amount of the bonds or the tax to be levied, or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. *Glenn v. Wray*, 126 N. C., 730; *Brown v. Stewart*, 134 N. C., 357. Section 2 simply authorized the commissioners, if they should deem it wise, to purchase at the end of five years, and annually therefater, one-fifth of the bonds. This was in no way obligatory, and we are unable to see how its omission by amendment (456) materially affected the original bill. If the commissioners had seen fit to exercise their discretion the annual tax may have been increased—it certainly could not have been decreased. We said in *Brown v. Stewart, supra:* "We can see no reason why the amendment, imposing no tax, creating no debt, nor increasing the amount of the bonds or the rate of interest thereon, could not be adopted by the Senate and incorporated into the original bill on and before its second reading." This language applies to the case before us, wherein a section having similar relation to the original bill is stricken out. We are of the opinion that his Honor's judgment is correct and must be

Affirmed.

Cited: Bank v. Lacy, 151 N. C., 5; *Pritchard v. Commrs.*, 159 N. C., 637; *Gregg v. Commrs.*, 162 N. C., 484; *Wagstaff v. Highway Commission*, 177 N. C., 357; *Guire v. Commrs., ib.*, 519.

PENLAND v. INGLE.

(Filed 23 May, 1905.)

Custom, How Proven—Essentials of—Brokers—Commissions for Sale of Land.

1. A custom cannot be established merely by the preponderance of the evidence, but the proof must be clear, cogent, and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist.
2. The essentials of a valid custom are that it must be uniform, long established, generally acquiesced in, reasonable, and so well known as to induce the belief that the parties contracted with reference to it.
3. A custom which gives to a broker 5 per cent of the purchase price of land for assisting in its sale, irrespective of the amount, value, or character of the service rendered, is unreasonable and void.

(457) ACTION by Jesse D. Penland against F. P. Ingle, heard by *Shaw, J.*, and a jury, at December Term, 1904, of BUNCOMBE.

This was an action by a real estate broker to recover the sum of $250 alleged to be due him for services rendered to the defendant in connection with the sale of a farm in Buncombe County. The farm was sold at the price of $5,000 and the plaintiff, admitting that there was no express contract as to the amount of his compensation, claimed that he was entitled to 5 per cent commissions on the gross purchase price by virtue of an alleged local custom by which real estate brokers, in the absence of a special contract, were entitled to such commissions for making or assisting in the making of a sale. Verdict for the plaintiff for $250. From judgment rendered, the defendant appealed.

Davidson, Bourne & Parker for plaintiff.
Frank Carter for defendant.

BROWN, J. The court charged the jury that the custom may be established by the preponderance of the evidence. In this there is error. While it may be considered settled at this day, according to the views of *Gray, C. J.*, as expressed in *Jones v. Hoey*, 128 Mass., 585, that a custom may be established by one witness, yet the testimony of that witness must be sufficiently convincing and patent to create in the minds of the jurors a full conviction of the existence of the custom. A custom cannot be said to be an established one if it is in serious dispute and can only be determined by carefully and nicely adjusting the scales to ascertain which side preponderates. The character and description of evidence admissible for establishing the custom is the fact of a general usage and practice prevailing in the particular trade

or business, and not the opinions of witnesses as to the fairness or reasonableness of it. While many early cases held that the custom could not be established by one witness, this rule has been almost universally departed from. It is nevertheless true that (458) that custom must be proved by evidence sufficient to satisfy the jury clearly and convincingly that such a usage existed as can fairly be presumed to have entered into the intention of the parties when they entered into the contract. The character of the proof must be clear, cogent, and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist. *Robinson v. S. S. Co.*, 75 Hun., 431; *Robinson v. Butterworth,* 80 U. S., 363; 29 A. and E. Enc. (2 Ed.), p. 415. Where the evidence is uncertain and contradictory, the custom is not established, and the court should so instruct the jury. *Desha v. Holland,* 12 Ala., 513; *Parrott v. Thatcher,* 9 Pick., 426; 12 Cyc., 1101; *Bissell v. Ryan,* 23 Ill., 517.

It is contended that the custom is not a valid custom because unreasonable. The appellate court of Illinois states the essentials of a valid custom as follows: "It must be uniform, long established, generally acquiesced in, reasonable, and so well known as to induce the belief that the parties contracted with reference to it." *Sweet v. Leach,* 6 Ill. App. Div., 212. All the authorities sustain that statement.

The reasonableness of the custom relied on in this case is assailed because it does not take into consideration the character of the service rendered. The defendant contends that the custom to pay 5 per cent commission on the purchase price is restricted to those cases where the broker furnished the customer and was the procuring cause of the sale, and that a custom, if any existed, which allowed 5 per cent for the services which the defendant testifies were rendered by the plaintiff in the cause is unreasonable. In this view we concur.

The testimony of the defendant tends to prove that he saw the advertisement and first opened negotiations with the commissioners; that he met the plaintiff accidentally and asked him to go with him to inspect the County Home place, which the commissioners desired to exchange with the defendant for his farm. The plain- (459) tiff did as requested, and on their return they met the commissioners and some chaffering took place. Next morning the defendant alone met the commissioners and, together, they went out and inspected the defendant's place. The plaintiff was invited to go, and said "I can't go." The defendant went with the commissioners and "Talked it up to the best advantage I knew how, and they agreed to take it and pay me $5,000 and give me the County Home."

The court should have presented this view to the jury and instructed them that if such be the true facts, the plaintiff would be entitled to

recover the actual value of his services only, irrespective of any alleged custom. The Court in *Sweet v. Leach, supra,* in speaking of the reasonableness of a custom relied on in that case, says: "Again, a custom, to be binding, must be reasonable and certain. If the custom contended for is binding, it would follow that an employer must pay for the entire period of time covered by the contract of hire, however small might be the amount of the service rendered." We likewise, are of opinion that a custom which gives to the broker 5 per cent of the purchase price of land for assisting in its sale, irrespective of the amount, value, or character of the services rendered, is unreasonable and void.

The proper office of a custom or usage in business is to ascertain and explain the intent of the parties, and it cannot be in opposition to a principle of general policy that forbids an unreasonable usage as interpreting their acts.

New trial.

Cited: S. c., Post, 752; *Peterson v. R. R.,* 143 N. C., 265.

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(460)

VANCE v. RAILROAD.

(Filed 23 May, 1905.)

Administrators—Presumption of Validity—Appointment—Existence of Assets—Cause of Action for Death.

1. Where it is admitted that the plaintiff was regularly appointed administrator, it will be presumed, in the absence of any evidence that the deceased did not leave assets in this State or that assets belonging to him have not come into the State since his death, that the clerk acted within his jurisdiction.
2. Where a nonresident was negligently killed by the defendant, in this State, the cause of action given by section 1498 of The Code (Lord Campbell's Act) is sufficient as a basis for the grant of letters, under section 1374 (4) of The Code, in the county where the injury and death occurred.

ACTION by Elisha Vance, administrator of J. R. Vance, against Southern Railway Company, heard by *Neal, J.,* at April Term, 1905, of BUNCOMBE. From a judgment for the plaintiff, the defendant appealed.

The defendant is a Virginia corporation, but operates a line of railway both in North Carolina and Tennessee. The plaintiff's intestate was at the time of his death domiciled in the State of Tennessee, and

left him surviving a wife, Matilda Vance, resident at Knoxville, in the State of Tennessee, and a father, Elisha Vance, resident in Buncombe County, North Carolina. The intestate left no children or representatives of children. He was injured by a locomotive of the defendant in Asheville, Buncombe County, N. C., on 1 January, 1905, and died in Buncombe County on the same day from said injuries. On 10 January, 1905, Elisha Vance applied to the Clerk of the Superior Court of Buncombe County for letters of administration upon the estate of the intestate, and the records of said court show that, at the time Elisha Vance filed his application with the clerk, a statement in writing was filed with the clerk and signed by (461) Matilda Vance, wife of the intestate, renouncing her right to administer upon the estate of her husband, and authorizing and directing the clerk to appoint Elisha Vance, father of the intestate, as administrator of his estate. The clerk on said day duly appointed Elisha Vance administrator. The proceedings for the appointment of Elisha Vance as administrator aforesaid were regular.

The defendant agreed to pay the plaintiff $1,250 in consideration of the full settlement and release of his claim for damages for the wrongful death of the plaintiff's intestate. The defendant refused to pay the said amount on demand, and alleged, as a defense and as a reason why said money had not been paid, that in another suit brought in Tennessee by Matilda Vance, administratrix of said J. R. Vance, appointed by the proper court in Tennessee, against said defendant for the same cause of action, the defendant had been enjoined in said State by the Chancery Court thereof from compromising said cause of action with or paying anything on account thereof to any other person than said administratrix. The said Matilda Vance was appointed administratrix after the appointment of the plaintiff and after the compromise had been effected.

The plaintiff moved for judgment on the pleadings at April Term of the Superior Court of Buncombe County, and at the hearing the court allowed the motion and entered judgment in favor of the plaintiff for the said sum. The defendant excepted to the judgment and appealed. It is assigned as error that the court erred in allowing the motion for judgment upon the defendant's answer and in entering the judgment set out in the record.

Locke Craig and Zebulon Weaver for plaintiff.
Moore & Rollins for defendant.

WALKER, J., after stating the case: The question in this (462) case is whether the apopintment of Elisha Vance as adminis-

trator of the intestate is valid. The defendant contests the validity of the letters of administration upon the ground that the clerk of the Superior Court of Buncombe County had no jurisdiction to issue them, as it appears the intestate was not domiciled in this State at the time of his death, but in the State of Tennessee, and that in such case, under section 1374, subsection 4, of The Code, letters could not be issued unless the intestate not only died in the county of the clerk, but left assets in the State or assets of the decedent have since come into the State. This position cannot be sustained, as it does not appear in the case that the decedent did not leave assets in this State or that assets belonging to him have not come into the State since his death. We do not mean to say that the validity of the letters cannot be questioned collaterally, the existence of such assets and their proper *situs* being a jurisdictional matter; but in the absence of any proof, one way or the other, we must assume that the clerk acted within his jurisdiction and that he has done his duty—a presumption that should perhaps be indulged in the case of every judicial officer until the contrary appears. It is admitted by the defendant that the plaintiff was regularly appointed administrator of the decedent, and this is all that does appear. With this admission before us, and nothing else appearing to impeach the plaintiff's appointment as administrator, we must hold that it was lawfully made and that he has the right to prosecute this action. *Lyle v. Siler,* 103 N. C., 261; *Shoenberger's Estate,* 139 Pa. St., 132; *In re Estate Mayo,* 60 S. C., 401; 11 A. and E. Enc. (2 Ed.), 785.

But the letters may be sustained on another ground. We held in *Hartness v. Pharr,* 133 N. C., 566, that the money recovered in an action brought under section 1478 of The Code (Lord Campbell's act)

(463) is no part of the assets of the decedent in the sense that it must be distributed according to the law of the domicile, as the cause of action never belonged to the intestate and as the method of distribution prescribed by our statute is an essential element of this new remedy given by the statute and which did not exist at common law. The distribution of the fund, wherever recovered, must therefore be made according to the law in this State. *Dennick v. R. R.,* 103 U. S., 11. But it does not follow that the cause of action given by the statute is not sufficient as a basis for the grant of letters in this State and in the county where the injury and death occurred. To hold otherwise, we think, would in many cases defeat the object of the Legislature in passing the statute. It is provided therein that the action shall be brought by the administrator, and the statute embraces not only the intestate who was a resident of this State and a person domiciled here, but also a nonresident domiciled elsewhere,

whose death was caused by a negligent or wrongful act. If it should so happen that a decedent, whose death was thus caused, had no assets in the State at the time of his death and none should afterwards come therein, the next of kin, as beneficiaries of the statute, would be deprived of their right of action for damages, which was surely not contemplated by the Legislature. When it was provided that the action should be brought by the administrator, it was intended that he should be appointed by the clerk of the county where the death occurred, if the decedent was a nonresident domiciled in another State and without assets situated here; otherwise, the statute as to such nonresident would be nugatory. This view of the law is sustained by the weight of authority at least. In *Hutchins v. R. R.*, 44 Minn., 7, the Court says: "It would seem to follow, from the appellant's logic, that if the deceased left no assets, strictly so called, no administration could ever be had, and consequently the statutory right of action for the benefit of the next of kin could never be enforced. This right of action is given in case of the death of any person, whether a resident of the State or only sojourning temporarily in it at the time of (464) his receiving the injuries causing his death. The law will not allow it to be defeated for want of a party to maintain it. The fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it, and administer the proceeds in accordance with the statute." "Speaking strictly," says the Court in *Brown v. R. R.*, (Ky.), 30 S. W., 640, "within the line of the general statutes on this subject, defining when, under what circumstances and what courts shall have power to appoint an administrator for a nonresident decedent, it may be that the matter sued for in this action is not a debt or demand belonging to or owned by the decedent at the time of his death. Neither is it strictly personal estate of the decedent. But beyond these general statutes, we think the particular statute applicable to cases of this kind wherein the right of action is expressly given to an administrator, necesarily implies the right to have an administrator appointed by the local courts for this purpose alone, if there be no other necessity or right or authority for such an appointment. And we deem the court of the county where the injury was done and where the man died the proper court to entertain such jurisdiction." In *In re Mayo*, 60 S. C., 415, it was said: "The statute is remedial, and should be liberally construed so as to accomplish its object. We, therefore, hold that the statute creating a right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court of the county where the intestate was killed

in granting administration for the purpose of enforcing such right of action. This view is well supported by authority in other jurisdictions."

The provisions of the law construed in the cases cited and in numerous other cases mentioned therein are substantially like those
(465) to be found in section 1498 and section 1374, subsection 4, of our Code. The construction given by those courts to similar enactments appears to be so reasonable and so much in accord with their intent and spirit that we do not hesitate to adopt it as the correct exposition of our own law. Whether the administratrix appointed in Tennessee is entitled to recover against the defendant for the same cause of action stated in this case is a question not now before us. We have discussed the only question presented by counsel and find no error in the decision of the same by the court below.

No error.

Cited: Hall v. R. R., 146 N. C., 348; *s. c.*, 149 N. C., 110; *Fann v. R. R.*, 155 N. C., 140; *Broadnax v. Broadnax*, 160 N. C., 435; *Hood v. Tel. Co.*, 162 N. C., 94.

ROWE v. LUMBER COMPANY.

(Filed 23 May, 1905.)

1. What are the boundaries of a grant or deed is a matter of law; where those boundaries are is a matter of fact.
2. Where a deed calls for a creek by name, nothing else appearing, the call must go to the running stream, and when neither the side line or bank nor the middle line is expressed, the conclusion of law is that the channel or middle line is intended.
3. Where a deed calls for "Catskin Creek," and there is evidence tending to show that the term was used as descriptive of Catskin Swamp, the jury must say upon the evidence what was intended, and, if the swamp, whether the call stopped at its edge or extended to the run.

ACTION by J. W. Rowe and another against the Cape Fear Lumber Company, heard by *Moore, J.*, and a jury, at September Term, 1904, of PENDER. From a judgment for the plaintiff, the defendant appealed.

(466) *Stevens, Beasley & Weeks and J. D. Kerr for plaintiff.*
Rountree & Carr for defendant.

WALKER, J. What are the termini or boundaries of a grant or deed is a matter of law; where those boundaries or termini are is a matter

of fact. This is the general rule. When, therefore, a creek is called for by name, as Catskin Creek, nothing else appearing, the call must go to the running stream, and, when neither the side line or bank nor the middle line is expressed, the conclusion of law is that the channel or middle line (*filum aquæ*) is intended. This rule applies when the natural object is unique or has properties or characteristics peculiar to itself and which admit of its easy and certain identification, as a creek or river. There is, then, no ambiguity in the call, and resort to oral evidence is not necessary in order to fit the description to the thing. But when, as in this case, "Catskin Creek" is called for and there is evidence tending to show that the term was used as descriptive of Catskin Swamp, it is for the jury to say upon that evidence what was intended. *Spruill v. Davenport,* 46 N. C., 203; *Toole v. Peterson,* 31 N. C., 180; Tyler on Boundaries (1876), p. 297. If Catskin Swamp was really called for, then the case is brought within the principle of *Brooks v. Britt,* 15 N. C., 481, and the jury should further determine whether the call stopped at the edge of the swamp or extended to the run, as held by us in a former appeal. *Rowe v. Lumber Co.,* 133 N. C., 433. There was oral evidence in this case and expressions in some of the deeds which tended to show that Catskin Swamp was known as Catskin, Catskin Creek, Merrick's Creek, and Catskin Branch, these terms being used interchangeably to describe Catskin Swamp, that is, the run and the low and boggy land on either side of it. In this state of the proof it was for the jury to say what was meant.

We have examined the record carefully and considered it in (467) the light of the arguments of counsel and of the authorities, and we have not been able to discover any reversible error committed by the court below. His Honor seems to have given a correct interpretation to our former decisions in the case and to have applied to the facts the law as therein and as herein declared. No error has been shown in the other rulings sufficient to induce us to disturb the judgment. The motion to set aside the verdict for misconduct of the jury is denied.

No error.

Cited: Sherrod v. Battle, 154 N. C., 353.

BANK v. BANK.

(Filed 23 May, 1905.)

1. Where the president of a corporation, who held a deed of trust on its real estate, executed for full value a deed for the property as president of said corporation, with a covenant that the same was free from all encumbrances, and thereafter the grantee corporation, of which he was a director, obtained a loan, secured by a deed of trust, with his knowledge and consent, under which latter deed of trust the property was sold and the purchaser held the possession, received the rents, and claimed ownership for more than seven years with his knowledge and without the assertion of any lien on his part: *Held*, that he is estopped from asserting any lien against the property.
2. Where one knowingly suffers another in his presence to purchase property in which he has a claim or title which he wilfully conceals, he will be deemed under such circumstances to have waived his claim, and will not afterwards be allowed to assert it against the purchaser.
3. A ruling made by a referee and confirmed by the judge will not be disturbed on appeal where no exception thereto appears in the record.

ACTION by Battery Park Bank and others against Western Carolina Bank, heard by *Shaw, J.*, at December Term, 1904, of BUN-
(468) COMBE, upon petition of Merrick & Hewitt for the cancellation of a deed of trust in favor of J. M. Campbell, at the expense of the receiver. From the judgment rendered, both Campbell and the receiver appealed.

The Battery Park Bank filed its creditor's bill against the Western Carolina Bank and the assets of the defendant bank were placed in the hands of a receiver, and as part of the assets there came into his hands a certain parcel of real estate in the city of Asheville, known as the "Asheville Tobacco Works and Cigarette Factory." This property had formerly belonged to the Asheville Tobacco Works, which company conveyed it to George S. Powell in trust to secure a debt of $1,000 due John M. Campbell.

The property was also mortgaged to the defendant bank after it had been conveyed to the Asheville Tobacco Works and Cigarette Company. This mortgage was foreclosed by a sale under the power contained in it, and the defendant bank became the purchaser. The receiver, W. W. Jones, sold the property to Merrick & Hewitt, who, after their purchase, discovered that the deed in trust in favor of Campbell had not been marked satisfied upon the registry of the county of Buncombe, and thereupon filed their petition in this creditor's bill, setting forth the facts and praying the court to require that the said deed of trust be canceled at the expense of the receiver. The receiver answered, setting forth that the alleged debt to Campbell had

been paid off and discharged; that Campbell was estopped to assert said claim as a lien or encumbrance on the property; that the title of the bank was protected by the statute of limitations and adverse occupation; and, further, that the bank had a debt of $700 or $800 which was a valid offset to be applied in reduction of the amount due Campbell, should his claim be established.

On motion, and in pursuance of an order duly made, summons was issued and served on Campbell, the claimant and Powell, the trustee, and Campbell came into court, and answered, denying (469) that his claim had been paid, denying there was any estoppel, and averring that he had a right to enforce its collection by sale under his deed of trust.

The receiver replied in substance as alleged in his original answer, and the cause having been duly constituted, all matters in issue were referred to M. W. Brown, who heard the evidence and made report, finding the facts and declaring his conclusions of law as follows:

Conclusions of law:

1. That the bond secured by the deed of trust from the Asheville Tobacco Works to George Powell, trustee, has not been paid.

2. That the amount of the above judgment in favor of The Western Carolina Bank and against J. M. Campbell should be credited on said bond as set-off and counterclaim.

3. That the bond secured by the deed of trust is barred by the statute of limitations.

4. That the prayer of the respondent, Campbell, for affirmative relief is in the nature of an action to enforce the power of sale contained in the deed of trust, and not having been sought within ten years after the power of sale became absolute, is barred by the statute of limitations.

At May Term, 1904, before *Judge Long,* the report was in all things confirmed. At December Term, 1904, before *Judge Shaw,* a decree was signed declaring in substance that the right of Campbell to foreclose the deed of trust by decree of court was barred by the statute of limitations; that Campbell, by coming into court and demanding that the same be foreclosed, had waived his right to proceed by action of the trustee out of court; that the deed of trust be canceled of record; that the title of the bank was free and clear from any lien or encumbrance; that the purchaser pay the balance of the purchase money, and on receipt of the same that the receiver make title, etc. (470)

Both the receiver and the claimant, Campbell, excepted to the judgment of *Judge Shaw* and appealed.

Merrimon & Merrimon, F. W. Thomas, and Thomas Settle for claimant.

Charles E. Jones for receiver.

APPEAL OF J. M. CAMPBELL, CLAIMANT.

HOKE, J., after stating the facts: The Court is of opinion that J. M. Campbell, the claimant, is estopped from asserting any lien or encumbrance against the property sold by the receiver to Merrick & Hewitt, and known as the "Asheville Cigarette Factory," and, on the admissions in the pleadings and the facts found by the referee, the deed of trust should be canceled of record and the judgment below affirmed.

It appears that the property was owned by the Asheville Tobacco Works, and on 20 May, 1891, this corporation executed the deed of trust in question to George S. Powell, trustee, to secure a debt of $1,000 in favor of J. M. Campbell—Campbell being at the time secretary and treasurer of the tobacco works; that on 23 March, 1892, the tobacco works for valuable consideration conveyed this property, with all its other property, to a new corporation, the Asheville Cigarette Company; that the deed was executed for the tobacco works by the claimant, Campbell, who had then become its president, and contained full covenants of warranty, and also a covenant that the same was free from any and all encumbrances; that on 10 February, 1893, the cigarette company made a deed of trust for the property in question to L. P. McLeod, as trustee, to secure a debt due to the defendant bank; that the deed was made with the knowledge and consent of the claimant, Campbell, who was then a director in this company; that on 5 March, 1895, McLeod sold the property under
(471) the deed and the same was bought by the bank and title made.

From that time to the sale by the receiver in December, 1902, the referee finds that the bank has paid the taxes on the property, and has been in the actual, continuous, and notorious possession of the same, receiving the rents and profits, claiming and using the same as absolute owner under a deed in fee simple and with the knowledge of Campbell and the trustee, Powell.

In the opinion of the Court, these facts present every element of an equitable estoppel against the assertion of any lien or encumbrance on the property in favor of the claimant, Campbell. He conveys the title to the cigarette company, for full value, by deed containing a covenant that the same is free from any and all encumbrances. True, this was a conveyance by the corporation, and therefore is not an estoppel by deed against Campbell as an individual. But he signed the deed for the company as its president, and to that extent he was

an actor in the matter, and this covenant that the property is free from encumbrances amounts to a representation by him that this is true. Again, when a director of the cigarette company, he knowingly permits the defendant bank to advance money and take a lien on the property, evidently to its full value, presumably greater, as the bank was compelled to buy in the property on its debt. And after the bank purchased and took the title, it continued to occupy and claim the same as owner under its deed for more than seven years and until the same was sold by the receiver in December, 1902; and during this entire time there was no assertion of any lien on the part of Campbell, nor any mention of it, so far as the evidence discloses. True, the occupation and conduct after the purchase are not evidence on the estoppel, but these facts are very strong testimony confirming the view taken by the court that Campbell throughout dealt with the property as if he had no lien upon it, and that he permitted and induced others to advance and invest their money in and upon (472) it, believing and having every right to believe that the same was free from encumbrances. Under the circumstances of this case he should not be heard now to set up such claim to their prejudice.

It is familiar learning that "where one knowingly suffers another in his presence to purchase property in which he has a claim or title, which he willfully conceals, he will be deemed under such circumstances to have waived his claim, and will not afterwards be permitted to assert it against a purchaser." Numerous decisions of our own Court uphold and apply this doctrine. *Gill v. Denton,* 71 N. C., 341; *Morris v. Herndon,* 113 N. C., 236; *Shattuck v. Cauley,* 119 N. C., 295; *Bassett v. Noseworthy,* II White and Tudor, par. 1, pp. 29, 30.

The decision below is affirmed on the ground that the claimant is estopped from asserting any lien or encumbrance on the property, and that the same should be canceled of record as a cloud on the title.

It seems that the defendant bank had a claim against Campbell to the amount of $700 or $800, and the referee declared, as one of his conclusions of law, that the debt was a valid offset against the claim of Campbell, and should be applied in reduction of such claim. Without expressing any opinion as to the correctness of this ruling, it will suffice to say that the same was made by the referee and confirmed by the judge, and no exception appears in the record which gives this Court the right to disturb it. The effect, therefore, is that this debt of the bank against the claimant, Campbell, is extinguished and must be so considered. Judgment below

Affirmed.

APPEAL BY RECEIVER.

HOKE, J. The Court is unable to perceive how the rights of the receiver were in any way prejudiced by the judgment appealed from, and such judgment is therefore

Affirmed.

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(473)

KERR v. GIRDWOOD.

(Filed 23 May, 1905.)

1. A clause in a holograph will reciting that the testatrix wished to record the wishes of her husband as expressed in his last illness, that at her death he wished the two laundries sold and the proceeds divided between his sister and brothers, is a testamentary disposition of said property.
2. No particular form of expression is necessary to constitute a legal disposition of property; although apt words are not used and the language is inartificial, the courts will give effect to it where the intent is apparent.

ACTION by J. P. Kerr and another, executors of the will of Laura A. Girdwood, against George Girdwood and others, for a construction of the will, heard by *Moore, J.*, at March Term, 1905, of BUNCOMBE. From the judgment rendered, certain of the defendants, to wit, Mrs. Salena M. Roberts and E. S. Clayton and wife, Bethel Clayton, appealed.

F. A. Sondley and Merrick & Barnard for plaintiffs.
Merrimon & Merrimon for defendants.

BROWN, J. Mrs. Laura A. Girdwood died during 1904, leaving a last will and testament executed by her as a holograph will and dated 26 December, 1903. The correctness of the judgment appealed from depends upon the efficacy of a certain clause in said will as a testamentary disposition of the property named in it, which clause is as follows:

"I wish to record the wishes of my darling husband as expressed to me in his last illness. He felt that he had left me well provided for, and was so thankful to think so, and wanted me to have exclusive use of all property and everything so long as I live. At my
(474) death he wished the two laundry properties to be sold, or disposed of to the best advantage, and the proceeds of the sale to be equally divided between his sister (if living) and his brothers,

who are living. He wished me to do just as I pleased with my home place, and personal property, and I hereby express my wishes."

The testatrix then proceeded to dispose of her said home place and to give sundry legacies, but left undisposed of a lot in the city of Asheville on Bailey Street, which descended to her sister, Bethel Clayton, as her heir, and a lot on Penland Street, and also left undisposed of personal property and money. The testatrix, besides other dispositions, made provision for her mother, Mrs. Salena Roberts, and her sister, Mrs. Bethel Clayton.

The only question presented on this appeal relates to the legal effect of the language above quoted employed by the testatrix in what is undeniably a testamentary document.

Are these words testamentary in character, or merely a recital of an occurrence which had taken place between her and her husband? After carefully considering the entire will, in the light of the authorities, we have concluded that it was the intention of the testatrix in employing these words that they should have a testamentary effect, and that the language employed by her is of such legal efficacy that the law can give force to it and execute her intention.

It cannot be doubted that the testatrix thought she was making her will. The paper is testamentary in form and has been duly admitted to probate. The conclusions of her act and its solemnity and importance are disclosed in the closing words used by the testatrix, to wit, "Written when I am well as I ever am, and my mind as clear." In this document she disposes of a great deal of her property and makes devises and bequests of real and personal property to these appellants and many others besides. Why should she have incorporated these words expressing her husband's wishes in her own will, unless she intended to give effect to them? They related to a most im- (475) portant and valuable part of the estate her husband had given to her at his death. To have recited his wishes, that these particular properties should go to her husband's own near relatives, and then to deliberately withhold the necessary purpose and intent to effectuate his wishes, is not at all consistent with the evident love and affection the testatrix felt for her husband's memory. The closing words of the will indicate that the testatrix was conscious that she was executing an instrument which might be contested, and that the language employed in it would be closely scrutinized.

The words she used point out unmistakably the particular property she intended to devise, and also indicate unerringly the persons to whom such property shall go. In reciting her husband's wishes, she evidently intended then to carry them out and to indicate that they were in accord with her own. She made no subsequent disposition

of these properties to other persons and did not again refer to them in her will. It is almost inconceivable that she intended to die intestate as to them.

It is not only a cardinal principle in the construction of wills to give full effect to the intent of the testator, but also to so construe the instrument as to give force and effect to every part of it, if possible. No part of such an instrument will be discarded unless in conflict with some other part, and then that part will be enforced which expresses the intention of the testator. This is done, *ut res magis valeat quam pereat;* for the law to do otherwise would be to defeat the very thing which it undertook to enforce.

There is nothing in the entire will inconsistent with the purpose to give the laundry properties in accordance with her husband's wishes. To refuse to give them effect would be at variance with her plain intent. No particular form of expression is necessary to constitute a legal disposition of property. Underhill on Wills, sections 37-
(476) 43; Schouler, sections 262, 263; *Alston v. Davis,* 118 N. C., 202. Although apt legal words are not used and the language is inartificial, the courts will give effect to it where the intent is as apparent as that of the testatrix in this will. Form will be discarded, and has been, so that an instrument in form a deed has been held to be a will. *Henry v. Ballard,* 4 N. C., 397; *In re Belcher,* 66 N. C., 51, 54. We think the court below properly interpreted the will, and the judgment is

Affirmed.

Cited: In re Edwards, 172 N. C., 371; *In re Deyton,* 177 N. C., 507.

WHITAKER v. JENKINS.

(Filed 23 May, 1905.)

Ejectment—Answer—Tenants in Common—Adverse Possession—Provision of Maintenance—Examination of Defendant—Demurrer.

1. In actions of ejectment it is generally sufficient for the defendant to make a simple denial and introduce evidence of his possession in support of his denial, and it is not necessary to plead the statute specially.
2. If one tenant in common have the sole possession for twenty years without any acknowledgment on his part of title in his cotenant, and without any demand or claim on the part of such cotenant to rents, profits, or possession, he being under no disability during the time, the law raises the pre-

sumption that such sole possession is rightful, and the tenant who has been out of possession is barred of recovery.

3. An answer by a tenant in common which avers that his cotenants abandoned the land to him, and he thereupon took sole and exclusive possession, and that he has held the possession openly, notoriously, and adversely ever since, is sufficient to imply that he held the land under a claim of ownership.

4. A devise to the wife of certain land during her life, or until her three sons should become of full age, at which time the lands should belong to them, the wife to have her maintenance out of the land, if she survived that event, gives no interest or estate in the land to the wife after the sons arrived at full age, and does not affect the right of the sons or any one of them to the possession.

5. The examination of the defendant, taken pursuant to sections 580-1 of The Code, and filed in the record, cannot be taken as a part of the answer for the purpose of passing upon a demurrer.

6. Where an answer is so framed as to raise an important issue of fact, and it discloses a substantial ground of defense, a motion to strike it out as sham was properly overruled, though it may be that the answer is false.

ACTION by Jesse L. Whitaker and others against Russell Jen- (477) kins and others, heard by *Shaw, J.*, at December Term, 1904, of BUNCOMBE. From a judgment overruling a demurrer to the answer of the defendant, Russell Jenkins, the plaintiffs appealed.

This is a proceeding for partition. Josiah Jenkins, who owned the land, devised it as follows: "I will and devise to my wife, Martha, all the land which I now own, with the full benefit of all the buildings and farm as her own right and property during her life or until her three sons, Thomas Erwin, Joshua, and Russell, shall come to the full age of 21 years, at which time all the land to belong to them; but if my wife should live longer than the time of their coming to age, she is to have her maintenance of the land."

The three sons arrived at full age, and their mother, who survived them, died in May, 1900. Thomas and Joshua died intestate and without children, leaving as their heirs a brother and a sister, who are defendants in the proceeding. By an order in the cause some of the defendants were made plaintiffs. The defendant Russell Jenkins denies the tenancy in common, and pleads *sole seizin.* (478) Plaintiff demurred. The first question raised is as to the sufficiency of the plea. In his answer he avers that after he and his brothers were of age "he took actual and *sole seizin* and possession of the land and has been in open, notorious, and adverse possession of the same without any demand or claim of any other claimant to rents, profits, or possession for more than twenty years." He alleges that his two brothers, being unwilling to assume the burden of supporting their mother, abandoned the land more than twenty years before this

proceeding was commenced and left him in the sole and exclusive possession thereof. It is further alleged that "he is and has been for more than twenty years in the sole and exclusive use and possession of the land under known and visible lines and boundaries, without demand or claim of the alleged tenants in common or those under whom they claim, or any of them, and adversely to all persons," and that neither the petitioners nor those under whom they claim have been seized or possesssed of the premises within twenty years before the commencement of this proceeding. He avers that he has supported and maintained his mother from the time the title vested in the three sons of Josiah Jenkins. The court overruled the demurrer, and the plaintiffs appealed.

F. W. Thomas for plaintiffs.
Tucker & Murphy for defendants.

WALKER, J., after stating the facts: In actions to recover land, wherein the plaintiff alleges title and right to the possession, it is generally sufficient for the defendant to make a simple denial and introduce evidence of his possession for twenty years, or, of his possession under color for seven years, in support of his denial. It is not necessary to plead the statute specially. *Farrior v. Houston,* 95 N. C., 578; *Mfg. Co. v. Brooks,* 106 N. C., 107; *Cheatham v. Young,* 113 N. C.,
161. Whether this familiar principle applies to an action be-
(479) tween tenants in common, we need not stop to inquire, as we are convinced that the right of the plaintiffs to partition is fully denied and the defendant's *sole seizin* arising out of his adverse and exclusive possession for twenty years is well pleaded. In *Covington v. Stewart,* 77 N. C., 148, the Court by *Bynum, J.,* thus describes the kind of possession by one tenant of the common property which will toll the entry of his cotenant and bar his recovery in ejectment: "The possession of one tenant in common is the possession in law of all; but if one have the sole possession for twenty years without any acknowledgment on his part of title in his cotenant, and without any demand or claim on the part of such cotenant to rents, profits, or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful, and will protect it. In such cases, where the tenant who has been out of possession brings ejectment, it has been held that his entry is tolled and that he cannot recover."

The averments of the answer of the defendant are as full and explicit as is the statement of the doctrine in the case just cited. We had occasion to discuss the question as to the nature of the possession of

one tenant in common, which the law requires to bar the right of his cotenant, in *Bullin v. Hancock, ante,* 198. It was suggested that the defendant does not allege that, while in the possession of the land, he claimed it as his own, nor does he in so many words, but we think it is substantially alleged. He avers that his two brothers abandoned the land to him and he thereupon took sole and exclusive possession, and that he has held the possession openly, notoriously, and adversely ever since. This would seem to be sufficient to imply, at least, that he had held the land under a claim of ownership.

But the plaintiff contends that if the defendant's alleged *sole seizin* is properly pleaded, it appears on the face of his answer that it is based solely upon his possession of the land, and that there could be no adverse possession as to the plaintiffs until the death (480) of Josiah Jenkins' widow in 1900, because she acquired a life estate by the terms of the devise. We cannot assent to the correctness of this proposition. The provision is that the land shall belong to her during her life or until the sons be of full age, at which time it shall belong to them, his wife to have her maintenance out of the land if she survived that event. The intention of the devisor is most clearly expressed. We cannot infer that he intended his wife to have an estate or even an interest in the land, when he had expressly said that it should belong to his sons, and that she should only have a maintenance. It would be straining the words of the devise to give them any such meaning. Besides, we think language similar to that used in this will, though not so clear in expressing the intention of the devisor, has been construed by this Court as giving no interest or estate in the land to the person for whose support provision is made. There has apparently been some difference in the cases with respect to the nature of the provision for maintenance, whether it constitutes a charge upon the land, so that the latter can be subjected to sale for its payment, or whether it creates merely a charge upon the rents and profits. In this respect we think the cases can be reconciled, but it is not necessary that it should be done at this time, as in neither view would the widow acquire any interest or estate in the land. The sons would have the title and the right of possession—and certainly so long as the duty to maintain her was performed. In *Gray v. West,* 93 N. C., 442, the provision was: "Arey Gray is to have her support out of the land," and it was held that it only gave her a right to be supported out of the rents and profits, and that she had no interest in the land and no lien thereon. To the same effect are *Misenheimer v. Sifford,* 94 N. C., 592; *Wall v. Wall,* 126 N. C., 405; *Helms v. Helms,* 135 N. C., 164. See, also, *McNeely v. McNeely,* 82 N. C., 183. The provision for maintenance did not operate as a condition precedent to the (481)

vesting of the estate, nor even as a condition subsequent. It was at most only a charge in favor of the beneficiary (*Tilley v. King,* 109 N. C., 461), and could not affect the right of the sons or any one of them to the possession. Consequently, the possession of the defendant Russell Jenkins had the legal effect of barring the rights of his cotenants, provided it was of the character and continued the length of time required by law for that purpose. Whether the defendant has in fact held possession of the land adversely and continuously for twenty years is a question to be decided by the jury upon the proof and under proper instructions from the court. We only decide now that the answer, taken as a whole and without special reference to any particular one of its averments, is sufficient to raise an issue as to the defendant's *sole seizin.*

The defendant further contended that the examination of the defendant, taken pursuant to sections 580-1 of The Code and filed in the record, should be taken as part of the answer for the purpose of passing upon the demurrer. We cannot think so. The examination is not intended by the law to be a part of the pleading, but is in its very nature simply evidence which can be used by the plaintiff in support of his allegations and which may be rebutted by the defendant. A demurrer is directed against the pleading itself and admits the truth of its averments for the purpose of testing its sufficiency, and it is perfectly clear to us that it will not lie to evidence, taken upon an examination of a defendant under sections 580-1 of The Code, as it cannot be considered as a part of his answer. The plaintiff moved to strike out the answer as sham. His motion was overruled, and he excepted and appealed, but did not perfect his appeal. This exception of the plaintiff is not noticed in his assignment of errors in this case. Assuming that it is before us, we do not think it should be sustained, and for the reasons, among others, we have already given in passing upon the demurrer. As substantially said by this Court in *Buie*
(482) *v. Brown,* 104 N. C., at p. 337, when discussing a similar motion for judgment, it may be that the answer is false, but, treating it as a pleading, it is so framed as to raise an important issue of fact and it discloses a substantial ground of defense.

We find no error in the rulings of the court below.

No error.

Cited: Dobbins v. Dobbins, 141 N. C., 218; *Rhea v. Craig, ib.,* 611; *Mott v. Land Co.,* 146 N. C., 526; *Lumber Co. v. Lumber Co.,* 153 N. C., 51; *McKeel v. Holloman,* 163 N. C., 137; *Lumber Co. v. Cedar Works,* 168 N. C., 350.

CRESSLER v. ASHEVILLE.

(Filed 23 May, 1905.)

Appeal—Case on Appeal—Practice—Record Proper—Stenographer's Notes—Transcript on Appeal—Certiorari.

1. Where there is no "case agreed" on appeal and none "settled" by the judge, and no error upon the face of the record proper, the judgment must be affirmed.
2. A "case on appeal" can be dispensed with only when the errors are presented by the record proper. Errors occurring during the trial can be presented only by a case on appeal.
3. When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper of which the court will take notice.
4. Chapter 58, Laws 1903, authorizing an official stenographer for Buncombe County, and providing that the stenographic notes shall be typewritten and filed with the clerk of said court, and "shall become a part of the records of the court," does not make them a part of the "record proper" on appeal, nor a part of the "case on appeal."
5. The "transcript or record on appeal" consists of the "record proper," i.e., summons, pleadings, and judgment, and the "case on appeal," which is the exceptions taken, and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to, for review.
6. When the appellant makes out his "case on appeal" he should set out only so much of the evidence as is necessary to point his exceptions to evidence or to the charge given or prayers refused.
7. Where there is a nonsuit granted or refused or a demurrer to the evidence, all the evidence that the appellant deems material should be sent up, but immaterial matters should be omitted.
8. While the stenographer's notes will have great weight with the judge, they are not conclusive of what the evidence was, or as to what exceptions were taken, or as to what rulings were made, and if counsel disagree, the judge must settle the case as provided by section 500 of The Code.
9. The appellant should not "dump" the stenographic notes into the "case on appeal," but should prepare a concise statement of the evidence in a narrative form.
10. The mistake of counsel for appellant in sending up a certified copy of the stenographer's notes, instead of settling the case on appeal as required by statute, does not entitle the appellant to a *certiorari.*

ACTION by Jane H. Cressler and her husband against the (483) city of Asheville, heard by *Justice, J.,* and a jury, at September Term, 1904, of BUNCOMBE. From a judgment for the plaintiff, the defendant appealed.

Locke Craige for plaintiff.
Davidson, Bourne & Parker for defendant.

CLARK, C. J. There is no "case agreed" on appeal and none "settled" by the judge, and there being no error upon the face of the record proper, the judgment must be affirmed. See numerous cases cited in Clark's Code (3 Ed.), p. 769. Errors occurring during the trial can be presented only by a "case on appeal." It is only when the errors are presented by the record proper, as in an appeal from a judgment
(484) upon a demurrer, or upon a case agreed, or judgment granting or refusing an injunction to the hearing heard upon the affidavits, that a case on appeal can be dispensed with. *Ibid.*, p. 770. When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper of which the court will take notice. *Cummings v. Hoffman,* 113, N. C., 267; *Appomattox v. Buffaloe,* 121 N. C., 37.

By chapter 58, Laws 1903, an official stenographer was authorized for Buncombe County, and a clause in section 4 of said act provides that "such stenographic notes shall be typewritten and filed with the clerk of said court and shall become a part of the records of the court." But that did not make them a part of the "record proper" on appeal, which are the summons, pleadings, and judgment; still less did it make such notes a part of the "case on appeal," which is a statement of the exceptions taken on the trial and so much only of the evidence, or charge, or other happenings during the trial as is necessary to present intelligibly the exceptions. This Court has both by decisions and an express rule (No. 22) endeavored always to avoid the unnecessary expense and oppression of copying into a transcript and printing superfluous matter that can throw no possible light upon the exceptions taken. Clark's Code (3 Ed.), and cases cited on p. 918.

The entries of continuances and other docket entries, interlocutory judgments in the cause and incidental matters, as judgments *nisi* against witnesses, and many other matters, are "a part of the records of the court" in a case, but are not part of the "record on appeal," unless there is some exception presenting it for review. "The evidence forms no part of the record." *S. v. Godwin,* 27 N. C., 401. Prayers for special instruction are no part of the record on appeal. 24 A. and E. Enc. (2 Ed.), 165. Though the charge of the court, when in writing (Code, section 414), and prayers for instructions (Code, section 415), must be filed and become a "part of the record of the action"
(485) just as these stenographer's notes, they are not a part of the "record proper," nor do they become a part of the transcript or record on appeal, except such parts as some exception may require being

put into the "case on appeal" by counsel, if they agree, and if not, then by the judge when he "settles" the case on appeal.

The "transcript or record on appeal" consists of the "record proper," *i. e.,* summons, pleading, and judgment and the "case on appeal," which last is the exceptions taken and such of the evidence, charge, prayers, and other matters excepted to, for review. When the appellant makes out his "case on appeal," he should set out only only so much of the evidence as is necessary to point his exceptions to evidence, or to point his exceptions to the charge given or prayers refused. The appellee can accept the appellant's "case," or, if he adds or rejects anything, the judge "settles" the case on appeal.

When there is a nonsuit granted or refused, or a demurrer to the evidence, all the evidence that the appellant deems material should be sent up, but even then immaterial matters, especially evidence as to character and like matters, should be omitted, and indeed all except the evidence claimed to be material. While the stenographer's notes are filed under the statute, the section 550 of The Code, just as in all other cases. The appellant will prepare "a concise statement of the case," presenting such matters as were excepted to. If there was a nonsuit refused or taken and the parties cannot agree upon the evidence, the judge must settle it. The stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge, who is alone authorized and empowered by the Constitution to try the cause, and who alone (if counsel disagree) can settle for this Court what occurred during the trial.

Here, the appellant, under an erroneous opinion as to the (486) function of the stenographer's notes, served no "case on appeal" on the other side, but sent up a certified copy of such notes as were conclusive both of what the evidence was and as to what exceptions were taken, and as to what rulings were made. This gave neither the appellee nor the judge any opportunity to scrutinize their correctness. Of course, if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made, and all other matters occurring in the progress of the trial. This would simply depose the judge and place the stenographer in his place for all the purposes of an appeal. All the care taken to secure men of high integrity and impartiality to discharge the functions of the important office of judge of the Superior Court, and the retention of the rotating system to prevent unintentional bias by his knowing too intimately parties and causes, become of secondary importance if a stenographer appointed by the clerk of the court, and not the judge elected by the people of the State, is to decide what were the exceptions, rulings, evi-

dence, and other incidents of a trial. Now, as always, these matters must be settled by the judge, when counsel disagree. The stenographer's notes will be a valuable aid to refresh his memory. But the stenographer does not displace the judge in any of his functions.

Now that stenographers are coming into more general use, it is timely that this Court should again repeat what it has heretofore said (*Durham v. R. R.*, 108 N. C., 399; *Mining Co. v. Smelting Co.*, 119 N. C. 415; *Hancock v. R. R.*, 124 N. C., 228), that such notes should not be "dumped" into the "case on appeal." Whether a part or all the evidence is to come up, it should not be sent up in the form of question and answer (except when on some point it is material), but the appellant should prepare, as the statute requires, "a concise statement." The evidence should be stated in a narrative form. If the evidence as
(487) stated by the appellant does not suit the appellee, he can amend it, and the judge can then settle it, giving, of course, in the parts necessary to point an exception, as nearly the literal words as possible, as he may recall them, refreshed by the aid of the stenographic notes. In every trial, of any length, a very large part of the evidence is incidental and throws no possible light upon the matters to be reviewed, and should not be sent up in the "case on appeal."

The increasing disposition, which is fostered by the use of stenographers, to "dump" into the "case on appeal" all the evidence, however useless, in reviewing the exceptions taken, is an abuse which must be guarded against by the courts and by counsel, to prevent the growing and needless expense of appeals, which must work hardship and oppression to many suitors. See Rule 22, 128 N. C., 640, and the decisions under that rule, Clark's Code (3 Ed.), p. 918.

The appellant, by sending up the stenographer's notes, instead of settling a "case on appeal" in the mode required by the statute (Code, section 550), has failed to present his intended ground for review, i.e., that the judge refused to nonsuit the plaintiff upon the evidence, and an exception to the evidence. This misconception of counsel as to the requirements of the law in making up the "case on appeal" does not entitle the appellant to a *certiorari*, as we have already held. *Barber v. Justice, ante*, 20. The motion for *certiorari* must, therefore, be denied. We will say, however, having carefully looked through the record, we find no ground either for a motion to nonsuit or for the exception to evidence, had they been properly presented.

Affirmed.

Cited: Bucken v. R. R., 157 N. C., 444; *Brazille v. Barytes Co., ib.*, 460; *Overman v. Lanier*, 157 N. C., 551; *Skipper v. Lumber Co.*, 158

N. C., 323; *Brewer v. Mfg. Co.*, 161 N. C., 213; *Bank v. Fries*, 162 N. C., 516; *S. v. Shemwell*, 180 N. C., 722; *S. v. Harris* 181 N. C., 613; *Rogers v. Asheville*, 182 N. C., 597.

(488)

WRIGHT v. INSURANCE COMPANY.

(Filed 25 May, 1905.)

Pleading—Prayer for Relief—Complaint—Sufficiency—Waiver of Defects.

1. The common-law rule that every pleading shall be construed against the pleader is modified by the present Code system (section 260), which requires that all pleadings shall be liberally construed with a view of substantial justice between the parties.
2. Under the present system of pleading and practice, any relief may be granted which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. (Code, sec. 425.)
3. Under section 276 of The Code, all defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party shall be disregarded in every stage of the action.
4. In an action on a fire policy, where the complaint alleged that the insurance was written on tobacco and that defendant agreed to transfer the insurance from the tobacco to certain machinery, and that the tobacco and the machinery were totally destroyed by fire during the life of the policy: *Held*, that the plaintiff, having failed to show any transfer of the insurance from the tobacco to the machinery, can recover for the loss of the tobacco, although the complaint seems to have been drawn for the purpose of recovering the loss of the machinery.
5. In an action on a fire policy, the failure to allege the value of the property insured at the time of the fire, even if an essential allegation, is such a defect as can be cured by amendment, and is waived by answer.

BROWN, J., dissents.

ACTION by R. H. Wright against Teutonia Insurance Company, heard by *Peebles, J.*, and a jury, at January Term, 1905, of DURHAM.

This action was brought to recover the amount of a policy (489) of insurance issued by the defendant to Gorman-Wright Company, "on leaf and scrap tobacco and tobacco stems, their own or held by them in trust or on condition, or sold but not delivered," to an amount not exceeding $1,500. The plaintiff alleged the insurance of the tobacco by the policy and that the defendant had agreed to transfer the insurance from the tobacco to certain machinery in the same building, the property of J. N. and P. H. Gorman, and worth $4,000. He

further alleged that the tobacco and the machinery were totally destroyed by fire in July, 1903, during the life of the policy; "that proof of loss was promptly made out and submitted to the defendant for the payment of said policy of $1,500, which policy, as plaintiff is advised by counsel, on account of said transfer, covered said machinery in said prizehouse"; that defendant denied its liability on the policy and refused to adjust the loss and pay the amount thereof; that the policy was assigned to the plaintiff in November, 1903, after the loss occurred, and he is entitled to recover the amount thereof; and "that the defendant is justly indebted to the plaintiff in the sum of $1,500, 75 per cent of the value of said machinery being in excess of this sum." The plaintiff then demands judgment for $1,500 and interest, and for such other and further relief as he may be entitled to have in the premises.

The defendant filed an answer in which it admitted the issuing of the policy and the destruction by fire of the prizery, but alleged a want of knowledge or information as to whether or not there was a total loss of the property contained therein. It denied the transfer of the insurance from the tobacco to the machinery, and also denied the transfer of the amount due on the policy to the plaintiff.

The plaintiff tendered the following issues: (1) Is plaintiff the assignee of the interest of the assured, Gorman-Wright Company? (2) What was the value of the tobacco destroyed by fire? (3) What was the value of the machinery destroyed by fire? The defendant tendered issues confined to the transfer of the policy to the machinery, and the amount, if any, the plaintiff is entitled to recover for the loss
(490) of the machinery. His Honor stated that he would not settle the issues at the beginning of the trial, but would hear the evidence and at its conclusion would frame such issues as he thought necessary. There was much evidence as to the transfer of the insurance to the machinery, and the proof of loss of tobacco and machinery (the value of each being shown by the proof, and the schedule annexed thereto) was put in evidence. The evidence tended to show that the tobacco stems (worth $100) belonged to the Gorman-Wright Company and the strips (worth $1,600), were held "in trust" by them for other parties. At the close of the testimony the court nonsuited the plaintiff, and he appealed.

Manning & Foushee for plaintiff.
Winston & Bryant and Busbee & Busbee for defendant.

WALKER, J., after stating the case: It must be conceded that if in any view of the testimony, considered in the most favorable light for him, the plaintiff was entitled to recover, there was error in the ruling

of the court. Counsel in their arguments and briefs discussed principally the question whether, if the plaintiff had failed to show a transfer of the insurance from the tobacco to the machinery, there were sufficient allegations in the complaint to entitle him to recover for the loss of the tobacco or any part of it. It may be granted that the plaintiff failed to show any transfer of the insurance from the tobacco to the machinery, and yet, this being so, the insurance, of course, remained upon the tobacco, and he is entitled to recover for any loss sustained by its destruction to the amount of the policy and to the extent that he has acquired his alleged assignor's right or interest. It is very true that the complaint seems to have been drawn by the pleader for the purpose of recovering for the loss of the machinery; but this fact does not defeat the plaintiff's right to recover for the loss of the tobacco if the allegations of the complaint are otherwise (491) sufficient for that purpose.

The common-law rule that every pleading shall be construed against the pleader is modified by the present Code system, which requires that all pleadings shall be liberally construed with a view of substantial justice between the parties. Code, section 260. If the complaint is merely defective in form, but a cause of action is stated in substance or by reasonable intendment, the defendant waives the defect by answering to the merits, and it is cured by verdict and sometimes by averments in the answer. When the defect is organic and vital, so that it cannot be cured by amendment, it is not waived by pleading over or by verdict, and it can be taken advantage of even in this Court. *Harrison v. Garrett,* 132 N. C., 172. Even where a material allegation is omitted, it is a defective statement of a cause of action merely and not a statement of a defective cause of action. *Johnson v. Finch,* 93 N. C., 205; *Garrett v. Trotter,* 65 N. C., 430; *Bank v. Cocke,* 127 N. C., 467.

In the case at bar the plaintiff alleges the issuing of the policy and the loss of the property insured. Upon these averments he might recover (if otherwise entitled) the value of the property destroyed by fire, not exceeding the amount of the policy. The only allegation omitted is the one as to the value of the property insured at the time of the fire. But even if this allegation is essential to the statement of a complete and perfect cause of action, its omission is but a defect which can be cured by amendment and is waived by answer, as much so as the omission to allege the determination of the former action in a suit for false arrest, which was the defect in *Johnson v. Finch, supra.* The mere fact that the plaintiff sought to recover for the loss of the machinery does not prevent the application of that principle to this case. In *Stokes v. Taylor,* 104 N. C., 394, it was held that where a plaintiff sues upon a special contract and fails in his proof, (492)

he may nevertheless recover upon a *quantum meruit,* if sufficient facts are alleged upon which to base such a recovery, and this can be done without amendment. *Jones v. Mial,* 82 N. C., 252. Under the present system of pleading and practice, any relief may be granted which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. Clark's Code, section 425, and notes. Any and all defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party shall be disregarded in every stage of the action, and no judgment shall be reversed or affected by reason of the same. Clark's Code, section 276, and notes. The plaintiff cannot, of course, sue upon one contract and prove another and essentially different contract. This is more than a mere variance; it is a failure of proof. But if he sues for specific relief, to which he is not entitled, upon facts which show him entitled to other and different relief, he may be adjudged to have that relief to which he is in law entitled.

We do not understand it to be seriously questioned that, if there are sufficient allegations, the plaintiff can recover for the loss of the tobacco, although he evidently sued for the loss of the machinery. But it is insisted that he has not made sufficient allegations for that purpose, as the value of the tobacco at the time of the fire is not stated. In *Jones v. Ins. Co.,* 55 Mo., 342, where the plaintiff sued on a policy and failed to state the value of the property destroyed, the Court held that averments substantially like those in this case were sufficient as to the value of the property. "These averments of value and loss," says the Court, "would seem to be sufficient after verdict. That the property insured was totally destroyed by fire would seem to be a distinct averment of loss to the value of the property. That an insurance was given on this property to the amount of $1,200 would strongly imply that, in the estimation of the underwriters, it was at least worth
(493) as much as that or more." To the same effect is *Lane v. Ins. Co.,* 12 Mo., 44, in which the Court also says that the defendant should have taken advantage of the alleged defect by special demurrer, which we know was always directed against the form of the declaration, as framed in violation of some rule of pleading, and not against the substance of the declaration, as disclosing a case insufficient on the merits. Stephen on Pleading (9 Am. Ed.), pp. 44, 140; *Ins. Co., v. Seitz,* 4 Watts and Serg., 273; *Ins. Co., v. Cornick,* 24 Ill., 463. Discussing a similar question in *Wright v. Williams,* 20 Hun., at p. 326, the Court says: "Suffice it at present to say that an actual total loss is averred and that a cause of action for some amount is fairly deducible from the complaint as thus framed." See, also, May on In-

surance (4 Ed.), section 590. The rules of pleading may require that an allegation of the value of the property at the time of the fire should have been made, and also that the plaintiff should have inserted two counts or causes of action in his complaint: one for the loss of the tobacco and the other for the machinery; but these are mere defects of form, which should have been pointed out by motion to make the pleading more definite and certain, or by demurrer, as may have been proper. The defendant preferred to answer, and the plaintiff thereupon tendered issues, not only as to the machinery, but as to the tobacco. It was announced by the court that the issues would be settled at the close of the testimony. There certainly was nothing in the evidence adduced by the plaintiff that affected his right to the issue as to the tobacco, but, on the contrary, there was direct proof of the insurance of the tobacco and its loss by fire and of its value, and there was no objection to this evidence by the defendant. His Honor could have ordered the complaint to be made more definite and certain if "the precise nature of the charge was not apparent" (Code, section 261), so that the allegations might in all respects correspond with the proof, but he erred in summarily dismissing the action without submitting issues to the jury and trying the case upon its real (494) merits, especially where there was a sufficient allegation in the complaint of the right to recover for the loss of the tobacco, although imperfectly made. *McKinnon v. McIntosh,* 98 N. C., 89. The insertion of the claim for the machinery, which proved to be unfounded and which could not be made to answer a useful purpose, will be disregarded and not allowed to vitiate the preceding good averment as to the tobacco, from which the insurance is alleged to have been transferred. *Utile per inutile non vitiatur.* If the transfer was invalid, the insurance still rested on the tobacco, and this appears reasonably and by the clearest intendment from the pleadings. The defendant was aware of it, as it admitted the original insurance of the tobacco and denied the validity of the transfer. It followed necessarily that the tobacco was insured. How, then, could the defendant have been surprised or misled? The plaintiff on his present complaint can recover "such damages as by law he may be entitled to, unless he chooses to ask for and is allowed an amendment." *Jones v. Mial, supra.* The rights of the insured, under a policy of this kind, have not been discussed, as they are fully considered and decided in *Lockhart v. Cooper,* 87 N. C., 149, and as the argument of counsel was mainly addressed to the other question.

New trial.

CLARK, C. J., concurring: The complaint alleges that the policy of insurance issued by the defendant was for $1,500 insurance on tobacco;

that the tobacco was destroyed during the life of the policy, by fire; that the plaintiff had theretofore requested defendant's agent to transfer the insurance from the tobacco to the machinery; that said agent had authority to make such transfer and had frequently made similar transfers. There is no averment that the transfer of the insur-
(495) ance to the machinery was in fact made, though the complaint does allege that "plaintiff is advised by counsel that the policy, 'on account of such transfer,' covered said machinery." This is evidently merely an allegation that the legal effect of such request to the agent, etc., was to transfer the policy to the machinery; and, further, the complaint asks judgment for the recovery of $1,500 upon the value of the machinery. The answer denies any transfer of the insurance to the machinery, and on the trial there was no proof of such transfer, and the policy itself, being put in evidence, showed that in fact no transfer had been made.

Thus there was neither allegation nor proof of a transfer of the insurance to the machinery; there was allegation that the insurance was upon the tobacco and proof by the policy itself that it had not been transferred, supporting the averment of the answer to the same effect. The indirect statement that by "such transfer" the policy covered the machinery is the assertion of a legal inference merely, and is not supported by any allegation of fact in the complaint. It is true that the complaint asks for judgment for $1,500 upon the machinery, but the demand for judgment is immaterial. The court will grant any relief which is "authorized by the facts alleged and proven," whether such relief is demanded in the prayer for judgment or not, and even when an entirely different relief is prayed for. Clark's Code (3 Ed.), pp. 200, 201, and numerous cases there cited.

The distinguishing feature of the reformed procedure is that cases shall be tried upon their merits, disregarding technicalities and over-refinements. The Code, 260, provides that "pleadings shall be liberally construed with a view to substantial justice between the parties," and section 269 provides, "no variance between the allegation in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits." This section further provides that the adverse party
(496) must allege that he was misled, and must prove that fact "to the satisfaction of the court," and wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action or loss of substantial rights by either party. The sole object is that the case shall be tried and decided upon its merits. Here the defendant did not allege that he was misled, and the judge

did not find that this was shown to his satisfaction. Had he done so, justice and the statute prescribe as the sole remedy an amendment upon such terms as the court might deem just. The court could not visit upon the plaintiff, as a penalty for inadvertence in pleading, or a mistaken allegation of fact (if made), a dismissal of the action. In fact, it is clear that the defendant was not "misled" to his prejudice "in maintaining his action upon the merits." His own averment of no transfer was proven, and the plaintiff having alleged and shown the insurance upon the tobacco and its loss, was entitled to recover its value, not to exceed the amount of the policy. There was no need to aver the value of the tobacco lost. That was a matter to be determined, not to exceed the contract for indemnity, $1,500. If the defendant wished the amount more definitely stated, he could have asked for an order to require the plaintiff to make his pleading more definite upon that point. See numerous cases Clark's Code (3 Ed.), pp. 290-293, and pp. 275-278.

There was no need to amend the complaint, for the insurance upon the tobacco and the loss of the tobacco were alleged and proven. There was no direct allegation of a transfer of the policy of insurance as a fact and no proof of it, but a denial of such transfer and proof that the insurance had not been transferred. There was no need to amend the prayer for judgment, for its support was immaterial. Averment of the total loss of the tobacco entitled plaintiff to show its value.

In granting judgment of nonsuit there was error.

BROWN, J., dissenting: The question presented is as to (497) whether there was a material variance between the allegations and proof, which prevented a recovery upon the proof offered in the absence of an amendment to the complaint, which was not asked. I have examined the case with care, impressed with the conviction that the merits are with the plaintiff. Nevertheless, I am impelled to conclude that there was such a variance as prevented a recovery upon the complaint in its present form. The allegations of the complaint are: That on 15 January, 1903, W. L. Brown was agent of the defendant company in Greenville, N. C.; that on the date mentioned the defendant, through said agent, issued its policy to the Gorman-Wright Company, insuring certain tobacco contained in a building in Greenville, occupied as a tobacco prizery; that the lot on which the prizery was situated and the machinery in the prizery was owned by J. N. and P. H. Gorman; that J. N. Gorman was the secretary and general manager of the Gorman-White Company; that on 9 April, 1903, J. N. Gorman notified said agent to transfer said policy from the tobacco to the machinery in said prizery, which machinery belonged to the partnership of J. N. and P. H. Gorman; that said machinery was worth

$4,000; that said agent was authorized to make said transfer, and that J. N. Gorman had frequently had similar transfers made by said agent; that in July, 1903, the said prizery, tobacco, and machinery were destroyed by fire; that proof of loss was filed with the defendant for the payment of said policy of $1,500, which policy, on account of said transfer, covered said machinery; that on 25 November, 1903, the Gor-Man-Wright Company and J. N. and P. H. Gorman transferred all their interest in said policy to the plaintiff; that the defendant is indebted to the plaintiff in the sum of $1,500, being 75 per cent of the value of said machinery in excess of this sum. Section 8 of the complaint is in these words: "That proof of loss was promptly made out and submitted to the defendant company for the payment of
(498) said policy of $1,500, which policy, as plaintiff is advised by counsel, on account of said transfer, covered said machinery in said prizehouse, but defendant failed and refused to pay said policy or to adjust the loss thereon, claiming that it was not liable in any amount therefor." Section 10 is as follows: "That the defendant is justly indebted to the plaintiff in the sum of $1,500, 75 per cent of the value of said machinery being in excess of this sum."

Nowhere in the complaint is the value of the tobacco stated or any allegation made of damage sustained by the plaintiff on account of its loss. The only allegation whatever of any loss is on account of the machinery. It was admitted upon argument and it is virtually admitted in plaintiff's brief that the proof failed to show that the policy had ever been transferred from the tobacco to the machinery. The plaintiff now contends that, notwithstanding that defect in the proof, he is entitled to recover for the loss of the tobacco which was covered by the policy. This is not a case where the policy covers all the property destroyed. It did not cover the tobacco and machinery both. It covered one only, and the plaintiff thought it was the machinery and not the tobacco. So the complaint is framed with the idea and purpose to exclude the tobacco and include the machinery within the protection of the policy. Having failed to show that the policy covered the machinery, how can plaintiff recover for loss of the tobacco upon a complaint which completely negatives the idea that the tobacco was insured by the policy at the time of the fire? The doctrine of aider in pleading cannot apply here. The denials in the answer raise issues as to the transfer of the policy from the tobacco to the machinery, and as to the assignment to plaintiff. The fact that the answer denies the transfer of the policy from the tobacco to the machinery will not permit the plaintiff to recover for the tobacco. It is a simple denial and not a statement of the facts. Even if it recited the
(499) facts, the plaintiff will not be allowed to abandon the averments

in the complaint and recover upon a collateral statement of facts set out in the answer. *Grant v. Burgwyn,* 88 N. C., 95. The proper course was to ask leave to amend. *Rand v. Bank,* 77 N. C., 152; *Willis v. Branch,* 94 N. C., 142. In this latter case it is said: "A variance arises when the proofs do not sustain the cause of action alleged in the complaint. If it is immaterial, it will be disregarded; if material and misleading, the court may in its discretion allow an amendment." Issues arise on the pleadings. They do not arise on the proofs. Therefore, the rule that *allegata et probata* must correspond obtains under The Code the same as under the old system. The only difference is that a new rule has been introduced for determining what a variance is and its consequences. Pomeroy on Remedies, section 553. An immaterial variance is one which is so slight and unimportant that the adverse party could not reasonably be misled by it. The court may, then, order an amendment or disregard the variance and proceed without amendment. When the variance is substantial, such that the adverse party may have been misled by the averments, if the proof bears some apparent relation to the averments, an amendment may be allowed. *Carpenter v. Huffsteller,* 87 N. C., 278. But the amendment is essential, for proof without allegation is as ineffective as allegation without proof. *McLaurin v. Cronly,* 90 N. C., 50; *McKee v. Lineberger,* 69 N. C., 217. In *Shelton v. Davis,* 69 N. C., 324, *Chief Justice Pearson* said: "The idea of giving the plaintiff judgment upon a state of facts not alleged in the complaint and entirely inconsistent with it, whatever may be said in regard to the progress of the age and the liberal and enlarged views of C. C. P., is a proposition which no member of this Court can for a moment entertain." In this case the complaint practically avers that the machinery was insured and the tobacco was not. The proof shows that the tobacco was insured and the machinery was not. The suit is brought to recover for the machinery.

The statement of the matter is sufficient to satisfy me that the court below committed no error. (500)

Cited: Alley v. Howell, 141 N. C., 115; *Davis v. Wall,* 142 N. C., 451; *Boney v. R. R.,* 151 N. C., 121.

AREY v. COMMISSIONERS.

(Filed 25 May, 1905.)

Taxation—Distiller—Rectifier.

Under chapter 247, sections 60 and 63, Laws 1903, imposing a tax on distillers and on rectifiers, a distiller who rectified the product of his own distillery is subject to the tax on rectifiers; the two businesses seem to have been regarded by the Legislature as separate, and there is nothing in the Constitution which prohibits the General Assembly from imposing the increased tax upon the distiller who also operates a rectifying plant.

CONTROVERSY without action by D. L. Arey against the Board of Commmissioners of Rowan County, heard by *Bryan, J.*, at Fall Term, 1904, of ROWAN. From a judgment for the defendants, the plaintiff appealed.

Burton Craige and W. H. Woodson for plaintiff.
T. C. Linn for defendants.

BROWN, J. The controversy is submitted to determine the legality of a tax assessed against the plaintiff under sections 60 and 63, chapter 247, Laws 1903. The plaintiff operates a 40-bushel distillery, and it is admitted he is liable to the tax of $125 assessed against him under section 63. He operates, also, a rectifying plant at the same place and rectifies the product of his own distillery. Section 60 imposes a tax of $200 on rectifiers of liquor. The plaintiff in his brief con-
(501) tends, "that the tax is unconstitutional; that the process of purifying the whiskey is one and the same process in manufacturing whiskey, and that the manufactur's license covers the business in which he is engaged," and he also contends "that rectifying or purifying his own whiskey is not a trade or business in itself, such as to be taxable under the Constitution."

We are not conversant with the processes of distilling and manufacturing liquor, but the General Assembly, exercising its knowledge, has classified rectifying as a business entirely distinct from distilling. It has taxed rectifying in the section with wholesalers and has exempted the rectifier from the wholesaler's tax. Therefore, the rectifier may deliver his product under section 60 to the common carrier without additional tax.

The same privilege is given distillers in section 63, but nowhere in that section is the rectifier associated with the distiller. The two seem to have been regarded by the Legislative mind as separate and distinct vocations, although dealing in the same commodity.

The burden of proof is on the plaintiff to show that the two are but one and the same trade or business. There are no facts set forth in the record from which we can infer it.

Assuming that the two occupations of distilling and rectifying may be united in one and conducted by one person, there is nothing in our Constitution which prohibits the General Assembly from imposing the increased tax upon the distiller who also operates a rectifying plant. Subject to the organic law, the power of the General Assembly to tax is suppreme.

Affirmed.

Cited: Washington v. Lumber Co., 145 N. C., 14.

(502)

LEDFORD v. EMERSON.

(Filed 25 May, 1905.)

Parol Evidence—Collateral Writings—Rule as to Parol Evidence.

1. In an action to recover the plaintiff's share of the proceeds of the sale of options, which the plaintiff alleges the defendant has fraudulently withheld from him, it is competent to permit parol evidence of the options and their contents, as they are collateral to the issue.
2. The rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between parties to the writing and when its enforcement is the substantial cause of action.

ACTION by J. P. Ledford against A. S. Emerson, heard by *Shaw,* J., and a jury, at Spring Term, 1905, of CHEROKEE. From a judgment of nonsuit, the plaintiff appealed.

Busbee & Busbee, Axley & Axley, and E. B. Norvell for plaintiff.
Dillard & Bell for defendant.

BROWN, J. The plaintiff alleges that he procured options on about 60,000 acres of land and placed the same in the hands of the defendant for sale; that the defendant sold the options for $10,000 cash and paid the plaintiff $600, and by false and fraudulent statement to the plaintiff obtained from the plaintiff a receipt in full.

The plaintiff sues to recover $4,400, the remainder of his half of the $10,000. Neither the options nor their contents are in litigation.

On the trial the plaintiff proposed to show by his own evidence that he had performed his part of the contract between himself and de-

(503) fendant; that he took options for about 65,000 acres of land, delivered the same to the defendant, and that the defendant sold them for $10,000. On objection of defendant, the court refused to allow the plaintiff to show this, holding that the plaintiff could not speak of the options without producing them and refusing to allow the evidence offered by the plaintiff.

His Honor misconceived the kind of action that was being tried, for from his ruling he must have thought that the options or their contents were in litigation—were the gravamen of this action—when they were not. The purpose of the action is to recover the plaintiff's share of the proceeds of the sale of the options, which the plaintiff alleges the defendant has fraudulently withheld from him. It was competent, therefore, to permit parol evidence of the options and their contents. They were collateral to the issue. Our Reports contain numerous precedents. *Carden v. McConnell,* 116 N. C., 875; *Pollock v. Wilcox,* 68 N. C., 50; *Reynolds v. Magness,* 24 N. C., 26; 1 Greenleaf Ev., 275-279.

The rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between parties to the writing, and when its enforcement is the substantial cause of action.

The contention of the defendant that the plaintiff had waived or abandoned his right to appeal cannot be sustained.

New trial.

Cited: S. c., 141 N. C., 597; *S. c.,* 143 N. C., 527; *Andrews v. Grimes,* 148 N. C., 439; *Rabon v. R. R.,* 149 N. C., 60; *Whitehurst v. Padgett,* 157 N. C., 429; *Holloman v. R. R.,* 172 N. C., 375; *Morrison v. Hartley,* 178 N. C., 620; *Miles v. Walker,* 179 N. C., 484; *Hall v. Giessell, ib.,* 659.

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(504)

HEMPHILL v. HEMPHILL.

(Filed 25 May, 1905.)

Hearsay—Declarations and General Reputation as to Boundaries—When Competent.

1. The declarations of a person as to the location of a boundary are competent if the declarations were made *ante litem motam* and the declarant is dead when they are offered, and he was disinterested when they were made.

2. Evidence of general reputation as to the location of a boundary is competent if the declaration has its origin at a time comparatively remote and *ante litem motam*, and attaches itself to some monument of boundary or natural object or is supported by evidence of occupation and acquiescence tending to give the land in question some definite location.

ACTION by Benjamin C. Hemphill and wife against T. C. Hemphill and others, heard before *Justice, J.*, and a jury, at September Term, 1904, of BUNCOMBE.

This is an action of ejectment. The question at issue is the location of the line dividing the lands of the plaintiffs and defendants. Both of these tracts originally constituted one tract owned by Andrew Hemphill. About 1850 a parol division of this land was made between B. C. Hemphill, one of the plaintiffs, and John R. Hemphill, both sons of Andrew Hemphill. The plaintiffs claim that the line in question, located when the land was divided, runs from the mouth of the branch emptying into Reem's Creek to the point of a ridge, and thence in a southeasterly direction on the face of the mountain across minor ridges and gullies to the "Jump Corner." The defendants claim that the line runs from the mouth of the branch to the point of the ridge, and thence in a northeasterly direction up the ridge to the Vance line. Between these two lines contended for is the triangular piece of land in (505) controversy.

In 1860 John R. Hemphill executed a bond for title to a portion of the land to John Brigman. John Brigman died and John R. Hemphill, in accordance with the terms of the bond for title, executed a deed to the heirs of John Brigman. This land was sold by J. G. Chambers, administrator of John Brigman, to pay the intestate's debts, and James Hemphill became the purchaser. James Hemphill conveyed the land by deed to his children, Eliza, Jane, Brank, and Bettie Shope, defendants.

Verdict and judgment for the plaintiffs, and the defendants appealed.

Moore & Rollins for plaintiffs.

Frank Carter, Locke Craig, and H. C. Chedester for defendants.

HOKE, J., after stating the facts: The rights of the parties to this controversy were made to depend upon the correct location of the divisional line between Benjamin C. and John R. Hemphill, under whom the defendants claim; and the defendants contend that the true location of this line runs from the "mouth of the branch to the point of the ridge and thence in a northeasterly direction up the ridge to the Vance line." In order to establish this position, the defendants offered, first, the deed from John R. Hemphill, now dead, to the heirs of John Brigman, bearing date 18 November, 1866, as a declaration of John R. Hemphill on the correct location of the line in dispute.

The defendants further proposed to prove by a witness, John G. Chambers, that he had known the land in controversy for fifty years; that he knew the general reputation in that community as to the true location of this divisional line, and that according to such reputation the same ran along the top of this ridge, and was placed as the defendants claimed. On objection by the plaintiffs, this testimony was (506) held incompetent, and the defendants excepted.

It is the law in this State that under certain restrictions both hearsay evidence and common reputation are admissible on questions of private boundary. *Sasser v. Herring,* 14 N. C., 340; *Shaffer v. Gaynor,* 117 N. C., 15; *Yow v. Hamilton,* 136 N. C., 357.

The restrictions on hearsay evidence of this character—declaration of an individual as to the location of certain lines and corners—established by repeated decisions, are: That the declarations be made *ante litem motam;* that the declarant be dead when they are offered, and that he was disinterested when they were made. *Bethea v. Byrd,* 95 N. C., 309; *Caldwell v. Neely,* 81 N. C., 114.

The declarations of John R. Hemphill in this deed to the heirs of John Brigman, as to the location of his own line, are heresay. They are incompetent for the reason that he was interested when the same were made, and the judge below ruled correctly in excluding them.

On the second point: The evidence offered from the witness John G. Chambers, on the general reputation as to the location of the divisional line: Such evidence has been uniformly received in this State, and the restriction put upon it by our decisions seems to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always *ante litem motam.* Second, that it should attach itself to some monument of boundary, or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location. *Tate v. Southard,* 8 N. C., 45; *Mendenhall v. Cassells,* 20 N. C., 43; *Dobson v. Finley,* 53 N. C., 496; *Shaffer v. Gaynor,* 117 N. C., 15; *Westfelt v. Adams* 131 N. C., 379-384. The proposed evidence comes fully up to the requirement of these decisions. The reputation is attached to a place reasonably definite, and the wit- (507) ness stated that he had known the land for fifty years; knew the general reputation in the community as to the line in dispute, and where such line was placed by that reputation. We think it appears by fair intendment that the reputation offered had its origin *ante litem motam* and at a time sufficiently remote.

There was error in rejecting the proposed evidence which entitles the defendant to a

New trial.

Cited: Bland v. Beasley, 140 N. C., 631, 632; *Lumber Co. v. Triplett,* 151 N. C., 411, 412; *Lamb v. Copeland,* 158 N. C., 138; *Bank v. Whilden,* 159 N. C., 281; *Picks v. Woodward, ib.,* 648; *Sullivan v. Blount,* 165 N. C., 10; *Lumber Co. v. Lumber Co.,* 169 N. C., 96; *Byrd v. Spruce Co.,* 170 N. C., 434; *Lumber Co. v. Hinton,* 171 N. C., 30; *Stewart v. Stephenson,* 172 N. C., 83; *Bank v. Whilden,* 175 N. C., 54; *Singleton v. Roebuck,* 178 N. C., 203.

WOOD v. TINSLEY.

(Filed 25 May, 1905.)

Effect of Connor Act on Parol Contracts—Rights of Vendee—Purchaser for Value—Purchase Money and Betterments.

1. Since the Connor Act (Laws 1885, ch. 147), one who goes into possession of land under a parol contract to convey, paying the purchase-money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase-money and improvements as against a purchaser for value from the vendor, holding under a duly registered deed, though the purchaser had notice of the contract. (Expressions in the opinion in *Kelly v. Johnson,* 135 N. C., 647, conflicting herewith were *obiter,* and are corrected.)
2. A claim for betterments, under section 473 of The Code, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land.
3. *Quere:* What effect has the Connor Act upon equities and equitable titles arising out of parol trusts or attaching to the legal title by construction or implication?

ACTION by T. S. Wood and another against Pearce Tinsley, heard by *Shaw, J.,* and a jury, at August Term, 1904, of TRANSYLVANIA. (508)

This was an action for the recovery of land. The plaintiffs alleged that they are the owners of the land described in the complaint and that the defendant was in the wrongful possession thereof. The defendant by way of answer alleged that prior to 1 December, 1893, one W. L. Lankford was the owner in fee of the land described in the complaint, and contracted in parol to sell the land to the defendant, with the exception of 10 acres; that in pursuance of said contract the defendant paid Lankford the sum of $75, the purchase price thereof; that, relying on said contract, he erected a dwelling-house, cleared 6 acres and planted an orchard thereon; that the plaintiffs had full

knowledge of the fact that he had purchased the land from Lankford and had paid him for it and had made improvements on it, taking the deed therefor. The plaintiffs by way of reply admitted that Lankford was the owner of the land, denied that they had any knowledge or information in regard to the alleged contract of purchase or improvements, etc. The only issues submitted to the jury were as to the plaintiffs' ownership and the defendant's possession. On the trial the defendant offered to prove that he had made a verbal agreement with Lankford to purchase the land and had gone into the possession of the same in the year 1893; that he had paid the purchase money and had built a dwelling-house, etc., on the land. The defendant also offered to prove that Pless, the mortgagee, and the plaintiffs all had notice of said contract, etc. The plaintiffs objected to all of the evidence on the ground that the alleged contract of purchase was not in writing and that they claimed under the mortgage executed by Lankford to one Pless, which was duly registered, and that pursuant to the power in the mortgage, Pless sold the land, which was bought by the plaintiffs, who took a deed therefor, which was duly recorded. The objection was sustained, and the defendant excepted. Under the instruction of the court the jury returned a verdict in favor of the plaintiffs, and
(509) from the judgment thereon the defendant appealed.

George A. Shuford and Shepherd & Shepherd for plaintiffs.
W. W. Zachary for defendant.

CONNOR, J., after stating the facts: The sole question presented by the defendant's exception is whether, since Laws 1885, ch. 147, one going into possession of land under a parol contract to convey, paying a part or all of the purchase money and making improvements thereon, can resist an action for the possession by a purchaser for value from the vendor, until he has paid the amount expended for purchase money and improvements. Chapter 147 enacts that "No conveyance of land, nor contract to convey, nor lease for more than three years, shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor or bargainor, but from the registration of such deed." This Court has consistently, and without the slightest variation, held that the statute placed deeds and contracts to convey upon the same footing, as to registration, as mortgages and deeds of trust had theretofore been since Laws 1829 (Code, section 1254). *Reade, J.*, in *Robinson v. Willoughby*, 70 N. C., 358, said: "Prior to 1829, it was settled by elementary writers and by the decisions of our own courts that an unregistered encumbrance would be upheld by the courts of equity against a subsequent registered encum-

brance with notice of the former, and that creditors and purchasers for value were affected by notice of prior equities." He said that such was then the law, except as to deeds of trust and mortgages, concluding: "Since that statute, the decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors, unless they are registered; and that they take effect only from and after registration, just as if they had (510) been executed then and there." *Blevins v. Barker,* 75 N. C., 436; *Todd v. Outlaw,* 79 N. C., 237, and many other cases. In *Hinton v. Leigh,* 102 N. C., 28, *Merrimon, J.,* says that no notice, "however clear," of a prior unregistered mortgage could prejudice a purchaser for value. *Quinnerly v. Quinnerly,* 114 N. C., 145. It is thus settled beyond controversy that as against purchasers for value an unrecorded mortgage has no validity either by way of passing title or creating a lien, equitable or otherwise.

Referring to the act of 1885 in *Hooker v. Nichols,* 116 N. C., 157, *Faircloth, C. J.,* said: "It will be noted that the effective words of this act are identical in substance with section 1254 of The Code, and we are driven to the conclusion that the Legislature, with full knowledge of the meaning and effect of said act of 1829, intended to apply the same rule to all conveyances of land, as declared in the late act of 1885, and we must give the same effect to it." *Allen v. Bolen,* 114 N. C., 560.

In *Collins v. Davis,* 132 N. C., 106, we held that no notice, however full or formal, will supply the want of registration. In *Maddox v. Arp,* 114 N. C., 585, *Shepherd, C. J.,* referring to the position of one claiming under an unregistered contract to convey, said: "Actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value whose deed is duly registered according to law." These, and other cases in our Reports, fully sustain the proposition that if the defendant had taken a written contract from Lankford to convey, and paid the entire purchase money, going into possession and putting improvements upon the land, and had failed to register such contract, it would not be valid at law to pass any property in the land against the plaintiff.

It must follow from the statute and these decisions that if, (511) after the execution and registration of the mortgage to Pless, Lankford had, in accordance with his parol contract, executed a deed to the defendant, it would have been of no validity as against the plaintiff. It is difficult to perceive how the defendant, being in possession under a parol contract, not enforcible against Lankford, can be in any better or stronger position than if he had Lankford's deed unregistered—or how he has any equity affecting the legal title to which he can resort to prevent the plaintiff's recovery.

Our attention is called to a number of decisions of this Court in which it is held that when one induces another to enter upon and improve land under a parol promise to convey, he will not, upon repudiating his contract, be permitted to oust him until he has compensated such person for the enhanced value of the land, less reasonable rents and profits. The doctrine is first announced by this Court in *Baker v. Carson,* 21 N. C., 381. The right of the vendee to retain possession does not rest upon the idea that any equitable right to or trust attaches to the legal title by virtue of the parol agreement, followed by possession and improvement. This right was recognized by the English chancellors under the doctrine of part performance. Mr. Bispham thus illustrates the doctrine: "Hence, if a verbal contract is made for the sale of real estate, and is acted upon to the extent above indicated, neither party can then refuse to perform it on the ground that the provisions of the statute of frauds have not been complied with. If, for example, upon the faith of a parol agreement, the purchaser has gone into possession, has paid the purchase money and has made valuable improvements, the vendor will not be suffered to set up the statute of frauds as a ground for refusing to execute the contract. The case, as it is said, is taken out of the statute." Eq., 384. This doctrine is held and enforced in many of the States of the Union. but has been repudiated by this Court. *Ellis v. Ellis,* 16 N. C.,
(512) 341, and other cases. In *Baker v. Carson, supra,* the Court speaking of the right to remain in possession, asserted by the vendee, said: "This claim to relief is not founded upon the supposed existence of any contract of which it seeks execution, or for the breach of which it asks compensation or damages. It is an appeal to the court to prevent fraud." This decision was followed in *Albea v. Griffin,* 22 N. C., 9. *Gaston, J.,* said: "If they (the vendors) repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property." In all of the cases found in our Reports involving this equitable doctrine, the same principle prevails. Prior to *Luton v. Badham,* 127 N. C., 96, the principle was invoked by the vendee to be permitted to retain possession until he was compensated for his improvements. In that case the Court held that the vendor, being in possession, is liable to the vendee for the value of the improvements. In none of the cases is it suggested that the vendee, under such circumstances, may have the vendor declared a trustee, or upon any other principle acquire the title, either legal or equitable, to the land. No right in or to the property accrues to the vendee by virtue of the parol contract to convey. If he seek to enforce it and it be denied, he cannot show its terms,

or, if it be admitted and the statute be pleaded, the court will not enforce it. It may be said that as Lankford could not oust the defendant until he has compensated him for his improvement, the plaintiff, taking title with notice of the inability of his grantor, stands in his shoes and takes subject to the burden or duty resting upon him. It is true that when one takes with notice of an equity, he takes subject to such equity. To permit him to take free from an equity attaching to the title in the hands of his grantor, with notice thereof, would be to permit him to participate in a fraud and profit thereby. There is another well-settled maxim—equity follows the law. As we (513) have seen, the law expressly declares that the contract to convey is void as against the paintiff, because not registered; it is difficult to see how any equity can attach to the plaintiff's perfect title by reason of a void, unregistered agreement made with his grantor. For the grantor in an unrecorded deed to sell and convey the same land to another person is a fraud, and if the second grantee has notice of the first deed, he participates in the fraud. Yet, in obedience to a well-defined and settled public policy which finds expression in clear and explicit language in the statute, the second grantee takes the title free from any rights or claims of the first grantor or vendor. The answer to the objection is *ita lex scripta est.* The right to retain possession, as against the vendor, repudiating his parol agreement, does not rest upon the statute giving compensation for betterments. As we have seen, it had its origin long before the passage of the act of 1871-'72, Code, section 473. In *Justice v. Baxter,* 93 N. C., 405, the defendant claimed his betterments under the statute. The plaintiff objected for that the contract to convey made by a husband and his wife, the latter being an infant, was never recorded. The plaintiff insisted that the defendant in tracing his title back would have discovered that the title was in *feme covert* and had never been divested by any valid conveyance or contract to convey on her part. The Court held that such a construction of the statute was too narrow. The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. We do not think the defendant is in a position to claim the benefit of this statute. Even if he were in other respects, the exception does not present the question. A claim for betterments under the statute cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed under a judgment declaring the plaintiff the owner of the land. This is illustrated by what is said in *Rumbough v. Young,* (514) 119 N. C., 567.

We have had our attention called to no case in which the defense or claim of the defendant was set up against a purchaser from the original vendor, except as hereinafter noted. However the question may have been decided prior to the act of 1885, we are of the opinion that since that statute no such claim can be maintained against a purchaser for value holding under a duly registered deed. Onr attention is directed to the opinion in *Kelly v. Johnson,* 135 N. C., 647. We decided in that case that one who had been let into possession under a parol agreement and had made improvements was entitled to be compensated, and that as the purchaser had not paid all of the purchase money to the vendor, the vendee interpleader should be paid out of the balance remaining due. The writer, in justice to the other members of the Court, assumes the responsibility for the expressions used in that opinion conflicting with what is here decided, and corrects it by admitting the error into which he fell. The decision in that case is correct; the language, in so far as it expresses the opinion that the purchaser was affected by the parol unrecorded agreement, was erroneous, and the opinion in that respect is modified.

We carefully refrain from expressing any opinion in regard to the operation of the act of 1885 as affecting equities attaching to the legal title, as against purchasers for value, beyond what is necessary to the decision of this case. As we have endeavored to show, the defendant here cannot assert against the plaintiff the right to remain in possession until he is compensated for his improvements, because he claims under an unregistered agreement to convey, which comes directly within the express words of the statute. What effect the statute has upon equities and equitable titles arising out of parol trusts or attaching to the legal title by construction or implication, we (515) express no opinion. The question is important and interesting. Whether persons entitled to such rights come within the words of the statute as claiming under the "donor, bargainor, or lesssor" must be left for future consideration and be decided when presented. The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. That hardships would come to some in applying the rigid statutory rule was well known and duly considered. That every possible effort to reduce the number of such hardships to the smallest possible limit consistent with the integrity of the statute and the enforcement of the policy upon which it was founded, was made, is shown by the carefully drawn provisos and safeguards. The change in our registration laws was demanded by the distressing uncertainty into which the title to land had fallen in the State. No

one could say for himself or advise others with any certainty or safety in regard to a title. Deeds which for years had not been seen or heard of beyond the family chest or drawer were brought forward and registered, destroying "by relation" titles which were supposed to be perfect and for which full value had been paid. The statute has been in force without amendment for twenty years. This Court has uniformly so construed it that the purpose of the Legislature has been effectuated. If the defendant has sustained an injury by the conduct of the person with whom he made a parol contract, which should have been in writing and recorded, it is to be regretted, but it is not the fault of the law. Its protective provisions are clear and explicit. To permit him to disregard it at the expense of the plaintiff, who has obeyed it, would be to seriously impair the value of the statute and return to many of the evils which its enactment sought to remove. The judgment must be

Affirmed.

WALKER, J., concurs in result.

Cited: Piano Co. v. Spruill, 150 N. C., 169; *Smith v. Fuller,* 152 N. C., 14; *Wood v. Lewey,* 153 N. C., 403; *Ballard v. Boyette,* 171 N. C., 26; *Banks v. Cox, ib.,* 81; *Lynch v. Johnson, ib.,* 621; *Pritchard v. Williams,* 175 N. C., 321; *Hooper v. Power Co.,* 180 N. C., 651.

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(516)

NICHOLSON v. RAILROAD.

(Filed 25 May, 1905.)

Fellow-servant Act—Construction of—"Operating" Railroad.

The Fellow-servant Act (Private Laws 1897, ch. 56), giving any employee of a railroad "operating" in this State a cause of action for injuries suffered by the negligence of a fellow-servant, applies to any injury suffered by any employee in any department of work of a railroad which is being operated, but does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated.

ACTION by William Nicholson against the Transylvania Railroad Company, heard by *Ferguson, J.,* and a jury, at October Term, 1904, of JACKSON. From a judgment for the plaintiff, the defendant appealed.

Coleman C. Cowan for plaintiff.

George A. Shuford, W. A. Gash, Walter E. Moore, and Shepherd & Shepherd for defendant.

CLARK, C. J. The evidence tended to show that the plaintiff was injured by the negligence of a fellow-servant, and the defendant asked the court to charge that if the jury should find such to be the fact, and "should further find from the evidence that the defendant, although a railroad corporation operating a railroad in this State, was not operating a railroad at the point where the plaintiff received his alleged injury, nor within a nearer distance to said point than five or six miles, and had laid no track at said point nor within said distance from said point, but was engaged in constructing a railroad at said point, and the plaintiff was employed at said time as a construction hand and was engaged in the work of building a trestle at said
(517) point, and while so engaged was injured by the negligence of said fellow-servant, then the plaintiff is not entitled to recover, and the jury will answer the third issue 'No.'" The refusal of this prayer was error.

The "fellow-servant act," unaccountably printed in Private Laws 1897, chapter 56, provides (section 1), "that any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such employee who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company," and section 2 renders nugatory any waiver, express or implied, of the benefit of said act.

The recent origin and the reason of the rule exempting the master from liability for the negligence of a fellow-servant were first discussed in this Court in *Hobbs v. R. R.*, 107 N. C., 1, and attention was called to the fact that the rule had been abrogated as to railroad employees by statute in many States. After the passage in this State in 1897 of the above-cited statute abolishing the fellow-servant doctrine as to railroad employees, the act was fully discussed and its constitutionality sustained in *Hancock v. R. R.*, 124 N. C., 222; *Coley v. R. R.*, 128 N. C., 534, and in the same case, on rehearing, 129 N. C., 407, and that ruling has been sustained in all the cases since, and similar statutes in other States have been held not in violation of the Fourteenth Amendment by several decisions of the United States Supreme Court.

In *Mott v. R. R.*, 131 N. C., 237, it was sought to curtail and restrict the act so that it should apply only to railroad employees engaged in operating trains; but the Court held to the contrary, and said: "The language of the statute is both comprehensive and explicit. It em-

braces injuries sustained by (quoting the act) 'any servant (518) or employee of any railroad company . . . in the course of his services or employment with said company.' The plaintiff was an employee and was injured in the course of his service or employment." In that case the plaintiff, working in the repair shops, was injured by the negligence of a fellow-servant while removing a red-hot tire from an engine, and it was held that he could recover.

The same ruling was repeated in *Sigman v. R. R.*, 135 N. C., 184, where it is said: "The plaintiff was injured by the negligence of a fellow-servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow-servant law, chapter 56, Private Laws 1897, applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service." Then, after quoting the above extract from *Mott v. R. R.*, 131 N. C., 237, it is added that to the same effect were "*R. R. v. Pontius*, 157 U. S., 209, cited since with approval in *Tullis v. R. R.*, 175 U. S., 352; *R. R. v. Harris*, 33 Kan., 416; *R. R. v. Koehler*, 37 Kan., 463; *R. R. v. Stahley*, 62 Fed., 363, and many other cases." To those we now add (from among many) the well-considered case of *Callahan v. R. R.* (Mo.), 60 L. R. A., 249, which, reviewing the authorities to that time (it was filed December, 1902), holds with this Court that "a statute making a railroad company liable for injuries to servants through the negligence of fellow-servants does not violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work."

Knowing from the history of the strenuous discussion for and against the passage of the act, and from its language as well, that the intention of the Legislature was that the doctrine of the nonliability of the master for injuries to an employee caused by the negligence (519) of a fellow-servant should be abolished as to all employees in railroad service, "whether (as we have said in *Sigman v. R. R., supra*) they are running trains or rendering any other service," we have no disposition to do other than to affirm fully our rulings already made and cited above. But the act applies only to employees of a "railroad operating," not that such employees must be operating the trains, but they must be employees, in some department of its work, of a railroad which is being operated. Such business is a distinct, well-known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the

service of an "operating railroad," are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow-servant. It is not necessary to show that the plaintiff was injured by a fellow-servant while operating a train, but he must "show that he was injured while performing a service necessary to or connected with the use and operation of the road." *R. R. v. Vincent,* 56 Kan., 344; *Stubbs v. R. R.,* 85 Mo. App., 192; *Thompson v. R. R.,* 54 Ga., 509; *R. R. v. Ivey,* 73 Ga., 504.

Here the railroad was being "constructed," not "operated." It was 5 or 6 miles from the completed track, still farther from the track on which trains were being operated. Though it was in the construction of the extension of a railroad, the work was that of building a bridge or trestle, and the liabilities of the employer were the same as those of any one else engaged in bridge building. It does not matter that elsewhere the same employer was "operating" a railroad. It was not doing so at this point. Here it was not a railroad at all. It was constructing, building, what later would become a part of an "operating railroad."

(520) It is true, an employee injured by the negligence of a fellow-servant while building or repairing a bridge on the line of an operating railroad, under precisely similar circumstances, could recover of the railroad company, while here he cannot. That is because the statute must draw the line somewhere, and the Legislature has seen fit to restrict the repeal of the former law to "any servant or employee of any railroad company operating" in this State, which means in the course of its "operation" of that business, in any of its departments, but not in the course of its "construction."

We must read the act as it has been written by the law-making power, neither restricting nor extending its effect. For the error in refusing this prayer there must be a

New trial.

Cited: O'Neal v. R. R., 152 N. C., 405; *Bailey v. Meadows Co., ib.,* 604; *Twiddy v. Lumber Co.,* 154 N. C., 239; *Jackson v. Lumber Co.,* 158 N. C., 320; *Buckner v. R. R.,* 164 N. C., 204; *McDonald v. R. R.,* 165 N. C., 625; *Lloyd v. R. R.,* 168 N. C., 650.

DUCKWORTH v. JORDAN.

(Filed 25 May, 1905.)

Wills—Lapsed Devise—Effect—Equitable Conversion—Reconversion—Election—Infants—Husband and Wife—Descent and Distribution—Power of Sale in Will.

1. Under section 2142 of The Code, a devise which lapsed by the death of the devisee before the testator passes under the residuary clause, where there is nothing in the will which shows a contrary intention.
2. An equitable conversion is a change of property from real into personal and from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity.
3. Before any change in the property has taken place there may be a reconversion, which occurs where the beneficiaries by some explicit and binding action direct that no actual conversion shall take place, and elect to take the property in its original form, and if the election is properly made, the power of sale under the will is extinguished, and the beneficiaries have the right to hold the land *in specie*, unless it be required to pay the debts of the testator.
4. Where some of the beneficiaries are infants, an election cannot be made by or for them, except by sanction and order of the court after due inquiry, disclosing that it would be for the benefit of the infants that a reconversion should be had.
5. For the purposes of devolution and transfer, where there has been an equitable conversion of the property, land is considered as money, and the share of the wife, who died without action concerning it, devolved on her husband as her sole distributee under the statute, in the absence of debts against her estate, and he alone is required to elect as to her share.

ACTION by Joseph E. Duckworth, administrator with the will (521) annexed of Thomas P. Jordan, against William B. Jordan and others, heard by *Neal, J.*, at April Term, 1905, of TRANSYLVANIA. This was an action to obtain a construction of the will of Thomas P. Jordan.

On 28 August, 1879, Thomas P. Jordan made and published his will as follows:

"First. That my beloved wife Nancy C. Jordan, shall provide for my body a decent burial and pay all funeral expenses, together with my just debts, howsoever and to whomsoever owing, out of the money that may first come into her hands as a part or parcel of my estate.

"Second. I give and bequeath to my beloved wife, Nancy C. Jordan, all the lands whereon I now live and all the personal property that I may be in possession of, together with all moneys, notes, and accounts, all the crops of every description on the plantation whereon I now live, and all the provisions and stock on hand at the time of my death, to have and to hold to her own use, the said Nancy C. Jordan, for and during her natural life.

"Third. After the death of my beloved wife, Nancy C. Jordan, I give and bequeath unto my nephew, Thomas P. Jordan, all of the tract of land whereon we now live, to have and to hold to him and to his heirs in fee simple forever.

"Fourth. My will and desire is that all the residue of my estate, after the death of my beloved wife, Nancy C. Jordan, shall be
(522) sold, and the debts owing shall be collected, and to be equally divided and paid over to my brother, S. D. Jordan's, children, to each and every one of them, their executors, administrators, and assigns, forever.

"Fifth, and lastly, I do hereby constitute and appoint my brother, S. D. Jordan, and friend, James M. Davis, my lawful executors to all intents and purposes to execute this my last will and testament according to the true intent and meaning thereof."

The testator died in 1896. Thomas P. Jordan, his nephew, the devisee mentioned in the third paragraph of the will, died before the testator. Nancy C. Jordan, the wife of the testator, survived her husband and died in 1898. The executors mentioned in the will refused to qualify as such, and the plaintiff was appointed administrator of the testator, with the will annexed. The children of S. D. Jordan, the brother of the testator mentioned in the fourth paragraph of the will, living at the date of the death of the testator, were the defendants William B. Jordan, Sallie B. Chumbley, wife of Robert Chumbley, Mary P. Parks, wife of O. A. Parks, and J. P. Jordan and Hannah Patterson, wife of ——— Patterson, who subsequently died, leaving her husband, and Nettie Patterson, Neta Patterson, Nellie Patterson, Joseph Patterson, E. M. Patterson, and W. H. Patterson, her children. The husband of Hannah Patterson, and all of her children, are parties defendant hereto. The last four named are minors and are represented herein by their guardian, G. W. Wilson. The husband of Hannah Patterson was made a defendant on the trial and adopted the answer of his codefendants then on file.

All of the children of S. D. Jordan, the brother of the testator, except Hannah Patterson, conveyed their interest in the land devised in the second and third paragraphs of the will, by deed in 190___, to the defendants W. B. Duckworth and W. P. Whitmire, and the
(523) children of Hannah Patterson who were of age joined with them in the deed.

The plaintiff brought this action to have the "court to construe said will, and every part thereof, in so far as the same applies to the rights, powers, and duties of the plaintiff as administartor with the will annexed, and that the court give the plaintiff such instructions, directions, and orders as may be necessary to enable him to fully discharge his

rights, powers, and duties under said will," etc.

The defendants admit that Thomas P. Jordan made the will, that he is dead, and that the plaintiff is his administrator as alleged; they also admit that Thomas P. Jordan, his nephew, died before the death of the testator, and that the children of S. D. Jordan are correctly named; that all of said children, except Hannah Patterson, conveyed their interests in the land contained in the lapsed devise to the nephew to the defendants Duckworth and Whitmire, and that all of the children of Hannah Patterson who are of age had joined in said deed.

The defendants set up in their answer, among other things, that they had elected to take the said lands instead of the proceeds thereof, by way of reconversion thereof, to prevent the exercise of the power claimed by the plaintiff to sell the same.

The court held that the lapsed devise to the nephew did not fall into and was not included in the residuary clause (item 4 of the will). Defendants excepted and appealed.

Merrimon & Merrimon for plaintiff.
Moore & Rollins for defendants.

HOKE. J., after stating the facts: From the foregoing statement it appears that the testator devised his home lands to his wife, and after her death to his nephew, Thomas P. Jordan. Under the fourth item of the will it is directed that after the death of his wife, all the residue of the testator's estate shall be sold and the proceeds (524) equally divided among the children of S. D. Jordan; that Thomas P. Jordan died before the testator, and after the testator's death the wife died, and no sale of the land has yet taken place; that all of the children of S. D. Jorden have conveyed their interest in the land of the testator to the defendants W. B. Duckworth and W. P. Whitmire, except Hannah Patterson, who died leaving her surviving a husband and six children, four of whom are minors; that the adult children of Hannah Patterson, deceased, have joined in the conveyance to Duckworth and Whitmire; that all of them, and also the husband of Hannah Patterson, are parties defendant—the infants being duly represented by guardian—and all answer, stating that they elect to take the land by way of reconversion.

On these facts the questions presented are:

1. Whether the devise in the second item of the will of Thomas P. Jordan, which lapsed by the death of the devisee before the testator, passed under the reisduary clause to the children of S. D. Jordan.

2. In case the lapsed devise does pass under the residuary clause, have the beneficiaries under said clause the right to hold the same as

land, or must it be sold by the plaintiff as administrator and the proceeds distributed as directed by item 4 of the will?

On the first question the Court is of opinion that the property, the subject of the lapsed devise, passed under the residuary clause of the will and must be disposed of as herein directed. Section 2141 of The Code provides that the will must speak and take effect as if executed immediately before the testator's death, unless a contrary intention appears by the will. Section 2142 provides that unless a contrary intention appears by the will, such property, the subject of a lapsed devise, shall be included in the residuary clause (if any) contained in the will. There is nothing in this will which shows or tends to (525) show an intent contrary to this statute; and in the absence of any such intent in the will the provisions of the statute must prevail. The case, on this point, is controlled by the decision in *Saunders v. Saunders,* 108 N. C., 327. There is nothing in *Hinton v. Jones,* 133 N. C., 399, which conflicts with the position here declared. The opinion in *Hinton v. Jones* expressly recognizes the operative effect of the sections of The Code cited, where the same apply, and rests the decision on the ground that a contrary intention appeared in the will.

On the second question: Under item 4 of the will there was for certain purposes an equitable conversion of the property. In Bispham's Principles of Equity, ch. 5, section 307, the author defines this to be, "A change of property from real into personal and from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity." And, quoting a decision of Sir Thomas Jewell, M. R., to this effect, the author continues: "By this and other similar declarations the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense, but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed form, and not in its original state, although the change may not have actually taken place." The doctrine has been applied in several decisions in this State and very generally in other jurisdictions. *Brothers v. Cartwright,* 55 N. C., 113; *Benbow v. Moore,* 114 N. C., 263; *Ford v. Ford,* 70 Wis., 19; *s. c.,* 5 Am. St., 117, and note at 147; *Bank v. Rice,* 143 Cal., 265; Pomeroy Eq., sections 1175, 1176. And it is equally well established that before any actual change in the property has taken place there may be a reconversion, which occurs, says Mr. Bispham, where the direction (526) to convert is countermanded by the parties entitled to the property.

This reconversion can be effected where all the parties, beneficially interested in the property, by some explicit and binding action,

direct that no actual conversion shall take place, and elect to take the property in its original form. Pom. Eq., *supra;* Bispham, section 322 *et seq.; Craig v. Leslie,* 3 Wheat., 562; *Ford v. Ford, supra,* note. There can be no doubt that if a sale is to be had under the provisions of the will, the plaintiff is entitled to execute the power of sale. Code, section 1493; Laws 1889, ch. 461; *Saunders v. Saunders, supra.* But if the election has been properly made, then the power of sale under the will is extinguished, and the beneficiaries and their grantees are entitled to hold the property as it is, and without the expense or disadvantage of a sale.

In devises of the kind we are now considering, where land is directed to be sold and the proceeds divided, in order to a valid election all the interests must concur and all must be bound. If the beneficiaries are all *sui juris,* such election can be made by deed in which all join, or by answer expressly stating that the parties desire to hold the land as it is, or this may be done partly by deed and partly by answer (and there are other methods), but all must concur by some action that will bind them.

In case some of the beneficiaries are infants, an election cannot be made either by or for them, except by sanction and order of the court after due inquiry. The four infant children of Hannah Patterson who are made parties defendant have made no deed, and it would not bind them if they had. Nor can they elect by answer, simply, even though duly represented by guardian. To bind them, an inquiry would have to be made in the cause, and an order signed by the court only when such inquiry disclosed that it would be for the benefit of the infants that a reconversion should be made. This might be done, if it were necessary, in the present case, and the matter so determined; but in the view taken by the Court this is not necessary here, (527) for the reason that all the interest in the property, which would have gone by the will to Hannah Patterson, is now vested in her husband, who is a party defendant of record and has filed an answer, stating expressly that he desires and elects to hold his interest by way of reconversion. As heretofore stated, at the time a sale was directed by the will to be made, there was an equitable conversion of the property, and for the purposes of devolution and transfer this land was considered as money. The share of Hannah Patterson would go to her as personalty, and she having died without action concerning it, such interest devolved on her husband. Under our statute he has the right to administer on his wife's estate and is made her sole distributee, and in the absence of any suggestion or claim of indebtedness, the husband has the sole beneficial interest in the property, so far as his wife's

share is concerned; and while the land on its reconversion goes to him as it was under the will so as to be bound perhaps by intervening liens, in another sense he takes the property by reason of his election as a new acquisition. Being the sole beneficial owner of his wife's share, he alone is required to make the election as to that share, and when made, and all concur, on reconversion he is the owner of that interest in the land in his own right.

As the case goes back for further orders, we deem it proper to say that if there is any suggestion of debts against the wife's estate, it may be well to direct that the husband qualify as her administrator, as he has the right to do under the statute, so that the creditors, if there be such, may have some one whom they can hold responsible for their claims, to the extent of the wife's interest. The principles here stated will be found approved and sustained by authority. *Proctor v. Ferebee,* 36 N. C., 143; *Benbow v. Moore, supra; Ford v. Ford, supra; Craig v. Leslie, supra; Finley v. Bent,* 95 N. Y., 364; *Hannah v. Lawrence,* 3 W. and S., 223; *s. c.,* 38 Am. Dec., 755, and note; *Burr v. Sim,* 1 Whart., 252; 1 White and T. Leading C. Eq., part 2, p. 1170. And on questions of similar import see *Conigland v. Smith,* 79 N. C., (528) 303; *Davis v. R. R.,* 136 N. C., 115.

This being true, the defendants in their answer have presented a case of reconversion by election, valid and binding on all the parties having a beneficial interest in the property, and by which the power of sale under the will is extinguished.

The adult children of S. D. Jordan have conveyed their shares to the defendants Duckworth and Whitmire, and the husband of Hannah Patterson, who alone represents that share, has in his answer signified his desire that a reconversion be had.

It will be noted that we speak here throughout of a sale under and by virtue of the will, and on the idea that there are no debts outstanding against the estate of the testator requiring a sale of the realty. If the plaintiffs establish debts and their right to sell the land to pay the same by order of the court, such power might arise to them under the statute providing for the sale of realty to pay debts; but this question is not presented in the appeal.

It is the opinion of the Court that the land, the subject of this controversy, is included in the residuary clause; that the answer, if established, presents a case of reconversion which extinguishes the power of sale under the will, and gives the defendants the right to hold the land *in specie* unless the same be required to pay the debts of the testator.

Reversed.

Cited: *Battle v. Lewis,* 148 N. C., 152; *Phifer v. Giles,* 159 N. C., 748; *Barfield v. Carr,* 169 N. C., 576; *Broadhurst v. Mewborn,* 174 N. C., 403.

(529)

BANK v. MOORE.

(Filed 26 May, 1905.)

Action on Note—Defenses—Parol Evidence.

Where the defendant executed his note and received a valuable consideration therefor, the defense that there was an understanding and agreement at the time that payment should never be enforced or demanded is not open to him, parol evidence being incompetent to contradict or modify the written contract.

ACTION by Western Carolina Bank and W. W. Jones, receiver, against C. B. Moore, heard by *Moore, J.,* and a jury, at March Term, 1905, of BUNCOMBE.

W. W. Jones, receiver of the Western Carolina Bank, having found the note of defendant, to the amount of $600, among the assets of the bank, instituted this action against defendant, alleging that the note sued on belonged to the bank and was due and unpaid. The defendant answered and denied that the note belonged to the bank, and by way of further defense averred that on or about 22 February, 1897, he was approached by one Lewis Maddox, at that time president of the Western Carolina Bank, who stated to him that J. E. Reed, who was the father-in-law of the defendant and a director of said bank, was largely indebted to said bank and that the bank had been criticised by the public and others interested in the affairs of the bank because of said fact—that is, because said Reed, being such debtor, was also a director of the bank; that he (Maddox) and Reed had agreed together that the defendant should formally take an assignment of the stock which said Reed then held in the bank, to wit, $500 of the same, and the defendant should formally execute his note payable to Reed therefor; "that new stock should be formally issued to the defendant in place of the stock of said Reed, and that said note and said stock should be held by said bank, but that the same, the said note, should never (530) be collected or presented for payment, and that said stock, although issued to the defendant, should be considered and remain the property of the said J. E. Reed; that said Reed should resign as such director in said bank, and that this defendant should formally become a director thereof in his place.

"That thereupon this defendant, believing said transaction innocent in itself, and that thereby he would subserve the interest of said bank and of the said J. E. Reed, his father-in-law, he consented to make said note upon said terms and did then and there sign the same and deliver it to said bank through the said Maddox, its president, upon the terms and understanding stated in the first paragraph of this further defense; and the said note was held by said bank and said receiver took the same, if he took at all, and still holds it, upon said terms above set forth.

"Wherefore, this defendant demands judgment that the said note be delivered up for cancellation and that he go hence without day and recover of the plaintiff his reasonable costs in this action behalf incurred."

There was evidence that the defendant's father-in-law, J. E. Reed, now dead, had been a stockholder and director in the bank and had borrowed a large sum of money, which he still owed, and the management of the bank was being criticised by reason of the loan of so much money to one of its directors. It was thereupon determined, at the suggestion of the president, that Reed should sell his stock to defendant, resign as director, and the defendant should become director in his place. In pursuance of this arrangement Reed surrendered his stock and same was canceled and a new certificate was issued in the name of the defendant, and the defendant executed the note sued on to J. E. Reed and both note and stock certificate were left with the bank.

The defendant having thus become a stockholder, was elected (531) director instead of Reed, and qualified as such and served from February, 1897, to October of the same year; then the bank suspended. The defendant took part as director in the bank management, was present at the meetings and received pay for his services as director. This note and stock certificate were found with the assets of the bank, marked as collateral to Reed's indebtedness, and had been reported as part of the bank assets during the year the defendant served as director. The defendant testified that all this was only a formal arrangement, and that it was understood and agreed at the time the note was signed by him and left with the president of the bank that payment of his note should never be enforced, and that the stock was left with the bank as the property of Reed. The president of the bank testified that there was no such arrangement, but that Reed sold his stock to the defendant, who executed the note sued on, pledging the stock issued to him to secure his note, and that both note and stock were placed by Reed with the bank as collateral for Reed's indebtedness.

On issues submitted the jury rendered a verdict that the bank was the owner of the note, and that it agreed at the time the note was executed that the defendant should not be liable thereon, as alleged in the answer. On the rendition of the verdict the plaintiff moved for judgment for the amount of the note and interest, which was refused, and the plaintiff excepted. There was judgment for the defendant, and the plaintiff excepted and appealed.

Charles E. Jones for plaintiff.
Moore & Rollins for defendant.

HOKE, J. The Court is unable to perceive anything in the allegations or testimony which shows or tends to show a valid defense to this demand. It appears from the answer and the evidence that the defendant executed the note sued on to his father-in-law, J. E. Reed, for his stock in the bank, and received the consideration. (532) By virtue of his agreement and the note the defndant became a stockholder in the bank, qualified and served as a director, taking part in the bank's management and receiving pay for his services. During that time this note was reported as part of the assets of the bank, and the jury have decided that same belonged to the bank. The only defense attempted amounts in substance to this: That though the defendant executed his note and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to the defendant. In *Meekins v. Newberry,* 101 N. C., 18, it was said by *Merrimon, J.:* "It is a settled rule of law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake properly alleged, parol evidence cannot be heard to alter or contradict or modify it."

And by *Smith, C. J.,* in *Ray v. Blackwell,* 94 N. C., 10: "It is a settled rule, too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict or alter the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose." "The cases," said the *Chief Justice,* "which are apparently to the contrary do not contravene this rule, but rest upon the idea that the writing does not contain the contract, but is part execution of it." The decisions here and elsewhere are uniformly to the same effect. *Moffit v. Maness,* 102 N. C., 457; *Nickelson v. Reves,* 94 N. C., 559; *Bank v. Tisdale,* 84 N. Y., 565; *Hirsch v. Oliver,* 91 Ga., 554; *Forsythe v. Kimball,* 91 U. S., 291.

The principle is so familar that citation of authority is not required,

but the decisions are noted by reason of the marked similarity of some of them to the case before us.

(533) The jury having declared by their verdict on the first issue that plaintiff is the owner of the note sued on, and there being nothing in the further defense or the testimony which tends to establish a legitimate defense, the Court is of opinion that the plaintiff is entitled to a judgment for the note and interest, notwithstanding the verdict on the second issue, and his motion to that effect should have been allowed. *Ward v. Phillips,* 89 N. C., 215; *Corporation Commission v. R. R.,* 317 N. C., 1.

Let this be certified, to the end that judgment be entered in favor of plaintiff for the note and interest.

Error.

Cited: Mudge v. Varner, 146 N. C., 150; *Basnight v. Jobbing Co.,* 148 N. C., 357; *Rivenbark v. Teachey,* 150 N. C., 292; *Hilliard v. Newberry,* 153 N. C., 109; *Kernodle v. Williams, ib.,* 485; *Bowser v. Tarry,* 156 N. C., 38; *Mfg. Co. v. Mfg. Co.,* 161 N. C., 434; *Boushall v. Stronach,* 172 N. C., 275; *Farquhar Co. v. Hardware Co.,* 174 N. C., 377; *Mfg. Co. v. McCormick,* 175 N. C., N. C., 279; *Miles v. Walker,* 179 N. C., 484.

BROWN v. ELECTRIC COMPANY.

(Filed 6 May, 1905.)

Municipal Corporation—Rights in Streets and Sidewalks—Rights of Abutting Owners—Trees on Sidewalks—Erection of Electric Poles—Punitive Damages.

1. The right acquired by a city by condemnation of a street and sidewalk is confined to the public necessity and to the uses for which property is taken or burdened with the easement, and for any additional burden placed upon the servient tenement compensation must be made.
2. The power of a city to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks cannot affect the right of abutting owners to demand compensation for any additional burden placed upon their property.
3. An abutting owner has property in shade trees standing along the sidewalk which the law will protect, and they may not be removed except where their removal is necessary for the use of the street as a public highway.
4. Authority granted by a city to the defendant electric company to remove a shade tree in front of plaintiff's home in order to put up its poles and

wires does not justify the act of the defendant in removing the tree, the city having no power to deprive the plaintiff of his property for such purpose without compensation.

5. In an action to recover damages for cutting down a shade tree in front of plaintiff's home, where the evidence showed that it was not necessary to remove the tree, but was more convenient to place defendant's poles and string its wirs with the tree out of the way, and it was cut down while the plaintiff was away from home and over the protest of his wife: *Held*, that the plaintiff was entitled to demand punitive damages.

ACTION by B. C. Brown and wife against Asheville Electric (534) Company and others, heard by *Justice, J.*, and a jury, at September Term, 1904, of BUNCOMBE. From a judgment for the plaintiffs, the defendants appealed.

Frank Carter and H. C. Chedester for plaintiffs.
J. C. Martin and F. A. Sondley for defendants.

CONNOR, J. For the purpose of disposing of the questions upon this record, we may take certain propositions as settled. The land over which are the street and sidewalk upon which plaintiffs reside was the property of the grantor of the plaintiffs. By condemnation proceedings duly had, the city of Asheville acquired an easement over said land for the purpose of enabling it to open and maintain a public street and sidewalk for the use of the citizens of Asheville. That the fee to said land remained in the owner and was granted to plaintiffs, together with the lot, to the outer edge of the sidewalk. The tree, cut down by the defendants, stood upon the sidewalk on the outer edge, and was not a nuisance to or interference with the public use of the sidewalk. That the city by its charter and amendments thereto had control of the street and sidewalk, with all of the powers in regard to the use thereof and of removing obstructions therefrom necessary and (535) convenient to that end. That such powers included the right to cut down and remove this or any other tree, on the street or sidewalk, which, in the judgment of the city authorities, was a nuisance to or an obstruction of the public in the use of the street and sidewalk. That said tree afforded shade to the premises and residence of plaintiffs, and its removal depreciated the value of plaintiffs' property to the extent of $499, as found by the jury. In view of his Honor's instruction to the jury, we must assume that the jury found, and we find ample reason to justify such finding, that the defendant Electric Light Company, with the permission of the Superintendent of Streets of the City of Asheville, afterwards approved by the board of aldermen, removed the tree for the purpose of more conveniently erecting its poles and stringing its electric wires along the street. His Honor thus stated the contention on

the part of the defendants: "The defendants contend that they had the right to cut down this tree, on account of the fact that the land was condemned for a street; that they had the right to cut it down for any purpose, and especially that they had the right to cut it down for the purpose of allowing electric light wires to pass there, which they say was for the benefit of the public. The court charges you that if that was the purpose, and the city allowed the corporations that ran the electric light wires and the railroad company to do so because more convenient to them, then it would be your duty to answer the first issue 'Yes.' The city would not have the right, as the court views the matter, to cut down that tree for the purpose of appropriating that part of the land for the use of the defendants, unless the condemnation was for the purpose of the city, and they would not have the right to go there and cut down the tree, unless they were going to use it for the purpose for which it was condemned." Before discussing the exceptions which challenge the correctness of this and other instructions involving the same principle, it is proper to say that by an amendment to the charter
(536) of the city made subsequent to the condemnation of the land for a street and sidewalk, the city authorities were given power to permit the erection of telegraph, electric light poles and wires, etc., on and over the public streets of said city. This power, of course, in no manner affects the rights of abutting owners. The Legislature could not have intended, because it had no authority, to confer such power to be exercised in violation of such private rights. It simply empowered the aldermen to grant the franchise over the streets of the city, subject, of course, to the rights of the citizen in respect to his private property. The Legislature had no power itself to empower corporations to appropriate private property without compensation, and of course could not authorize the city to do so. *Tel. Co. v. McKenzie,* 74 Md., 36. There are a large number of exceptions to his Honor's charge, both in respect to instructions given and refused. We do not deem it necessary to pass upon all of them, because in our view of the case, assuming the facts to be as contended by defendants, we find no error in the record. Conceding to the city of Asheville the largest possible powers in respect to the opening and controlling its public streets, they must all be construed and exercised within the well-defined limitation that they are held and to be used as a public trust for the benefit of the citizens of Asheville, and not for the convenience, or even the necessities of private persons or corporations. In speaking of the exercise of this power, the New York Court says: "But we think it cannot, under guise of exercising this power, appropriate a part of the street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street, without making

compensation for the injury sustained." *Reining v. R. R.,* 128 N. Y., 168.

As the question is one of much practical importance to the people of the State, we will endeavor to mark the line which limits the power of municipal and quasi-public corporations, or private cor- (537) porations engaged in public service, in interfereing with the rights of abutting owners upon streets and highways. This Court, has, in *Tate v. Greensboro,* 114 N. C., 392, defined the power which the duly constituted city authorities have in opening, widening, using, and controlling public streets. That this power, when exercised for the purpose and objects for which it is granted and in good faith, is not subject to the supervision of the courts, is well decided in that case. We have no disposition to bring that decision, or anything said therein, into question. We adopt what is said by *Justice Burwell* as stating the principle upon which our decision is based. "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such wrongdoer and trespasser." Where it is said, "who has no authority from the city," it is meant, no lawful authority, because, as we shall see, the city has no power to confer authority except in the manner and for the purpose for which it may do the act itself. Many of the decisions discussing the right of abutting owners upon streets and highways make a distinction between owners holding the fee in the land and those who have only such rights as accrue from their location on the side of the street. It is conceded that the fee to the land upon which the sidewalk is located, and the abutting lot, is in the plaintiff; we shall discuss the case from that view. The condemnation for a street and sidewalk, therefore, gave to the city an easement, the limit and extent of which both in respect to the use and the time of its enjoyment, is measured by (538) the public necessity. "Where an easement only is taken for a public highway, the public acquires a paramount right to use and improve the land taken for highway purposes, which includes, not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes and the like." 2 Lewis Em. Dom., section 589; *Barney v. Keokuk,* 94 U. S., 324. This Court has uniformly held that the right acquired by condemnation is confined to the public necessity and to the uses for which property is taken or bur-

dened with the easement; that for any additional burden placed upon the servient tenement, compensation must be made. *Story v. R. R.*, 90 N. Y., 122; *White v. R. R.*, 113 N. C., 610; *Phillips v. Tel. Co.*, 130 N. C., 513; *Hodges v. Tel. Co.*, 133 N. C., 225. Such conflict as may be found in the decisions arises out of the application of the principle. It is uniformly held that an easement acquired for one purpose, either by grant, dedication, or condemnation, cannot be appropriated to another purpose. "It is certainly well settled that where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another purpose without the consent of the party from whom it was derived, or for whose benefit it was created. We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the Legislature to deprive the owner of the use of a lot fronting on land so dedicated. . . . It cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use, or that the Legislature have the power to encroach upon the reserved rights of the owner, by materially enlarging or changing the nature of the public easement." *Elevated R. R. case, supra.*

(539) In respect to an easement acquired by condemnation the reason is obvious; in assessing compensation the commissioners are restricted to such damages as are incident to the specific use for which the condemnation is made. While the city authorities had ample power to confer upon the defendants a franchise to lay their traks, erect their poles, and string their wires along the streets or sidewalks, if such franchise did not materially restrict or interfere with the public use for which it was held in trust, such power could not affect the right of abutting owners to demand compensation for any additional burden imposed upon their property. The fact that the defendant corporation was operating a public utility does not affect the question. The only difference being, that if the city conferred the privilege upon a private citizen or corporation operating a private business, and its enjoyment interfered with the right of an abutting owner, no right to continue the use of the privilege could be acquired except by grant; whereas, if the person or corporation is conducting a business concerning the public—one conferring the right of emeinent domain—the right to use the franchise or privilege may be acquired by condemnation and paying the abutting owner compensation for the additional burden. The doctrine is well stated in *Reining v. R. R., supra:* "It is quite probable that the general interests of B and of the larger public are promoted by this appropriation of the streets, but it by no means follows that a lot-owner whose property is injured should bear the loss for the public

benefit. . . . The power conferred by the charter of B upon the common council to permit the track of a railroad to be laid in, along, or across any street or public ground must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded." In the same case, *Gray, J.*, concurring, said: "Here the object was to subserve the railroad use, and the appropriation of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property-owner's appurtenant easement, as (540) though the railroad was operated in front of his premises upon a structure physically incapable of other uses." In *Eels v. A. T. and T. Co.*, 143 N. Y., 133, *Peckham, J.*, says: "We think neither the State nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose for which they are to be applied is to string wires thereon and thus transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the Constitution provides that private property shall not be taken for public use without compensation to the owner. Where the land is dedicated or taken for a public highway, the question is, What are the uses implied in such dedication or taking? Primarily, there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement." To impose any different or additional burden without compensation cannot be done by the Legislature, either directly or by granting the power to a city. We cannot assume that it was intended to do so. Such intent is not to be gathered from the statute. *White v. R. R., supra.* The question is exhaustively discussed in *Story v. R. R., supra.*

There is some conflict of judicial opinion in respect to what constitutes an additional burden. The Supreme Court of Maryland in *Tel. Co. v. McKenzie,* 74 Md., 36 (47), says: "And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property and unlawful unless the right to do so is acquired by contract or condemnation." After (541) discussing the rights of the public in the streets, the Court proceeds to say: "Subject to these and other like rights in the municipality and the public to the use of the street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation, for additional servitudes placed thereon, that the owner of

the bed of a highway in the country is entitled to. If then, the fee of the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land for which she could claim compensation, and the act of the Assembly could not deprive her of it." In *Broome v. Tel. Co.,* 42 N. J. Eq., 141 (2 Am. Elec. Cases, 259), the *Chancellor* says: "In order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." The same view is held in *Tel. Co. v. Barnett,* 107 Ill., 507 (1 Am. Elec. Cases, 565). That was an action of trespass, as the one before us. It appeared that in addition to putting the poles upon the highway, in which plaintiff owned the fee, the employees of the company "cut away the hedge because it was in their way, and they also cut down two hedge trees." The Court said: "The position taken by the defendant is that the State can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without consent of the abutting landowner; that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully made, the public obtain all the rights the landowner had, and the State may authorize any usage of it not consistent with its use as a highway." After stating the contention of the landowner, the Court says: "The latter position is the one best (542) sustained by authority and rests on sounder principles. . . .

The principle is, neither the State nor a municipal corporation has any rightful authority, under the Constitution, to grant away the private property of the citizen, and if corporations *quasi*-public, in the exercise of the right of eminent domain with which they are clothed by the sovereign power of the State, seek to appropriate it so that they may have a benefit therefrom, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value. But aside from all considerations of right and justice, the Constitution has so declared, and its mandate in that respect may not be disregarded." *R. R. v. Hartley,* 67 Ill., 439; *Wills v. Erie T. and T. Co.,* 37 Minn., 347; *Stowers v. Tel. Co.* (Miss.), 3 Am. Elec. Cases, 855; Joyce on Elec. Law, section 321. That shade trees may not be removed except when necessary for the use of the street to the public is well settled. Lewis Em. Dom., section 132. There are some authorities to the contrary, but we think the view taken by those cited the sound one. We have no hesitation in holding that, assuming that the Board of Aldermen of the City of Asheville had met and formally granted to the defendants authority to remove the tree, finding that its

removal was necessary to put up its poles and wires either for the electric light or street railway, upon and along the sidewalk, such action would not have justified the act of defendants. It was not within the power of the city to deprive the plaintiff of his property for such purpose without compensation. We find, however, no averment or evidence that it was necessary to remove the tree. It is suggested that it was more convenient to place the poles and string the wires with the tree out of the way. This falls far short of the essential conditions upon which private property may be taken, or burdens imposed upon it. The right of eminent domain has been so freely conferred upon corporations, upon the mere suggestion that their business is in some way connected with service to the public, that we are in danger of for- (543) getting that it is one of the most delicate and dangerous powers conferred by the people upon their Government. Public franchises have been so generously and lavishly conferred and so freely used without compensation, that those who wish to enjoy them forget that one of the chief ends for which government is created and taxes paid is the protection of private property—and then only with compensation. The record in this case shows that a valuable right of property, affecting the comfort, health, and welfare of the citizen and his family, has been taken upon the suggestion of a private corporation to the superintendent of streets, without inquiry by the board of aldermen, notice to the plaintiff or any opportunity to be heard in defense of his rights. No person shall be deprived of his property, except by the law of the land, or due process of law—which has been defined to mean the right to be heard —before he or his property is condemned. This sacred right is binding upon every department of the Government and all of its agencies, including municipal and private corporations.

While it is held in *Tate v. Greensboro,* 114 N. C., 392, that the power to remove shade trees, where their removal is necessary for the use of the street as a public highway, may be conferred upon the street committee, it would be more in accordance with due and orderly procedure to do so only after due notice to the owner and a hearing before the legislative body of the city. The tree was cut on 21 March, 1901. This action was brought on 5 July, 1901. On 16 September, 1904, the board of aldermen adopted a resolution reciting that the action of three corporations named, "or one or more of them, in cutting down and removing the tree in front of the place then owned and occupied by B. C. Brown, etc., some years ago in putting a line of street railway and appurtenances upon said street in front of said property, or replacing thereon certain light wires, be and is hereby ratified and confirmed, said tree having been so cut and removed by direction of the proper authorities of the said city." It is evident that at the time of (544)

the passage of this resolution the board were not certain to what corporation the power was given to cut the tree, or for what purpose it was conferred. It is not suggested in the resolution that it was necessary to remove the tree—or that it interfered with the street railway or the light wires. Indeed, it is apparent that the board knew but little about the matter which they "ratified and confirmed." We have discussed the case upon the assumption that the tree was on the sidewalk. The testimony shows that while the condemnation took place in 1892, the land had never been used as a sidewalk. The plaintiff testified, without contradiction, that he had at the time the tree was cut lived at the place six years, and "there had never been any sidewalk there." The tree was removed in March, 1901, and the hole out of which it was taken "about 10 feet square," was open at the time of the trial. The testimony further shows that the tree was cut by the superintendent of the defendant companies, while Mr. Brown was away from home; that his wife phoned him, and he directed her to forbid the removal of the tree; the parties gave no heed to her request, and that in some way the wires connecting the phone were cut.

We are impressed with the wisdom of the words of *Judge Peckham* in concluding his opinion in *Eels v. A. T. and T. Co., supra.* Referring to the argument that cases of this character should be decided with reference to the wants of an advancing civilization, which is doing so much to render life more comfortable and attractive, he says: "Let the defendants pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the re-
(545) fusal of the owner will not stop the proposed undertaking."

We have carefully examined the record and the exceptions to his Honor's rulings. We find no error of which the defendant can complain. We are of the opinion that the allegations were sufficient to entitle the plaintiff to demand exemplary and punitive damages, and the testimony shows ample ground upon which to base the claim. In the entire transaction there was on the part of the defendants a painful disregard of the rights of the plaintiff. While extensive powers and wide discretion are given municipal authorities for the discharge of their duty to the public, it should always be borne in mind by those who serve in public positions that in our system of government there is no room or place for arbitrary power. The law which is a rule of action for the citizen is equally so for the official. Every man when his right of person or property is invaded has a right, and it is his duty, to demand *"Quo warranto."*

No error.

Cited: Daniels v. Homer, 139 N. C., 262; *Staton v. R. R.,* 147 N. C., 435, 438; *Dorsey v. Henderson,* 148 N. C., 425; *Rosenthal v. Goldsboro,* 149 N. C., 136; *Elizabeth City v. Banks,* 150 N. C., 412; *Moore v. Power Co.,* 163 N. C., 302, 303; *Hoyle v. Hickory,* 164 N. C., 82; *Wood v. Land Co.,* 165 N. C., 371; *Hoyle v. Hickory,* 167 N. C., 620; *McMahan v. R. R.,* 170 N. C., 459; *Wheeler v. Tel. C.,* 172 N. C., 11; *Powell v. R. R.,* 178 N. C., 246, 247.

(546)

JONES v. WAREHOUSE COMPANY.

(Filed 26 May, 1905.)

Verdict—Negligence—Master and Servant—Assumption of Risk—Questions for Jury—Dangerous Methods Adopted.

1. This Court has no power to consider the question of setting a verdict aside as against the weight of evidence unless it clearly appears that there was no evidence to sustain the finding.
2. Negligence is a want of ordinary care and 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 law.
3. Negligence is a mixed question of law and fact, and it is impracticable for the court, as a matter of law, to say whether or not there is negligence, except where the facts are admitted and no reasonable controversy can arise as to the inferences to be drawn therefrom.
4. In an action by an employee to recover damages for injuries sustained in replacing a belt while the machine was in motion, as ordered by his employer, it is a question to be decided by the jury whether replacing the belt while the machine was in motion was unsafe to such an extent that an ideal prudent man under similar circumstances would direct his employee to do so.
5. Where an employer fails to perform its duty and furnish the employee with safe and suitable methods of doing the work, the employee 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 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 employee may discover by the exercise of ordinary care.
6. Both the employer and employee must exercise that degree of care under the circumstances and in the condition in which they are found which the ideal prudent man would do.
7. Where a change is made in the method of operating a machine after the employment has been accepted, it is a question for the jury to say whether the increased hazard is so obvious that a man of ordinary prudence under

like conditions would know and appreciate the danger which extends to the continued employment.

DEFENDANT'S petition to rehear. For former opinion, see 137 N. C., 337.

Lindsay Patterson, R. D. Reid, Pou & Fuller, Watson, Buxton & Watson, and Winston & Bryant for petitioner.

(547) *Manly & Hendren in opposition.*

CONNOR, J. In view of the large amount involved and the number of exceptions in the record presenting many interesting questions, we were willing to rehear this case. It was ably argued by counsel upon full and exhaustive briefs, and we have, with the aid thereof, carefully reëxamined the entire record. To the argument pressed upon us that the plaintiff was not injured in the manner testified to by being caught in the belt of the machine and thrown against a post, we can only say, in the light of the testimony and the charge of the court, the jury have found in accordance with his allegation. He swears positively that he was injured in that way. Two witnesses, Burgess and Wilson, testified that they saw him as and immediately after he was injured. The credibility of the witnesses was entirely for the jury. The learned and careful judge who tried the case and heard the entire evidence did not think it his duty to set the verdict aside as being against the weight of the evidence. We have no power to consider the question unless it clearly appears to us that there was no evidence to sustain the finding. Taking the fact to be as found by the jury in this respect, we have this case: Plaintiff alleges that he was employed eight weeks before the accident by defendant company, and that about four weeks before the accident was put to work at a machine called the "napper." That attached to the machine was a pulley, run by the belt connected

(548) with the shafting overhead. On the inner or lower side of the machine was a small pulley which drove a fan and was run by a small belt. That the belt on this small pulley would sometimes slip off, making it necessary to replace it. He was in the habit of stopping the machine to replace the belt. Some three or four days before the injury, the superintendent told him to replace the belt while the machine was in motion. That on one occasion, the machine being stopped to replace the belt, Mr. Krantz, superintendent, said with some emphasis, "Do not stop that machine to put the belt on." He walked up, took hold of the shifter, put the idle belt on the pulley and started the machine up. Plaintiff told him that it seemed dangerous to do that; he said, "There is no danger in it at all." Plaintiff did that way the next time it came off. Did it two or three times. On 2 July, at about

4 o'clock in the morning, plaintiff being at work at the machine, the belt came off and he undertook to put it on while the machine was in motion. As he did so, his finger was about to be caught. He jerked his hand away and the large driving belt that went overhead caught his arm, his sleeve, and jerked him around over the pulley and hurled him against the post. Struck the smaller part of his back. That he was putting the small belt on in that way by the command of the superintendent. That, if he had stopped the machine to put on the belt as he had been accustomed to do before the superintendent instructed him otherwise, there would have been no danger whatever. He says that he could see the pulley and understand the location and operation thereof. He further says that it was perfectly plain to him that if he caught his hand under that belt he would be hurt, and that he was always careful to keep his sleeve from going under it, because he could see that it was dangerous—knew that it was dangerous. There was other testimony on behalf of the plaintiff of the same character. There was a great deal of testimony directed to the controversy in regard to the alle- (549) gation of the defendant that plaintiff was injured by falling from a rock. In the light of the finding by the jury, this becomes immaterial.

It is conceded by the plaintiff and was so stated by his Honor that the machine which was being operated was standard in make and quality and had no defect. We attach no importance to the suggestion that the small pulley should have been grooved. The controversy was narrowed down to the single question whether the defendant had imposed upon the plaintiff the duty of operating the machine in a dangerous manner, and if so, whether he had assumed the risk incident to such danger or was guilty of contributory negligence. The question is thus stated by defendant's counsel: "If plaintiff was injured by the belt accident, does his own testimony show that the injury was caused by his own negligence and not by any negligence of the defendant, or that it was caused by the danger incident to his employment? Of course, he had knowledge of such danger, and of which he assumed the risk. All other questions are incident and subordinate to this." His Honor instructed the jury as follows: "The act upon which the plaintiff relies, and which he alleges was negligence, is that the defendant, through its officers, required him to do certain work in a manner which was not reasonably safe, and that in consequence thereof, while endeavoring to follow the requirements of the defendant, he was caught by a belt and injured. It therefore becomes material to inquire what is negligence. 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 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 method to do his work, and on entering (550) into employment the servant has a 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 care for his own safety. It is also a part of the contract of employment that the servant assumes the ordinary risk of his employment and also the risk incident to dangerous work or dangerous methods of work, if they are obvious." He properly instructed the jury in regard to the burden of proof and proximate cause. Upon the third issue, his Honor instructed the jury as follows: "The burden upon this issue is upon the defendant to satisfy you by the greater weight of the evidence that the plaintiff assumed the risk of his injury. It becomes material, then, to inquire what is meant by assumption of risk. It is a doctrine that grows out of the relationship of master and servant and is based upon the contract between them. As I have before stated, the law imposes certain duties upon the master and certain duties upon the servant, and in addition to those mentioned it becomes a part of the contract of employment that the servant will assume the risk of those dangers and injuries ordinarily incident to the employment, and also those dangers not ordinarily incident to the employment, but which are obvious or which could be discovered by the exercise of ordinary care. If the risk is not ordinarily incident to the employment or is not obvious or could not be discovered by the exercise of ordinary care, it is not one of those risks which enter into the contract and which the servant assumes. In passing upon the nature of the risk you would consider the intelligence of the plaintiff, his opportunties to discover the risk, the information he had as to the danger, and all the circumstances. (The court here (551) fully stated the contentions of the plaintiff and the defendant upon this issue.)

"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 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 of 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 defendant has knowledge of the defects of dangerous machinery and goes on with the work, that 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 those 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."

There were a number of special requests on behalf of the defendant, all based upon the theory that if certain facts were found, his Honor should instruct the jury, as a matter of law, that plaintiff could not recover either by reason of the failure to show any negligence on part of the defendant or assumption of risk on his part. We are of the opinion that his Honor properly presented to the jury the principles by which they were to be guided in arriving at a correct verdict. (552) His Honor properly said to the jury, after stating to them the duty which defendant owed the plaintiff: "Negligence is a want of ordinary care and 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 law." This definition is in strict accordance with the best approved formula found in the text-books and adopted by the courts.

The answer to the allegation that there was such negligence is to be arrived at, first, by finding the facts, and, secondly, by drawing such inferences therefrom as are reasonable and natural. This is so where there is any controversy, and is peculiarly a matter for the jury. This Court has long since abandoned the theory that negligence is a question of law, and adopted the only rational and workable theory, that it is a mixed question of law and fact. It is impracticable, if not impossible, for the court, as a matter of law, to say whether or not there is negligence except where the facts are admitted and no reasonable controversy can arise in regard to the inferences to be drawn therefrom. We have so frequently repeated this proposition that it is unnecessary to cite authority. We think that his Honor correctly instructed the jury in this respect. To replace the belt while the machine is standing still is undoubtedly safe. To replace it while it is in motion is to some extent unsafe. Whether to such an extent that an ideal prudent man under

similar circumstances would direct his employee to do so, is peculiarly a question to be decided by the jury. We also think that his Honor correctly instructed the jury upon the third issue, as he properly said to them if they found that the danger was open and obvious and known to him, that he appreciated the danger and continued to work at the machine and replace the belt, when it slipped off the pulley while in motion, they would answer the third issue "Yes." This we think in strict accord with the definition of assumption of risk. He fur-
(553) ther said to the jury that where "the defendant failed to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, plaintiff will not be held to assume the risk in undertaking to perform a dangerous work, unless the act itself is so obviously dangerous that in its careful performance the inherent probability of the injury is greater than those of safety."

As we said in *Marks v. Cotton Mills, ante,* 401, the same measure of duty is imposed upon the plaintiff as upon the defendant. Both must exercise that degree of care under the circumstances and in the condition in which they are found which the ideal prudent man would do. If the defendant fails to do so in the light of the standard which the law sets to define his duty, and such failure is the proximate cause of the injury, he is liable to an action; on the other hand, if the plaintiff fails to exercise the same degree of care under the same circumstances and with the same light before him, and his failure is the proximate cause of his injury, the law attributes the injury to such failure, and he cannot recover. The standard of duty in each case is ordinary care, that is, such care as a man of ordinary prudence, under similar circumstances, would exercise. This we understand to be the conclusion to which, after long and anxious thought, the courts have come in administering the law in such cases. There was undoubtedly testimony in this case which would have fully justified the jury in answering the issues in favor of the defendant. They have, however, accepted the view of the plaintiff's testimony and under the instruction of a very learned and careful judge have found a verdict which we cannot disturb. What the rights may have been, if at the time of entering upon the service the method of replacing the belt had been known to him and the service accepted with full knowledge thereof, we are not called upon to say. As we said in *Marks*
v. Cotton Mills, supra, it is not to be required that employees in
(554) operating dangerous machinery shall immediately surrender their employment upon a change being made in the method of operating or cleaning machinery adopted after the employment has been accepted. Such changes must be made after reasonable notice to the employees, and with an opportunity on their part to fully understand them and appreciate the danger incident thereto. It is always a question

for the jury whether in such cases the increased hazard is so obvious that a man of ordinary prudence, under like conditions, would know and appreciate the danger which extends to the continued employment. We have also examined the other exceptions in regard to the expert evidence, and while, as conceded by plaintiff's counsel, the questions are not so accurately framed as might be desired, we do not think that the form in which they are put was calculated to mislead the jury to the prejudice of the defendant. Upon a full reëxamination of the entire case, we find no such error as to justify a reversal of our former decision. As stated by counsel, the case is a singular one in many aspects. The plaintiff was seriously and permanently injured—it may be, in the manned contended by defendants. The jury have found otherwise, and that, so far as the duty and power of this Court are concerned, must be assumed to be correct.

Let the petition be dismissed.

Petition dismissed.

Cited: Chesson v. Walker, 146 N. C., 513; *Hamilton v. Lumber Co.,* 156 N. C., 523; *Pigford v. R. R.,* 160 N. C., 100.

(555)

AMMONS v. RAILROAD.

(Filed 26 May, 1905.)

Railroads—Regulations Requiring Purchase of Tickets—Expulsion When No Tickets on Sale.

1. A regulation of a carrier is reasonable which requires passengers to procure tickets before entering the car, and where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train or by requiring the payment of a higher rate than the ticket fare.
2. If, without having afforded a reasonable opportunity to the passenger to provide himself with a ticket, the carrier should eject him upon his refusal to pay the additional charge for carriage without a ticket, when he is ready and offers to pay his fare at the ticket rate, his expulsion will be illegal, and he may recover damage for the trespass, and his right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale.

ACTION by W. R. Ammons against the Southern Railway Company, heard by *Long, J.,* and a jury, at August Term, 1904, of SWAIN. From a judgment of nonsuit, the plaintiff appealed.

The plaintiff alleges that he was unlawfully ejected from one of the defendant's trains and sues to recover damages for the wrong thus committed. At the close of the testimony and after the plaintiff had requested certain instructions to be given to the jury, the court held that he could not recover in the action. The plaintiff thereupon submitted to a nonsuit and appealed. It is necessary to state only the substance of this testimony, which is as follows: On 20 June the plaintiff went to Almond, a station on defendant's line, to buy a ticket to Noland, which is 9 miles away. The defendant's agent told him he was out of tickets, but to get on the train and he would tell the conductor
(556) not to charge extra fare. The agent said the ticket rate was 41 cents. The extra or train rate was 65 cents. The agent said the plaintiff would have to pay only 41 cents. He boarded the train and the conductor asked him for his ticket. The plaintiff told him what the agent had said to him, and the conductor demanded 75 cents and said that the agent did have tickets. He then told the plaintiff to pay 75 cents or get off. He pulled the bell cord, when the plaintiff said, "If you put me off, I will sue the company," and the conductor replied, "It would not make a durn bit of difference to me if you did." When the conductor called for the fare, the plaintiff offered him 50 cents, and added that he did not mind a rebate, but did not want to pay 75 cents. The conductor refused to take the 50 cents and put the plaintiff off the train 400 yards from the station. It is a rule of the company to require the payment of 25 cents extra when a passenger has no ticket. There was evidence as to the damages, not necessary to be stated.

A. J. Franklin and F. C. Fisher for plaintiff.
Moore & Rollins and A. B. Andrews, Jr., for defendant.

WALKER, J., after stating the case: Assuming the plaintiff's testimony to be true, and giving him the benefit of all reasonable inferences therefrom—and this is the way it should be considered—we think the judge erred in his intimation of opinion against the plaintiff's right to recover. The law of the case, at least in the present development of the latter and in the aspect of it now presented, seems to be well settled, and is thus stated by a learned and accurate text-writer: "It is undoubtedly competent for a railroad company, as a means of protection against imposition and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car, and where this requirement is duly meade known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train regardless of a tender of the fare in
(557) money, or by requiring the payment of a larger fare upon the

train than that for which the ticket might have been procured. A regulation or by-law of the carrier is not unreasonable which provides that when such tickets are not procured before the commencement of the journey, and the carrier is therefore put to the inconvenience of collecting from the passenger his fare during its progress, the price of the carriage shall be more than would have been charged for the ticket, and that upon the refusal of the passenger to pay the higher fare, not extortionate in amount, he shall be ejected. And if adopted in good faith and with a view to facilitate the business of the carrier, there can be certainly nothing unreasonable or unjust in such rule, especially in the case of railway carriers. But as a condition precedent to the existence of this right of expulsion for the refusal to procure a ticket or to pay the higher fare, an opportunity, at least reasonable and such as the statute requires where a statute exists, must have been afforded by the carrier to the passenger, not himself in fault, to provide himself with the required ticket. If, therefore, no office be kept or opened at the proper time, nor adequate facilities be provided for the purpose of supplying passengers with them, or if the office provided for the purpose be closed before the time fixed by law or by a rule of the carrier, and for either reason the passenger has been unable to obtain a ticket, the higher rate cannot be lawfully demanded. And if, without having afforded such proper facilities to the passenger, the carrier should exact from him the additional charge for carriage without a ticket, the former may sue for and recover the amount so paid above the established rate when a ticket is purchased, and if, upon his refusal to pay it, he be ejected, when he is ready and offers to pay his fare at such established rate, his expulsion will be illegal, and he may recover damages for the trespass." Hutchison on Carriers (2 Ed.), section 570 *et seq.;* 5 A. E. (2 Ed.), 595, and note 4. (558)

In his work on Carriers, at section 269, Fetter thus states the doctrine: "By the overwhelming weight of authority, the furnishing of proper facilities to enable a passenger to purchase a ticket is a prerequisite to the right to demand a train fare at a higher rate than the ticket fare; and, if such facilities are not furnished, a passenger who without fault on his part boards the train without such a ticket will, on tender of the ticket fare, be entitled to all the rights and privileges that a ticket would afford him. If he is rightfully on the train without a ticket, it is his right to complete his journey by paying the ticket rate for his fare. So, it has been held that the fact that the company agrees to refund the excess of train fare on presentation of the conductor's receipt or check at a regular station does not authorize the higher train charge, if no reasonable opportunity is given the passenger to purchase a ticket in the first instance. It cannot be justly said that it is reason-

able to require the passenger to pay more than a regular rate on the train, even though a process is created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts."

These principles are well sustained by the authorities cited in their support and are in themselves most just and reasonable. They apply with peculiar force to the facts of this case.

The plaintiff's right of recovery cannot be made to depend upon the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale to intended passengers. If he did not know it, and refused to accept and act upon the plaintiff's statement, no fault can be imputed to the plaintiff and the defendant cannot escape liability, as the cause of action rests upon the fact that there was no opportunity afforded to purchase a ticket, and the plaintiff is not responsible and cannot be made to suffer for the conductor's ignorance of ex-
(559) isting conditions. The defendant's station agent could easily have informed the conductor that his tickets had been exhausted, and actually promised the plaintiff to do so, so that in this case there was no excuse for a want of knowledge of the facts. It is sufficient to declare, in the light of the authorities and with the plaintiff's testimony before us, that he was entitled to have the case submitted to the jury under proper instructions from the court. Having so decided, we need not discuss the question of damages. The subject, though, has recently been considered by this Court in the following cases: *Holmes v. R. R.,* 94 N. C., 318; *Rose v. R. R.,* 106 N. C., 168; *Tomlinson v. R. R.,* 107 N. C., 327; *Allen v. R. R.,* 119 N. C., 710; *Remington v. Kirby,* 120 N. C., 320.

There was error in the ruling of the court that the plaintiff upon his own showing was not entitled to recover.

Reversed.

Cited: S. c., 140 N. C., 196; *Harvey v. R. R.,* 153 N. C., 572, 578; *Herbst v. Power Co.,* 161 N. C., 459; *Edwards v. R. R.,* 162 N. C., 282; *Lankford v. R. R.,* 165 N. C., 654; *Holmes v. R. R.,* 181 N. C., 499.

(560)

STATE v. SCHENCK.

(Filed 28 February, 1905.)

Bail Bond—Sureties—Rights of—Liability of.

1. Under section 1230 of The Code, a surety on a bail bond can, at any time before execution awarded against him, surrender to the court or to the sheriff his principal, in discharge of himself.
2. The condition of a bail bond is not performed by the appearance, conviction, and sentence of the defendant. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff, but to exonerate the surety the defendant must submit to such punishment as shall be adjudged.
3. A bail bond, conditioned for the defendant's appearance at the next term of court to answer the State on a criminal charge, and "not to depart the same without leave first had and obtained," binds the sureties for the continued appearance of their principal from day to day during the term and at all stages of the proceeding until he is finally discharged by the court either for the term or without day, and he must answer its calls at all times and submit to its judgment.

THIS was a motion by T. C. Howard and another, sureties on the bail bond of defendant, to set aside a judgment absolute, entered at April Term, 1904, against them, heard by *Councill, J.*, at November Term, 1904, of CRAVEN.

The defendant Schenck was tried before a justice of the peace for unlawfully selling liquor, a misdemeanor by statute. He was required to give bail for his appearance at the next term of the court held in October, 1903, and the appellants, Williams and Howard, became sureties on his bond, which was conditioned for Schenck's appearance at the said term of court "to answer the State on a charge of selling liquor on Sunday, and selling liquor without license, and not to depart the same without leave first had and obtained." Schenck appeared, was tried and convicted. The court adjudged that he pay a fine of $100 and the costs. He thereupon excepted and appealed and was (561) required to give an undertaking in the sum of $35 for the costs of appeal, an undertaking in the sum of $150 to stay the execution of the judgment, and one in the sum of $100 for his appearance at the next term of the court. He failed to give any of these undertakings or to pay the fine and costs, and having been called and failing to appear, a judgment *nisi* was entered against him and his sureties for $100, the penalty of his bond. A *scire facias* issued on this judgment and was duly served, and at April Term, 1904, the judgment was made absolute. The appellants moved to set aside the judgment; the motion was overruled, and they appealed.

Robert D. Gilmer, Attorney-General, for State.
R. A. Nunn for sureties.

WALKER, J., after stating the case: The ground upon which appellants seek to vacate the judgment is that when Schenck appeared and was convicted and sentenced, the condition of the bond was fully performed and the appellants, his sureties, were exonerated, as by reason of the conviction, they lost control of him and, thereafter, he was in the custody of the law. We cannot think this is the true construction of the bond, and it is certainly contrary to the uniform practice of the courts in this State in such cases. At common law, when bail was given, and the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail. They had a dominion over him, and it was their right, at any time, to arrest and deliver him again to the custody of the law, in discharge of their obligation. They were sometimes said to be his jailers and to have him always upon the string, which they may pull when they please, in order to surrender him in their own dis-
(562) charge. *Cain v. State,* 55 Ala., 170; 1 Chitty Cr. Law, 104. If they would fully discharge their obligation as his bail, they should as effectually secure their principal's appearance and put him as much under the power of the court as if he were in the custody of the proper officer, and they do not answer the end of the law unless this is done. The principle thus stated is of ancient origin and has been recognized as controlling in determining the liability of bail. 1 Bacon Abr., "Bail," L. *S. v. Stout,* 6 Halstead, 124. The extent of their duty and obligation, therefore, is to see to it that the principal, at all times during the term of the court to which he is bound to appear, is present to answer the call of the court and to do what the law may require of him. If they fail in this respect they have not kept him under the power of the court as if he had been in the custody of its proper officer. It must not be inferred that the surety is thereby required to do something not stipulated in his bond, for the obligation thus imposed is nothing more than what the law reasonably considers to be within the condition of his undertaking. It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. This was said, too, with reference to a bail bond worded precisely like the one in this case. It was contended by counsel in that case, which we will presently cite, that the stipulation not to depart the court without leave was an unusual

one and of no binding force whatever, and in answering this contention the Court said: "That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than thirty years ago by this Court after full consideration." *S. v. Hancock,* 54 N. J. Law, 393. That was a well considered case and seems to be a conclusive authority against the appellant upon (563) the main question presented in the record. See, also, *S. v. Stout, supra.* The doctrine has been thus stated and illustrated: "A recognizance binds the principal not only to appear, but to abide the judgment of the court, and not depart thence without its leave, and if the principal be ordered to execute a new bond, either to keep the peace for a specified period or for his appearance at a subsequent term or before another court, and he depart without complying with the order, it is a breach of the recognizance." 3 Am. and Eng. Enc. (2 Ed.), 715; *S. v. Thompson,* 62 Ind., 367. This construction of a recognizance or bail is sustained by analogy in *S. v. Smith,* 66 N. C., 620. In that case the defendant gave a bond with a surety for his appearance at the next term of the court. His case was continued and he was ordered to give bond for his appearance at a subsequent term, which he failed to do, but departed without leave of the court. He was called, and, having failed to answer, his forfeiture was duly entered. In answer to the *scire facias* issued, the surety insisted that the defendant could not be called and a forfeiture entered after the continuance of the case. This Court held that under the recognizance he could not depart without leave of the court, though not so expressly stated therein, and that he was required to answer at any time during the term when called, "it being the universal practice near the close of the court to look over the docket and call such defendants as have departed without leave of the court." And this, we now say, is a most reasonable practice. *S. v. Morgan,* 136 N. C., 593. It works no harm to the sureties, nor does it increase the risk they assume nor in any way add to their obligation. It is fairly within the scope of their undertaking, as they have expressly agreed that their principal shall not depart without leave, and it appears to us that there is no valid reason for holding otherwise. The sureties can surrender their principal to the court or to any lawful officer appointed to receive him, and this can be done, it is (564) said in the statute, at any time before execution against them. Code, section 1230; *S. v. Lingerfelt,* 109 N. C., 775. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor, and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately,

but be permitted to find security for the costs of his appeal and for his appearance at the next term, and if he fails afterwards to appear, when called during the term, and perfect his appeal and give the necessary security for his appearance, or in default thereof to surrender himself in execution of the judgment, he may be called and his forfeiture entered. *Judge Story* says for the Court in *Ex Parte Milburn,* 9 Pet., 704: "A recognizance of bail in a criminal case is taken to secure the attendance of the party accused to answer the indictment, and to submit to a trial and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offense." In *People v. Stager,* 10 Wend., 431, we find an instructive discussion of the matter by *Savage, C. J.,* the substance of which, being briefly stated, is that a person bound by a recognizance is not at liberty to depart after once making his appearance in court, but he must remain until discharged, and not quit the court, without leave, at any stage of the trial, the object being not only to cause the accused to appear and answer the charge, but to submit to such punishment, if any, as shall be adjudged.

But there is another sufficient reason why the appellants should be held bound by the recognizance or bail bond and to be now liable for the penalty thereof. All the proceedings of the court are *in*
(565) *fieri* until the expiration of the term, and during the term the record remains completely under the control of the court. It may strike out its judgment and enter a different one. In other words, the court has the whole term during which to consider its action and modify or reverse it. The principle is supported by abundant authority. *Penny v. Smith,* 61 N. C., 36; *Halyburton v. Carson,* 80 N. C., 16; *Turrentine v. R. R.,* 92 N. C., 642. This being so, why could not the court strike out the verdict and judgment and award a new trial, and then continue the cause to the next term? In which case the sureties would remain liable (*S. v. Smith, supra*). And if it could do this, why did it not also have the power to direct that the defendant should not be taken into custody until it could come to a final determination in the matter, or, as in this case, suspend execution of the judgment for a proper reason? The conviction and sentence were not final and irrevocable until the end of the term, which was after the default of the defendant and the entry of the forfeiture. If the court could set aside the judgment, it could *a fortiori* postpone its enforcement.

We conclude that the recognizance binds the sureties for the continued appearance of their principal, from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for the term or without day. He must answer its call at

all times and submit to its judgment. In no other way can the criminal law of the State be well administered.

No error.

Cited: S. v. White, 164 N. C., 410; *S. v. Eure,* 172 N. C., 875; *Picklesimer v. Glazener,* 173 N. C., 639.

(566)

STATE v. TURNAGE.

(Filed 28 February, 1905.)

Homicide—Manslaughter—Evidence—Question for Jury.

1. Involuntary manslaughter is where death results unintentionally so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.
2. If death ensues from the unjustifiable and reckless use of a gun, it is manslaughter, whether the gun was intentionally discharged by the prisoner or not.
3. Where the evidence is conflicting, or where the facts testified to are such that reasonable minds may draw different inferences therefrom, the case should be submitted to the jury, with appropriate instructions as to the law, together with the contentions of both sides arising on the evidence.
4. If there is any view of the evidence, construed most favorably to the prisoner, by which innocence may be inferred, such view should be presented to the jury, who are the constitutional judges not only of the truth of the testimony, but of the conclusions of fact resulting therefrom.

INDICTMENT against Juhn Turnage, heard by *Councill, J.,* and a jury, at September Term, 1904, of GREENE. From a verdict of guilty of manslaughter and judgment thereon, prisoner appealed.

Robert D. Gilmer, Attorney-General for State.
No counsel for prisoner.

BROWN, J. The prisoner was tried at September Term, 1904, of GREENE, upon a bill of indictment charging him with the murder of James Hunt. He was convicted of manslaughter, and appeals to this Court. We set out only so much of the evidence as is necessary to an understanding of the case. The evidence on the part of (567) the State tends to show that on the day of the homicide the prisoner, then about 27 years of age, the deceased, Blaney Turnage, 19 years of age, Dan Moore and Sam Moore, were in the yard of Mrs. Turnage. The boys had been working in tobacco, and when it began

raining, sought shelter in a gin-house. After the rain was over they went to Mrs. Turnage's yard, near the house, for the purpose of getting some peaches. Dan Moore and Blaney Turnage were up in the tree gathering peaches, eating some and dropping others down to the boys below. The boys up the tree were "chunking peaches down at the others, and John Turnage, the prisoner, threw a brickbat up the tree at Blaney Turnage, who was in the tree." The boys then left the tree and went into Mrs. Turnage's back yard.

There was evidence on the part of the State tending to prove that the prisoner went around the house and Blaney Turnage, his brother, followed him with an axe. The prisoner went in the house and came out with a gun in his hands, with the muzzle in the direction of the deceased, and his companions, James Hunt and others. Dan Moore, a State's witness, testified that he could not say "how high the gun was up, or whether to the prisoner's shoulder or not; that he heard the gun fire when the prisoner was 12 feet from the deceased. James Hunt was hit, shot in the front of the stomach, and killed."

The prisoner, after testifying to the occurrences at the peach tree, stated in substance that he and Blaney Turnage were playing, that Blaney followed him with an axe, and that they were talking and laughing. "I went in the house and got the gun and took it out with me. It was an old gun. I went out the front door with the gun in my hand; as I stepped out of the door and got clear off the porch it fired, and as it fired I looked and saw the others coming around the
(568) house. The crowd were following me—Blaney in the rear. When I got the gun I did not know it was loaded—had no knowledge of it. After shooting, I learned that the gun had been loaded; did not intentionally point the gun at any one. The deceased told me I did not intend to shoot him or any one." The prisoner further stated on cross-examination that "the gun fired before I saw the boys. I did not notice whether the gun was cocked or not. It had been on the rack a long time and I did not know it was or had been loaded. I got the gun to frolic with Blaney. If I had had an idea it was loaded, I would not have taken it from the rack. I carried the gun in my right hand, swinging by my side. I did not cock the gun. My hand held the gun in front of the hammer."

Among other things, Blaney Turnage testified for the prisoner that "the gun was not kept loaded usually. Ben Danner told me he loaded the gun that morning."

We will notice only one exception of the prisoner, as in our opinion the court below erred, and a new trial must be had.

Among other instructions, the court charged the jury that upon all

the evidence in the case, if believed beyond a reasonable doubt, the prisoner was guilty of manslaughter at least.

We do not controvert any of the legal propositions contended for by the State as to what acts will constitute manslaughter, when death ensues from the reckless use of a deadly weapon, such as a pistol or gun. Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other States, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. Laws 1889, ch. 527. At common law, one who leveled a loaded gun at another without intention of discharging it, and the gun goes off accidentally and kills another, is guilty of manslaughter. *Regina v. Weston,* 14 Cox C. C., 346. Involuntary manslaughter (569) has been defined to be, "Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." 1 Wharton Cr. Law, section 305 (10 Ed.); *Barnes v. State,* 134 Ala., 36.

Applying these general principles of the law of homicide to the evidence in this case, we are of the opinion that the judge erred in his instruction that in any view of it the prisoner was guilty of manslaughter. We do not mean to intimate that there was not sufficient evidence to go to the jury, but we think the guilt or innocence of the prisoner should have been submitted to the jury upon all the evidence, with full and appropriate instructions as to what constitutes manslaughter, as the State asked for no other verdict, and presenting to the jury the contentions of the State and prisoner arising upon the evidence. Nor do we mean to intimate that in order to constitute manslaughter the gun must have been intentionally discharged by the prisoner. Any unjustifiable and reckless use of it which jeopardizes the safety of another is unlawful, and if death ensues therefrom, it is manslaughter. But where the evidence is conflicting, or where the facts testified to are such that reasonable minds may draw different inferences therefrom, it is settled law in this State that the case should be submitted to the jury, untrammeled by such an instruction as the one excepted to by the prisoner in this case.

The painstaking judge who tried the case in the court below seems to have overlooked the prisoner's evidence in some particulars. The prisoner denies that he fired the gun; states that he had it in his hand hanging down by his side, and as he was coming out of the house it went off accidentally; that at the time it went off he had his hand in front of the hammer, holding the gun; that he did not know it was loaded and that he did not intentionally point it at any one; that the gun fired before he saw the boys, and that he and his brother (570)

Blaney had been playing, and he got the gun to continue the frolic. Blaney Turnage testified that the gun was usually kept unloaded, and that Danner told him he loaded it that morning. The State's witness, Dan Moore, testified that he could not say how high the muzzle of the gun was up or whether the prisoner had it to his shoulder or not.

It is useless to discuss the evidence at any length. It is apparent to us that two different inferences may be drawn from it. *Robinson v. State,* 70 Tenn., 239. In considering it in the light of the instruction given, that construction should be put upon it which is most favorable to the prisoner, and if there is any view of it by which innocence may be inferred, such view should be presented to the jury.

We quote with approval the wise words of *Justice Connor* in granting a new trial in *S. v. Daniels,* 134 N. C., 678, for a similar error commited by the writer of this opinion when on the Superior Court bench: "The prisoner, however guilty, is entitled to be tried by 'the ancient mode of trial by jury,' in which the court decides all questions of law and the jury all questions of fact." "the jury are the constitutional judges not only of the truth of the testimony, but of the conclusions of fact resulting therefrom." *Henderson, J.,* in *Bank v. Pugh,* 8 N. C., 198, quoted in the above case.

For the error pointed out there must be a

New trial.

Cited: S. v. Stitt, 146 N. C., 646; *S. v. Limerick, ib.,* 651; *S. v. Trollinger,* 162 N. C., 621; *S. v. Crisp,* 170 N. C., 792; *S. v. McIver,* 175 N. C., 776; *S. v. Coble,* 177 N. C., 591; *S. v. Gray,* 180 N. C., 700.

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(571)

STATE v. YOUNG.

(Filed 21 March, 1905.)

Jurors—Qualifications—Freeholders—Sentence—Validity of Punishment.

1. An exception that the verdict is contrary to the weight of the evidence is a matter for the trial judge, and is not reviewable.
2. A tales juror who held a license under sections 3390-3392 of The Code (Laws 1893, ch. 287, sec. 2) to lay off an oyster and clam bed in the waters of the State, was properly rejected as not being a freeholder.
3. A sentence of a defendant convicted of a misdemeanor to thirty days imprisonment, and that he be assigned to the commissioners to be "worked on the public roads of the county" during said term, is valid under Laws 1887, ch. 355, and Article XI, section 1, of the Constitution.

STATE *v.* YOUNG.

INDICTMENT against Paul W. Young heard by *Moore, J.,* and a jury, at September Term, 1904, of NEW HANOVER. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General for State.
Herbert McClammy for defendant.

CLARK, C. J. The defendant, convicted of assault and battery, assigns as error:

1. That the verdict was contrary to the weight of the evidence. This was a matter for the judge below, and is not reviewable. *McCord v. R. R.,* 134 N. C., 59; *S. v. Kiger,* 115 N. C., 751.

2. That the State was improperly permitted to challenge one E. H. Freeman, tales juror, upon the ground that he was not a freeholder. The clerk of the Superior Court had issued to him a license under The Code, 3390-3392, Laws 1893, ch. 287, section 2, to lay off an oyster and clam bed in the waters of the State. This was not (572) an interest in land, but only a license to cultivate oysters within certain limits and upon prescribed conditions. *S. v. Spencer,* 114 N. C., 777. The land being covered by navigable water, is not subject to grant under the general law of the State. Code, section 2751. The above cited statutes style such authority issued by the clerk merely "a license," and the policy of the State in reference to the oyster privileges may be changed at pleasure. *Rea v. Hampton,* 101 N. C., 51; *S. v. Connor,* 107 N. C., 931; *Hess v. Muir,* 65 Md., 586; *McCready v. Va.,* 94 U. S., 391. Freeman possessed only a license, not an interest in land, and, not being a freeholder, was properly rejected as a tales juror. Code, section 1733.

3. The third and last exception is that the judge, having sentenced the defendant to thirty days' imprisonment in the county jail, directed that he be "assigned to the commisisoners of the county to be worked on the public roads of said county according to law, during the term of his imprisonment." This is in pursuance of the terms of the statute, Laws 1887, ch. 355, section 1, which authorizes the court to sentence direct "to imprisonment and hard labor on the public roads for such terms as are now prescribed by law for their punishment in the county jails . . . all persons convicted of offenses the punishment whereof would otherwise be wholly or in part imprisonment in the county jail." Prior thereto, section 3448 of The Code conferred on the county commissioners of each county the power to provide rules and regulations for the working upon the public road of any person sentenced to jail "upon conviction of any crime or misdemeanor." In *S. v. Norwood,* 93 N. C., 578, and *S. v. Johnson,* 94 N. C., 863, the Court having held that the statute gave the discretion to the county commissioners to work

upon the public roads, and that the judge had no power to direct the defendant to be so worked, the next General Assembly, 1887, (573) chapter 355, gave the judge the authority to make such order, thus declaring the public policy of the State. Soon thereafter, in *S. v. Weathers,* 98 N. C., 685, upon conviction for an affray and mutual assault, the court pronounced judgment that "the convicted defendants be put to work on the public roads by the county commissioners," and the judgment was affirmed. This Court said, speaking through *Smith, C. J.,* at p. 688: "The form of the sentence is fully warranted in the recent act regulating the working of convicts on the public roads (Laws 1887, ch. 355), which directly warrants the judgments, and places convicts sentenced to imprisonment and hard labor on the public roads under the control of the county authorities, investing them with power 'to enact all useful rules and regulations for the successful working of all convicts upon said public roads.'" Thus section 3448 of The Code and the act of 1887 were declared constitutional.

To the same effect is *S. v. Pearson,* 100 N. C., 414, which was an indictment for an affray. In *S. v. Hicks,* 101 N. C., 747, this Court held that "a defendant convicted of unlawful liquor selling may be, by virtue of chapter 355, Laws 1887, punished by imprisonment at hard labor on the public roads."

This Court declared in *Myers v. Stafford,* 114 N. C., 234, that bastardy having become a "petty misdemeanor," a defendant convicted of that offense "may under the authority of section 3448 be put to work on the public road until the fine and costs are paid."

S. v. Haynie, 118 N. C., 1265, was an indictment for an assault with a deadly weapon. This Court again said at p. 1270, "the permission to work the defendant on the public roads was authorized by Laws 1887, chapter 355," citing *S. v. Hicks* and *S. v. Weathers, supra.*

To the same effect is *S. v. Yandle,* 119 N. C., 874, which was a conviction for an assault and battery with a deadly weapon, and (574) this Court held that one legally convicted of any crime or misdemeanor may be, under the authority of section 3448, sentenced to work upon the public roads. This was cited and approved. Herring *v. Dixon,* 122 N. C., at p. 425.

And again in *S. v. Smith,* 126 N. C., 1057, a sentence to work the public roads on conviction of retailing spirituous liquors without license was declared valid. See, also, *S. v. Hamby, ib.,* 1066, at p. 1069. In the latter case the defendant was convicted of carrying a concealed weapon, and this Court declared that "the legality of working persons on the public roads has been often held."

The Constitution, Art. XI, section 1, specifies among the punishments authorized, "imprisonment with or without hard labor," and adds:

"The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways and other labor for public benefit." Under this authority for many years by repeated legislative enactments (beginning, indeed, in 1866, prior to the Constitution) to be found referred to in the headlines in section 3448 of The Code, and by the uniform and repeated decisions of this Court, "work upon the public roads" has been enacted and sustained.

This public policy was probably based upon the threefold consideration that prisoners would be healthier working in the open air than when confined in filthy and often overcrowded jails; that the taxpayers should not be burdened with sustaining them in idleness when they could earn their keep in some useful work for the public benefit; and that the fear of being seen by neighbors on the public roads might have a more deterrent effect than being hidden from sight and public observation behind the walls of a jail.

The argument was pressed on us that a justice of the peace might improperly exercise such power; but the defendant has protection by the right of appeal to the Superior Court in all cases. It (575) was also argued to us that the regulations under which prisoners worked on the road may be abused and be oppressive. But the officers are responsible for such misconduct, both civilly and criminally, and abuse is more liable to occur when prisoners are immured in jail than when working under the public eye. In both cases the humanity of the law requires that the regulations must be reasonable. The General Assembly under the authority of the Constitution having adopted work on the public road as a part of the punishment for misdemeanors and crimes, the courts have no power to declare such sentence void.

No error.

Cited: S. v. Morgan, 141 N. C., 728.

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(576)

STATE v. BURTON.

(Filed 21 March, 1905.)

Indictments—Provisos—Vinous Liquors—Time as Essence of Offense —Objection to Venue—How Taken.

1. An indictment charging the defendant with violating an act forbidding the sale or manufacture of vinous liquors in a certain county, section one

thereof concluding with a proviso that the act shall not apply to wine or cider manufactured from fruit raised on the lands of the person manufacturing same, need not aver that the liquors sold were not manufactured from fruit raised on the lands of the defendant, and a motion to quash, for that no such averment was made, was properly denied.

2. There are two kinds of provisos—the one, in the nature of an exception, which withdraws the case provided for from the operation of the act; the other, adding a qualification whereby a case is brought within that operation. When the proviso is of the first kind, it is not necessary in an indictment to negative the proviso; it is left to the defendant to show that fact by way of defense. But, in a proviso of the latter description, the indictment must bring the case within the proviso.

3. In an indictment for selling liquor without license, a demurrer to the evidence on the ground that it was not shown upon what day in August preceding the sale was made was properly overruled, as time was not of the essence of the offense.

4. Under section 1194 of The Code, an objection to venue must be taken by plea in abatement, and a demurrer to the evidence on this ground was properly overruled.

INDICTMENT against Joel Burton, heard by *Justice, J.*, and a jury, at January Term, 1905, of DUPLIN. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General for the State.
Kerr & Gavin for defendant.

CONNOR, J. The defendant was charged with violating chapter 347, Laws 1901, forbidding the sale or manufacture of spirituous, vinous, or malt liquors in Duplin County. Section 1 of the act concludes: "*Provided,* that this act shall not be so construed as to apply to wine or cider manufactured from grapes, berries, or fruit raised on the lands of the person so manufacturing the same." The bill of indictment charged the sale of vinous liquors. It contained no averment that the liquors sold were not manufactured from grapes raised on the lands of the defendant.

Defendant made a motion to quash, for that no such averment was made. Motion denied; defendant excepted. His Honor properly denied the motion. The principle is well stated by *Henderson, C. J.*, in *S. v. Norman,* 13 N. C., 222: "We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act; the other adding a qualification whereby a case is brought within that operation. When the proviso is of the first kind, it is not necessary in an indictment or other charge founded upon the act to negative the proviso; it (577) is left to the defendant to show that fact by way of defense.

But in a proviso of the latter description, the indictment must bring the case within the proviso." In *Norman's case* the act defining and fixing the punishment for bigamy contained in the same section the proviso. *Ashe, J.,* in *S. v. Heaton,* 81 N. C., 542, says: "It is a well-established principle that if there be an exception contained in a clause of the act which creates the offense, the indictment must show negatively that the subject of the indictment does not come within the exception; but when the exception or proviso is in a subsequent clause of the statute, as in this case, it is a matter of defense for the defendant and need not be negatived in the pleading." The defendant presses upon our attention the language of *Davis, J.,* in *S. v. Hazell,* 100 N. C., 471. It is only suggested therein that the indictment should contain the negative averment. The language of the statute under which the indictment was drawn was different from that under consideration—in any event, the case does not decide the point. The defendant misconstrues the words, "same clause," used in many of the opinions, by giving to it the same signification as same section. The line separating the two classes of cases is not made dependent upon the mere location of the excepting language, but is dependent upon its office in describing the offense. This is illustrated in *S. v. Holder,* 133 N. C., 713. The indictment did not negative the fact that defendant had a license. This was a fatal defect, because the statute defines the offense to be "retailing without license." As in *S. v. Krider,* 78 N. C., 481, an indictment charging the larceny of fish was held defective for that it did not charge that they had been reclaimed and were valuable for food, etc.—these words being an essential part of the statutory description of the offense. The principle is applied in *S. v. Liles,* 78 N. C., 496.

A large number of cases are to be found in our Reports sustaining the ruling of his Honor. The defendant pleaded not guilty. The State introduced one Lanier, who testified that he purchased (578) wine from defendant several times during 1904—some time in August—paid for it, etc. The defendant demurred to the evidence. The court overruled the demurrer, and defendant excepted. The court charged the jury that it developed upon the State to satisfy them beyond a reasonable doubt that defendant sold witness vinous liquors within two years before the finding of the bill, for gain, in Duplin County. Defendant excepted. Verdict of guilty. From a judgment upon the verdict, defendant appealed.

The grounds of the demurrer are: (1) That it was not shown upon what day in August the sale was made. There is no merit in the point. Time is not of the essence of the offense. *S. v. Jones,* 80 N. C., 415. (2) That it did not appear that the sale was in Duplin County. Code, section 1194, expressly provides that this objection must be taken by

plea in abatement. *S. v. Holder,* 133 N. C., 709. The authorities are uniform and fully sustain his Honor's ruling. The objection that there was no evidence that the offense was committed in the State cannot be sustained on the demurrer to the evidence, or the request to charge that the burden was on the State. It is open to the defendant to show it, if he can, upon the plea of not guilty. *S. v. Mitchell,* 83 N. C., 674. The court expressly left the question to the jury whether the defendant sold "vinous liquors." *S. v. Scott,* 116 N. C., 1012. We have examined the record and defendant's brief and find

No error.

Cited: S. v. Blackley, post, 622; *S. v. Connor,* 142 N. C., 702; *S. v. Long,* 143 N. C., 673, 674; *S. v. Smith,* 157 N. C., 585; *S. v. Moore,* 166 N. C., 287; *S. v. Hicks,* 179 N. C., 734; *S. v. Helms,* 181 N. C., 572, 573.

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(579)

STATE v. SHEPPARD.

(Filed 21 March, 1905.)

Licenses—Putting Up Lightning Rods—Carrying on Business—Surplusage in Indictment.

1. Where, on an indictment for carrying on the business of putting up lightning rods without license, as required by section 47 of Revenue Act of 1903, ch. 247, the evidence tended to show that the defendant, after the rods were sold by another, delivered them and put them up, an instruction that defendant would be guilty if he had more rods in his possession than were necessary to rod the house in question was erroneous.
2. The possession of more rods than were necessary to rod a particular house is not of itself a violation of the statute, though it may have been a circumstance to be considered, tending to show that defendant was carrying on the business.
3. The statute does not require a license for a single act of putting up lightning rods, but for "carrying on the business" of putting up rods.
4. An averment that defendant "sold" lightning rods is surplusage in an indictment for violation of the statute, which requires a license for carrying on the business of putting up rods.

INDICTMENT against A. J. Sheppard, heard by *Ferguson, J.,* and a jury, at September Term, 1904, of WAYNE.

The defendant was indicted for selling and unlawfully putting up lightning-rods without having obtained a license as required by Laws 1903, ch. 247, section 47.

The sheriff testified that the defendant had not obtained a license to put up or sell lightning-rods in the county of Wayne; that the defendant was requested to do so, but said he was "not under the law," and that his manager was located at some point in this State.

W. S. Casey testified that he did not purchase any rods from the defendant; that he carried them to his house and put them up, and the men worked under his direction; that the defendant had (580) the agreement which showed with whom the trade was made; that he brought the agreement, which was in writing, when he brought the rods; that the rods were in a long box and he had more than enough to put on his house. The witness had a guarantee from Cole Bros.; the defendant said that they did business in Indiana.

The defendant testified that he was the agent for Cole Bros. in putting up rods; the main office was in St. Louis, Mo., and the factory in Indiana. The contract was introduced, for sale of rods between J. L. Harris, agent for Cole Bros., and Casey; his orders from the management were not to pay taxes; they take orders for future delivery, which are sent by H. T. Day to Cole Bros. for shipment, and on arrival they take them out of the depot and place them for persons giving the orders. The witness solicited J. C. Winn to put up the rods—put up old ones for him. The witness did not sell or put up for Winn.

His Honor instructed the jury in part as follows: "That if from the evidence you believe that the defendant had more rods in his possession than were necessary to rod and complete the work on Casey's house, then it will be your duty to bring in a verdict of guilty." The defendant excepted and from a judgment on the verdict appealed.

Robert D. Gilmer, Attorney-General for the State.
Gilliam & Gilliam and Dortch & Barham for defendant.

CONNOR, J., after stating the case: The defendant is indicted for selling and putting up lightning-rods without first having obtained a license, as required by section 47 of the Revenue Act, chapter 247, Laws 1903, which is in the following words: "On every person or company who puts up lightning-rods, $25 annually for each county in which he carries on business or sells lightning-rods." It is de- (581) clared by the Revenue Act that the tax shall be "imposed for the privilege of carrying on the business or doing the act named." The evidence tends to show that after Cole Bros. had, pursuant to a written contract made with Casey through another person as their agent, sold to him certain lightning-rods, the defendant delivered them and superintended the hands in putting them up. This of itself falls far short of showing that the defendant carried on the business of putting up rods,

being the business for the carrying on of which the license is required by the statute. While it is true that in construing revenue laws requiring a license for carrying on certain trades or practicing professions, evidence of one or more acts is competent to be considered by the jury, they are not *per se* conclusive evidence to sustain the charge. It is true that the defendant says he is agent for Cole Bros., under the management of H. T. Day in putting up rods. It may be that, in the light of the entire evidence, the jury may under proper instructions have found that he was "carrying on the business." The only test, so far as the record shows, which his Honor applied was whether he had more rods in his possession than were necessary to rod Casey's house; if so, he was guilty. This fact, if found by the jury, may have been a circumstance to be considered, tending to show that he was carrying on the business. It was not of itself any violation of the statute to have more rods than were necessary to rod the particular house.

The contract made with Casey by Cole Bros. was to deliver "sufficient 5-8 . . . rods." The fact that they sent more than were necessary for that purpose could not make the defendant guilty.

It may be that the entire charge is not set out and that the judge explained the law fully to the jury. However this may be, the portion sent up is, we think, erroneous.

(582) The language of the statute is far from clear, but we think it sufficiently appears, when read in the light of the other sections, that it was not intended to require a license for a single act of putting up lightning-rods, but for carrying on the business of putting up rods. This clearly appeared from the special verdict in *S. v. Gorham,* 115 N. C., 721. The Court, by *McRae, J.,* says that the defendant was an "itinerant putting up lightning-rods." *S. v. Roberson,* 136 N. C., 587. The averment that he sold lightning-rods is surplusage. It would be safer for the solicitor to follow the language of the statute, which requires a license for carrying on the business of putting up rods.

We do not deem it necessary to discuss the other questions raised by counsel. For the error pointed out there must be a

New Trial.

Cited: S. v. Meachum, post, 749.

STATE v. GODWIN.

(Filed 21 March, 1905.)

Landlord and Tenant—Indictment—Verdict—Insensible or Repugnant —Duty of Court.

1. In an indictment under section 1761 of The Code, which makes it unlawful for a tenant to injure any tenement house of his landlord, the burden of proof is upon the State to establish, first, that the relation of landlord and tenant existed, and second, that during the tenant's term or after its expiration he did wilfully and unlawfully injure the tenement house.
2. Where, on the trial of an indictment under section 1761 of The Code, the evidence tended to prove that the defendant entered the house as A's tenant, he cannot be heard to say it was not A's property.
3. Where the jury, in response to the question of the clerk, "if they had agreed," said, "Yes; guilty, but innocently," and the court declined defendant's request to have this response entered on the record as the verdict, and told the jury to retire and consider the evidence and return a verdict of "guilty or not guilty" as they should find from the evidence and the law given them by the court, and the jury retired and after consultation returned a verdict of "Guilty": *Held*, that defendant's motion for his discharge on the ground that the first response was the true verdict and equivalent to a verdict of not guilty was properly denied.
4. Before a verdict returned into open court by a jury is complete it must be accepted by the court for record, and it is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records.
5. When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a verdict in proper form; but it is incumbent upon the judge not even to suggest the alteration of a verdict in substance.

INDICTMENT against Elijah Godwin, heard by *Ferguson, J.*, (583) and a jury, February Term, 1904, of LENOIR.

The defendant was tried upon a bill of indictment charging him with a violation of section 1761 of The Code, which makes it unlawful for a tenant to destroy, deface, injure, or damage any tenement-house of his landlord. He was convicted, and appealed from the judgment pronounced.

Robert D. Gilmer, Attorney-General for the State.
N. J. Rouse and W. D. Pollock for defendant.

BROWN, J. There was evidence tending to show that one Alexander Tilghman was the owner of the land and had sold the timber to Charles Riley & Co., with the privilege of building tramroads, sawmills, etc., necessary and incidental to cutting, hauling, and manufacturing

(584) lumber, and that Riley & Co., through Hines Bros., contracted with J. H. Hines to cut, saw, and remove said timber; that said Hines with the permission of said Tilghman, went on the land and located the mill and constructed buildings for the purpose of said work, and among others, the building described in the indictment, which was used as a dwelling for the employees while operating the mill—being constructed out of the lumber sawed at the mill; that the mill and property were sold at a mortgage sale to one Seth West, but not the land. There was evidence tending to prove that defendant rented the house from Tilghman and entered as his tenant. There was also controverting evidence tending to prove that the defendant entered as tenant of West. There was evidence tending to prove that defendant removed two windows which fastened into the house, without the permission of Tilghman, but with the permission of West, and that such removal was an injury to the house.

1. The defendant requested the court to charge that according to the evidence the house did not belong to Tilghman, and that the jury should return a verdict of not guilty. Refused, and defendant excepted.

The court instructed the jury that if they should be fully satisfied from the evidence that Tilghman was the owner of the land and that the defendant entered into the house as the tenant of Tilghman, and willfully, without any *bona fide* claim of right, removed the windows, and such removal injured the house, they would return a verdict of "guilty." (To this charge defendant excepted.) The court further charged the jury that if they should find from the evidence that the defendant entered as the tenant of West, and at the time he removed the windows he believed in good faith he had a right to do so, they would return a verdict of "not guilty."

We see no error in the refusal of the judge to give the instruction asked, nor do we see any error in the instruction given and ex-
(585) cepted to. The title to the land was not in controversy and could not have well been put in issue upon the trial of an indictment under the statute, section 1761 of The Code.

In order to convict the defendant, the burden of proof was upon the State to establish, first, that the relation of landlord and tenant existed between Tilghman and the defendant, and, second, that during his term or after its expiration, the defendant did willfully and unlawfully injure or damage the tenement-house. There was evidence tending to prove that the defendant entered into the house as the tenant and lessee of Tilghman. The question of the title to the house was, therefore, not involved. If the defendant entered as Tilghman's tenant, he cannot be heard to say it was not Tilghman's property. This is elementary.

2. The jury returned, and in response to the question of the clerk, "if

they had agreed," said, "Yes; guilty, but innocently." The defendant asked to have this response entered on the record as the verdict of the jury; this the court declined and told the jury to retire and consider the evidence and return a verdict of "guilty" or "not guilty," as they should find from the evidence and the law given them by the court, and the defendant excepted. The jury retired and after further consultation returned a verdict of "guilty." The defendant moved for his discharge on the ground that the first response was the true verdict and equivalent to a verdict of not guilty. This was denied, and the defendant excepted.

Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record. It is the duty of the judge to look after the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records of the court. For that purpose the court can, at any time while the jury are before it or under its control, see that the jury amend their ver- (586) dict in form so as to meet the requirements of the law. When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a proper verdict, i.e., one in proper form. But it is especially incumbent upon the judge not even to suggest the alteration of a verdict in substance, and in such matters he should act with great caution. In our own State these views are supported by the great names of Taylor and Henderson in *S. v. Arrington,* 7 N. C., 573. Later cases, *S. v. Bishop,* 73 N. C., 44, and *Willoughby v. Treadgill,* 72 N. C., 438. This is the view taken by nearly all the courts in the Union. See *Grant v. State,* 23 L. R. A., 725. The note to this case is very full and quotes from nearly all the courts of last resort in this country. See, also, Abbott's Trial Brief, Cr. (2 Ed.), 729. A verdict which must be "interpreted" —one which requires a course of reasoning to demonstrate its meaning— ought not to be accepted. Verdicts should be able to speak for themselves. In criminal cases, such as this, the jury discharge their duty best by responding in the time-honored formula "guilty" or "not guilty," and no more. We have no hesitation in holding that the verdict which the court refused to accept was insensible and of very doubtful import, if not repugnant; and that his Honor used most discreet and impartial language in directing the jury as to their duty.

No error.

Cited: Cox v. R. R., 149 N. C., 88; *S. v. McKay,* 150 N. C., 816; *S. v. Parker,* 152 N. C., 791; *S. v. Lumber C.,* 153 N. C., 613; *S. v. Bagley,* 158 N. C., 610; *S. v. Spear,* 164 N. C., 455; *S. v. Lemons,* 182 N. C., 831.

(587)

STATE v. TEACHEY.

(Filed 21 March, 1905.)

Homicide—Challenge to Array—County Commissioners—Revision of Jury Lists—Challenge to Juror—Dying Declarations—Refreshing Recollection—Premeditation and Deliberation—Evidence.

1. Where at August Term, 1904, the prisoner's challenge to the array was sustained because of irregularities in revising the jury lists in 1903, and in consequence of such ruling the commissioners revised the jury lists anew in September, 1904, destroying all the old scrolls remaining in the boxes and made an entirely new jury list for the county, composed of all citizens of good moral character and otherwise qualified as jurors, and placed their names in box No. 1, and at their meeting in October, 1904, the eighteen jurors required for the second week of the October Term were regularly drawn: *Held*, that the prisoner's challenge to the array of said regular jurors, on the ground that the commissioners destroyed all the old scrolls remaining in the boxes which contained the names of the persons eligible as jurors, was properly overruled.
2. While it is the duty of the county commissioners to draw the jury and revise the jury lists at the time and place the law directs, yet if these things are not so done, but are properly done at another time and place, they will be treated as irregularities, not vitiating their action, for these provisions of the statute are directory and not mandatory.
3. An exception relating to a challenge to a juror is without merit where the juror was stood aside for cause or the prisoner did not exhaust his peremptory challenges.
4. In an indictment for homicide, declarations of the deceased that the prisoner shot him, and detailing the particulars of the shooting, are competent as dying declarations, where the statements show that deceased knew he was *in extremis* and in the shadow of death.
5. Where the homicide was committed at the house of a woman whom the prisoner visited, a declaration by the prisoner that he would kill any man who came around "his woman's house" was competent as tending to show motive and malice.
6. In an indictment for homicide, a witness may refresh his recollection as to dying declarations of the deceased from an affidavit made by deceased in the presence of witness, the court telling the jury that the affidavit was not in any sense evidence to be considered by them.
7. Since the act of 1893, dividing murder into two degrees, if the killing is admitted or established beyond a reasonable doubt, the prisoner must justify it or excuse it, or he is guilty of murder in the second degree.
8. In order to convict of murder in the first degree, the burden is upon the State not only to establish the killing beyond a reasonable doubt, but likewise to prove that it was done premeditatedly and deliberately, or by lying in wait, poison, or starvation.
9. Where the prisoner was convicted of murder in the first degree, the failure of the court to charge the jury on the question of manslaughter was not

prejudicial to him, and besides, in this case, there was no element of manslaughter.

10. An instruction that if "the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution and killed the deceased in pursuance of such fixed design, then there was sufficient premeditation and deliberation to warrant finding him guilty of murder in the first degree" was proper.

INDICTMENT against Dan Teachey, heard by *Moore, J.*, and a (588) jury, at October Term, 1904, of DUPLIN.

The prisoner, Dan Teachey, was tried at August Term, 1903, for the murder of one Rivenbark in the county of Duplin. The grand jury which indicted him was drawn prior to a revision of the jury boxes on the first Monday in June, 1903. He was tried and convicted of murder in the first degree at August Term, 1903, and appealed to the Supreme Court. A new trial was ordered for error in reception of evidence. At August Term, 1904, the cause came on to be heard again. So far as the record discloses, no plea in abatement was filed or motion made to quash the bill for irregularity in selecting the grand (589) jury or other cause.

At said term the prisoner challenged the array of jurors for irregularities in revising the jury lists and boxes, which motion was sustained.

At October Term, 1904, the cause was tried, commencing second week, 7 November, before *Moore, J.*, and a jury. The prisoner was convicted of murder in the first degree, and from the judgment pronounced appealed to this Court.

Robert D. Gilmer, Attorney-General, and Stevens, Beasley & Weeks for the State.

James O. Carr and Kerr & Gavin for prisoner.

BROWN, J. The prisoner again challenged the array of regular jurors summoned for the second week, as well as the array of special veniremen. From a very full and complete finding of facts upon the hearing of such challenge we condense the following: At August Term, 1904, the challenge to the array was sustained because of irregularities in the revision of the jury boxes prior to the drawing of the jurors at the June (1903) meeting of the commissioners of the county. In consequence of such ruling of the court, the commissioners revised the jury lists anew on the first Monday in September, 1904. All names in boxes 1 and 2 were revised and destroyed. The board then caused to be laid before them the tax lists for 1903 and from those lists selected the names of such persons as had paid taxes and were of good moral character and sufficient intelligence, and, also, they selected such other citizens of

the county as did not appear on the tax lists, but who were legally eligible and qualified to serve as jurors. The names thus selected were declared to be the jury list for the county and were placed by the commissioners in box No. 1. At the time of the destruction of the scrolls mentioned there were in the boxes the names of persons
(590) eligible for jury duty.

The effect of this revision, of course, was to provide an entirely new list for the county composed of all the citizens of the county of good moral character and otherwise qualified as jurors. On the first Monday in October, 1904, the 36 regular jurors required for the first week and the 18 jurors required for the second week of October Term were drawn in the manner required by law. In drawing these jurors for the first week the names of those who had served within two years were rejected and placed in box No. 2, but no names whatever were rejected in drawing the 18 jurors for the second week. The court overruled the challenge to the array, and the prisoner excepted. In such ruling we find no error.

In reviewing the action of his Honor, it is useless to discuss or pass upon the legality of the act of the commissioners at their October session when drawing the jurors for the October Term. Whether they had the right, after a name is drawn out of box No. 1 in due course by the small boy, to return it to box No. 2, instead of placing the name on the list of jurors to be summoned for the court, is immaterial in this case. The fact is found that no name was rejected in drawing the jurors for the second week and that the prisoner's trial began on Monday of that week. The bill of indictment was returned several terms before by a grand jury drawn in 1903. So the prisoner has not been prejudiced thereby so far as we are able to see.

The action of the board in revising the jury list anew at September Term, 1904, seems to have been rendered necessary, or at least advisable, by reason of the ruling of the court in this case at August term preceding, upon the prisoner's challenge to the entire panel of jurors, which challenge was sustained and the panel set aside for errors which his Honor thought vitiated the action of the commisisoners at their
(591) meeting in June, 1903, in revising the jury list for the county.

The particular act complained of is that at September Term, 1904, the board destroyed all the old scrolls remaining in the boxes, and made an entirely new jury list and placed the names in box No. 1. The facts found by the court below show plainly that not only was there no wrongful purpose or intent, but that the commissioners acted with great care and in a manner indicating a conscientious discharge of their duty. We do not hold that this action of the board was illegal or irregular, but at most it could be no more than the latter. That would

not vitiate the list of jurors drawn from the box, and constituted no ground for challenge to the array. The statute is considered directory so far as it relates to the action of the commissioners as to the time and place of drawing the jury and as to revising the jury lists. It is the duty of the commissioners to do these things at the time and place the law directs. But if not so done, but are properly done at another time and place, they will be treated as irregularities. This is necessary to prevent delay in the administration of justice. *Moore v. Guano Co.,* 130 N. C., 229.

Nor do we think that the prisoner can reasonably complain of the act of the commissioners in destroying all the old scrolls in the boxes. He had challenged the panel at August Term, 1904, drawn from those boxes, upon grounds tending to vitiate the contents of the boxes and the action of the commisisoners at June Term, 1903, in revising them. This challenge of the prisoner was sustained. The action of the board at September Term, 1904, was eminently proper in view of the ruling of the court.

In recurring to the statutes regulating the revising of jury lists of the county and the drawing of jurors, *Justice Connor,* in *S. v. Alfred Daniels,* 134 N. C., 648, says: "It has been held from the earliest period of our judicial history that the provisions of these statutes are directory and not mandatory." In this case and in the pre- (592) ceding one of *Moore v. Guano Co.,* the cases are all cited and discussed, which bear at all on this subject. We therefore forbear any further discussion of them. Exception No. 3, relating to challenge to an individual juror, is without merit, as the juror was stood aside for cause. Besides, the prisoner did not exhaust his peremptory challenges.

We proceed now to notice such of the prisoner's numerous exceptions noted during the trial and appearing in the voluminous record as we deem proper.

The evidence on the part of the State tends to show that the homicide occurred on Wednesday night, 4 March, 1903, between 8 and 9 o'clock, at the house of Gilbert Johnson and Easter Williams, in Duplin County, which house was situated a little more than three miles from the home of Robert Teachey, with whom his son, the prisoner, resided. There were present in the house when the homicide occurred Gilbert Johnson, Annie Johnson, Easter Williams and the four illegitimate children of Easter Williams. The evidence relied on by the State tends to show that the deceased left home a short time after dark and went to the house of Easter Williams for the purpose of securing her services in working his strawberries; that he remained in the house a short time, and after securing her promise to come on the following Monday, turned to leave the house, and after getting out of the door the prisoner

approached him from behind the house or from the corner, making threats and using profane language, and shot the deceased. After the shooting the deceased went in the direction of the home of J. E. Dixon, who lived about 180 yards from Easter Williams. Before reaching Dixon's house, the deceased fell, and in answer to his cries, Dixon came and found him in great pain, lying on his back in the middle of the road. To this witness the deceased said, "I am shot and shot to die," adding, "Dan Teachey is the man who shot me; I saw him and caught his voice." The deceased was then taken to his father's house, and (593) died from the effects of his wounds between 5 and 6 o'clock P. M., on Friday following. There was also evidence tending to show the existence of illicit relations between Easter Williams and the prisoner, and that he was the father of Easter's youngest child. It also appears in the evidence that some time before the homicide the prisoner said he believed that Bob Rivenbark, the deceased, was going to Easter's house, and if he caught him there he would kill him, and that three weeks before the shooting the prisoner said: "I have two good guns and am going to buy another one," adding that "he would kill any man he caught at his woman's house." In his defense the prisoner relied upon an alibi and offered evidence of a number of witnesses tending to prove the alibi.

There are in this record a large number of exceptions by the prisoner to the testimony. We have examined each exception with that care which the importance of the case demands. We are unable to discover any merit whatever in any of them, and therefore we do not deem it necessary to discuss the exceptions to the evidence *seriatim*. As an example, we cite the exception to a certain part of the testimony of Ann Johnson, wherein she testified that the prisoner was in the back yard and asked, "How is Rivenbark?" and upon receiving a reply, the prisoner said, "Well, I must leave this place." "The prisoner was standing on the side not far from the oak tree the next morning. The prisoner spoke to Lizzie Williams while standing in the yard. I did not see him give her anything." As the ground of the objection is not stated, we have been unable to discover any possible reason for it. The declarations of the prisoner, several of which were offered in evidence by the State and proved by different witnesses, are plainly competent as evidence tending to prove the commission of the crime. These declarations were made under circumstances clearly indicating that they were (594) voluntary, and not made under duress or other improper influence.

The prisoner further objects, in his seventh exception, to the testimony of Ann Johnson in regard to a conversation with Max Myers. The record shows that she testified that "Max Myers was the first person who spoke to me about this occurrence." It is true, the prisoner was

not present, but the conversation, whatever it may have been, was not given in evidence. The fact that there was such a conversation is immaterial and harmless.

Exceptions 4, 5, 9, 10, 12, and 13 were made to the statements of several witnesses in regard to the dying declarations of the deceased. On the night he was shot, the deceased said to J. E. Dixon and one Booth, witnesses for the State, that "he was shot and wanted to tell us both, while he was in his right mind, who shot him." The deceased then said, "I am shot and shot to die. Dan Teachey is the man who shot me. I saw him and caught his voice." He said he came out of Easter Williams' house, and when he got a step or two from it, the prisoner came up from behind the house and said to him, "Bob, what in the devil business have you got here to-night?" He said he was going backwards from the prisoner and the prisoner shot him.

J. S. Rivenbark, a witness for the State, testified to being present when the declaration was made by the deceased to Dixon and Booth, and that the deceased further said, "I walked out of the house and the prisoner walked round the house cursing; he said 'By God, these women can get their living without work,' and jerked out his pistol and shot me; that the prisoner followed him and kicked him three or four times, knocked Easter Williams down, and then ran." This witness further testifies that on this occasion the deceased called his mother, put his arms around her and said, "I'm gone. I am going to die. Dan Teachey shot me to death."

The deceased also stated to J. D. Teachey, about 2 o'clock the same night he was shot, that the prisoner approached him from behind the house, making threats; and he stepped backwards and the (595) prisoner shot him and struck and kicked him; that he heard the prisoner's voice and saw his face. The deceased made a statement in writing which he swore to, but as this statement was not admitted as evidence it is unnecessary to notice it.

Every condition necessary to make the dying declarations of the deceased competent was shown to exist in this case. The deceased was shot on Wednesday night and died on Friday night following. The statements show conclusively that he knew he was *in extremis* and in the shadow of death. He told the physician that he was going to die, and made the same statement to his mother. The declarations under such circumstances were not only competent, but they were plain, unequivocal, and of no uncertain meaning. The ruling of the court in admitting them is sustained by the uniform decisions of this Court. *S. v. Dixon,* 131 N. C., 808; *S. v. Boggan,* 133 N. C.,761. Although a large part of the exceptions in the record do not point out that portion of the testimony which is obnoxious, as required under the ruling in

S. v. Ledford, 133 N. C., 714, yet in the interest of human life we have examined all the testimony with great care, and we are unable to see wherein the prisoner has just ground of exception to any ruling of his Honor disclosed in the record.

Exception is taken to the testimony of Max Myers and a number of other witnesses offered by the State as corroborative evidence only. The record shows that his Honor carefully explained, at the time of the introduction of the evidence, the purpose for which it was offered, and fully complied with the recent rule of this Court upon that subject. In addition, he called the attention of the jury in his charge to corroborative evidence in general, and impressed upon them their
(596) duty to give it only that effect and weight which its character deserved.

The testimony of McClung was competent as tending to show motive and malice. It was a declaration of the prisoner tending to show a premeditated and deliberate purpose to "kill any man who came around his woman's house," and it appears from the testimony that the homicide was committed at the house of the woman whom the prisoner visited.

The charge of his Honor is very full and clear, and in it all the rights of the prisoner seem to have been most carefully guarded, and the testimony and contentions in his behalf presented to the jury along with the State's with eminent fairness and ability. We do not deem it necessary to comment at length upon all of the exceptions to the charge.

The prisoner excepts because the court referred to the affidavit of the deceased, made before J. D. Teachey, a justice of the peace. This paper was permitted to be used by one or two of the witnesses, present at the time it was taken, for the purpose of refreshing their memory. His Honor was careful to call the attention of the jury to the fact that this paper was not in any sense evidence to be considered by them; that the law does not authorize the taking of an affidavit or deposition of a person mortally wounded, but the law does permit the dying declarations of the person who has been slain by another to be given in evidence before the jury. He told them further that the fact that the deceased swore to this paper is of no importance; that the only evidence the jury should consider of these dying declarations is the evidence of the witnesses who testified to them and that they were made in their presence, and that the only use which could be made of this paper is the use made of it by the witnesses Graham and Teachey, who were permitted to refer to it for the purpose of refreshing their recollection, as the affidavit was made in their presence and taken by them. It has been expressly decided in a number of cases that a witness may re-

fresh his recollection as to dying declarations of the deceased (597) from memoranda. *S. v. Whitson,* 111 N. C., 695; *S. v. Finley,* 118 N. C., 1161; *S. v. Craine,* 120 N. C., 601.

The court further instructed the jury that "If you are satisfied beyond a reasonable doubt from the evidence in this case that the prisoner, Dan Teachey, shot W. Robert Rivenbark, with a gun or pistol, on 4 March, 1903, and that Rivenbark died from the wound thus inflicted on 6 March, 1903, then the prisoner is guilty of murder in the second degree at least." It is the settled law in this State that, when the killing is admitted or established beyond a reasonable doubt to have been done by the prisoner, the burden is upon the prisoner to either justify or excuse the killing. If he fails to do so, he is guilty of murder. The act of 1893 has introduced a new element into the crime of murder and divided it into two degrees. Since the passage of that act, if the killing is admitted or established beyond a reasonable doubt, the prisoner must justify it or excuse it, or he is guilty of murder in the second degree. In order to convict of murder in the first degree, the burden is still upon the State not only to establish the killing beyond a reasonable doubt, but likewise to prove that it was done premeditatedly and deliberately, or by lying in wait, poison, or starvation. In this case the prisoner denied the killing and undertook to establish an alibi. Therefore, the burden was upon the State to prove the killing beyond a reasonable doubt, and, to justify a verdict of murder in the first degree, to prove premeditation and deliberation as well. The charge of the court below was entirely correct and in line with all the authorities.

The prisoner excepts because the court failed to present to the jury in this connection a view of manslaughter. The prisoner was convicted of murder in the first degree, and we do not see how it was prejudicial to him because his Honor failed to charge the jury on the question of manslaughter. *S. v. Munn,* 134 N. C., 680; *S. v. Lipscomb,* (598) *ibid.,* 689. In this case there is no element of manslaughter. The testimony of Gilbert Johnson and Ann Johnson, State's witnesses, pointed out to us by the prisoner's counsel as supporting a view of manslaughter, fails entirely to justify any such charge.

The refusal to give certain special instructions asked by the prisoner constitutes exceptions 13, 14, 15, 16, 17, 18, and 19. We do not think there was any evidence to sustain them, and they were properly refused.

In regard to the exceptions relating to lying in wait, an examination of his Honor's charge shows that he expressly told the jury that there was no evidence in the case sufficient to justify the jury in finding that the prisoner was lying in wait.

The court charged the jury: "If you are satisfied beyond a reasonable doubt that the prisoner killed the deceased, and that the killing was willful, deliberate, and premeditated, you should convict the prisoner of murder in the first degree. If you are satisfied beyond a reasonable doubt that the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution, and killed the deceased in pursuance of such fixed design to kill, then there was sufficient premeditation and deliberation to warrant you in finding the prisoner guilty of murder in the first degree." We are unable to see any error in this instruction. When the pursuance or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design be formed any definite length of time before the killing. *S. v. Spivey,* 132 N. C., 989.

There is in the record abundant evidence to justify the finding of the jury that the homicide was committed by the prisoner in the pursuance of a fixed design deliberately formed beforehand, and (599) under circumstances attended with heartless brutality. The evidence offered by the prisoner was not intended to show palliation, extenuation, or excuse. It was introduced for the sole purpose of establishing an alibi, and it seems to have had little weight with the jury. The prisoner has been tried twice for this crime, and on both trials the jury have pronounced him guilty of the willful and deliberate murder of Rivenbark. A minute examination of the entire record on the second trial shows that the prisoner was fairly and impartially tried, and that no error was committed of which the prisoner had just ground to complain. There is

No error.

Cited: S. v. Daniel, 139 N. C., 553; *S. v. Bohanon,* 142 N. C., 697, 8; *Hodgin v. R. R.,* 143 N. C., 95; *S. v. Jones,* 145 N. C., 470; *S. v. McDowell, ib.,* 566; *S. v. Banner,* 149 N. C., 521; *S. v. Roberson,* 150 N. C., 839, 842; *S. v. Logan,* 161 N. C., 236; *S. v. Tate, ib.,* 282; *S. v. English,* 164 N. C., 507; *S. v. McKenzie,* 166 N. C., 294; *S. v. Cameron, ib.,* 383; *S. v. Merrick,* 171 N. C., 798; *S. v. Walker,* 173 N. C., 782; *S. v. Alderman,* 182 N. C., 920.

STATE v. EXUM.

(Filed 21 March, 1905.)

Homicide—Threats—Examination of Witnesses—Statements While Under Arrest—Evidence of Character and Habits of Deceased—When Competent—Hypnotism—Impeaching and Corroborating Evidence—Comments of Counsel—Deliberation and Premeditation—Manslaugter —Charge.

1. In an indictment for homicide which occurred in September, evidence of threats made by the prisoner the same year, showing deep-seated animosity against the deceased, or of threats to take his life, is competent.
2. Where evidence of threats against the deceased was so involved that it would be meaningless unless the entire statement, which also showed threats against other persons, was given, it was not error to admit such statement, where the court instructed the jury that it was competent only as to the deceased and incompetent as to the other persons.
3. A witness gave his evidence without being sworn, and this being discovered, he was sworn and restated his testimony. It is no ground for a new trial, where the court told the jury that "they must disregard each and every statement made by the witness before he was sworn, and must not consider anything which the witness had then said as evidence in the case."
4. An exception to a statement pertinent to the inquiry made by the prisoner to a deputy sheriff when that officer had him in custody, for the reason that he was at the time in custody, is without merit.
5. On a trial for homicide, neither the character and habits of the deceased, nor even his disposition towards the prisoner, is relevant to the issue, except (1) when there is evidence tending to show that the killing may have been done in self-defense; or (2) where the evidence is wholly circumstantial and the character of the transaction is in doubt.
6. Where the ruling of the court in rejecting the evidence of a witness was correct at the time the evidence was offered and as the facts then appeared, its rejection was not error, though at a later stage of the trial it became competent; and if the prisoner desired the benefit of this evidence he should have offered it after the development of the trial had made it competent.
7. Where the prisoner testified that he had hypnotized his wife, and his evidence tended to show that he had influence over her to a greater extent than usually arises from the relationship between them, it was not error to permit the State to ask the wife on cross-examination if she had not been hypnotized by her husband, as affecting her credibility.
8. Where the wife testified as an eye-witness to the homicide, contradictory of the State's testimony, and tending to support her husband's claim that the killing was in self-defense, her declaration, "Oh, little did I think I would have married a murderer in my own family," was competent as impeaching evidence.
9. An affidavit made by a witness in the presence of the prisoner's wife, who said it was correct, is admissible, not as substantive evidence, but for the

purpose of corroborating the witness and contradicting the wife, who had testified for her husband.

10. Whenever the credit of a witness is impeached, whether by proof of general bad character or by contradictory statements by himself, or by cross-examination tending to impeach his veracity or memory, or at times by his very position in reference to the cause and its parties, it may be restored or strengthened by any proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony, whether such evidence appears in a verbal or written statement, verified or not, or whether the previous statements were made *ante litem motam* or pending the controversy.

11. A letter of the prisoner, concerning the deceased, which tended to show ill-will against the deceased, is competent for that purpose.

12. Comments of counsel in the argument to a jury are under the supervision of the trial judge, and this Court will not interfere with the exercise of his discretion unless it plainly appears that he has been too vigorous or too lax in the exercise of it, to the detriment of the parties.

13. In an indictment for homicide, evidence that the prisoner had strong enmity towards the deceased and had several times threatened to kill him, and when they were in the same room the prisoner withdrew, but on hearing an opprobrious epithet immediately returned, and, after asking whom the deceased meant, seized his pistol and advanced on the deceased, who was unarmed, in a reclining attitude, and as the deceased was endeavoring to escape, shot him, and as his victim fell helpless before him he fires another shot, causing instant death, pushing aside the interposing arm of his wife, the mother of the deceased: *Held*, that the evidence was sufficient to warrant a verdict of murder in the first degree.

14. In an indictment for homicide, where the evidence shows that just as the prisoner was withdrawing from the scene of the killing he was met by the brother of the deceased, drew his pistol on the brother and made him stand off, so that he could withdraw without hindrance, an instruction to the jury that "in determining the question of premeditation and deliberation it is competent for the jury to take into their consideration the conduct of the prisoner before and after, as well as at the time of the homicide, and all of the circumstances connected with the homicide," is not erroneous.

15. Where the judge in his charge to the jury gives a full explanation of both the statutory terms "deliberate" and "premeditate" in words which express both ideas and excludes all idea of a killing from passion suddenly aroused, and directs the jury, before they can convict of the higher crime, that the killing must be from a fixed determination, previously formed, after weighing the matter, it is correct, though the judge did not define each term separately.

16. The following instruction on the question of manslaughter is correct: "If you should find from the evidence that the prisoner willingly engaged in the fight with the deceased, and that the deceased threw his hand to his hip pocket and advanced upon the prisoner in a threatening manner, and that the prisoner, being willing to fight, seized a pistol and shot the deceased, and the deceased died from the wound, the prisoner would be guilty of manslaughter, provided that you should find from the evidence that the appearance and manner of the deceased were such as to cause

the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was thus armed and was about to harm him with it."

17. The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

INDICTMENT against William Exum, heard by *Moore, J.*, and (602) a jury, at September Term, 1904, of LENOIR, for the murder of Guy Walston.

The evidence on the part of the State tends to show that the homicide occurred on Saturday, 3 September, 1904, at the house of Runie Walston in Lenoir County. Mrs. Exum (formerly Mrs. Walston), the mother of the deceased and of Runie Walston, and wife of the prisoner, was on a visit, with her heusband, at the home of her son, Runie, whose wife was confined in bed by fever. They arrived on Tuesday before the homicide occurred on Saturday next. Guy, the deceased, who had been working in Greene County, about 20 miles away, came on Saturday.

The following named persons witnessed the shooting: Mrs. Mary A. Walston, wife of Runie; Mrs. Exum, wife of the prisoner, (603) and Miss Zenobia Jones. After dinner the prisoner went into the room of Mrs. Walston. Miss Jones was there when the prisoner entered. Guy came in and sat down by the bedside of Mrs. Walston, near an open window, with his head on a pillow and his feet on a sewing machine, and was fanning Mrs. Walston. The prisoner retired when Guy came in, going to an adjoining room. Mrs. Exum came in and sat down at the foot of the bed, and she and Guy commenced talking. She was telling him about Exum going down the country next week to look for a place to live another year, and Guy asked his mother if she was going with Exum, and she said, "Yes, I reckon I will." Guy then made use of an opprobrious epithet about Exum. Exum then pushed the ell door open and came into the room and asked Guy whom he was talking about, and Guy laughed and said "You." Exum then reached up on the bookcase and got his pistol and came towards him with pistol pointed at him. When he got to the east corner of the fireplace, Mrs. Exum pushed him back in the corner next to the bureau, and tried to take the pistol away from him. Guy then jumped up and ran for the door. Just as he passed and was midway of the fireplace, Exum whirled and shot him in the left shoulder. Guy turned, fell forward and put his arms around his mother's waist and swung around

on the hearth. As he fell forward, Exum put his pistol to his head and fired the second shot into his brain, causing his instant death.

The physician stated that the first shot entered the left arm just below the shoulder, and from behind passed through the blade, broke the third rib and embedded itself in the spinal column, third dorsal, fracturing the third dorsal vertebra; that the effect would cause paralysis from the fracture down, and the person who fired did so from behind, not directly, but at an angle.

(604) The prisoner offered evidence to show that he and his wife had gone to the house of Runie Walston from their home in Greene County, having been sent for, that his wife might assist in nursing Mrs. Runie Walston, who was sick in bed, from fever. He testified that he was in the room where Mrs. Walson was in bed, and Guy came in, and witness withdrew to an adjoining room. Mrs. Exum and Guy (the deceased) commenced talking, and in their conversation Guy made use of an offensive remark about witness. When he reëntered the room and asked him whom he was talking about, he said, "You, Will," and I said, "Guy, I wish you would please quit talking about me and calling me names, as you just now called me," and he said, "I will quit when I get ready, and fix you besides." He then threw his hand to his hip pocket, his left hand was on the window-sill in front of which he was lying, and raised up. At this juncture Miss Jones went out. "I reached then and took my pistol off the bookcase. Guy had advanced some then, and I said, 'Stop, Guy, stop; don't come on me,' and he said, 'I will stop when I fix you.' My wife was running towards me then, and she said, 'Don't shoot in here; it will scare Alice.' I said, 'Well, he is going to kill me.' Then I presented my pistol to shoot him in the right arm, and just as I presented my pistol to fire, he turned his left side to me and I fired. My wife jumped between us. Guy threw his left hand on her shoulder and was looking over her right shoulder into my face. Then I felt something striking me in my left side (about here) and I threw my pistol over her head. She said, 'Don't shoot any more,' and I said, 'He will kill me,' and I fired." The prisoner was convicted of murder in the first degree, and from the sentence pronounced on the verdict appealed.

Robert D. Gilmer, Attorney-General for the State.
N. J. Rouse, Loftin & Varser, and Aycock & Daniels for prisoner.

(605) HOKE, J., after stating the case: We have given this record and the exceptions noted in the case on appeal the close scrutiny and careful consideration which the supreme importance of the issue demands, and can find no error to the prejudice of the prisoner or his cause.

The first twelve exceptions, and exceptions 16 and 17, are to the admission of evidence showing previous threats on the part of the prisoner against the deceased. These threats were in July previous, and some as far back as January or February, 1904. They tend to show deep-seated animosity against the deceased, some of them amounting to direct threats to take his life, and are undoubtedly competent. *S. v. Hunt,* 128 N. C., 584, 587; *S. v. Moore,* 104 N. C., 743.

We suppose the real objection insisted on here is to the threat testified to by Runie Walston (page 18 of the record), in the following language: "He (the prisoner) said that not only Cousin Sam, but Guy had told on him things that were wrong, and that a man by the name of John Shackleford liked to have got him into trouble, and if the report about Cousin Sam be true, he was going to kill him, and while he was up there he was going to get the other two." It would not be competent as a separate proposition to show threats against other persons than the deceased; but this statement as to the others is so involved in the threat against the deceased that it was necessary to give the entire statement to make the jury properly apprehend its significance as against the deceased. "He was going to get the other two," standing by itself, would be meaningless, and by giving the entire statement, it became perfectly plain. His Honor was careful to tell the jury that this conversation was only competent, and should only be considered as evidence, in so far as it related to Guy Walston, and any statement in reference to Shackleford and others was incompetent. Only that referring to the deceased is competent. So qualified and explained, there was no error in permitting the statement to go to the jury. *S. v. Crane,* 110 N. C., 530. (530)

Exceptions 13, 14, and 15: In swearing the witnesses, Mrs. Walston and Miss Jones were not present, and when called they gave their evidence without having been sworn. The inadvertence was discovered, and they were then properly sworn and restated their testimony to the jury. In this connection the judge told the jury "they must disregard each and every statement made by these witnesses before they were sworn, and must not consider anything which these witnesses had then said as evidence in the case." The judge pursued the only course proper and perhaps permissible under the circumstances, and the decisions are against the prisoner. A case very similar in our own Court is *S. v. Morris,* 84 N. C., 756. In that case *Ruffin, J.,* said: "We cannot see that the judge below could have proceeded, under the circumstances, otherwise than he did. If he had made a mistake, it would have raised a serious question as to whether the prisoner, having once been in jeopardy, could again be put upon his trial. . . . It is im-

possible for the law to foresee and provide for all the contingencies that may arise unexpectedly in the course of trial on the circuits, and something must be left to the discretion and sound judgment of the judge; and this Court will not undertake to review the exercise of that discretion. It is true that if it should appear that this discretion had been so exercised that the prisoner had been deprived of a fair trial, this Court, as said by the late *Chief Justice* in *S. v. Tilghman,* 33 N. C., 513, would assert the right to grant a new trial. But we cannot perceive that this prisoner's rights were in any way impaired by the action of his Honor in the premises." A similar decision has been made in 148 Pa., 639, 640.

Exceptions 18 to 22 are to statements pertinent to the inquiry, made by the prisoner to Tom Albridge, the deputy sheriff, when that officer had him in custody, for the reason that he was at that time in (607) custody. These exceptions are without merit, and have been frequently decided contrary to the prisoner's position. *S. v. Daniels,* 134 N. C., 641; *S. v. DeGraff,* 113 N. C., 688; *S. v. Conly,* 130 N. C., 683.

Exceptions 23, 24, and 25 (p. 63 of the record) are in response to questions asked by counsel for the prisoner of Mrs. Exum, wife of the prisoner, the first witness who testified for the defense. The questions are as follows:

"At the time Guy and Exum lived with you, do you know whether it was Guy's habit to carry a pistol?" Objection by the State; objection sustained. Prisoner excepted.

"Do you know whether the deceased had the habit of carrying concealed weapons, and if so, whether the prisoner knew of the habit?" Objection by State sustained. Prisoner excepted.

"State whether or not your son, Guy, became angry because of your marriage to Mr. Exum." Objection by State sustained, and prisoner excepted.

It is ordinarily true that on trial for homicide, neither the character and habits of the deceased nor even his disposition towards the prisoner is relevant to the issue. This is the general rule, and has been declared in this State by repeated decisions of our highest Court. *S. v. Barfield,* 30 N. C., 344; *S. v. Hogue,* 51 N. C., 381; *S. v. Chavis,* 80 N. C., 353; *S. v. Craine,* 120 N. C., 601; *S. v. Bird,* 121 N. C., 684. And there are certain exceptions to this rule, equally well supported by authority. *S. v. Gooch,* 94 N. C., 987; *S. v. Turpin,* 77 N. C., 473.

In *S. v. Turpin* the exceptions are thus stated: "Such evidence is admissible when there is evidence tending to show that the killing may have been done on a principle of self-defense. (2) Where the evidence is wholly circumstantial and the character of the transaction is in

doubt." If this evidence had been offered at a later stage of (608) the trial after the prisoner had testified, his evidence tending to show a killing in his necessary self-defense, its rejection would have been reversible error; but at the time the ruling of the court was made there was nothing to bring the proposed evidence within either of the above stated exceptions. Mrs. Exum was the first witness for the defense, and while her evidence was to some extent contradictory to the State's witnesses, who testified to the occurrence, and while it tended in several particulars to support the testimony of her husband afterwards received, yet, standing alone, her testimony was very far from making out a state of facts showing that the killing was from a principle of necessary self-preservation. Until her husband testified and gave significance to certain of her statements, supporting his claim to self-defense, her account was not necessarily inconsistent with the claim of the State. The proposed evidence, then, comes under neither of the exceptions; not under the second, for there were four eye-witnesses to the transaction, and not under the first, as the evidence did not at that time tend to show a killing in the necessary self-defense of the prisoner. The evidence of Mrs. Exum is not set out here because of its length and because not necessary to explain the principle on which our decision rests; but all of it has been carefully read and considered.

We must not be understood as holding that if the ruling of the court below had been erroneous in rejecting this evidence that the error would have been cured by admitting the same testimony from the prisoner himself, and from other witnesses at a later stage of the trial, which was done. The authorities cited by the prisoner's counsel are apt to show that this would not be true. *S. v. Rollins,* 113 N. C., 722. We rest our decision here on the ground that at the time the evidence was offered and as the facts then appeared, the ruling of the court was correct, and if the prisoner desired the benefit of the evidence from this witness, he should have offered it after the development of (609) the trial had made it competent. *S. v. Cherry,* 63 N. C., 493.

The next four exceptions, 26, 27, 28, and 29, are insisted on because the court permitted the State to ask the witness (Mrs. Exum) if she had not been hypnotized by her husband; to which the witness answered, "Yes, three times." While this subject of hypnotism has received to some extent "judicial recognition," in the language of one of the briefs, the source of its power and the extent of its influence are, in the main, unknown, and we must hesitate to enter on such a field in the search for error.

The prisoner testified to the effect that he had hypnotized his wife on three occasions, and, as explained by him, it tended to show that he had influence over her to a greater extent than usually arises from the

relationship between them. If this be correct, the evidence is competent as affecting her credibility, and, if not, then we are unable to perceive how the prisoner's case was prejudiced by its admission.

The next two exceptions were on the evidence of J. H. Newsome, who was permitted to testify to certain declarations of Mrs. Exum, wife of the prisoner. This witness said that Mrs. Exum on the day of the homicide gave him her account of the occurrence, and as stated by him contradicting to some extent her testimony on the trial, and in this connection that Mrs. Exum had said in the witness's presence, "Oh, little did I think that I would have married a murderer in my own family." While Mrs. Exum's testimony, standing alone, did not tend to show a killing in self-defense until after her husband had testified, stating such claim on his part, there were several features of her testimony which were contrary to the State's version, and when taken in connection with his testimony tended to support his claim; and such was the impression she evidently intended to make on the jury. To our minds, his declaration was permissible as impeaching evidence. The court admitted it for that purpose only, and so told the jury at the time it was re-
(610) ceived and again in his charge. This exception was strongly pressed on our attention, and the prisoner's first criticism on the testimony is that all the woman intended by this expression was to say that there had been a homicide, without meaning to say that it was criminal. If this be a correct interpretation, then the statement would be harmless, and in any event the objection would be to its force and not to its competency.

It is further urged, however, that this is not a statement of fact, but a conclusion of inference on the part of the witness, and we are referred to *S. v. Rollins,* 113 N. C., 722, and *S. v. Teachey,* 134 N. C., 656. In this last case the prosecution, in an indictment against a son, sought to introduce a declaration of the father that, if the shooting was done at 9 o'clock at night, he would have to give up the case, as he could not account for his son after 7 o'clock. This decision was on the ground that there was nothing in the father's testimony which the declaration tended to contradict, and it was properly ruled out because, under the claim of contradiction, the effect of the evidence would be to admit against the son a declaration of the father that the son was likely guilty. In *S. v. Rollins,* on an indictment for murder, a witness, Mary Brandon, who had testified as to hearing a crowd near her home using threatening language towards each other, was asked by the defendant, "What did you say to those that came to your door?"—the stated purpose being to obtain an answer that they were killing a man out there. It was in the night, and the woman had seen nothing of the occurrence, and on objection the question was held incompetent, as it was sought

to put before the jury, as substantive evidence, a statement of the witness that was at most only an inference or surmise on her part. The Court in the opinion said: "The question was properly ruled out. It could not serve to corroborate the witness as to what she saw, which would have been competent, but only to show her belief or surmise at the time of the nature of the occurrence." The ruling (611) here in our opinion does not conflict with either of these decisions: not with *S. v. Teachey,* for the witness had given testimony as an eye-witness to the occurrence of which she was speaking, contradictory of the State's testimony and tending to support her husband's claim that the killing was in his necessary self-defense. Her declaration was, therefore, directly contradictory to her testimony. Nor in *S. v. Rollins,* because the declaration was not any surmise or inference as to what the witness had not seen, but she was giving an impression as to an occurrence she had seen, and it was properly received as impeaching testimony. *Handy v. Canning,* 166 Mass., 107.

Exception 32 relates to the introduction of a deposition of Mrs. Alice Walston. This is termed a deposition, but it was in fact an affidavit of Mrs. Walston, wife of Runie, taken and sworn to before a justice of the peace on the morning following the homicide. The justice, in his direct examination, testified in regard to this paper, that "Mrs. Exum, wife of the prisoner, was present, and as Mrs. Walston would make a statement, he asked Mrs. Exum if that was about the way it occurred, and she said it was. Mrs. Exum corroborated the statements of Mrs. Runie Walston and said they were correct." The justice was asked the following questions:

"Did you read the statements to Mrs. Exum?" "I read them to Mrs. Walston, and Mrs. Exum was present."

"What did she say?" "I asked her if that was the correct statement as she saw it, and she nodded her head, as much as to say it was."

The court on this statement admitted the deposition, telling the jury that it was admitted only for the purpose of corroboraing Mrs. Walston and contradicting Mrs. Exum, and in no sense as substantive evidence. Later in the trial, and in the charge, the court restricted the affidavit to corroboration of Mrs. Walston, and told the jury (612) they would not consider it at all as contradicting Mrs. Exum; but they could consider what Mrs. Exum said about it in so far as that tended to contradict her, and give it such weight for that purpose as they thought it should receive. The courts of this country are not in accord as to the admission of this character of evidence—previous consistent statements to corroborate a witness who testified at a trial. Some of them reject such evidence altogether as unsound in principle and dangerous in practice. Some of those that admit the evidence have

placed restrictions upon it, which we think go rather to its force than its competency; and the decisions of our own State have gone some further, perhaps, than the others in its admission. All the courts admitting such evidence are agreed that it is only competent as affecting the credibility of the witness, and is never used as substantive or independent supporting testimony; and, further, that it is never admitted until the witness has been in some way impeached. And it is held here by repeated and well-supported adjudications that whenever a witness has given evidence in a trial and his credibility is impugned, whether by proof of general bad character or by contradictory statements by himself, or by cross-examination tending to impeach the veracity or memory of the witness, or at times by his very position in reference to the cause and its parties—"In whatever way the credit of the witness may be impeached," said *Smith, C. J.*, in *Jones v. Jones,* 80 N. C., 246, "it may be restored or strengthened by this or any other proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony." *S. v. Craine,* 120 N. C., 601; *S. v. Whitfield,* 92 N. C., 831. And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not. *S. v. Craine, supra.* Nor does it signify whether the previous statements are near or more remote from (613) the occurrence, nor *ante litem motam* or pending the controversy. *Jones v. Jones, supra.* Such circumstances only go to its force, and not to its relevancy.

We think the decisons of our own Court on this question can be supported by the better reason; but, however this may be, it has become the established rule for the trial of causes here, and we have now neither the right nor the disposition to disturb or question it. The law of this State and some of the reasons sustaining it are well stated by the *Chief Justice* in *Jones v. Jones, supra:* "The admissibility of previous corresponding accounts of the same transaction to confirm the testimony of an assailed witness, delivered on the trial, rests upon the obvious principle that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury. The limitation on the rule contended for in the argument of defendant's counsel, which confines the evidence to such declarations as were made before the witness came under any bias or influence calculated to warp his testimony, is not supported in the numerous adjudications of this Court, nor, in our opinion, by sound reason. The relationship of the witness to the cause or to the party for whom he testifies is one among many sources of discredit this kind of evidence is intended to remove, and its application to the case supposed is a striking illustration of the usefulness and value of the rule. But its competency is not re-

stricted to such cases. The evidence is admitted to repel any imputations upon the credibility of the witness, whether they spring out of such relationship or arise from proof of general bad character, or of different versions of the fact given by himself, or result from the manner in which the cross-examination is conducted. In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony. Again, the accuracy of memory is supported by proof that at (614) or near the time when the facts deposed to have transpired, and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial. Suppose they had been written down and not since seen by the witness—would not the production of the written memorandum greatly confirm one's confidence in the integrity of his testimony to the same facts before the jury? It must be observed, however, that this evidence is not received in proof of the facts themselves, but to sustain the credibility of the witness in what he swears on the trial. These principles are settled in numerous cases, among which we will only cite the following: *S. v. George,* 30 N. C., 324; *Hoke v. Fleming,* 32 N. C., 263; *S. v. Dove, ib.,* 469; *March v. Harrell,* 46 N. C., 329; *S. v. Laxton,* 78 N. C., 564; *S. v. Parrish,* 79 N. C., 610."

The evidence was also competent for the purpose of contradicting Mrs. Exum, as she was present when the affidavit was made and said the statements in it were correct. The paper derived no force for the purpose it was here used because it was signed and sworn to by Mrs. Walston. Mrs. Exum said it was correct, and that made it her declaration also, if the jury believed the evidence. The court afterwards withdrew it from the jury as evidence for this last purpose. But this was in the prisoner's favor and gives him no ground for complaint.

Exception 33, to the admission of a letter of the prisoner concerning the deceased, is without merit. The letter tended to show ill-will against the deceased, and was competent for the purpose. And the same may be said of the exception advanced to the argument of the solicitor. In the part of the speech at all objectionable, the solicitor was promptly checked by the court, and the portion remaining was not improper. In *S. v. Craine, supra,* the Court said: "Comments of counsel in the argument to a jury are under the supervision of the trial judge, and this Court will not interfere with the exercise of his discretion unless it plainly appears that he has been too vigorous or too lax (615) in exercising it, to the detriment of the parties."

The remaining objections are to the charge to the court, and none of them can be sustained. It is urged that on the entire testimony there is

no sufficient evidence of premeditation to warrant a verdict of murder in the first degree.

Here is testimony tending to show that the prisoner had strong enmity towards the deceased and had several times made threats against him—in some of them expressing an intention to take his life. When they are together in the same room, the prisoner temporarily withdraws, but, on hearing an opprobrious epithet, immediately returns, and after asking whom the deceased meant, seizes his pistol, advances on an unarmed man in a reclining attitude, and, as the deceased was endeavoring to escape, he fires a shot which lodges in his backbone, paralyzing his lower limbs, and, as his victim falls helpless before him, he fires another bullet into his brain, causing instant death—pushing aside the interposing arm of his wife, the mother of the deceased, to make his aim more certain and deadly. A mere statement of the testimony is in itself a sufficient answer to the exception, and citation of authority is not required.

Again, it is alleged for error that the court, in charging the jury on murder in the first degree, said: "In determining the question of premeditation and deliberation, it is competent for the jury to take into their consideration the conduct of the prisoner before and after, as well as at the time of, the homicide, and all the circumstances connected with the homicide," and counsel cite in support of this position the case of *S. v. Foster,* 130 N. C., 675. In that case, on indictment for murder in the first degree, the prisoner had admitted his guilt of murder in the second degree, and the debated question was on his guilt or innocence of the higher offense. There was evidence showing
(616) the flight of the prisoner after the homicide, and the court in submitting the evidence to the jury said that his flight was a circumstance to be considered by the jury in determining whether the killing was premeditated murder. The Supreme Court awarded a new trial and in the opinion held that, on the facts of that case, flight was not a circumstance to be especially called to the jury's attention; and in this connection the Court said: "We are entirely unable to see why the attention of the jury should be especially called to the prisoner's flight, in the charge of the court, and told that this was a circumstance they must consider in connection with the other evidence in making up their verdict. We entirely fail to see how it shows or tended to prove deliberation and premeditation on the part of the prisoner, and that was the only matter the jury had to consider, as it had been admitted that the prisoner was guilty of murder in the second degree." It will be noted that in the charge of the court below in *Foster's case* the judge was adverting to the evidence on the question, and directed the jury in express terms to consider the flight as a circumstance on premeditated

murder when there was an admitted offense of lower grade, but sufficient to account for it. The case is not authority for sustaining the exception. In the case now before us the judge was defining the term "premeditation," and only referred to the evidence in a general way. He was not presenting the testimony to the jury.

There was conduct of the prisoner immediately after and part of the occurrence pertinent for consideration, to wit: just as the prisoner was withdrawing from the scene, he was met by the brother of the deceased, drew a pistol on the brother and made him stand off, so that he could withdraw without let or hindrance—the act of a deliberate, determined man; and so far as we can discover this was the only evidence of subsequent conduct on the part of the prisoner at all relevant to this feature of the inquiry. We can discover no evidence of flight. The prisoner spoke to the officer about how he intended to escape, (617) but no conduct of his could receive any such construction. But if there had been, it is fair to refer the remark to the court, made in this general way, to the testimony that was relevant, and we have no doubt the jury so understood it. Even in trials for homicide, error must be shown. Thompson on Trials, section 118.

Again, it is contended that the charge is erroneous because, while explaining to the jury the word "premeditated," the court did not explain the term "deliberate," both words being used in the statute defining the crime of murder in the first degree. But to our minds the charge is not open to any such objection. The judge told the jury among other things on the subject: "The word 'premeditate' means to think beforehand, as when a man thinks about the commission of an act and concludes and determines in his mind to commit the act. He has thus premeditated the commission of the act. The law does not lay down any rule as to the time which must elapse between the moment when a person premeditates or comes to a determination in his own mind to kill another person, and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination to kill the deceased and then at some subsequent time, either immediate or remote, does carry his previously formed determination into effect by killing the deceased. If there be an intent to kill and a stimultaneous killing, then there is no premeditation. If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution, there was sufficient premeditation to warrant the jury in finding murder in the first degree."

The two terms, "deliberate" and "premeditate," while frequently used in this connection as interchangeable, because perhaps the facts do not

always require that they should be spoken of separately, have not exactly the same meaning. "Premeditate" involves the idea of
(618) prior consideration, while "deliberation" rather indicates reflection, a weighing of the consequences of the act in more or less calmness. But if the charge of the judge is in words which express both ideas and which fully explain them to the jury, it is correct, though the judge may not define each term separately. *S. v. Lang,* 84 Ala., 1.

In the charge before us the judge gives a full explanation of both the statutory words, defining the crime. He excludes all idea of a killing from passion suddenly aroused, and directs the jury, before they can convict of the higher crime, that the killing must be from a fixed determination previously formed after weighing the matter. It comes fully up to the requirements of the law on the question and is well supported by authority. *S. v. Hunt,* 134 N. C., 684; *S. v. Spivey,* 132 N. C., 989.

There is another exception taken, that the judge below did not define the crime of manslaughter, and gave an erroneous charge concerning it. The judge did not give any abstract definition of manslaughter, but he did better: he defined manslaughter as applied to the facts in the case before him, and he defined it correctly. *S. v. Martin,* 24 N. C., 101. It is there said: "The court is not bound to lay down to the jury an abstract proposition, but only to state the law as applicable to the evidence introduced."

The court charged the jury on the question of manslaughter: "If you find from the evidence that the prisoner willingly engaged in a fight with the deceased, and that the deceased threw his hand to his hip pocket and advanced upon the prisoner in a threatening manner, and that the prisoner, being willing to fight, seized a pistol and shot the deceased, and the deceased died from the wound (then inflicted by the prisoner), the prisoner would be guilty of manslaughter, provided that you should find from the evidence that the appearance and man-
(619) ner of the deceased were such as to cause the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was armed with a deadly weapon and was about to harm him with it." The charge is supported by abundant authority. *S. v. Kennedy,* 91 N. C., 572; *S. v. Brittain,* 89 N. C., 481.

The remaining exceptions to the charge are without merit. They are formulated by making excerpts from different portions of the charge, and, so presented and separated from the context, some of them might be the subject of criticism. But this is not the correct way to interpret a charge. "It is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the

law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." 2 Thompson on Trials, section 2407.

The charge of the court, taken as a whole, is full, clear, and comprehensive. The prisoner has had a fair and impartial trial, and we find no error in the record.

No error.

Cited: *S. v. Daniel,* 139 N. C., 553; *S. v. Horner, ib.,* 606; *Gilliland v. Board of Education,* 141 N. C., 486; *S. v. Worley, ib.,* 767; *S. v. Bohanon,* 142 N. C., 699; *S. v. Banks,* 143 N. C., 658; *S. v. Jones,* 145 N. C., 470; *S. v. Stratford,* 149 N. C., 484; *S. v. Banner, ib.,* 525; *S. v. Dunlop, ib.,* 551; *S. v. Lance, ib.,* 556; *S. v. Roberson,* 150 N. C., 839, 842; *S. v. Fowler,* 151 N. C., 733; *S. v. Cox,* 153 N. C., 643; *Kornegay v. R. R.,* 154 N. C., 393; *S. v. Lewis, ib.,* 634; *S. v. Boynton,* 155 N. C., 466; *S. v. Price,* 158 N. C., 647, 650; *S. v. Burns, ib.,* 633; *Aman v. Lumber Co.,* 160 N. C., 374; *S. v. Tate,* 161 N. C., 285; *S. v. Drakeford,* 162 N. C., 671; *S. v. Armfield, ib.,* 29; *S. v. Blackwell, ib.,* 682; *S. v. Vann, ib.,* 541; *Bird v. Lumber Co.,* 163 N. C., 167; *Bowman v. Blankenship,* 165 N. C., 521; *S. v. Lance,* 166 N. C., 412; *S. v. Robertson, ib.,* 361, 365; *S. v. McKee, ib.,* 298; *S. v. Cameron, ib.,* 383; *S. v. Ray, ib.,* 435; *McNiell v. R. R.,* 167 N. C., 395; *Padgett v. McKoy, ib.,* 507; *S. v. Pollard,* 168 N. C., 122, 128; *S. v. Kennedy,* 169 N. C., 295; *Montgomery v. R. R., ib.,* 249; *S. v. Cooper,* 170 N. C., 721; *Deligny v. Furniture Co., ib.,* 203; *Kistler v. R. R.,* 171 N. C., 579; *S. v. Merrick,* 172 N. C., 874; *Leggett v. R. R.,* 173 N. C., 609; *Carter v. Leaksville,* 174 N. C., 562; *Taylor v. Powers, ib.,* 588; *S. v. Davis,* 175 N. C., 727; *Lumber Co. v. Lumber Co.,* 176 N. C., 503; *S. v. Wilson, ib.,* 754; *Harris v. Harris,* 178 N. C., 11; *In re Hinton,* 180 N. C., 214; *Haggard v. Mitchell, ib.,* 258; *S. v. Chambers, ib.,* 708; *S. v. Robinson,* 181 N. C., 519; *White v. Hines,* 182 N. C., 289; *In re Ross, ib.,* 483; *S. v. Jones, ib.,* 787; *S. v. Jenkins, ib* 820.

(620)

STATE v. BLACKLEY.

(Filed 28 March, 1905.)

Embezzlement—Place of Offense—Matter of Defense—Demurrer to Evidence—Indictment—Demand—Continuance.

1. In an indictment for embezzlement, where there was evidence that the defendant entered into a contract in Georgia with M., by which he agreed

to take a carload of mules to Raleigh, N. C., and sell them for M., and after deducting all expenses from gross receipts he was to receive one-half of the net profits as his compensation; that he brought several carloads of mules to Raleigh and sold them as agent of M., and at the termination of the business he was short in his returns: *Held*, a demurrer to the evidence was properly overruled.

2. The defendant cannot raise by demurrer to the State's evidence the objection that the crime, if proved, was not committed in this State, but this is a matter of defense to be affirmatively shown by defendant.
3. While an indictment for embezzlement must charge that the defendant was not an apprentice, nor under the age of sixteen years, yet it is not an act constituting a part of the transaction which the State is called on to prove, but is a status peculiarly within the knowledge of the defendant, and is a defense to be shown by him.
4. The statute (Code, sec. 1014) does not make a demand necessary to support a prosecution for embezzlement.
5. An exception for refusal of a continuance is a matter that lies in the discretion of the trial judge, and is not reviewable on appeal unless, possibly, when there has been a gross abuse of the discretion.
6. In order to convict the defendant of embezzlement four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment, and, (4) knowing it was not his own, converted it to his own use.

(621) INDICTMENT against J. C. Blackley, heard by *Ferguson, J.*, and a jury, at September Term, 1904, of WAKE. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General for the State.
J. C. L. Harris, S. G. Ryan, and F. S. Spruill for defendant.

CLARK, C. J. The defendant was convicted of embezzlement. There was evidence that the defendant entered into a contract in Georgia with one McAdow by which he agreed to take a car-load of mules to Raleigh, North Carolina, and sell them for McAdow, and after deducting all expenses from gross receipts, the defendant was to receive one-half of net profit as his compensation; that the defendant brought several car-loads of mules and horses to Raleigh and sold them as agent of the prosecutor (McAdow) and at the termination of the business he was "short" in his returns $4,212.55.

The defendant introduced no evidence, but asked the court to instruct the jury that upon the whole evidence they should return a verdict of not guilty. The defendant contends that nine points or defenses are raised by his demurrer to the evidence:

(1) For that the contract appeared to have been made in Atlanta,

Ga., and therefore the defendant cannot be convicted of embezzlement under that contract in the courts of North Carolina.

The evidence tends to show an embezzlement in Raleigh, N. C., since the conversion into money took place here, and the sum thus realized for prosecutor has not been paid over to him. Besides, if the crime charged, if proved, was not committed in this State, that is a matter of defense to be affirmatively shown by defendant (*S. v. Mitchell,* 83 N. C., 674; *S. v. Buchanan,* 130 N. C., 660; *S. v. Burton, ante,* 575), and could not be raised by a demurrer to the (622) State's evidence.

(2) For that there was a fatal variance between the allegation of the bill of indictment and the proof offered, in that the bill alleged that the defendant was not an apprentice nor under the age of 16 years, and in the testimony offered (all of which is sent up) there is to be found no word of proof as to either of the material averments.

It is not correct to say there was no evidence that the defendant was above the age of 16. There was no oral evidence on the point, but the defendant was in court and the jury had a right to use their eyes and draw their own inference that he was not shielded from responsibility by being a child, especially as there was no prayer to instruct the jury that he was not shown to be over 16, upon which the judge would have allowed evidence to be introduced upon the point to avoid a defect of justice. *S v. Holder,* 133 N. C., 712; *S. v. Williams,* 129 N. C., 582. While the indictment must charge that the defendant was not an apprentice, nor under the age of 16 years. (*S. v. Lanier,* 88 N. C., 658), yet it is not an act constituting a part of the transaction which the State is called on to prove. It is a status, peculiarly within the knowledge of the defendant (like non-marriage in indictments for fornication and adultery), which though charged in the bill, if denied, is a defense to be shown by defendant. *S. v. McDuffie,* 107 N. C., 888; *S. v. Peoples,* 108 N. C., 769; *S. v. Cutshall,* 109 N. C., 769. When the status of defendant, as being under a given age or married, by the terms of the statute would withdraw the defendant from responsibility, while the indictment must negative such status, the status is a defense in the nature of a confession and avoidance which must be shown by the defendant. *S. v. McDuffie, supra.* The State is not called upon to prove negative averments of this nature. *Cook v. Guirkin,* 119 N. C., 17. (623)

On indictment for retailing without license, though the indictment should *aver* selling "without license," the burden is on the defendant to show that he had license, because (like the above allegations, "not being an apprentice nor under 16 years of age") it is a matter peculiarly within the defendant's knowledge and susceptible

of ready proof by him. *S. v. Emery,* 98 N. C., 668; *S. v. Smith,* 117 N. C., 809; *S. v. Holmes,* 120 N. C., 576. In like manner, upon an indictment for entering land without license, the negative averment must be made in the bill but the burden is upon the defendant to show that he had license. *S. v. Glenn,* 118 N. C., 1194.

In Ohio, where on a charge for embezzlement upon a statute containing a similar exception, the judge was asked to charge that there being no evidence that the defendant was under 18 years, the jury should acquit, his refusal to so charge was held no error. The negative averment of such matter peculiarly within the knowledge of the defendant puts on the defendant the burden of proof to withdraw himself from liability for acts which, when proven, in themselves constitute a criminal offense, unless excused by the status of defendant. *Grillo v. State,* 2 Ohio S. and C. P. Dec., 208; 9 Ohio C. C., 394; 18 Century Dig., 732.

The evidence showed that the defendant came into possession of property by virtue of contract, and was the agent, not the apprentice, of the owner thereof.

(3) For that there was no sufficient evidence that the funds were ever embezzled at all, it appearing that the defendant at no time ever rendered a false account of his dealings, or made denial of his obligation to the prosecutor.

(4) For that the ownership of the property alleged to have been embezzled was, as appears from the evidence, partially in the defendant, and hence he could not be convicted of embezzling that of which he was a part owner.

(624) There was evidence as to the embezzlement and the sole ownership of the funds embezzled, which was properly submitted to the jury.

(5) For that the defendant had the right, as appears from the evidence, to mix the funds received for and on account of his principal with his own funds, and he could not, therefore, be convicted of embezzlement, for the reason that the money received must be regarded, for that time at least, as his own property and not that of his principal.

The court instructed the jury (as prayed) that if this was true, to find the defendant not guilty, and properly added, "But if the jury shall be satisfied from the evidence that Blackley was to sell the horses and mules for McAdow and pay the expenses, and then pay to McAdow the cost price of the horses and mules before any division of profits, he had no right to mix the cost price of the horses and mules with his own money." The jury found the latter state of facts to be the truth.

(6) For that, as is shown by the record, it appears that even if Mc-

Adow and Simpson were not partners at the time of consignment of the mules, yet the money derived from the sale of the mules, and which the defendant is charged to have embezzled, was to be used in the payment of a bill payable in a bank, which bill payable had been signed by both McAdow and Simpson, and hence was joint property.

(7) For that the contract between Blackley and McAdow constituted a coparnership between them, and one partner may not embezzle the partnership funds.

The following were the instructions asked on these points by the defendant, and both instructions were given as asked: (a) "If the jury shall find from the evidence in this case that the defendant was a partner of McAdow under the definition of partnership given by the court, then they will return a verdict of not guilty. One partner cannot commit embezzlement of the partnership funds that come into his hands because of the joint interest or ownership therein"; (625) and (*b*) "The property alleged to have been embezzled must have been at the moment of its conversion the property of McAdow. If it was the property of McAdow & Simpson, the defendant cannot be convicted."

(8) For that there was no evidence that there was any embezzlement in the State of North Carolina, even if embezzlement had been actually proven.

(9) For that it appears that prior to instituting this prosecution against the defendant there was no demand made upon him by the prosecutors.

The eighth exception is discussed already under the first exception. As to the last point, our statute does not make a demand necessary to support a prosecution for embezzlement. "Unless the statute requires it, a demand is not necessary." 10 A. and E. Enc. (2 Ed.), 995, and cases cited in note 5. Besides, when the witness met the defendant in Louisville, Ky., the latter, before arrest was even suggested, threw up his hands and stated voluntarily that the money was "all gone," and said he supposed the witness had come to take him back to North Carolina. These are the only exceptions in the brief, and presumably cover all grounds relied on (*S. v. Register,* 133 N. C., 751), and, indeed, the other exceptions naturally fall under one of the nine heads set out in the brief, save the exception for refusal of a continuance, which matter lies in the discretion of the trial judge and is not reviewable on appeal, unless, possibly, when there has been a gross abuse of the discretion, which was not the case here. *S. v. Scott,* 80 N. C., 365; *S. v. Lindsay,* 78 N. C., 500.

In order to convict the defendant of embezzlement four distinct propositions of fact must be established: "First, that the accused was

the agent of the person or corporation alleged, and that by the terms of his employment he was charged with receiving the money or property of his principal; second, that he did, in fact, receive (626) such money; third, that he received it in the course of his employment; further, that he, knowing it was not his own, converted it to his own use or to the use of some third person, not the true owner." Underhill Cr. Ev., sec. 281; Rapalje Larceny and Kindred Offenses, sec. 389, par. b; 3 Rice Ev. (Cr.), sec. 459; *S. v. McDonald,* 133 N. C., 680. There was evidence tending to prove all four of these distinct propositions of fact in the case at bar; that the defendant was the agent of the prosecutor, and by the terms of his employment had received property of his principal; that he received it in the course of his employment and, knowing it was not his own, converted it to his own use.

In *McDonald's case, supra,* this Court held that the intent to defraud is a question of fact for the jury. In the case under consideration an instruction as to intent was submitted by his Honor in the words of the defendant's fourth prayer, and this instruction was repeated in the charge of the jury.

After the fullest investigation we find

No error.

Cited: *S. v. Summers,* 141 N. C., 843; *S. v. Conner,* 142 N. C., 708; *S. v. Long,* 143 N. C., 674; *S. v. Hicks, ib.,* 694; *S. v. Smith,* 157 N. C., 583; *S. v. English,* 164 N. C., 506; *S. v. Moore,* 166 N. C., 286; *S. v. Gulledge,* 173 N. C., 747; *S. v. Falkner,* 182 N. C., 800.

(627)

STATE v. TYSON.

(Filed 4 April, 1905.)

Former Jeopardy—Mistrial—Drunken Juror—Duty of Court.

1. Where a prisoner was placed on trial for a capital felony under the same bill of indictment at a former term, and the trial judge, pending the argument, discharged the jury and ordered a mistrial on account of the drunken condition of a juror which incapacitated him for further service, a plea of former jeopardy was properly overruled.
2. In all cases the trial judge may, in his discretion, discharge a jury and order a mistrial when necessary to attain the ends of justice; but in capital cases it is his duty to find the facts fully and place them upon record, so that upon a plea of former jeopardy his action may be reviewed.

STATE *v.* TYSON.

INDICTMENT against Rufus Tyson, *alias* Morrison, for the murder of Walter Combs, heard by *Peebles, J.*, and a jury, at November Term, 1904, of SCOTLAND.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for prisoner.

BROWN, J. Only one exception is presented in the record and that arises upon the refusal of the court to sustain the plea of former jeopardy and discharge the prisoner. It appears that the prisoner was placed on trial under the same bill of indictment at the April term before *Judge Bryan,* who discharged the jury, after four and a half days, on account of the drunken condition of a juror, which incapaciated him from further service. From the findings of the court, we gather that after the evidence was closed and pending argument it was discovered that one of the jurors, one Covington, had, without permission, authority, or knowledge of the court or its (628) officers, gone to his home and procured a quantity of liquor and was in a grossly intoxicated condition on Friday night; that he had been drinking secretly all during the trial; that on Saturday morning, the last day of the term, the juror was in a very nervous and besotted condition and unfit for duty, and that unavailing efforts were made to render him fit. Whereupon the court discharged the jury and made a mistrial, after making a full and complete finding of facts, as appears of record.

It is well settled and admits of no controversy that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge; but in capital cases he is required to find the facts fully and place them upon record, so that upon a plea of former jeopardy as in this case, the action of the court may be reviewed. It is, then, the duty of this Court to say whether the findings of fact made by *Judge Bryan* and appearing in the record, warranted him in making a mistrial in this case.

We have no hesitation in declaring they fully justify his action and that his Honor, *Judge Peebles,* properly overruled the prisoner's plea of former jeopardy. We adhere to the maxim of the common law, as incorporated in the Federal Constitution, that no person shall be twice put in jeopardy of life or limb for the same offense. It has been adopted and acted upon in this country from the foundation of the Government to the present time. *S. v. Garrigues,* 2 N. C., 241, in 1795; *S. v. Jefferson,* 66 N. C., 309; *S. v. McGimsey,* 80 N. C., 379; and *S. v. Honeycutt,* 74 N. C., 391.

Where a jury has been empaneled and charged in a capital felony and the prisoner's life put in jeopardy, the court has no power to discharge the jury and hold the prisoner for a second trial, except (629) in cases of absolute necessity. *S. v. McGimsey, supra.* Where such absolute necessity appears from the findings of the court, and in consequence thereof the jury has been discharged, then in legal contemplation there has been no trial. The fact that the incapacity and illness of the juror is brought about by his own gross misconduct makes no difference so far as the interests of justice are concerned. The result is the same.

If we adopted the contention of the prisoner in this case, it would be within the power of a drunken juror to entirely defeat the ends of justice if he could get liquor enough to continue his intoxication. The court is in no way responsible through its officers, so far as we can see, for the deplorable condition of the juror. There is nothing else his Honor could do except declare the facts and discharge the jury. From these facts the law adjudges there has been no trial. *S. v. Scruggs,* 115 N. C., 806; *S. v. Washington,* 89 N. C., 535, and 90 N. C., 664; *S. v. Jenkins,* 116 N. C., 972.

No error.

Cited: S. v. Guthrie, 145 N. C., 495; *S. v. Dry,* 152 N. C., 815; *S. v. Upton,* 170 N. C., 770; *S. v. Cain,* 175 N. C., 830.

(630)

STATE v. BARRETT.

(Filed 11 April, 1905.)

Spirituous Liquors—Possession of Liquors—Prima Facie Evidence of Unlawful Sale—Rules of Evidence—Statutes—Constitutionality.

1. Chapter 434, Laws 1903, making it unlawful for any person except licensed dealers to sell or keep for sale within Union County any spirituous liquors, and providing that if any person "shall keep in his possession liquor to the quantity of more than one quart within said county, it shall be *prima facie* evidence of his keeping it for sale," is not unconstitutional as an invasion by the legislative of the judicial department of the government, nor as depriving the defendant of the presumption of innocence.
2. The Legislature has the power to change the rules of evidence and to declare that certain facts or conditions when shown shall constitute *prima facie* evidence of guilt; such power to be exercised within the limitations of the Constitution.
3. A statute is not void because it arbitrarily makes an act lawful in itself *prima facie* evidence of a guilty intent.

4. In an indictment for keeping liquor with intent to sell, the keeping is an essential fact to be proved and necessarily relevant, and the Legislature, in giving an additional intensity to the proof of a fact which is relevant, as tending to prove the fact in issue, is acting within its power, and the courts cannot undertake to fix the limit in respect to the quantity prescribed as the basis of the presumption.

5. The Legislature has the power to pass statutes of local application regulating the liquor traffic and to prescribe rules of evidence applicable to charges for their violation.

6. A statute making the keeping of more than a quart of liquor in a certain county *prima facie* evidence of keeping it with intent to sell, does not violate Article XIV, section 1, U. S. Constitution, which prohibits any State from making or enforcing any law which denies to any person within its jurisdiction equal protection of the law.

BROWN, J., dissenting.

INDICTMENT against Sampson Barrett, heard by *Justice, J.,* (631) and a jury, at November Term, 1904, of UNION.

Defendant was charged with unlawfully and willfully keeping for sale, etc., spirituous liquors contrary to the form of the statute, etc. Upon a plea of not guilty the State introduced one J. A. Williams, who testified that on the night in question witness and Mr. Bivens went up the road to see if they could head the defendant off. That about a mile or two from town they met him. He had two five-gallon kegs of corn whiskey, a one-half gallon jug, and one pint in a bottle, a little over a mile from town; he went on the public road in a top buggy. Whiskey was covered over with a lap robe. Said he got it up in the country from a colored man, whom he did not know. Said it did not belong to him, it belonged to some other people; that he would tell who it belonged to when it was necessary to do so; that he would prove it up. There was other testimony of the same character. It was admitted that the defendant had no license to sell liquor. He introduced no testimony. Defendant requested the court in writing to charge the jury, "that upon the whole evidence you cannot find the defendant guilty; the verdict should be not guilty." This was refused. Defendant excepted.

The court charged the jury, among other things, as follows: "That under the rules of evidence in all cases where defendant is charged with crime, it is the duty of the State to satisfy the jury beyond a reasonable doubt of the defendant's guilt. The statute under which the defendant is indicted provides that if any person other than licensed retail dealers under State laws shall keep in his possession liquors to the quantity of more than one quart within said county, it shall be *prima facie* evidence of his keeping it for sale, within the meaning of this act. The State insists it has shown to you that the defendant had more than one quart of liquor in his possession in said

(632) county of Union. The State insists that makes a *prima facie* case of guilt against the defendant, and that therefore, it has shown to you under the rules of evidence prescribed by this statute that the defendant is guilty. The law is that it is presumed, or rather it is a *prima facie* case—that is, a case upon the first impression made out, nothing else appearing—that the defendant had it for sale, if he is shown to have kept more than one quart of liquor in his possession within the county at one time. That is what the State insists upon. It insists that it has shown you that the defendant had the liquor, and that this statute is applicable, and that it is your duty to find him guilty. The defendant contends that at the time the prosecuting witness met him, he had stated that the liquor was not his; that he gave no account of it further than to say that it belonged to some other parties. The State does not rely upon his confession for a conviction in this case, but upon the fact that the liquor was found in his possession, and upon the statute. Taking this and applying this rule of evidence, if you find beyond a reasonable doubt that he had the liquor and kept it for sale, you will return a verdict of guilty; if the State has not satisfied you upon all of the testimony, you will return a verdict of not guilty." To this charge the defendant excepted. A verdict of guilty; motion for new trial; motion denied. Judgment, and appeal by the defendant.

Robert D. Gilmer, Attorney-General, for the State.
Redwine & Stack for defendant.

CONNOR, J., after stating the facts: The defendant is indicted for violating the provisions of chapter 434, Laws 1903, which provides that it shall be unlawful for any person, etc., other than licensed retail dealers, to sell, exchange, barter, or dispose of for gain, or to keep for sale, within the county of Union, any spirituous, vinous, malt, and intoxicating liquors, etc. That if any person other than licensed retail dealers, under State laws, shall keep in his possession (633) liquors to the quantity of more than one quart within this county, it shall be *prima facie* evidence of his keeping it for sale, within the meaning of this act.

The defendant contends that the section of the statute under which he was convicted is unconstitutional and void, for that: (1) It is an invasion by the legislative of the judicial department of the Government. (2) That it deprives the defendant of the presumption of innocence and puts upon him the burden of showing that he is not guilty.

There can be no serious doubt of the power of the Legislature to change the rules of evidence and to prescribe different rules in different classes of cases, subject to well-defined limitations.

"Laws which prescribe the evidential force of certain facts by enacting that upon proof of such facts a given presumption shall arise, or which determine what facts shall constitute a *prima facie* case against the accused, casting the burden of proof upon him of disproving or rebutting the presumption, are not generally regarded as unconstitutional, even though they may destroy the presumption of innocence. An accused person has no vested right in this or any other presumption or law of evidence or procedure that the law-making power cannot, within constitutional limits, deprive him of. The existing rules of evidence may be changed at any time by legislative enactment. But the legislative power must be exercised within constitutional limitations so that no constitutional right or privilege of the accused is destroyed. He cannot be deprived of a fair and impartial trial by a jury of his peers according to the law of the land." McLain Crim. Law, sec. 16; *Com. v. Smith*, 166 Mass., 370; *S. v. Cunningham*, 25 Conn., 195. Discussing a statute in some respects similar to ours, the Supreme Court of Massachusetts, in *Com. v. Williams*, 6 Gray (72 Mass.), 1, says: "Nor does it appear that the establishment of this new rule of evidence is in any degree the result of judicial, instead of legislative action; or that it does (634) in any way infringe upon the indisputable right of the accused to have his guilt or innocence ascertained and the charge made against him passed upon by a jury. The statute only prescribes, to a certain extent and under particular circumstances, what legal effect shall be given to a particular species of evidence, if it stands entirely alone and is left wholly unexplained. This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the Government to establish the accusation which it makes. . . . The only purpose and effect of the particular clause of the statute objected to are to give a certain degree of artificial force to a designated fact until such explanations are afforded as to show that it is at least doubtful whether the proposed statutory effect ought to be attributed to it; but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors. . . . Making out a *prima facie* case does not change the burden of proof. . . . But if the Government, in proving the delivery of any quantity of spirituous liquor, in support of a prosecution for an alleged violation of the law, prove also, as it must almost necessarily do, as a part of the transaction, the circumstances attending it, then those circumstances immediately become evidence in the case, to be weighed and

considered by the jury; and although the naked delivery would be *prima facie* evidence of the sale, and so, indirectly, of the guilt of the accused, yet this proof being accompanied by evidence of the manner in which the delivery occurred, and of the surrounding circumstances, he is not to be convicted unless upon just consideration of all the facts thus disclosed and placed before the jury they are satisfied beyond a reasonable doubt of his guilt." *Board of Excise v. Merchant,* 103 N. Y., 143; *People v. Cannon,* 139 N. Y., 32; *Voght v. State,*
(635) 124 Ind., 358; *Lincoln v. Smith,* 27 Vt. 328; *Santo v. State,* 2 Iowa, 165; Black on Intox. Liq., 60. The Legislature of this and, we presume, every other State has frequently changed the rules of evidence and declared that certain facts or conditions, when shown, shall constitute *prima facie* evidence of guilt. The power to do so has always been sustained. By section 983 of The Code it is made a "high misdemeanor," punishable by imprisonment in the penitentiary not less than five years, to sell liquor "found to contain any foreign properties or ingredients poisonous to the human system." If such liquors are found, upon analysis of "some known competent chemist," to contain any poisonous matter, "it shall be *prima facie* evidence against the party making the sale." By section 1005, prohibiting the carrying of concealed weapons off one's own premises, it is declared that if any person shall have about his person any such weapon, such possession shall be *prima facie* evidence of concealment. The construction of this statute has been frequently before this Court, but the power of the Legislature has not in any case been questioned to prescribe the rule of evidence, although the effect of it has been frequently decided, as in *S. v. Gilbert,* 87 N. C., 527, wherein *Ruffin, J.,* says: "The statute declares that the having of a deadly weapon upon one's person shall be *prima facie* evidence of its concealment, and this of itself seems necessarily to imply that it *may* be done under such circumstances as will not amount to an offense." In this and other cases this Court has held that upon all of the facts brought out by the State the presumption was rebutted and the defendant acquitted. By section 1077 it is made a misdemeanor for any dealer to sell, etc., liquor to any minor, etc., knowing the said person to be a minor—"*Provided,* that said sale or giving away shall be *prima facie* evidence of such knowledge." Section 1089, declaring it to be a misdemeanor to sell mortgaged property, makes the failure of the sheriff,
(636) etc., to find the property *prima facie* evidence of a sale with intent to hinder, defeat, etc., the rights of the mortgagee. Section 1109 makes it a misdemeanor to secrete or harbor any seaman who has deserted—knowing of such desertion—declaring that the con-

cealment shall be deemed *prima facie* evidence of knowledge. These and other statutes not necessary to cite show the course of legislation in this State on this subject. The author of the latest work on the law of evidence, in discussing the subject, says: "A rule of presumption is simply a rule changing the burden of proof, *i. e.*, declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the Legislature has the entire control over such rules as it has over all other rules of procedure in general and evidence in particular, subject only to the limitations of evidence expressly enshrined in the Constitution. . . . Yet this elementary truth has been repeatedly questioned, and courts have repeatedly vouchsafed an unmerited attention to the question, chiefly through a hesitation in appreciating the true nature of a presumption and a tendency to associate in some indefinite manner the notion of conclusively shutting out all evidence and that of merely shifting the duty of producing it. Fortunately, sound principle has almost everywhere prevailed, though at an unnecessary expense of argument and hesitation." Wigmore on Evidence, 1354.

"With what intent a person keeps intoxicating liquors is always a question of fact for the jury, to be determined upon a view of all the evidence. And in disposing of that question they are required by the statute to consider the keeping of the articles, in the manner specified in the statute, as presumptive evidence of an unlawful intent. But that evidence may be rebutted and controlled by the circumstances, as would be the case in the instances of the sexton and carman, alluded to, as well as by other evidence in the case, whether shown by the accused in his defense or by the State in connection with (637) the evidence proving the possession. With such evidence, the jury may also take into consideration the presumption of the innocence of the accused." *S. v. Cunningham, supra.* The defendant says that, conceding this to be true, the statute is void for that it arbitrarily makes an act lawful in itself *prima facie* evidence of a guilty intent. This criticism would apply to almost every case in which an act is made *prima facie* evidence of guilt. As illustrating this—carrying a weapon off one's premises is entirely lawful and the right to do so, it has been said, is secured by the Constitution. Const., Art. I, sec. 24. It has been expressly held that the act in this respect is constitutional. In *S. v. Cunningham, supra,* the Court says: "It has been said that the keeping of spirituous liquors is a lawful act, and being such, the Legislature has no constitutional power to make it evidence of an unlawful act. Many acts at common law are lawful, and yet the performance of them is prohibited by the Legislature, in the legitimate

exercise of their sovereign power. Even the sale of such liquors is not by the common law unlawful. It is only made so by statute. And if the Legislature can constitutionally prohibit such sale, we see not why they may not properly prescribe what acts shall be considered as evidence of an intent to make the sale." The slightest reflection will show that if this objection to the statute could be sustained, the power of the Legislature would be practically denied.

The defendant next calls into question the validity of the statute because he says the fact made *prima facie* evidence of the guilty intent has no relation to the criminal act and does not tend to prove it. First, because the possession of liquor does not tend to show an intent to sell it, and, second, the possession of a quantity more than one quart is entirely consistent with such possession for personal or domestic use. It must be conceded that some of the courts have placed this limitation upon the legislative power. *Peckham, J.,* in *People v.*
(638) *Cannon, supra,* says: "The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper." *S. v. Beswick,* 13 R. I., 211. This case has been criticised in the following language: "The opinion discloses confused notions as to the nature of presumptions and burdens of proof."

"It has occasionally been suggested that these legislative rules of presumption, or any legislative rules of evidence, must be tested by the standard of rationality, and are invalid if they fall short of it. But this cannot be conceded. If the Legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth. Apart from the Constitution, the Legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science. All that the Legislature does in such an event is either to render admissible a fact which was before inadmissible, or to place the burden of producing evidence on the opposite party. When this has been done, the jury is free to decide; or, so far as it is not, this is because the party has voluntarily failed to adduce contrary evidence. There is here nothing conclusive, nothing prohibitive. So long as the party may exercise his freedom to introduce evidence, and the jurors may exercise their freedom to

weigh it rationally, no amount of irrational legislation can (639) change the result." Wigmore on Evidence, sec. 1354.

We think that a full recognition of the limitation does not invalidate the statute under discussion. Certainly, the Legislature has the power to prohibit the keeping of liquor with intent to sell. Black on Intox. Liq., 387. It is equally clear that, without any statutory rule of evidence, the keeping is an essential fact to be proved and necessarily relevant. The quantity, place, circumstances, etc., in and under which it is kept are to be considered by the jury in passing upon the intent. Black on Intox. Liq., 525. This, for the manifest reason that they have a relation to the offense charged, to wit, the keeping with intent to sell. Therefore, when the Legislature gives an additional intensity to the proof of the fact which is, without any statute, relevant as tending to prove the fact in issue, we are unable to see how it can be said that it exceeds its constitutional limitation in this respect. The defendant, however, contends that the quantity named, to wit, "more than a quart," has no relation to and does not tend to prove the offense. The power being conceded, it is difficult to conceive how the court could undertake to fix the limit in respect to the quantity prescribed, as the basis of the presumption. It will be observed that it is not the keeping of a quart, or any fixed quantity beyond a quart, which is made a *prima facie* case, but "more than a quart." Of course, the *prima facie* case would be stronger or weaker according to the quantity kept in excess of a quart. We would find it exceedingly difficult to prescribe any limit to the power of the Legislature in this respect. We must ever keep in mind the fundamental principle that courts must not call into question the validity of statutes because they may not think them wise or wholesome. To do so would be to introduce untold confusion and uncertainty into our jurisprudence. It has been so frequently and forcibly said that within the sphere of its power the Legislature is supreme, that it does not need the citation of authority or extended reasoning to sustain it. As enforcing this truth, we quote: "Whether the Legislature acted wisely or not is a question with which we have nothing to do. The power being admitted, its abuse can- (640) not affect it; that must be for the legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the Legislature to act in a given case. It would be rank usurpation for us to inquire into the wisdom or propriety of the act." *Nash, C. J.*, in *Taylor v. Comrs.*, 55 N. C., 141. "It will not throw much light on a question like this to put extreme cases of abuse of the power to test the existence of the power itself." *Shaw, C. J.*, in *Norwood v. Commrs.*, 13 Pick., 60. "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected

by the judiciary." *Black, C. J.,* in *Sharpless v. Mayor,* 21 Pa. St., 147. See, also, *Iredell, J.,* in *Calder v. Bull,* 3 Dal., 386. In *Cunningham's case, supra,* the act provided that the finding of spirituous liquors in possession of a person, except in his dwelling-house, should constitute *prima facie* evidence that it was kept for sale. In *Com. v. Williams,* 72 Mass., 1, the statute provided that the delivery of liquor in any other place than a dwelling-house should constitute *prima facie* evidence of guilt. In *Cannon's case, supra,* the act made the possession of a junk seller of second-hand bottles and kegs presumptive evidence of the unlawful use. In *Santo v. State,* 2 Iowa, 165, the statute made the keeping of liquor in any other place than the dwelling or its dependencies *prima facie* evidence of keeping liquor with intent to sell. These acts were all sustained. See, also, *Lincoln v. Smith, supra; Am. Fur. Co., v. U. S.,* 2 Peters, 358. Notwithstanding the decision in *Beswick's case, supra,* we find the Supreme Court of Rhode Island at the same term, in *S. v. Mellor,* 13 R. L., 666, holding that a
(641) statute providing that evidence of the sale or keeping of intoxicating liquors for sale shall be evidence that the sale or keeping is illegal, was valid—the Court saying: "This inference or presumption, without the aid of the statute, would not be available as legal evidence, but we think that it was in the power of the General Assembly to make it so, and when it once becomes evidence, it is for the jury, not the court, to say whether or not it is sufficient to prove the fact, for the proof of which it is adduced." We know of no rule based upon sufficiently general observation or experience which would enable this Court to say, as matter of law, that the keeping of more than a quart of liquor in one's possession has no relation to an intent to sell. It will be observed that this is a local statute applying only to the county of Union. Upon what basis the Legislature adopted the standard we are not informed. There is no evidence before us how much liquor is usually kept for private or domestic use by citizens of that county. The evidence in this case is the extent of our information. Certainly, there is nothing here to bring us to the conclusion that the standard fixed is so unreasonable and arbitrary as to have no relation to the offense charged. An examination of a large number of cases from those States which have enacted repressive legislation in regard to the liquor traffic shows that it has been found necessary to incorporate this and similar provisions in their statutes, and the courts of such States have, with the exception of the one case in Rhode Island, uniformly sustained them. That Court has sustained statutes similar to the one before us. If we should say that the keeping of "more than a quart" has no relation to the offense, what standard shall we set? Upon what more rational basis could we fix the limit—at a gallon or

any other quantity? It is not our province or duty to supervise the legislative mind in this regard. To the suggestion that this law may be abused in its execution and the personal and property rights of the citizen invaded, it is sufficient to say that human wisdom has never yet devised any system of legislation or jurisprudence to (642) which the same objection may not be urged It would be difficult to find any principle of the common law or any statutory law which does not contain, within itself, the germ from which an oppressive administration may not develop. After all that can be said and done, the safety of the citizen is dependent upon the observance and enforcement of his constitutional rights, as interpreted and enforced by officers of his own selection. As was said by a great jurist and statesman. whose life was devoted to the defense of constitutional liberty, "There is nothing more easy than to imagine a thousand tyrannical things which the Legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice." *Black, J.*, in *Sharpless v. Mayor, supra.* While we are to keep a watchful eye, clear mind, and firm hand upon every threatened invasion of the constitutional guarantees of the citizen, we are to accord to the several departments of the Government, and those who may administer them, the same jealous regard in that respect which we ourselves exercise.

As indicating that the General Assembly, in its desire to suppress the liquor traffic in the county of Union, in response (as we must assume) to the wishes of the citizens of that county, we note that it has carefully guarded the sanctity of the dwelling by requiring any person, applying for a warrant to search suspected premises, to file an affidavit setting forth that the affiant has reason to believe that the owner of such premises is keeping for sale liquors as prohibited by this act, which reasons shall be set forth in the affidavit, and if the justice of the peace . . . shall deem such reasons sufficient, he shall issue his warrant . . . It will thus be seen that no citizen may be disturbed in his premises, under this statute, until a judicial officer shall determine upon sworn evidence that sufficient reason exists therefor. While the statute may be open to criticism in respect to (643) its rigid provisions, such criticism must be addressed to the legislative department of the Government, which represents and gives expression to "the State's collected will," rather than to us, who are confined to the question of its validity measured by the Constitution of the State.

The defendant next suggests that the statute violates the Constitution in that it prescribes a rule of evidence applicable only to the

citizens of Union County, and not to other counties in the State. The force of this contention depends upon the power of the Legislature to declare that the keeping of spirituous liquors with intent to sell in Union County is a misdemeanor, or, in other words, to pass statutes of local application upon the subject. This power has been so long recognized by the Court and exercised by the Legislature that we do not deem it necessary to examine the foundations upon which it rests. In *S. v. Muse,* 20 N. C., 463, *Ruffin, C. J.,* says: "There can be no doubt that the Legislature hath power, and that there is an obligation in sound morals and true policy on that body, to protect the decency of Divine worship by prohibiting any actual interruption of those engaged in worship or any practices at or near the place, in which the Legislature may see a tendency to produce such interruptions." The act referred to prohibited the sale of spirituous liquors near a church. This Court, in *S. v. Joyner,* 81 N. C., 537, says: "Nor is the competency of the Legislature to pass local acts such as the present now open to question. The power has been so long and so often exercised and recognized in cases coming before this and other courts that its existence must be considered as settled." *S. v. Stovall,* 103 N. C., 416; Black on Intoxicating Liquor, sec. 40. The power to pass the law of local application being conceded, we are unable to perceive any reason why the Legislature may not prescribe rules of evidence, within the limitations fixed, applicable to charges for its violations; nor are (644) we cited to any authorities to the contrary.

The defendant suggests that the statute violates Article XIV, section 1, of the Federal Constitution, which prohibits any State from making or enforcing any law which denies to any person within its jurisdiction equal protection of the law. The question viewed from this standpoint has been so thoroughly and ably discussed and settled by the Supreme Court of the United States in *Mugler v. Kansas,* 123 U. S., 623, that we do not deem it necessary to do more than refer to that case.

It is seriously insisted, however, that to sustain this act would be to overrule *S. v. Divine,* 98 N. C., 778. We have carefully examined the opinion of the *Chief Justice* in that case, and find nothing in the question decided which conflicts with the conclusion at which we have arrived. The defendant was indicted under a statute containing very peculiar provisions, the only one of which it is necessary to be considered here is that declaring that when any live stock should be killed or injured by any car or engine running on a railroad in certain enumerated counties, such injury . . . should be a misdemeanor; that the president, superintendent, engineer, or conductor may be indicted therefor. It was further provided that when any

stock was killed or injured in such counties, it would be *prima facie* evidence of negligence. The defendant (superintendent of the road) was indicted under the statute. The jury found that the defendant was not upon the train or engine when the stock was injured, and in no way connected therewith. The eminent counsel for the defendant insisted, among other manifest reasons, that the statute was invalid for that it rendered the act criminal in one locality which was not so in another, and raised out of an act done by one employee a presumption of guilt against another employee who did not in any way participate in it. This Court sustained the objection. The distinction between the statute then under consideration and the one before us is manifest. The act which was made the *prima* (645) *facie* evidence of guilt in our case can be committed only by the person accused. The "keeping" made *prima facie* evidence must be the personal act of the defendant.

We have given to the questions discussed by the defendant's able and zealous counsel more than usual consideration. His Honor carefully guarded the right of the defendant to be tried by a jury of his county and convicted only when they were satisfied beyond a reasonable doubt upon the whole of the evidence that he kept liquor for sale, expressly stating to the jury that if the State had not thus satisfied them upon all the testimony, they should return a verdict of not guilty. It would seem that in the light of the testimony no other conclusion could have been reached.

No error.

WALKER, J., concurring in result: Having with him so large a quantity of liquor in packages of different size and covered over with a lap robe was sufficient of itself to constitute *prima facie* evidence of the defendant's guilty possession. When proof of a certain fact is made *prima facie* evidence of the main fact to be established, the law does not mean that there is any presumption of guilt thereby created, but there is sufficient evidence to go to the jury and upon which they may convict if there is no countervailing testimony. It does not shift the burden of proof, but the State is still required to prove its case beyond a reasonable doubt. Wig. Ev., sec. 2494 (2); *Womble v. Grocery Co.*, 135 N. C., 474. The case was submitted to the jury in this view of the law, and I am unable to see how any substantial error was committed by the court when the jury were permitted to consider all of the evidence. The mere fact that reference was made to the statute did not prejudice the defendant, when his possession, under the circumstances clearly shown by the evidence and not disputed, was sufficient to carry the case to the jury. He had the full benefit of the doctrine of reasonable doubt upon the whole evidence, (646)

which was submitted to the jury, and the case was fairly and correctly tried.

BROWN, J., dissenting: I dissent from so much of the opinion of the Court as undertakes to sustain the constitutionality of section 3, chapter 434, Laws 1903, relating to the citizens of Union County, to wit: "That if any person, other than licensed retail dealers under said laws, shall keep in his possession liquors to the quantity of more than a quart within said county, it shall be *prima facie* evidence of his keeping it for sale within the meaning of this act."

The provisions of this act make it an indictable offense to keep liquor in one's possession with intent to sell it, and at the same time prohibits the sale of intoxicating liquors within the county of Union. Irrespective of the provisions of the act, I am of the opinion that there was sufficient testimony to be submitted to the jury that the defendant did have in his possession liquor with intent to sell it. But inasmuch as his Honor in charging the jury gave force and effect to the *prima facie* case contemplated by the statute, I think a new trial should be granted, because it is impossible for us to determine upon what view of the evidence the jury rendered their verdict. I am of opinion that the Legislature has no power to declare that the mere possession of more than a quart of liquor shall be *prima facie* evidence that the possessor intends to sell it, and thereby subject himself to the penalties and pains of a criminal prosecution. The Legislature has not seen fit, even if it had the power to do so, to prohibit the use and possession of intoxicating liquors within Union County. It has only prohibited the keeping in possession of intoxicating liquors with intent to sell. The possession and use of intoxicating liquors are lawful acts which any citizen
(647) of that county may do with impunity. The Legislature has very extensive powers in respect to fixing, changing, or modifying the rules of evidence to be applied by the courts, but the exercise of this power in relation to criminal proceedings is subject to very important limitations prescribed by the organic law of the country, which Legislatures, courts and all others in authority must respect. Among other limitations, the Legislature cannot deprive any citizen of Union County of that equal protection of the laws of the land which is guaranteed by the Fourteenth Amendment of the Constitution of the United States, nor can it deprive such citizen of the protection of that fundamental principle which declares him to be innocent until he is proven guilty to the full satisfaction of a jury of his peers. This presumption of innocence is thrown around the accused and he is entitled to it at every stage of the legal proceedings instituted against him. In prosecutions under the liquor laws there have been many legislative provisions in the different States tending to facilitate the conviction

of offenders by admitting presumptive or indirect proof of certain facts, and generally these acts have been so framed as to meet with no valid constitutional objection; but there is one underlying principle which has been observed in the preparation of all such acts except the one now under consideration. "In criminal cases the limitation has been imposed that the acts declared *prima facie* evidence of the crime must have some relation to the criminal act and tend to prove the crime." Jones on Evidence, vol. 1, sec. 194, and cases cited.

One of the most sacred rights which guard the liberty of the citizen in this and all other States of this Union is the presumption of innocence which the law throws around him. While the Legislature may make certain acts of the individual and certain facts connected with him *prima facie* evidence of guilt, yet it is everywhere conceded that the act is obnoxious to the organic law unless the facts have some tendency to prove guilt. In other words, the Legislature (648) cannot by its arbitrary will give to a perfectly lawful and innocent act an unlawful and criminal effect, or draw from acts warranted by law, and which every one may rightfully do, an unlawful, improper, and criminal intent. By this act the Legislature has withdrawn from the citizens of Union County the equal protection of the law which is given to the other citizens of the State. In no other county in North Carolina is the citizen so situated that he may perform a perfectly lawful act and enjoy a legal right and at the same time, by the mere force of an arbitrary statute, have inferred from it a wrongful and criminal intent. The question as to what is a denial of the equal protection of the law is one which has been before the Supreme Court of the United States in a great many cases. The decisions of the highest courts of the States will show that it is one not easily determined. No rule can be formulated that will cover every case, but it has been generally said that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same jurisdiction and in like circumstances. *Missouri v. Lewis,* 101 U. S., 31. *Justice Field* says, in *Barbier v. Connolly,* 113 U. S., 27, that "the Fourteenth Amendment means that equal protection and security shall be given to all persons under like circumstances in the enjoyment of their personal and civil rights." "Due process of law and the equal protection of the laws are secured, if the laws operate on all alike and do not subject individuals to an arbitrary exercise of the powers of government." *Duncan v. Missouri,* 152 U. S., 377. No duty rests more imperatively upon the courts than the enforcement of these fundamental provisions intended to secure with equality the rights which are the foundation of all free government. It doubtless conduces greatly to the peace,

happiness, and morality of a community to prohibit the illicit sale of intoxicating liquors, but in doing so it is of equal, if not greater, importance that the fundamental rights of the citizen under our organic law should not be ruthlessly destroyed. "The State has un-
(649) doubtedly the power by proper legislation to protect the public morals, the public health, and the public safety; but if by their necessary operation its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." *Connolly v. Sewer Pipe Co.,* 184 U. S., 558.

I do not question the right of the Legislature to make the possession of intoxicating liquors with intent to sell an indictable offense, any more than I question its right to prohibit the sale of it entirely within the entire State or any county or township in it; but I do deny its right in the prosecution of crime under such laws to take away from the citizen the fundamental rights which are thrown around him to protect him from the penalties and pains of a criminal prosecution.

It will be seen by an examination of the cases, I think, that there is absolutely no authority against the position I have taken, although innumerable cases can be found in which the Legislature has made the possession of intoxicating liquors *in certain cases and under certain ciircumstances prima facie evidence* of an intent to sell. But I do not think my brethern can find any statute where the mere fact of the possession of three pints of intoxicating liquors under any and all circumstances has ever been made *prima facie* evidence of a criminal intent to sell, or where any such statute has ever been upheld by any court in this country. I refer to a number of cases: *S. v. Cunningham,* 25 Conn., 195; *S. v. Morgan,* 40 Conn., 44; *Commonwealth v. Wallace,* 7 Gray (Mass.), 222; Black on Intoxicating Liquors, sec. 60. In most of these cases the statutes under consideration relate to certain houses wherein liquor is found. Some of them provide that where liquor is delivered in certain quantities such delivery shall be sufficient
(650) evidence of sale. *S. v. Hurley,* 54 Me., 562. Other statutes provide that where persons are seen drinking intoxicating liquors on certain premises it shall be *prima facie* evidence that it was sold by the occupant of such premises with intent to be drunk thereon. Statutes have been upheld which provided that proof of the finding of liquor in the possession of the accused under certain circumstances specified in the act shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to law. Again, the notorious character of certain premises, when proven, has been held to be *prima facie* evidence of certain facts. The statutes are

too numerous to set out or comment upon at length. Suffice it to say that all of them contain specific circumstances or relate to certain premises, and none of them provide that the mere fact of the possession of a quantity of liquor exceeding a quart, without any exception whatever, shall be *prima facie* evidence of crime.

In *Com. v. Merchant,* 103 N. Y., 148, *Judge Earle* says: "It would not be possible to uphold a law which made an act *prima facie* evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act." . . . But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* evidence of a fact to be established, leaving the adverse party at liberty to rebut it. Here the act which is made *prima facie* evidence of an illegal sale takes place upon the premises of the person charged; it has some relation to and furnishes some evidence of an illegal sale, and occurs in a place where liquors are authorized to be kept and sold." *Judge Peckham,* now of the Supreme Court of the United States, in *People v. Cannon,* 139 N. Y., 43, says: "It cannot be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the Legislature may, with certain limitations, enact that where certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. The limitations are that the fact (651) upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary." In *S. v. Shank,* 74 Iowa, 652, it is said: "The defendant being authorized to keep liquors for lawful purposes, no presumption arises against him that they are kept for unlawful purposes. The law will presume, in the absence of proof to the contrary, that the defendant kept them for lawful purposes, for men are presumed to act in obedience to the law where their acts are not shown to be unlawful." The Supreme Court of Indiana says: "We should unhesitatingly declare a statute void which attempts to enact that a person should be convicted of an offense upon proof of facts which might be consistent with innocence, yet it has often been held that the Legislature in defining a crime may also enact that proof of facts which are universally recognized as indicating guilt shall be sufficient *prima facie* evidence of the commission of the offense defined by statute." *Voght v. State,* 124 Ind., 361. In *People v. Lyon,* 27 Hun. (N. Y.), 180, *Judge Larned* says: "In the present case the defendant is charged with having sold liquor with intent that it should be drunk on the premises. It is right to have the question tried by jury. That means that the jury are to determine

from their own judgment upon the facts legally given in evidence whether or not the defendant is guilty. If the Legislature can declare that a certain fact is *prima facie* evidence of the defendant's guilt, such a declaration means that the jury must convict unless the defendant explains away this evidence." In giving a number of pertinent illustrations, the learned judge says: "If the Legislature can legally enact such a clause, they might enact that if a dead body were found in any house, that should be *prima facie* evidence that the occu-
(652) pant of the house had murdered the deceased, because the legislative enactment is purely arbitrary and need have no regard to the connection or want of connection between the evidence and the conclusion which is to be proved."

In *S. v. Beswick,* 13 R. I., 218, the Court says: "It will be observed that the statute makes proof of the facts mentioned in it not only evidence against the accused, but *prima facie* evidence of his guilt, so that upon proof of that it is the duty of the jury to convict unless the presumption is rebutted by other evidence. . . . We have carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common-law maxim that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. . . . Certainly, the accused does not have the judgment of a jury if the jury is compelled by an artificial rule to convict him upon proof of a fact which is consistent with his innocence. . . . Suppose the General Assembly were to enact that if any person was generally reputed to be guilty of murder it should be *prima facie* evidence of his guilt. Could it be said that his life or liberty had been taken from him by the judgment of his peers? . . . Indeed, to hold that a Legislature can create artificial presumptions of guilt from facts which are consistent with innocence is to hold that it has the power to take away from the judicial trial the very element which makes it judicial. . . . It is true, the accused has the right of defense, and if he can adduce satisfactory evidence he may rebut the statutory presumption, but the production of such evidence is not always easy, even with the right to testify in his own behalf." In *S. v. Beach,* 43 N. E. (Ind.),
951, it is said: "A law which makes an act *prima facie* evi-
(653) dence of crime, which has no tendency whatever to establish a criminal act, is unconstitutional and void."

The right of which the Legislature deprives the citizens of Union County is probably the most sacred and valuable of all the rights guaranteed to the citizens of this country in our National and State constitutions. The words "due process of law" and "equal protection

of the laws," as used in the Fourteenth Amendment, mean practically one and the same thing. The words, "the law of the land," were borrowed from Magna Charta and have a recognized significance. Judge Cooley, in his work on Constitutional Limitations, sec. 355, cites with approval a definition by *Judge Edwards,* in *Westervelt v. Gregg,* 12 N. Y., 202: "Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." The effect in criminal prosecutions is to secure to the accused a judicial trial according to the general principles of the common law, and not in violation of those fundamental rules which have been established by the common law of the protection of the citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proven guilty. "This rule," said *Judge Selden,* in *People v. Toinbee,* 2 Parker Cr. R., 490, "will be found incorporated into many of our State constitutions, and is one of those rules which in our constitutions are compressed into the brief but significant phrase, 'due process of law.'" In *S. v. Divine,* 98 N. C., 783, *Chief Justice Smith* quotes with approval from Judge Cooley's Constitutional Limitations, 309: "The mode of investigating the facts, however, is the same in all, and this is through a trial by jury, surrounded by certain safeguards which are a well-understood part of the system and which the Government cannot dispense with." "Meaning, as we understand," says *Judge Smith,* "that the charge must go before the jury and the guilt of the accused proved to them, with the presumption of innocence until this is done." In *Cummings v. Missouri,* 4 Wall., 328, *Mr. Justice Field* says: (654) "The clauses in question subvert the presumption of innocence and alter the rule of evidence which heretofore under the universally recognized principles of the common law have been supposed to be fundamental and unchangeable." In *Wynehamer v. People,* 13 N. Y., 446, the Court says that "the Legislature cannot subvert that fundamental rule of justice which holds that every one shall be presumed innocent until he is proved guilty." In *San Mateo v. R. R.,* 8 A and E. R. R. Cases, 10, the Supreme Court of the United States says: "Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws; and by equal protection is meant equal security under them by every one on similar terms in his life, liberty, and in the pursuit of happiness."

Subjecting the statute under consideration to the test as laid down by these authorities, the conclusion to my mind is irresistible that it is obnoxious to our organic law, both Federal and State. What is the fact to be proven which constitutes the gravamen of the offense? It

is certainly not the mere possession of more than one quart of liquor. That is a perfectly lawful act, not only in Union County, but in every other county in North Carolina. It is the intent to sell which constitutes the crime. Does the possession of three pints of liquor under any and all circumstances tend to prove that the possessor intends to sell it? If it does, the act is constitutional. If it does not, it is violative of the organic law of the land, if the authorities I have quoted are worth anything. What is there in the mere possession of three pints of liquor which would tend in the least degree to indicate that the owner of it kept it for sale or ever intended to sell it? There are five thousand individuals in this country who purchase liquor for their own consumption to one who purchases it for sale. To (655) give the act the effect contended for, it must be construed with reference to the purpose of the one, without having any regard whatever to the purpose of the five thousand. The act must not be tested by the evidence in this case. Independent of the act, I am willing to admit that the evidence was amply sufficient to support a conviction. But the act in question is purely arbitrary, and it has been given that effect. It does not, as the cases I have referred to, give any specified circumstances under which the presumption shall arise. It applies to the possession of three pints of wine with as much force as to the possession of three barrels of whiskey. A lady who places on her dinner table for the entertainment of her guests three pints of claret is as much a *prima facie* criminal as the peddler who hauls around in his covered wagon a barrel of "untaxed corn" with his pint pot tied to the spigot. The latter might justly and legally constitute a *prima facie* case of "intent to sell," but it would be impossible to infer such an intent from the former. The possession of three pints of liquor in ninety-nine cases out of a hundred is far more indicative of an intent to drink than of an intent to sell. Yet the statute makes no distinction. It "feeds all out of the same spoon," and invests all persons with equal criminality in the eyes of the law, regardless of circumstances or surroundings, reason or logic. The individual in Union County who dares to have in his residence three pints of scuppernong wine, prescribed as a tonic for his ailing wife, is in danger of having his liberty taken from him, and sent to break rock upon the county roads by virtue of a few little words in this statute. It will not do to say that no jury would convict a man under such circumstances. He is placed on the defensive. The shield and panoply of innocence is stripped from him, and he is at the mercy of twelve men. Fanaticism has done worse things than convicting a man under such circumstances, however unjustifiable we think it may be. This protection is given to the citizen, not to prevent his conviction alone when charged with crime, but it is given him to protect him from

unjust, improper, mortifying, and expensive criminal prosecu- (656)
tions, and it is the most valuable and priceless possession the individual has. The citizens of Union County are as much entitled to it as any other citizens of North Carolina or the United States.

The Court does not undertake to explain how the possession of more than a quart of liquor can possibly be significant of a purpose to sell, and I am at a loss to know. The mere possession of three pints of liquor is no more indicative of the owner's purpose and intent in relation to it than is the possession of three pints of flour, meal, or anything else. Men sell liquor, it is true, and so they do other things; but inasmuch as the vast majority are buyers of such articles and not sellers, I fail to see how mere possession of so small a quantity indicates an intent to sell as strongly as it does a purpose to consume.

Unless the Court can show that the possession of such a quantity of liquor indicates a purpose to sell, it must hold that the Legislature can by arbitrary enactment make a perfectly innocent and lawful act evidence of a criminal intent, although such act has no tendency to prove guilt. And such is really the effect of the decision in this case.

I have cited from the opinions in a few of the leading precedents referred to in the judgment of the Court, and the citations sustain fully my contention. All the statutes referred to in the opinion of the Court or in the cases cited therein make certain acts, which tend to prove guilt, *prima facie* evidence of it. None of them undertake to make a purely lawful act, from which no unlawful intent and purpose can be reasonably inferred, evidence of crime. But all the cases, without an exception, so far as I can discover, declare that cannot be lawfully done. Space will not permit me to comment on all these statutes, but I will cite our own statute against carrying concealed weapons as an illustration. The statute makes the possession of the weapons named in it (pistols, bowie-knives, etc.), off one's premises, *prima facie* evidence of (657)
concealment. That act is plainly constitutional. Why? Because the weapons named in the act may be and commonly are carried in the pocket and concealed from view. When the weapon is seen in the hand of the owner off his premises, it is a fact tending to prove that he took it from his pocket and thereby had it concealed on his person. If I had space I could point out the true significance of every act of the Legislature mentioned by the Court, and easily show that the facts declared to be *prima facie* evidence of crime have some tendency to prove it, while the fact stated in the act under consideration has no such tendency.

The General Assembly, in my opinion, has just as much right to declare that in all indictments in Union County for having liquor in possession with intent to sell, the defendant shall be presumed to be guilty

and shall be required to establish his innocence, as it had to enact the statute in question, wherein, by mere arbitrary words, a perfectly lawful and innocent act is declared to be *prima facie* evidence of a guilty intent. There are some things the General Assembly cannot do. It may declare that hereafter "black shall be white," but it cannot make it so. Nor can it lawfully, by the exercise of its arbitrary will, turn innocence into *prima facie* guilt. It has just as much right to declare that the possession of a gun shall be *prima facie* evidence of an intent to kill.

The Court declares that *Mugler v. Kansas,* 123 U. S., 623, is a plain authority that the act under consideration does not violate the Fourteenth Amendment to the Federal Constitution. With the utmost respect for the opinion of my brethern, I am constrained to say that the case has no bearing whatever on the question at issue in this appeal. In *Mugler v. Kansas* it is decided: (1) That the State of Kansas had the right to prohibit the manufacture and sale of intoxicating liquors within the State. (2) That Mugler could not recover the value of his brew-
(658) ery. (3) That in prosecutions under the Kansas act it is not necessary for the State to affirmatively prove that the defendant did not have a permit to sell intoxicating liquors. I do not controvert anything decided in that case. The third proposition has always been the law in North Carolina in indictments for selling intoxicating liquors without license. The possession of the license is a matter of defense. The utter lack of pertinency of the *Mugler case* to the one at bar can be seen from the following quotation: "It is only a declaration that when the State has proven that the place is kept for the manufacture of intoxicating liquors (such manufacture or sale being unlawful except for specified purposes, and then only under a permit), the prosecution need not prove a negative, viz., that the defendant has not the required license. If the defendant has such permit, he can easily produce it and thus overthrow the *prima facie* case established by the State." How very different is the act we are considering. Under it the State can prove the possession of three pints of wine in a citizen's private dining-room, who is not engaged in any business connected with intoxicating liquors, rest its prosecution upon the *prima facie* case thus made out under the statute, whereby a lawful and innocent act is arbitrarily converted into evidence of a criminal intent. If the jury should from prejudice or fanaticism refuse to believe the defendant's explanation, he is helpless. Why? Because the statute has robbed him of the greatest protection the citizen has against unwarranted prosecution, viz., the presumption of innocence thrown around him by the fundamental law. The Court would have done well to quote some of the forcible utterances of *Judge Harlan* in the *Mugler* case. He says: "It does not at all follow that every statute enacted ostensibly for the pro-

motion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go." And again: "Undoubtedly, the State, when providing by legislation for the protection of (659) the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument."

In conclusion, I will say that I sympathize deeply with all legislative efforts to extirpate illicit traffic in intoxicating liquors, and will be found sustaining all such laws when within the legislative power. But I cannot conscientiously assist in laying the judicial axe to the most valuable and sacred of all the fundamental rights of civil liberty, viz., the legal right to be adjudged by the court innocent unless the State has offered evidence tending to prove the commission of a crime. The citizens of Union County are as much entitled to the protection of this organic law, in the prosecution of any and all offenses, as are the other citizens of the State, and, when it is denied to them, as it is by this statute, they are denied the equal protection of the "law of the land," and are at the mercy of capricious and uncertain jurors.

For the reasons I have attempted to give, I think there should be a new trial, and the court below directed to submit the case to the jury upon the evidence without reference to any *prima facie* case under the statute.

Cited: *S. v. McGinnis, Post* 731; *Daniels v. Homer,* 139 N. C., 243; *Furr v. Johnson,* 140 N. C., 162; *In re Applicants,* 143 N. C., 23; *Stone v. R. R.,* 144 N. C., 226; *Overcash v. Electric Co., ib.,* 578, 584; *S. v. Dowdy,* 145 N. C., 439; *S. v. Williams,* 146 N. C., 626; *Burns v. Tomlinson,* 147 N. C., 635; *S. v. McDonald,* 152 N. C., 805; *S. v. Watkins,* 164 N. C., 427, 429; *S. v. Wilkerson, ib.,* 431, 436, 441; *S. v. Russell, ib.,* 485, 486; *Drainage Comrs. v. Mitchell,* 170 N. C., 325; *S. v. Randall, ib.,* 757; *Power Co. v. Power Co.,* 175 N. C., 679; *S. v. Bean, ib.,* 749, 752; *S. v. Price, ib.,* 808; *S. v. Baldwin,* 178 N. C., 697; *Tatham v. Mfg. Co.,* 180 N. C., 630; *S. v. Helms,* 181 N. C., 569.

STATE v. HAYES.

(Filed 25 April, 1905.)

Rape—Collateral Writing—Cross-examination As to Contents of Letter.

In an indictment for rape, the prisoner had a right to cross-examine the prosecutrix as to the contents of a letter written by her to him after the alleged rape, for the purpose of showing that the sexual relations between them were voluntary on her part; the prisoner was not required to offer the letter itself as evidence (although at the time in the hands of his counsel), it being collateral to the matter at issue.

INDICTMENT for rape against C. E. Hayes, tried by *Ward, J.*, and a jury, at November Term, 1904, of ROBESON. The prisoner was convicted of the crime of rape upon the person of one Mary Inman, and from the sentence of death pronounced by the court, appealed.

Robert D. Gilmer, Attorney-General for the State.
John D. Shaw, Jr., and R. E. Lee for prisoner.

BROWN, J. The prosecutrix, Mary Inman, was examined as a witness for the State and said in substance that the alleged assault occurred at her mother's house on Thursday, 30 June, 1904; that at the time the prisoner came to her mother's home and saw the prosecutrix in the parlor; that he shut the door and locked it; and after giving all the details, prosecutrix states that the prisoner forced her, while standing up, to have sexual intercourse with him. On cross-examination she stated that she made no outcry because she was afraid the prisoner would kill her, as he was armed with a pistol and threatened to use it. The prosecutrix further testified that she went to church on Sunday night;
(661) that she saw the prisoner, and he handed her a note. She states that she did not read the note, but stuck it in her belt and kept it there during the service, then put it in her bureau drawer; afterwards tried to read it; could not do it, and tore it up; that she got another note from prisoner on Monday morning, and wrote him a letter on Tuesday. She further states that she told the prisoner in this note, which she wrote him on Tuesday morning, that "if I would deliver myself up to him for five minutes he had promised to let me alone." "I told him in the note that I trusted him and expected him to keep his promise." Prosecutrix admits that she ate a watermelon with the prisoner on Monday afternoon. She testified on cross-examination that while eating the watermellon, prisoner asked her to have intercourse with him again. "I said I would have to ask my mother, and he proposed that we ask her together." Prosecutrix further says that on Mon-

day night she went out to the kitchen and had sexual intercourse with the prisoner, and that her mother knew that she was in the kitchen with him. She also states that she had intercourse again with the prisoner on Wednesday night, and that her mother knew she was in the kitchen with him on that night. The prosecutrix claims, however, that these several acts of intercourse succeeding the first were brought about by fear of the prisoner and by threats, intimidation, and force on his part. Upon cross-examination prisoner's counsel asked the witness the following question: "Did you not, in your letter of Tuesday, say to Hayes that you could not see him again?" State objected. The objection was sustained, and prisoner excepted. It is stated in the case that this letter of Tuesday, which the prosecutrix wrote the prisoner, was then in court and in the hands of the prisoner's counsel at the time the question was asked. The prisoner's counsel was doubtless attempting to bring out the whole of the contents of the letter.

In refusing to admit this testimony, we think his Honor committed error. The prisoner had a right to cross-examine the prose- (662) cutrix as to the contents of this letter. The letter was purely collateral to the matter at issue before the court, and it did not require that the letter should be introduced as the only legal evidence of its contents. Inasmuch as it was written by the prosecutrix herself, it was competent to draw out of her personally all the contents of that letter for the purpose of showing that the sexual relations between her and the prisoner were voluntary on her part and were not brought about by fear and the overpowering intimidation of the prisoner. The prisoner would not be required to offer the letter itself as evidence, if he could elicit the facts therein from the State's witness. We can easily see that it would be a perfectly legitimate and very effective method of getting before the jury the facts alleged to have been contained in the letter of prosecutrix by drawing them out of the prosecutrix herself on cross-examination. *S. v. Ferguson,* 107 N. C., 841.

Upon a careful consideration of all the testimony in this case, while it may be possibly sufficient to be submitted to the jury, we cannot refrain from expressing the hope that upon another trial, inasmuch as the prisoner's life is at stake, the State will be able to strengthen the case made out on the first trial, if a verdict of guilty of a capital felony should be insisted upon by the solicitor.

In this connection we will call attention to the language of *Sir Matthew Hale,* 1 Pleas of the Crown, 633: "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though ever so innocent." He then gives account of

two trials for rape which took place before him at the Suffolk Assizes, and says: "I only mention these instances that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care (663) and vigilance, the heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried on to the conviction of the person accused thereof by the confident testimony of sometimes false and malicious witnesses." New trial.

STATE v. HOUGH.

(Filed 2 May, 1905.)

Homicide—Self-defense—Assaults With and Without Felonious Intent—Rights of Person Assaulted.

1. A charge that if the jury believed the evidence of the defendant he would at least be guilty of manslaughter, excludes any idea of self-defense and was rroneous, if, taking the defendant's testimony in its most favorable aspect, an inference of self-defense might have been reasonably drawn therefrom by the jury.
2. The fact that the defendant procured a pistol on the morning of the homicide is not conclusive evidence of an intent to unlawfully use it if an emergency arose, where it appears that the deceased had threatened to kill the defendant and there was a great disparity in the size and strength of the two men.
3. If an assault be committed under such circumstances as to naturally induce the defendant to believe that the deceased was capable of doing him great bodily harm, and intended to do it, then the law will excuse the killing, because any man who is not himself legally in fault has the right to save his own life, or to prevent enormous bodily harm to himself.
4. There is a distinction between an assault with felonious intent and assault without felonious intent; in the former a person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be; in the latter, he may not stand his ground and kill his adversary, if there is any way of escape open to him.

(664) INDICTMENT against W. L. Hough for the murder of one George Hartsell, heard by *W. R. Allen, J.*, and a jury, at October Term, 1904, of CABARRUS. The prisoner was convicted of manslaughter, and from the judgment of the court he appealed.

Robert D. Gilmer, Attorney-General, for the State.
Montgomery & Crowell for prisoner.

BROWN, J. His Honor charged the jury that if they believed the evidence of the defendant he would at least be guilty of manslaughter, to which the defendant excepted. It follows, therefore, from the charge of his Honor, that any idea of self-defense was excluded, and if, taking the defendant's testimony in its most favorable aspect, an inference of self-defense might have been reasonably drawn by the jury from the testimony of the defendant, then there was error in the charge of the court.

The defendant's wife testified that the deceased made an improper proposal to her in the field where she was at work; that he was her stepfather; that she declined, and the deceased went off and in a short while returned and renewed the proposition, and said: "If you don't consent, tell your husband I am going to kill him"; that she told her husband of this conversation. The defendant then testified in his own behalf, as follows: "My wife told me that night what the deceased had said. I went next morning and borrowed a pistol. That evening I was at work in my field when deceased came to me and wanted to exchange his horse for mine to work to the reaper. I told him I wanted a settlement. He went off and returned late in the evening and asked where Mary, my wife, was. I told him I did not know, and 'you are the cause of her being gone.' He started towards me, rolling up his sleeves. I told him to stand off; he kept advancing, and I shot, and gave back four cotton rows. He kept advancing, and I shot four times as I retreated. He got near enough to grab at me. The (665) last time I shot he stopped. I was twenty-five steps from my house. When I began to shoot he was about seven cotton rows from me. At the time I shot him he was approaching me rolling up his sleeves. I saw no weapon. I saw him go to the house from the field and come back through the field to me, and I thought he had gone to his house and got something. He looked mad and showed fight. I knew he was a very strong, large, muscular man, weighing agout two hundred pounds. I weigh one hundred and twenty-two pounds. The land I lived on and worked belonged to the deceased. I did not have the pistol when he came to the field the first time. The wounds were the cause of his death." Thomas Bost testified as to the dying declarations of the deceased, as follows: "Hartsell said he was going to die. Said he was willing to suffer the punishment. That he would not hurt a hair on Hough's head. Said he thought Hough justifiable in what he did." There was also evidence tending to prove that the general character of the deceased was bad for violence, and that the defendant knew it; that he was a large and powerful man physically, very muscular, and weighing about two hundred pounds, and that the defendant

was a very small, weakly man, weighing one hundred and twenty-two pounds, and of excellent character.

It is contended by the State that the fact that the defendant procured a pistol on the morning of the homicide is to be taken as conclusive evidence of an intent on the part of the defendant to unlawfully use the pistol if an emergency arose, and that he was in fault in entering into the combat with a deadly weapon. This would probably be a legitimate argument, but for the fact that the testimony discloses that the deceased threatened to kill the defendant; that he told the defendant's wife to tell him so, and in view of the fact that there was a great disparity in the size and strength of the two men, it does not fol-
(666) low necessarily that the defendant's purpose was to do more than defend himself. The defendant's testimony, if believed by the jury to be true, establishes the following facts: That the defendant was at his own home attending to his business; that the deceased came to the defendant's house; that he was a very powerful, violent, and dangerous man; that he had threatened to kill the defendant, and told the defendant's wife to tell him so; that at the time of the shooting he was advancing on the defendant in a striking attitude; the defendant orders him to stop. It is a fair inference to suppose that the defendant thought the deceased was advancing upon him for the purpose of carrying into execution the threat he had made. The defendant retreats and gives back, although he is on his own premises. This powerful and dangerous man continues to advance, rolling up his sleeves; one shot does not stop him; he did not stop until the fourth and fatal shot.

It is undoubtedly true that if two engage in a fight upon a sudden quarrel, one being unarmed and the other armed, and one kills the other with a deadly weapon, it is at least manslaughter. *S. v. Curry,* 46 N. C., 280. But if the defendant's evidence is to be believed, this was not a fight upon a sudden quarrel. He had a right to suppose that the deceased was advancing on him for the purpose of carrying into execution his previous threats; and if under such circumstances the jury should find that the defendant had reasonable ground to believe that the deceased intended to do him great bodily harm, then he had a right to defend himself; and if the jury should find that the use of a deadly weapon under such circumstances, considering the enormous difference in the size and strength of the two men, was necessary in order to make his defense effectual, then the defendant would not be guilty. If the assault was committed under such circumstances as would naturally induce the defendant to believe that the deceased was capable of doing him great bodily harm and intended to do it, then the law would

excuse the killing because any man who is not himself legally in (667) fault has the right to save his own life or to prevent enormous bodily harm to himself. *S. v. Lipscomb,* 134 N. C., 692. The general rule is that "one may oppose another attempting the perpetration of a felony, if need be, to the taking of the felon's life, as in the case of a person attacked by another, intending to kill him, who thereupon kills his assailant, he is justified." 2 Bishop's Criminal Law, sec. 332. There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without felonious intent. "In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." 2 Bishop's Criminal Law, *sec. 6333,* and cases cited. It is said in 1 East Pleas of the Crown, 271: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense." The American doctrine is to the same effect. See *S. v. Dixon,* 75 N. C., 275.

It is true, there is no evidence that the deceased was armed with a deadly weapon—at least, none was exhibited—but the evidence does show that the deceased had sent word to the defendant that he intended to kill him, and the defendant had a right to suppose that the deceased was endeavoring to carry out his threat and was prepared to do it. Then, again, the evidence shows there was an enormous disparity in the relative strength and power of the defen- (668) dant and deceased, the one being a weakly, delicate man of very small stature; the other, in comparison, being a giant of violent nature, and evidently capable of either killing the defendant or doing him great bodily harm without the aid of a weapon. The defendant was on his own premises, engaged in his peaceful pursuits, at the time the deceased advanced on him in a manner giving unmistakable evidence of his purpose to do the defendant bodily harm. How was the defendant expected to receive him? In the oft-quoted language of *Judge Pearson* in *S. v. Floyd,* 51 N. C., 392, "One cannot be expected to encounter a lion as he would a lamb," and the measure of

force which the defendant was permitted to use under such circumstances ought not to be weighed in "golden scales."

We think the case should have been submitted to the jury with appropriate instructions by the court.

New trial.

Cited: *S. v. Blevins, post,* 670; *S. v. Hill,* 141 N. C., 771; *S. v. Lilliston, ib.,* 862, 871; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Rowe,* 155 N. C., 447; *S. v. Dove,* 156 N. C., 658; *S. v. Lucas,* 164 N. C., 474; *S. v. Johnson,* 166 N. C., 396; *S. v. Ray, ib.,* 431; *S. v. Heavener,* 168 N. C., 162.

STATE v. BLEVINS.

(Filed 16 May, 1905.)

Homicide—Self-defense—Felonious Assaults—Necessity for Killing—Question for Jury—Duty of Retreating

1. Where a man is without fault and an assault with intent to kill is made upon him, he is not required to retreat, but may stand his ground, and if he kill his assailant, and it is necessary to do so to save his own life or protect his person from great bodily harm, it is excusable homicide.
2. The necessity, real or apparent, for killing one's assailant to protect one's self is a question to be determined by the jury on the facts as they reasonably appeared to the one assailed.
3. In ordinary assaults (not felonious), even with a deadly weapon, a man assailed is required to withdraw if he can do so, and to retreat as far as consistent with his own safety, before killing his assailant in self-defense.

(669) INDICTMENT against Flem Blevins for murder of J. J. Buchanan, heard by *McNeill, J.,* and a jury, at February Term, 1905, of MITCHELL. The jury found the prisoner guilty of manslaughter, and he excepted and appealed from the judgment pronouncel.

Robert D. Gilmer, Attorney-General, for the State.
S. J. Ervin and W. C. Newland for defendant.

HOKE, J. There was evidence of the State tending to show that the prisoner was guilty of murder. The prisoner testified in his own behalf that he was on his way to town and came up to Jason Harrell's house, where a lot of men were assembled. One Waits Harrell and his son, George, were in a fuss, and witness interferred to try and keep it

down. George had threatened to kill his father, and each had a gun. Some of the men had hold of George, and witness took hold of Waits Harrell's gun and wrenched it out of his hand and was going off with it. As the prisoner walked away with the gun, he saw the deceased cutting at Jason Harrell; had given him a severe wound and was raking at him with a knife, when the prisoner called to the deceased to "stop that"; was walking towards them, called two or three times and said, "Don't do that," "Put that up," when the deceased turned and came at witness "full dive with a knife." The witness "kinder backed to the right," said "Take care, take care," and as he was coming on, the witness pointed the gun and fired and killed him. He was coming on in a stooping position with his left hand extended and right hand raised. The witness shot him because witness thought he was going to kill him with that knife. The witness had nothing against him. The deceased came on the witness very brisk, and the witness never retreated very far—didn't have time to. At the time the witness said "Don't do that," the deceased was raking at Jason Harrell (670) with his knife. He fell near the end of the gun. The deceased was running on the witness "full dash," when the witness shot. He never pointed the gun at the deceased till he started at the witness.

In apt time the prisoner requested the court to give the jury the following instruction: "4. If the deceased attacked the prisoner with a deadly weapon, to wit, a knife, intending to kill him, then the prisoner was not required to retreat, but had the right to stand his ground and repel force with force, and to kill the deceased if necessary to defend himself from death or great bodily harm . . ." The court declined to give this instruction, and the prisoner excepted.

To another prayer, in substance, that if the deceased assaulted the prisoner with a knife and with intent to kill under the circumstances as stated by him, and it was necessary for the prisoner to kill the deceased to save his own life or protect his person from great bodily harm, such killing would be excusable on the ground of self-defense, the court added, "if the prisoner was unable to retreat with safety."

It has been established in this State by several well-considered decisions that where a man is without fault, and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat, but may stand his ground, and if he kill his assailant and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held (*S. v. Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 275; *S. v. Hough, ante,* 663); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him.

True, as said in one or two of the decisions, this is a doctrine of

rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose, and that he (671) took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with deadly weapons. In such case a man is required to withdraw if he can do so, and to retreat as far as consistent with his own safety. *S. v. Kennedy,* 91 N. C., 572. In either case, he can only kill from necessity. But, in the one, he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other, he must show as one feature of the necessity that he has retreated to the wall.

Without intending in any way to pass on the probative force of the testimony, there was evidence on the part of the prisoner tending to show that he was without fault, and that the deceased made an assault upon him with intent to kill, and with present power to carry out his felonious purpose. If this is true, the prisoner had a right to stand in his defense, and to have that phase of his testimony submitted to the jury, without requiring him to show that he endeavored to retreat. In so modifying one of the prisoner's prayers for instructions and in refusing the other, there was error committed, which entitles the prisoner to a new trial, and it is so ordered.

New trial.

Cited: *S. v. Lilliston,* 141 N. C., 862; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Cox,* 153 N. C., 642; *S. v. Rowe,* 155 N. C., 447; *S. v. Dove,* 156 N. C., 658; *S. v. Lucas,* 164 N. C., 473; *S. v. Gaddy,* 166 N. C., 346; *S. v. Robertson, ib.,* 362; *S. v. Johnson, ib.,* 396; *S. v. Ray, ib.,* 430; *S. v. Hand,* 170 N. C., 706.

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(672)

STATE v. DUNN.

(Filed 16 May, 1905.)

Embezzlement—Bankers—Misuse of Funds—Fraudulent Intent—Question for Jury.

1. Under section 1017 of The Code two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending their moneys without consent; the other is the failure to account for such moneys.
2. If the money of a society, of which defendant was treasurer, was deposited in his private bank as a general deposit, and put in general use and circulation as other bank deposits with the consent of the society, the defendant

was not guilty of any offense, though he became insolvent and could not settle on demand.

3. But if the defendant used the money of the society in his banking business without its knowledge and consent, and appropriated it to his own use with fraudulent intent, neither the fact that he became insolvent and suspended his banking business, nor that he afterwards had an agreement with the society as to the time when he was to pay the indebtedness, would be any defense to the charge of embezzlement under section 1014 of The Code.

4. In indictments for embezzlement, the fraudulent intent of the defendant in using the money is an essential element of the crime, and is peculiarly a question for the jury.

INDICTMENT for embezzlement against Charles F. Dunn, heard by *Moore, J.*, and a jury, at November Term, 1904, of LENOIR. The bill was drawn under section 1014 of The Code. The defendant was convicted, and appealed.

Robert D. Gilmer, Attorney-General, and Land & Cowper for the State.
No counsel for defendant.

BROWN, J. The defendant was formerly indicted under section 1017 of The Code, and on appeal to this Court it was held that the character of the society was not the kind described in section 1017. Under that section two offenses are created, which (673) apply only to certain officers of benevolent or religious institutions. One offense is the failure to account for such moneys. What is said in the opinion of the Court relates to the indictment under that section (134 N. C., 664). After that opinion was handed down, the solicitor indicted the defendant for the offense of embezzlement under section 1014.

The objections of the defendant to this last bill of indictment are untenable and were all properly overruled.

The testimony of the defendant himself tended to prove, if believed to be true, that he conducted a small private banking institution in the town of Kinston, which was patronized to some extent by people of his race; that the money belonging to the unincorporated society of which he was treasurer was deposited in the defendant's bank, and put in circulation and used in the general business of the bank, as other general deposits are used; that this was done by consent of and with the knowledge and approval of the society and its members. There was evidence by the State tending to contradict this.

His Honor instructed the jury that if they "shall find that the Love and Union Society No. 1, consented that the defendant should keep the moneys of the society in his private banking institution, together with

the other moneys of the bank, it was not a conversion for the defendant to use the same, but that the conversion took place upon his failure to pay or settle on demand, and that notwithstanding the fact that the defendant may have used the fund in his bank with the consent of the society, that a failure to pay or settle on demand would be an unlawful conversion, and if done with a dishonest, corrupt, or fraudulent
(674) intent, the defendant would be guilty of embezzlement."

In this instruction there is error. The judge should have instructed the jury that if the money was deposited in the defendant's private bank as a general deposit, and put in general use and circulation as other deposits, and this was done by the consent and with the approval of the society or of its controlling officers, the defendant would not be guilty of any offense. But if the defendant used the money of the society in his banking business without its knowledge and consent, and appropriated it to his own use with fraudulent intent, the fact that he became insolvent and suspended his banking business would be no defense to the charge in this bill of indictment. Nor would the fact that he afterwards had "an agreement with the committee of the society" as to the time when he was to pay the indebtedness, relieve the defendant from the consequences of a criminal act.

We think the court below should have given prayer No. 1 or prayer No. 14. Both relate to the same thing, to wit, the fraudulent intent of the defendant in using the money. In indictments for embezzlement, that is peculiarly a question for the jury and is an essential element of that crime. *S. v. McDonald,* 133 N. C., 680.

We have not been favored with either argument or brief on the part of the defendant, but as the case is to be tried for the third time, we have endeavored to point out all the errors which we have been able to discover in this record.

New trial.

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(675)

STATE v. GARLAND.

(Filed 16 May, 1905.)

Homicide—Manslaughter—Self-defense—Provoking Fight.

1. Where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life.

2. In case of a mutual combat, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he quitted the combat before the mortal wound was given, and retreated as far as he could with safety, and then, urged by mere necessity, killed his adversary to save his own life.

CONNOR and WALKER, JJ., dissent.

INDICTMENT against Elisha Garland for murder, heard by *Neal, J.*, and a jury, at August Term, 1904, of MCDOWELL. The evidence considered necessary to a proper understanding of the decision is as follows:

Alfred Williams, for the State, testified that "Just before deceased came in prisoner was drinking, cursing, and talking. I was in there when deceased came in. When he came in he walked up to the stove and turned his back to it. Prisoner told Calicutt, the deceased, to put some coal in the stove. Deceased said, 'I am not working here.' Prisoner told him again about the stove and fire. Deceased said he had no authority there. Prisoner said, 'Damn you, you will do it, too.' Calicutt turned around. Prisoner caught him in the collar, shoved him back, and shot him between the eyes. When prisoner had deceased by the collar one of the men said, 'Don't do that, Leish; quit.' Calicutt never said anything but what I have told. When the shot was fired, deceased fell. Prisoner dropped his pistol, picked it up, opened the door with both hands and went out. Calicutt went out on the platform. Nothing was said except what I have (676) told."

As to dying declarations of deceased, James Calicutt testified: "Deceased was my son. He lived eight days after he was shot between the eyes. He was conscious all the time. He told me when he came home that he was shot. He said every day he was going to die; asked me and his mother to pray for him. He said he had been to the festival; started home; went down to the railroad bridge with some others who were going to a wake at Morehead City (in this county). He got to the bridge and said he would not go further; went into the depot to see what time it was, and some one, he did not know who, asked him to make a fire in the stove. He told the man, 'I don't work here.' The man said, 'You've got to make it, for I am cold.' This fellow said, 'Maybe you are not going to do it.' Deceased said, 'No, for I don't work here.' The man said, 'God damn you, I'll see if I can make you do it,' grabbed me (deceased) in the collar and shot me.' Deceased said he fell behind the door."

The prisoner, Elisha Garland, testified in his own behalf: "I laid down and dozed off to sleep. When deceased came in the door slammed and woke me. That was the time Ive Calicutt, deceased, came

in. I had not seen him before. Did not know him. I was lying where the partition between the seats was torn out, on my left side, asleep. Door slammed and I woke. I raised my head and laid down again. Cold chill ran over me. I looked and saw the darkey standing up near the stove with his back to it. I said, 'Partner, wake that man and tell him to put some coal in the stove.' He said, I have nothing to do with waking him.' I said, 'Can't you wake him and tell him to make a fire in the stove?' He turned his head to the left and said, 'Who are you—a Mitchell County son of a bitch?' I said, 'Don't you say that any more,' I jumped up and said, 'You have got that to take back.' He said, 'I don't say a damn thing to take
(677) back.' I said, 'There have been men who said things and took back.' He said, 'You damn liar, you son of a bitch, I will shoot your head off.' Threw his right hand to his right hip, threw himself to the right and turned on his heel. I drew a revolver and fired. I fired when he threw himself around. His face was straight towards me. I dropped my pistol when I went to open the door, picked it up and went out the door and left. He was standing up on the south side and I walked up to him on the north side. I walked up from where I was lying at the stove, ten or twelve feet to where he was, and the shot was fired in two minutes."

On cross-examination prisoner testified: "I saw no firearms on the deceased. No gun or knife, no rock or stick. He never moved one step towards me. Saw no stick. Made no attempt to strike me. The Governor offered a reward for me. I was found in Mitchell County. I never heard Hollifield say, 'Stop, Leish; don't do that.' I came over here to work. Did not bring my trunk or any clothes except what I wore. When I told him he had to take that back, then it was I walked up to where he was, at the side of the stove. I was indicted for marrying a woman through a joke. I have been in the U. S. Army; joined in 1902. I gave in my age as 18. I was not sworn as to my age. I was in the army fourteen months. The mock marriage took place in the woods. I was drunk once six or eight years ago."

The court among other things instructed the jury, after reciting all the evidence, that if they believed the prisoner's evidence and that of his witnesses to be true, he would at least be guilty of manslaughter. To the foregoing charge the prisoner in apt time excepted and assigned the same as error. This was the only exception as to the charge given.

The jury rendered a verdict of guilty of manslaughter, and
(678) from the judgment thereon the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
A. C. Avery and P. J. Sinclair for prisoner.

HOKE, J., after stating the case: It is the law of this State that where a man provokes a fight by unlawfully assaulting another and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he "quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life." Foster's Crown Law, p. 276.

The same author says on page 277: "He, therefore, who, in case of a mutual conflict, would excuse himself on the plea of self-defense, must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter." To the same effect is *Lord Hale,* who lays it down, "That if A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannat retreat to the wall or other *non ultra* without danger of his life, and then kills B, this shall not be interpreted to be *se defendendo,* but to be murder or simple homicide (manslaughter), according to the circumstances of the case; for, otherwise, we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo.*"

This principle was approved and applied in this State in *S. v. Brittain,* 89 N. C., 481. There it was held that when a prisoner makes an assault upon A and is reassaulted so fiercely that he cannot retreat without danger of his life, and the prisoner kills A, the killing cannot be justified on the ground of self-defense. The (679) first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to the favorable interposition of the law. Applying this dictrine to the facts of this case, the Court is of opinion that no error has been committed.

According to the prisoner's own version of the occurrence, he was asleep in the waiting-room of the station and was waked up by the slamming of a door; feeling chilled, he said to the deceased: "Partner, wake that man up and tell him to put some coal in the stove," and the deceased replied: "I have nothing to do with waking him up." The prisoner replied, "Can't you wake him up and tell him to put some fire in the stove?" The deceased then used most insulting language towards the prisoner, and the prisoner jumped up and said, "You have

got to take that back," and advanced towards the deceased ten or twelve feet, when the deceased made a motion as if to draw a pistol, and the prisoner fired and killed him. On cross-examination the prisoner said, "I saw no firearms on the deceased, no gun, no knife, no rock or stick. He never moved one step towards me, and made no attempt to strike me. . . ."

A fair and correct interpretation of this testimony puts the prisoner in the wrong at the commencement of the difficulty. Although he may have been grievously insulted, yet, in going up to the deceased, having advanced ten or twelve steps and saying, "You've got to take that back," the prisoner unlawfully brought on the affray, and under the authorities cited the position of self-defense is not open to him, unless he can show that he quitted the combat before the mortal blow was given. In telling the jury that on the prisoner's own statement, if believed, he was guilty of manslaughter, there was no error, and it is so adjudged.

No error.

(680) CONNOR, J., dissenting: The rule of law is daily announced and enforced by this Court that when the defendant demurs to plaintiff's evidence and demands judgment, he thereby admits the truth of the evidence and every reasonable inference to be drawn therefrom most favorable to the plaintiff. "In passing on and deciding the question presented by the demurrer, the court must consider not only all the facts which the evidence tends to establish, but, also, such fair and reasonable inferences of fact as the jury, if trying the cause, might have lawfully drawn from such evidence." 6 Enc. Pl. and Pr., 442. The State having shown the killing with deadly weapon, and there being nothing in the evidence tending to show self-defense, the defendant assumed the position of actor. He took upon himself the burden of showing that he acted in defense of his own person. His Honor's instruction to the jury in respect to the legal effect of defendant's testimony places the solicitor in the attitude of demurring. Considered from this point of view and for the purpose of disposing of the exception, the principle invoked and applied in both civil and criminal cases applies. The general principle in regard to the law announced by the court, with some limitations not necessary to be noted for the purpose of this opinion, is conceded. This concession presents the question whether the facts testified to by the prisoner establish, as a matter of law, an assault by him. The latest definition of an assault, made by this Court, is to be found in a well-considered opinion in *S. v. Daniel,* 136 N. C., 571, wherein it is said: "An assault is an intentional offer or attempt by violence to do an injury to

the person of another. There must be an offer or attempt. Mere words, however insulting or abusive, will not constitute an assault. Nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. . . . If, therefore, the defendant had threatened the prosecutor with violence, and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards prosecutor in a menac- (681) ing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at that time in striking distance."

In *S. v. Crow,* 23 N. C., 375, the court charged the jury, "That if the conduct of the defendant was such as would induce a man of ordinary firmness to suppose that he was about to be stricken and to strike in self-defense, the defendant would by such conduct be guilty of an assault." *Daniel, J.,* said: "We admit such conduct would be strong evidence tending to prove . . . that his adversary *first* attempted or offered to strike him; but it is not conclusive evidence of the fact; for if it can be collected, notwithstanding appearances to the contrary, that there was not a purpose to do an injury, there is no assault. The law makes allowance to some extent for the angry passions and infirmities of men." The jury must judge of the circumstances. As was said by *Judge Gaston,* in *S. v. Davis, ibid.,* 127, "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed." It is for this reason that when there is a reasonable doubt as to the purpose of the defendant, his conduct being open to explanation, the question should be submitted to the jury. In *S. v. Mooney,* 61 N. C., 434, a new trial was ordered because the judge told the jury "that in any view of the case the defendant was guilty." The testimony tending to show an assault was very much stronger than here. The Court said: "After a careful consideration of the testimony we are obliged to say that in no view of the case is the defendant guilty." This is a striking illustration of the wisdom of the law, which submits to the jury not only the decision of the facts, but the inferences to be drawn therefrom.

S. v. Millsapps, 82 N. C., 549. The defendant was asleep in (682) the public depot at night on 4 February. He was awakened by deceased coming in; he felt cold and asked deceased to wake up the man in charge of the depot and tell him to put some coal in stove. Deceased refused, saying that he had nothing to do with the man. Defendant said: "Can't you wake him up and tell him to make a fire in the stove?" There was certainly nothing offensive in this

language. Deceased retorted, applying to defendant most insulting and opprobrious language. Defendant "jumped up" and said: "You have got that to take back." Deceased said: "I don't say a damn thing to take back"—to which defendant said: "There has been men who said things and took back." It is not clear whether at this time defendant had walked towards deceased. As he narrates the occurrence, he says: "He said: 'You are a damn liar, etc. I will shoot your head off.' Threw his right hand to his hip and threw himself to the right and turned on his heel. I drew a revolver and fired. I fired when he threw himself around. He was standing on south side of stove, and I walked up to him on north side." There is not in the defendant's testimony any suggestion that he had made any threat or that as he walked towards deceased his attitude or manner was menacing—that his hand was raised or that his pistol was drawn. The inference is that it was not. He says: "I drew revolver and fired." I do not say that there was no evidence of an assault; I simply insist that the evidence should have been submitted to the jury under proper instructions as to what constituted an assault. In the trial of cases involving allegations of negligence, it is only when the facts are admitted and but one inference can be drawn from them, that the court may say, as a matter of law, that the allegation is or is not established; if from the admitted facts two minds may reasonably differ as to the inferences to be drawn, the question must be submitted to the jury—certainly when the citizen is charged with crime and his conduct is capable of more than one construction. "It is neither charity
(683) nor common sense nor law to infer the worst intent which the facts will admit of. . . . The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." *Ashe, J.,* in *S. v. Massey,* 86 N. C., 661.

Therefore, unless it can be said, as a matter of law, that the conduct of defendant constituted an assault, the question should have been submitted to the jury—because, as was wisely said by *Henderson, J.,* in *Bank v. Pugh,* 8 N. C., 198, "The jury are the constitutional judges not only of the truth of testimony, but of the conclusions of fact resulting therefrom." It is for the same reason that this Court has repeatedly held that it is error to charge the jury that if they believe the evidence they should convict the defendant. *S. v. Barrett,* 123 N. C., 753; *Sossamon v. Cruse,* 133 N. C., 470; *S. v. Green,* 134 N. C., 658. A man is grossly insulted—he demands a retraction; this he has a right to do—a duty to himself to do. He walks toward the person using the language, making no threat, using no violence, no demonstration of force. Is it possible that thereby he becomes, as a matter of

law to be declared by the court, an outlaw—that his God-given right of self-defense is thereby forfeited? If this be the law, and the deceased had drawn and presented his pistol after his threat to kill the defendant, but one of three courses was left him; to be shot in his track, turn his back and flee, thereby increasing his danger, or defend himself by taking the life of his assailant and submitting to a judgment branding him as a felon—and subjecting him to an infamous punishment. I cannot think that this is the law. I have not so learned it from the Elders. It may be said the case put is extreme. Without conceding it to be so, I think it fairly illustrates the principle laid down by the Court. If his Honor was in error in saying that upon his own testimony the defendant was guilty of an assault, and was thereby deprived of the right to defend himself, there should (684) be a new trial because the jury were not permitted to inquire whether at the time he shot the deceased the prisoner had reasonable ground to apprehend and did apprehend that he was in danger of death or great bodily harm. The defendant requested his Honor to instruct the jury: "If the defendant has satisfied you from the evidence that when he arose from his seat and approached toward the deceased, saying, 'Don't say that again,' 'You have got to take that back,' only meant to remonstrate with him and not to fight or injure him and that he did not offer to strike deceased, nor make any further demonstration of force, and that thereupon deceased, suddenly turning half round, threw his right hand on his right hip pocket as if to draw a pistol, cursing defendant and threatening to shoot him, caused the defendant to believe, and was sufficient to cause him to reasonably apprehend that he was about to lose his life or suffer great bodily harm, and thereupon he suddenly fired the fatal shot, then it would be excusable homicide, and you would answer the issue in favor of the defendant."

This was refused. I think the instruction should have been given. It involved the inquiry whether the defendant had made an assault upon the deceased. If they had found the hypothesis involved in the instruction in that respect to be true, there can be no doubt of the correctness of the concluding portion of the instruction. Other instructions varying the form, but presenting the same question to the jury, were asked and refused.

The opinion concludes with the statement: "A fair and correct interpretation of this testimony puts the prisoner in the wrong at the commencement of the difficulty. Although he may have been grievously insulted, yet in going up to the deceased, having advanced ten or twelve steps, and saying: 'You've got that to take back,' the prisoner unlawfully brought on the affray, and, under the authori-

(685) ties cited, the position of self-defense is not open to him unless he can show that he quitted the combat before the mortal blow was given." I respectfully but strongly dissent from so much of this proposition as assumes that the testimony puts the prisoner in the wrong at the commencement of the difficulty. I assume that it is meant that he committed an act which was illegal—that is, that he made an assault upon deceased. If the prisoner had stopped at the stove and the matter had ended as he reached that point, could it be said that, as a matter of law, an assault had been committed? It is not clear that the court should not, in that event, have held that as a matter of law no assault was committed. However that may be, I entertain no doubt that the defendant would have been entitled to a trial by jury. By the ruling of the judge the defendant was not permitted to have his plea of self-defense considered by the jury. It may be said that ample evidence was introduced by the State to establish the defendant's guilt. That may be true. The defendant may be guilty; if so, it was the province of the jury and not the court to find the fact. No matter how guilty he may be, he is none the less entitled to a trial according to the law of the land. If he has been adjudged guilty otherwise, not only is a wrong done him, but a precedent is set which may be used to adjudge other men—innocent men —guilty. Crime must be punished, but the safeguards which the wisdom of the ages has established must not be removed or weakened. I find in the language of *Mr. Justice Rodman* in *S. v. Matthews,* 78 N. C., 537, the rule which should govern judges in the trial of criminal cases. He says: "We think he is required in the interest of human life and liberty to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one. To do otherwise is to fail to 'declare and explain *the law arising on the evidence,*' as by the act of Assembly he is required to do."
(686) I think the defendant is entitled to a new trial.

WALKER, J., concurs in the dissenting opinion.

Cited: *S. v. Simmons,* 143 N. C., 617; *S. v. Godwin,* 145 N. C., 463; *S. v. Cox,* 153 N. C., 643; *S. v. Baldwin,* 155 N. C., 496; *S. v. Dove,* 156 N. C., 657; *S. v. Robertson,* 166 N. C., 363, 364; *S. v. Ray, ib.,* 431; *S. v. Pollard,* 168 N. C., 119; *S. v. Kennedy,* 169 N. C., 329; *S. v. Crisp,* 170 N. C., 792; *S. v. Evans,* 177 N. C., 569; *S. v. Coble, ib.,* 592.

STATE v. STINES.

(Filed 23 May, 1905.)

Rape—Evidence—Outcry

In an indictment for rape it is competent for the prosecutrix to testify that immediately after the alleged assault she stated to her husband and two other persons what had occurred.

INDICTMENT against Charlie Stines for rape, heard by *Moore, J.*, and a jury, at February Term, 1905, of MADISON. From a verdict of guilty and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for prisoner.

BROWN, J. The prosecutrix, Sarah Collins, lived about one and three-quarters of a mile from Hot Springs. On Sunday, 18 December, she was at home alone. She testified that the prisoner came to her house, entered, after pushing the door open. He had a knife in his hand, and the prosecutrix seized an axe, which the prisoner took from her. He then threw the prosecutrix on the floor and had carnal knowledge of her by force. She resisted and made outcry, and in the struggle scratched the prisoner's face, causing it to bleed. When an opportunity presented she fled from the house and was followed by the prisoner, who again overpowered her and accomplished (687) his purpose a second time. When her husband returned she informed him that "she had been mistreated," and to two persons who came to the door and whom she did not know, she made a similar statement. Other testimony was introduced by the State as well as by the prisoner, which it is needless to set out.

The only exceptions presented by the record are to the ruling of the court in permitting Sarah Collins to testify that immediately after the alleged assault she stated to her husband and two others what had occurred. There is no merit in either exception. It was not only competent to offer such evidence, but incumbent on the State, if it could do so, to show that prosecutrix made "outcry" shortly after the occurrence. Had prosecutrix failed to do so and kept the facts concealed it would have been a suspicious circumstance against her and tend to impeach the credibility of her statement. The charge is not sent up, as there appears to have been no exception taken to it. We have examined the record with the close scrutiny we give to capital felonies, and the law must take its course, as we fail to find any error committed.

No error.

(688) STATE v. ADAMS.

(Filed 23 May, 1905.)

Homicide—Evidence as to Other Crimes—Circumstantial Evidence—Footprints—Motive—Practice.

1. The rule that evidence as to one offense is not admissible against a defendant to prove that he is also guilty of another and distinct crime, is subject to well-defined exceptions, to wit: it is admissible to produce evidence of a distinct crime to prove *scienter*, to make out *res gestæ*, or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged.
2. No particular formula or set of words is required in regard to the force of circumstantial evidence, and it is sufficient if the judge charges the jury in substance that the law presumes the defendant to be innocent, and that the burden is upon the State to show his guilt, and that upon all the testimony they must be fully satisfied of his guilt.
3. It is not necessary that footprints should be identified in any particular manner, nor in an instruction to the jury thereon is there any fixed phrase of the law applicable to all cases.
4. The existence of a motive may be evidence to show the degree of the offense or to establish the identity of the defendant as the slayer, but motive is not an essential element of murder in the first degree, nor is it indispensable to a conviction, even though the evidence is circumstantial.
5. In an indictment for murder, where the State relies upon a motive, such as robbery, it is not necessary to prove that the prisoner at the time of the killing knew the fact from which the alleged motive may be inferred.
6. In a criminal action the court is not required to select a single fact from the mass of the testimony, and charge the jury that the proof as to that must exclude every reasonable hypothesis except the defendant's guilt.

INDICTMENT against Will Adams for murder, heard by *Moore, J.*, and a jury, at January Term, 1905, of WAKE.

(689) This case was before us at a former term, when we ordered a new trial for the reason stated in the opinion of the Court. 136 N. C., 617. The defendant was indicted in the court below for the murder of Mary Bridgers on Friday, 22 January, 1904. The testimony tended to show that Robert Bridgers and his wife (the deceased) and their three children lived in a house off the public road and about a mile and a half from the defendant's home. The defendant had passed Bridgers' house and inquired of him how much money he had made. Bridgers told him he made $300. Defendant afterwards asked Bridgers to change ten cents, which Bridgers refused to do, saying that he did not keep money, but that his wife kept his money. Defendant was at Bridgers' house the day before the homicide was committed, and asked Mary Bridgers when her husband was going to town and when he would come back. She told him her husband would

go the next morning and return about sunset. He then asked where her husband was at that time, and she replied: "Yonder he comes with his gun on his shoulder. He has been hunting." Defendant was then standing in the yard, and as Bridgers approached him he left hurriedly without speaking to Bridgers, though he was in speaking distance. Early Friday morning the defendant was seen going in the direction of the Bridgers house. He did not arrive at the Massey home, where he worked, until 9 or 10 o'clock in the forenoon, and remained there only until noon, when he left and went in the direction of the Bridgers place. At 1 o'clock he was seen at the latter place standing at the corner of the house. About sunset of the same day he was seen coming out of the woods or old field between the Bridgers house and the public road. He was running at the time and his behavior was unusual. Crossing the road, he "squatted down" behind a holly bush, as if trying to conceal himself. One of the witnesses who saw him spoke to him and asked him what he was doing there, and he made no reply. The witness remarked to his son, who was in the buggy with him: "That negro has done something mean; he (690) is scared to death; it may be one of the negroes who broke out of jail." His son replied: "No, it is Will Adams." They left him there, and he was next seen at his own house about 1 o'clock in the night, when the officer went to arrest him. His conduct at that time was peculiar. He refused to answer when he was called, and, when the officer attempted to arrest him, he resisted and struck at the officer with a stick and threatened to kill him. He did not submit until the officer threatened to shoot him with his gun. The officer examined his clothing and found that his trousers and shoes and socks were wet. Tracks were found by the holly bush and from the holly bush along a hedgerow and thence on to the creek, and tracks were also found at the creek, indicating that some one had forded it at the place where it was crossed, and from the creek to the defendant's house. Tracks corresponding with those mentioned were found at Bridgers' house and from the house to the place where Mary Bridgers' body was found, about 100 yards away, and from that place back to the house. Tracks were also found from the holly bush to a path at a point about 100 yards from the body. There was much evidence tending to show that all of these were tracks of the defendant. Robert Bridgers left his house early Friday morning for Raleigh, and returned at sunset the same day. As he approached the house, he called his wife, but received no answer. He then went to the house and found two of his children badly wounded and in a dying condition. He rode rapidly on his mule to the house of a neighbor and the two returned to Bridgers' house. Bridgers examined his bureau and found that his

money, $6 in all, had been taken. He went to the back door of the house, and, seeing tracks, he followed them to the place, about 100 yards from the house in the cotton patch, where he found his wife's dead body. Her head had been crushed, and the coroner, who (691) is a physician, testified that it was done with a blunt instrument like the eye of an ax, and there was evidence tending to show that blood was found on the axe at the woodpile, a few steps from the house. There were two tracks from Bridgers' house to the place where the body was found; one the track of a man, and the other the track of a woman, and the track of a man returning to the house. The tracks from the house to the place where the body was found indicated by their appearance that the man and the woman were running when they were made. The defendant was searched by the officer who arrested him and two half-dollar pieces and four coppers were found in his pockets. One of the silver coins was a very bright piece and apparently had never been used; the other was older and darker. They were identified by Bridgers as two of the pieces taken from his bureau drawer. The defendant's statement, when asked by the examining magistrate as to his whereabouts on Friday, was contradicted by the witnesses acquainted with the facts.

The defendant objected to all evidence relating to the finding of the children by Bridgers in his house when he returned from Raleigh and to their condition, as not being pertinent to the issue, and, upon its being admitted he excepted. The defendant asked that the following instructions be given to the jury:

1. When circumstantial evidence is relied upon to convict, it must be clear, convincing, and conclusive in its connection and combination, and must exclude all rational doubt as to the defendant's guilt. And, therefore, if the evidence as to the footprints in this case is not clear, satisfactory, convincing, and conclusive to the minds of the jury—in other words, if such evidence does not point with moral certainty to the guilt of the defendant and to that of no other person—then the jury should acquit the defendant, unless the whole evidence in (692) the case, after leaving out of consideration the evidence bearing upon the footprints, is sufficient to satisfy fully the minds of the jury as to the guilt of the defendant.

2. It is essential that the correspondence between the tracks and the feet or shoes of the defendant, to have a decisive bearing, should be proved by actual comparison, as by bringing the two into juxtoposition and placing the shoe into the impression, or by actual measurement of the two and a comparison of the measurements.

3. The footprints are insufficient to establish guilt if they are not distinguished from ordinary footprints by any peculiar marks, and

the correspondence between them and the tracks of the defendant is merely in superficial shape, outline, and dimensions.

4. If the State has satisfied the jury from the evidence beyond a reasonable doubt that Mary Bridgers was killed, and also from the evidence of footprints that the defendant, Will Adams, was in such a situation as made it possible for him to have committed the act, then it is incumbent on the State to show, if possible, that Will Adams had a motive for so doing, for where the State relies on circumstantial evidence to convict, the motive becomes not only material, but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case, and the burden is on the State to show to the jury beyond a reasonable doubt that the defendant had a motive for the commission of the act.

5. The court instructs the jury that the proof of the facts from which motive is to be inferred must be clear, satisfactory, convincing, and conclusive, and exclude any other reasonable hypothesis than that of the defendant's guilt. And further, that such facts must be proved to have been known to the defendant at the time of the homicide. Therefore, since the State relies upon robbery as the motive in this case, the court instructs you that the burden is on the (693) State to satisfy the minds of the jury beyond a reasonable doubt, not only that Robert Bridgers, the husband of the deceased, had money in the house in which he lived, but that the defendant killed Mary Bridgers in furtherance of an attempt to take such money.

The court refused to give these instructions, and the defendant excepted. The court gave other special instructions asked by the defendant and charged the jury generally in regard to the facts and the law. There was no exception to the general charge. There was a verdict of guilty of murder in the first degree. Judgment was pronounced thereon, and the prisoner excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. B. Snow and E. M. Shaffer for prisoner.

WALKER, J., after stating the facts: The defendant objected to the testimony of Robert Bridgers as to the condition of his children when he found them on his return home, upon the ground that it was not pertinent to the issue, and his counsel argued before us that if it was pertinent for any purpose it should have been restricted by the court in its charge to that purpose. There is no error committed in regard to this testimony. True it is that evidence as to one offense is not admissible against a defendant to prove that he is also guilty of

another and distinct crime, the two having no relation to or connection with each other. But there are well-defined exceptions to this rule. Proof of another offense is competent to show identity, intent, or scienter, and for other purposes. In *S. v. Murphy,* 84 N. C., 744, the Court held that "it is important not to confound the principles upon which the two classes of cases rest. On the one hand it is admissible to produce evidence of a distinct crime to prove scienter, or to make out *res gestae,* or to exhibit a chain of circumstantial (694) evidence of guilt in respect to the act charged," and, on the other, the evidence should be limited to these exceptions, and should be excluded when it does not legitimately fall within their scope. Wharton Cr. Law (7 Ed.), sect. 650 and 631. And so, in *S. v. Thompson,* 97 N. C., 498, this Court, discussing an objection similar to the one now made, said: "The circumstances strongly pointed to a single agency, and with the ownership of the rope with which the kindling materials were bound, to the defendant as the guilty author of both of the firings. The facts proved are parts of one continuing transaction, and are but the development of the conduct of the person by whom the successive acts were done," citing Wharton Cr. Law, sec. 649. While the last case cited is closely analogous to this one, the case of *S. v. Mace,* 118 N. C., 1244, is perhaps more like it. There, the defendant was indicted for murder, and this Court held it competent to show an assault upon a witness, it being connected with the offense charged and material evidence upon several grounds as tending to show, among other things, that the act was done to prevent a discovery of the defendant's crime, so that he could escape its probable consequences, and also to show that the homicide he was charged to have committed was willful, intended, and not merely accidental, deliberate, and premeditated. "Crimes," says Underhill, "leading up to or connected with the homicide, so that they form parts of one transaction, may be proved as parts of the *res gestæ* to illustrate the conduct and disposition of the accused about the time of the homicide." Underhill Crim. Ev., sec. 321. He then says in the same section: "It may be shown that in the same affray, or immediately before or after, the accused killed or attempted to kill another person than the one for whose homicide he is on trial," if the homicides are connected with each other and were committed at or about the same time and place. *S. v. Graham,* 121 N. C., 623; *S. v. Jeffries,* 117 N. C., 727. We think the condition of the children was an essential part of the transaction and an important link in (695) the chain of circumstances tending to prove the guilt of the defendant. As his Honor said below, this cannot be separated from the other facts, and we say the story of this horrible tragedy

cannot be told without it. There is no error in the ruling of the court, and this exception is not sustained. *People v. Molineux,* 168 N. Y., 264, is not in point. There, the homicides, if there were two committed, were separated by long intervals of time, occurred in widely separated places, and were induced manifestly by different motives, and they were not in any way connected with each other, so far as appeared. The other cases cited by the defendant's counsel are equally inapplicable. They come within the rule, and not within the exception.

Nor did the court err in refusing to give the first prayer for instruction. There is no particular formula by which the court must charge the jury upon the intensity of proof. "No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are 'fully satisfied' or 'entirely convinced' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury, by which to 'gauge' the degrees of conviction, has resulted in no good." We reproduce these words from the opinion delivered by *Pearson, C. J.,* in *S. v. Parker,* 61 N. C., 473, as they present in a clear and forcible manner the true principle of law upon the subject. The expressions we sometimes find in the books as to the degree of proof required for a conviction are not formulas prescribed by the law, but mere illustrations. *S. v. Sears,* 61 N. C., 146; *S. v. Knox, ibid,* 312; *S. v. Norwood,* 74 N. C., 247. The law requires only that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence (696) and to the consequent rule as to the burden of proof. *S. v. Knox, supra.* The presiding judge may select, from the various phrases which have been used, any one that he may think will correctly inform the jury of the doctrine of reasonable doubt, or he may use his own form of expression for that purpose—provided, always, the jury are made to understand that they must be fully satisfied of the guilt of the defendant before they can convict him. In *S. v. Gee,* 92 N. C., 761, where the court below had refused to charge according to one of these supposed formulas, and told the jury that it was not a rule of law, but only an illustration, and intended to impress upon the jury the idea that they should be convinced beyond a reasonable doubt of the defendant's guilt, the Court, by *Smith J.,* said: "We do not see in the charge, or in the manner of submitting the case to the jury, any error of which the defendant has a right to complain." If the judge charges the jury in substance that the law presumes the defendant to be innocent, and the burden is upon the State to show his

guilt, and that upon all of the testimony they must be fully satisfied of his guilt, he has done all that the law requires of him, the manner in which it shall be done being left to his sound discretion, to be exercised in view of the facts and circumstances of the particular case.

The second and third prayers were properly refused. We are not aware of any principle of law which requires that footprints should be identified in the manner described. Expressions of the kind used in the prayers may perhaps be found in the books, and, if so, they were intended merely as illustrations to make the law clear to the jury in some peculiar state of the facts, and not as containing in themselves any fixed phrase of the law applicable alike to all cases. Besides, in this case it appears that the defendant made tracks at the holly bush and along the hedgerow where he was seen in the (697) afternoon of the day on which the homicide was committed; that those tracks extended to the creek where he forded it and from the creek to the house where he lived, and that they corresponded in appearance with the tracks at and near the Bridgers house. There was other strong and convincing proof of the identity of the tracks at the place of the homicide with those of the defendant.

The fourth prayer does not embody a correct principle of law, and should not have been given. It is not required that a motive should be shown under the circumstances recited in the prayer. When the evidence is circumstantial, the proof of a motive for committing the crime is relevant, and sometimes is important and very potential, as it may carry conviction to the minds of the jurors, when otherwise they would not be convinced. This is all that is meant by the Court in the cases cited by counsel. *S. v. Green,* 92 N. C., 779. Murder may be committed without any motive. It is the intention deliberately formed, after premeditation, so that it becomes a definite purpose, to kill, and a consequent killing without legal provocation or excuse, that constitutes murder in the first degree. The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer, but motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission. *S. v. Wilcox,* 132 N. C., 1143; *S. v. Adams,* 136 N. C., 620. There was no error in refusing to give the instruction contained in the fifth and last prayer. If the instruction thus asked to be given to the jury was proper in form and correct in all its parts, we yet do not think it is necessary, where the State relies upon a motive, such as robbery, that it should be required to prove that the defendant at the time of the killing knew the fact from which the alleged motive may be inferred, that is, in this case, that there was money in Bridgers' house. There

is evidence in this record that he had knowledge of that fact, (698) though there was no such evidence at the first trial. Bridgers told the defendant that he had money and that his wife kept it for him. It was said in the former opinion that knowledge by the defendant of the fact must be shown in order to prove a motive, when it consists in robbery, but that language was used in reference to the charge of the court, then being discussed, that the taking of the money from the house was one of the facts which tended to establish the defendant's guilt, the court holding that this could not be so unless it had been shown either that the defendant knew that the money was in the house or that some of the stolen money was found on his person or in his possession; and there was no proof of either of those facts. That money was stolen must be some evidence that the motive was robbery, even though the defendant did not know there was money in the house, and even though none of the money was found in his possession. It was not sufficient by itself to show that the defendant was the thief. It may be further said of this prayer that the court is not required to select a single fact from the mass of the testimony and charge the jury that the proof as to that must exclude every reasonable hypothesis except the defendant's guilt. Such a charge would necessarily mislead the jury by directing their attention to that fact as the pivotal one of the case, and convincing proof of its existence as the crucial test of his guilt. It is sufficient, in order to preserve and safeguard all the rights of the defendant, to charge the jury as his Honor did, and, as we have already shown, is quite in accordance with settled principles of the criminal law, that the jury should weigh all the facts and circumstances which they find to be established by the testimony, giving the defendant the benefit of any reasonable doubt, and unless they are fully satisfied, upon a consideration of all the evidence and under the instructions of the court as to the law, that the defendant is guilty, they should acquit. The court fully explained to the jury the difference between the degrees of murder, and in all respects the charge was clear and comprehensive and (699) presented the case to the jury in every conceivable phase. It was substantially responsive to all of the defendant's prayers for instructions, so far as they are warranted by the facts and the law.

It is proper to refer to the rare skill and ability with which the defense in this case has been conducted by the learned counsel assigned by the court. The record shows an unusually strong presentation of the defendant's case in the court below by his counsel, who have served him with untiring zeal and singular devotion throughout the case, and without any reward for their services, except that which will come to them from the consciousness of duty well performed. In this Court,

at both hearings, we have had the benefit of able and exhaustive arguments in the defendant's behalf. We are constrained, though, after a most attentive consideration of the record, the arguments and the briefs of counsel, to declare that no error was committed by the court at the last trial.

No error.

Cited: *S. v. Turner,* 143 N. C., 643; *S. v. Carmon,* 145 N. C., 486; *S. v. Dobbins,* 149 N. C., 469; *S. v. Stratford, ib.,* 484; *S. v. Leak,* 156 N. C., 646; *S. v. Neville,* 157 N. C., 597; *S. v. Wilkins,* 158 N. C., 607; *S. v. Charles,* 161 N. C., 289; *S. v. Bradley, ib.,* 292; *S. v. Lane,* 166 N. C., 340; *S. v. Bridgers,* 172 N. C., 883; *S. v. Frady, ib.,* 979; *S. v. Martin* 173 N. C., 809; *S. v. Clark, ib.,* 475; *S. v. Bynum,* 175 N. C., 781; *S. v. Simons,* 178 N. C., 682; *S. v. Stancill, ib.,* 686; *S. v. Wiseman, ib.,* 791; *S. v. Pannel,* 182 N. C., 840; *S. v. Jones, ib.,* 786; *S. v. Alderman, ib.,* 920.

(700)

STATE v. SMITH.

(Filed 23 May, 1905.)

Rape—Confessions—Privileged Communications—Attorney in Fact—Harmless Error—Questions for Jury.

1. In an indictment for rape, error, if any, in admitting a voluntary declaration of the prisoner that if he ever got out of this scrape he would never get in jail again; that when he left jail before he did not intend to get back; that he was in jail three years ago for killing a girl, was harmless.
2. An objection that the prisoner was in the custody of an officer when a declaration, which was offered in evidence, was made, is untenable, there being no evidence whatever of inducement or force.
3. An objection to the introduction of declarations of the prisoner made to a man who afterwards acted as his attorney in fact before the committing magistrate is without merit.
4. The rule as to privileged communications extends only to such confidential communications as are made to the attorney by virtue of his professional relation to the client.
5. In an indictment for rape, a request to instruct the jury that the failure of prosecutrix to make outcry was "strong" evidence to discredit her, was correctly modified by omitting the word "strong," it being for the jury to determine what strength or weight they will give to it.

INDICTMENT against Peter Smith for rape, heard by *Moore, J.,* and a jury, at February Term, 1905, of MADISON. From a verdict of guilty and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for prisoner.

BROWN, J. The prosecutrix, about fifteen years of age, lived with her father on Spring Creek, in Madison County. On the night of 8 November, 1904, according to her testimony, she went (701) out of the house where she resided, and remained about five minutes, and had started back, when the prisoner seized her and said he was going to take her to Gadfield Suttles'. The prosecutrix said she would call her father, whereupon the prisoner put his arm around her waist and his hand over her mouth and forced her to go along with him. Without rehearsing the details, revolting and brutal in the extreme, the evidence tends to show that prisoner made the prosecutrix go with him through the fields and woods for about two miles. He then, notwithstanding her resistance and efforts to flee, forced her to submit to him. They then went on to the ford above one Jesse Slagle's, and the prisoner required her to yield to him again and again. The prisoner was armed with a gun and repeatedly threatened to kill prosecutrix.

A witness for the State (Mayo Reeves) testified that he and one Wells were hunting above Jesse Slagle's on the night of the occurrence. Their dogs were running and barking on the mountain-side and they sat down to wait. They heard a woman "hollering" and in two or three minutes Eva Suttles, the prosecutrix, came running up and said that Peter Smith was up there trying to kill her. She wanted to be taken home, but witness took her to Jesse Slagle's where she spent the night and related the circumstances of the assault. There was abundant evidence tending to corroborate the prosecutrix. Her testimony discloses a case of such unparralleled brutality upon the part of the prisoner that we have been more than cautious to see that natural indignation does not sway our judgment in passing upon his rights. We have, therefore, subjected the record to the closest scrutiny.

First exception: L. S. Plemmons, a witness for the State, testified that he had the prisoner in custody, made no threats, offered no inducements; that prisoner, on the way to jail, voluntarily stated to witness that "If he ever got out of this scrape he never allowed to be guilty of being back in jail again; that when he left jail before, (702) he never aimed to be back; that he was in jail three years ago for killing a girl." If it was erroneous to admit this declaration of the prisoner, it was harmless error. It did not tend to prove or disprove the charge in the indictment. It was an expression as to what he intended to do in the future, and not a recital of what he had done in the past. We are unable to see how it could have seriously influenced

the jury in passing upon the guilt of the prisoner. The exception is without merit.

Second exception: The prisoner objected to the testimony of Jasper Ebbs, who testified to certain declarations of prisoner to Ebbs, upon the ground that Ebbs was his *attorney in fact,* and that the statements were made to Ebbs on the day of the preliminary examination before the justice of the peace, and on the day before. After these declarations were made to Ebbs, it appears that prisoner's father asked Ebbs to do what he could for prisoner, and prisoner at the same time made the same request. Ebbs promised that he would. The objection of prisoner is stated in the following language: "That, being in the custody of an officer and having made the declarations as testified to by the witness to a man to whom he had gone for advice and help, and who afterwards acted as his attorney *de facto* in the examination before the justice of the peace, such declarations made under such circumstances are not admissible." The objection that prisoner was in the custody of an officer when the declaration was made is untenable, there being no evidence whatever of inducement or force. This has been repeatedly held in this State. Neither can the objection be sustained on the other ground. The declarations were made before the relation existed, and had Ebbs been an attorney at law, the prisoner could not deprive the State of such important evidence by "retaining" the witness. The relation of client and attorney at law did not exist at any time between Ebbs and prisoner. Ebbs may (703) have acted as his adviser before the trial before the justice of the peace, but he had no legal right to appear as prisoner's attorney in any court in this State, and there is no evidence that he did. Courts will not extend the rule as to privileged communications. "As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it." 23 Am. and Eng. Enc. (2 Ed.), p. 71. The rule extends only to such confidential communications as are made to the attorney by virtue of his *professional* relation to the client. 23 Am. and Eng. Enc. (2 Ed.), p. 72. The exception is overruled.

The third exception is to the charge. It was contended by the prisoner that the prosecutrix failed to make "outcry" at the time of the assault and made none at any time during the night. The court was asked to instruct the jury that if this was true, it was a *strong* circumstance against the truth of her statement. The court gave the instruction in the words of the prayer, omitting the word "strong." In this his Honor was correct. In this country the law is well settled and it is uniformly held that failure upon the part of the victim to make out-

cry or immediate disclosure of the outrage is to be considered as *tending* to show consent on her part. 23 Am. and Eng. Enc. (2 Ed.), p. 862. It is a material fact when proven to be weighed and considered by the jury, but the weight or strength to be given to it is for the jury and not the judge to determine. The early English writers, Hale and East, in referring to failure to make outcry or complaint, use the words "strong presumption," "strong circumstance," etc. Hale P. C., 633. Blackstone and Russell follow them. It has always been the custom of English judges to advise jurors as to the weight to be given to certain evidence and to comment upon the evidence and the facts. Under our statute this is forbidden. The judge was asked to instruct the jury as a *rule of law* that failure to make outcry is *strong* evidence to discredit the prosecutrix. There is no such rule of (704) law in this State. It is for the jury to determine what weight they give to it, and then each case must depend upon the circumstances and facts proven. The identical question is set at rest by *Chief Justice Person* in *S. v. Cone,* 46 N. C., 20, and again in *S. v. Peter,* 53 N. C., 19.

A minute examination of the record shows that the prisoner has been fairly tried by an able and unusually painstaking judge, and has been convicted upon evidence that leaves no reasonable doubt of his guilt. He fully deserves the penalty he must pay for the shocking crime he has committed.

No error.

Cited *S. v. Bohanon,* 142 N. C., 699; *S. v. Jones,* 145 N. C., 472; *S. v. Cooper,* 170 N. C., 731; *S. v. Lowry, ib.,* 734.

STATE v. WHITE.

(Filed 23 May, 1905.)

Homicide—Evidence—Harmless Error—Manslaughter

1. In an indictment for murder, it was error to exclude the testimony of one of the prisoners that his brother, the other prisoner, asked the witness to go with him to the home of deceased to help him persuade deceased to marry their niece, and that the witness informed his brother he would go with him for that purpose, and there was no agreement or conspiracy to use force or violence if deceased declined.
2. Neither the rejection of competent evidence nor the withdrawal of the question of manslaughter from the consideration of the jury is reversible error where, in considering the entire testimony, including that rejected,

and accepting the statements of the prisoners as true, there is no aspect of the case that would justify a verdict of a lesser crime than murder in the second degree, of which the prisoners were convicted.

3. The doctrine that when men fight upon a sudden quarrel, and one kills the other in the heat of passion aroused by the combat, the law considers the killing a case of manslaughter, has this limitation: that the combatants must fight on equal terms, at least at the outset, and no unfair advantage must be taken.

4. Intentional killing is manslaughter where the act is committed under and by reason of a passion caused by provocation which the law deems adequate to excite uncontrollable passion in the mind of a reasonable man.

5. In an indictment for murder against two brothers, where it appeared that they had a common purpose in going to the house of the deceased, and though they may have gone without any purpose to kill or do unlawful violence, yet when they drew their weapons they entered on that purpose unlawfully, and were so manifestly acting together, one in aid of the other, that a killing by either, under the facts of this case, would inculpate both.

(705) INDICTMENT for murder against Thomas J. White and Chalmers L. White, heard by *Cooke, J.*, and a jury, at September Term, 1904, of ROWAN.

The eye-witnesses to the transaction were Mrs. A. E. Sherrill, mother of deceased, and the prisoners, Thomas J. White and Chalmers L. White, and their direct testimony is here set out.

Mrs. Sherill, mother of deceased, testified for the State: "Chal. and Tom White came there very early in the morning before I got up; it was before sun-up; they came from the south; I did not see them come, but they hitched their horses on the south side of the railroad that goes in south; they were in a two-horse buggy, driving two horses; I did not know them when I went to the door; I had seen them often, but, as I say, I did not know them. The prisoners came up from the left side of the house—on the west, I might say, of the front side; they hitched their horses to a post, I suppose; can't say whether they were hitched or not. This post was about 50 yards or a
(706) little further from the house or porch; the porch is on the north side of the house; its width I do not know; I have never measured it; its length is about 12 or 15 feet, I guess; I do not know; it is an old-fashioned piazza, with wide door and latticed around. On the morning of 17 September I was in my room and heard some one knock at the front door. I stepped in the front room to the window and called to them that I would be down in a few minutes. I stepped back and dressed, opened the door and saw two strangers; they said to me, 'We want to see Russell.' I said he was asleep, and then they asked me to tell him to come down; said they didn't want to see me, and to tell him some gentlemen wanted to see him. Russell said, 'Who

is it?' and I said, 'I don't know, they are strangers; come down.' I went down myself and stepped into the back hall on the front porch and stood there until Russell came down; when he came down I stepped back and stood about midway the door. They said to me, 'You stay back, and we will see you later.' I did not do it; I stepped immediately to the front door, near my son. Two pistols were drawn on my son in this way (indicating pistol pointing on each side). They then said, 'We are Tom and Chal. White; you are aware you have ruined our niece, Annie White, and we have come to make you marry her, or we will kill you before you leave our sight.' Russell said, 'I did not ruin her; I was not the first one there.' They said, 'You did ruin her, and you will marry her or we will kill you before you leave our sight.' I stepped between them and begged them not to kill my son. I told them if they could not spare him for his own sake, then for mine, at least. I turned to the brothers and they said, one of them, 'I am deaf,' and then one said, 'You go back; we will see you later.' I stepped inside the door, and they again said, 'You go back or we will kill you.' And my son said, 'Go,' and I said, 'I will go.' The deaf man followed my son and kept him from going into the door. They said, 'You will go with us,' and Russell said, 'I do not love her, and I cannot do it.' Two pistols fired immediately, and (707) he fell. He fell straight back with his head towards the west, towards the bench that he had been sitting on. Yes, when I went to the door he was seated on the bench. That bench was right along on the west side of the porch, and he was seated here (indicating) on the bench at the west end of the porch. The bench was about 5 feet long. He was about midway the bench, about the middle of the porch. The bench was sitting one end back against the lattice. They were talking to me then—both pistols drawn on Russell. That's when they said, 'You go back; we will see you later.' They were still talking to him. When he was shot I do not know whether I fell or sank down, or what I did. I must have gotten up and went to my son to see if he was dead, and spoke to him, and he did not give me any answer. I thought he was dead, and went immediately into the walkway of the yard. These two men just stepped off after they had killed him. My son, when he was shot, got up and came to the door and would have come in, but they kept him from coming and pushed him a little to one side, and I saw his hand go up before his face. My son did not have a thing in his hand, not a thing; he threw up one hand; I saw only one hand. Two shots were fired right together, and then a third one; I do not know whether both men shot or not; there were two shots, though, right together, and then a third. My son was hit in the back of the head and in the face. One man was on each side of

my son when he was sitting down and when he was standing. They had their pistols then."

(Mrs. Sherrill then described the position of her son and the two White boys. One thing in particular the reporter caught was the close proximity of the White boys to Russell Sherrill, that is to say, they pressed him closely on each side, as Mrs. Sherrill went on to show. She demonstrated how his retreat was cut off from the door, pistols in hand.)

(708) "My son stepped out towards the deaf man, and he turned then to the left to pass the tall man. Chal. White moved forward to the right. (Mrs. Sherill here again takes up the position of the men). Russell fell to the left toward the bench, 'caticorner'—not so much so, however. When these men first came my son was in bed and I told him to get up; he came down in a very few minutes; did not more than half dress himself; he just had on his pants and dress shirt and shoes; his shoes were ties, but were not tied at the time, and he had a hat on his head."

Q.: Now, Mrs. Sherrill, Chal. White testified that you came out on the porch, took a seat and said you wanted to talk the matter over; that you were sorry this had come about; that you had tried to raise the family better. Did you say that? A.: I did not say that.

Q.: Did you sit down? A.: I did not.

Q.: State whether or not, at the time your son was shot, he was making any attack upon either of the prisoners. A.: He was not; he had his hand up to ward off the pistol.

Q.: Did Thomas White touch you on the shoulder, as he testified he did? A.: He did not.

The prisoners testified that, having heard that their niece had been ruined by the deceased, they went to the home of Mrs. Sherrill, where deceased lived, with a view and purpose of inducing him to marry their niece, and save the families the disgrace; that they each had a pistol, but there was no conspiracy between them to kill the deceased, and no intention of doing so, but thought they could persuade the deceased to marry the girl. Chalmers White testified in behalf of himself and coprisoner: "When I left my sister-in-law's, I started early in order that we might find him at home before he would leave. I had information of his probable leaving, and I had another reason for wanting to go early. I wanted it kept as quiet as possible until it was over. It was not more than three-quarters of a mile, possibly a mile, but I do not think over three-quarters. I arrived there,

(709) I think, about 6 in the morning. It was a dark, cloudy morning—a fog, and a very dark morning. We hitched our horses out in front of the porch or out from the house to a hitching-post, and

then went to the house and knocked; walked upon the piazza and knocked upon the door. A lady then answered it. My brother took part in the conversation down to my sister-in-law's; he talked, but not as much as I did, and not as long; but he talked with her; Mrs. Sherrill came to the door and I told her good morning, and asked if Russell Sherrill was at home; she said, 'Yes.' I told her I would like to see him on some business; she handed us two chairs; we sat down and waited till he came; presently he came down, his mother with him. I spoke to him and introduced myself and my brother; we both shook hands with him, and I told him we wanted to see him on some business, privately. He then said to his mother, 'You go back into the house,' which she did. She walked back into the hall, and he stepped back and closed the door. He then walked out on the piazza to the front end of the porch and sat down on the bench; we walked up near him, around him, in front of him. I said to him, 'Mr. Sherrill, you are aware of the fact that we came here to make you keep your promise.' He replied, 'I did not do it.' I said, 'You must marry her,' and he said, 'I cannot; I do not love her.' And I said, 'You can't get out of it that way.' He said, 'I will fix it up, but I will not marry her; I will die first,' and sprang to his feet in an angry, threatening attitude. I stepped back and drew a pistol. He said, 'I will marry her,' and I said, 'I am glad of it.' Mrs. Sherrill heard a part of the conversation and came out into the hall. She said, 'What is the trouble? Don't kill my boy,' and I said, 'He has ruined our niece, Annie White, and we have come up to get him to marry her.' She said, 'Well, do not kill my boy,' and I said, 'I do not want to kill him.' She said, 'Let's talk the matter over and save shame and disgrace.' I told her I would. She sat down on a chair just back of us, and said she was sorry her family had come to this; that she had tried to raise the boy (710) better. I then turned and walked back to where Mr. Sherrill was and told him to come on and go with us. He then seemed very angry, began to advance, and then said, 'I will die first,' and as he said that he sprang towards us, or forward, and I shot him. My brother fired at him about the same time. I do not know who shot first; we shot nearly at the same time. As he started towards me, Mrs. Sherrill ran from the porch into the hall, screaming at the top of her voice, and as she fell to the floor, we walked off; she was not inside when we fired; she screamed and ran into the hall. He was very close to me, and I think just a little, possibly, to the center of the door; he was very close to me. I thought he was going to strike me with something when he advanced; he was in a striking attitude and in an angry frame of mind. I think he was going to strike me, because he was rushing on me, and I thought I saw something. He could see that I was armed,

and I thought he was armed, and I did not think he would attack me unless he was. I could not see the knife in his hand; he could have held a knife or something I could not see; it was a dark, cloudy morning—a very dark, foggy morning. I went there with no purpose or idea of killing him, no intention whatever; it was only to get him to marry the girl and save shame and disgrace. I never saw him before. My brother and I had never at any time talked about killing him. I did not know I had hit him. I knew I had shot, but did not know I had hit him. When he started at me, I retreated a step, from time to time, when he started back towards the further end of the porch from where my brother was when he sprang forward; this threw my brother behind him; my brother had been to the left; and this threw my brother almost diagonally between us." The prisoners show on the map what they mean. "When he sprang up he said something to my brother, and he said for him to talk to me, that he could
(717) not hear. (Further deccription as to porch and position of men.)

The three of us would have made a triangle or three sides of a triangle. He rushed on me with his arm drawn back when I fired, as if to strike, just this way (witness shows striking position of right hand and arm drawn back as if to deliver a blow) I left there; went to my buggy. I did not anticipate any trouble. I took the pistol in case I would need it to protect myself against any one and any danger; was not going up looking for trouble—no, not even with Sherrill. I carried the pistol, though. I would rather have a pistol through the country."

Q.: So you expected trouble, did you? A.: I did not know what I would find; I did not know how it might terminate.

Q.: So you took him along to help kill this man if he didn't marry your niece, is that it? A.: I didn't take him; he went because we were going on a dangerous mission.

Q.: And you expected trouble, eh? A.: No, but I didn't know the man, and didn't know how it would end.

"From the time we struck that porch until the time he came down, I presume the whole time would be about four or five minutes before he was lying on his back on the floor, dead. It was not my intention to kill him; he didn't give us the opportunity to hear his refusal and go back to Mrs. Archer's quietly. I knew my brother had a pistol; he borrowed it. I do not know where he borrowed it; in Concord, I guess. He sprang to his feet and we drew our pistols; the pistols were not pointing in his face—pointing at him, though, I suppose; my brother's was pointing at him, too."

By the State: Q.: Did you see anything in his hand? A.: I could not tell what he had in his hand.

Q.: Did you see the knife? A.: He had his hand drawn back this way (striking attitude), drawn back as though to strike. I could not see what was in his hand.

Q.: Was there anything in his hand? You say you could distinguish Mrs. Sherrill was a lady when she came to the door. Now, if he had a knife, why couldn't you have seen that? I say, why (712) couldn't you have seen that? I say, why couldn't you? A.: I did not know what he had in his hand; I thought there was something in his hand; I could not tell what it was.

Redirect: "My testimony was interrupted very much by counsel on both sides at the preliminary hearing, and I could not give the testimony as fully as I wanted to. I never had any difficulty in my life before; yes, I stated a while ago, I thought I shot twice; I ascertained I did not, after the pistols had been examined and brought to the attorney's office. That was the day of the preliminary hearing; the pistols were examined and my pistol showed I shot only once; my brother shot twice, as his pistol showed. I did say a while ago we did not want to kill him, and because that would have made matters more public, worse, and the shame would have gone further. I had no intention of killing him."

Thomas White's testimony in behalf of himself and coprisoner (he is deaf): "I can hear through a trumpet in my right ear, but not as well as I can in the other. It was about 6 when we got to Mrs. Sherrill's house. It was daylight; the morning was cloudy and threatening rain. The first thing after arriving we tied our horses (two horses and a top buggy) to a hitching-post about 40 or 50 yards off. We went up to the house and my brother knocked at the door; soon after he knocked, Mrs. Sherrill responded; when she came to the door a conversation took place between her and my brother. I knew Mrs. Sherrill, and did not see why she did not know me. I did not hear the conversation after Mrs. Sherrill came to the door; she set out two chairs; my brother took one and I took the other, occupying opposite sides of the piazza. I said to my brother in a low tone, after she had gone back in the house, 'Is he at home?' He nodded assent. In a short time after that Russell Sherrill came down on the piazza; my brother spoke to him, shook hands with him, introduced him to me, and I shook hands. I had seen him, but was not personally acquainted with him. After he came out, Mrs. Sherrill also came out, and a conversation took place between them. Sherrill said something (713) to his mother, and she went back into the hall. Sherrill followed her and closed the hall door; he closed the inner door, then came back and sat down on the bench at the end of the piazza; my brother then went to him, and again the conversation began; in a few minutes after

the conversation he sprang to his feet and assumed a threatening attitude. At that time my brother drew his pistol and stepped back one step. I did not know what had passed; I was just judging from my brother's actions; then almost immediately after that, just after the pistols were drawn, Mrs. Sherrill came out of the hall and a conversation took place between her and my brother. We were all sitting down at the beginning, but at the time Mrs. Sherrill came out we were all standing, and then the conversation took place between her and my brother; Mrs. Sherrill turned to me, and I said, 'Talk to my brother; I cannot hear you,' and just at that moment she stepped between us and I touched her on the arm or shoulder and told her not to come between us; this seemed to infuriate Sherrill, from his actions and expressions of his face. He was directing his conversation to me after I touched his mother on the shoulder. It seemed as if I had angered him very much. I said, 'Talk to my brother; I cannot hear you.' I then asked my brother if Sherrill would marry her, and he said he would; then I said to Sherrill, 'Come and go in the buggy.' Mrs. Sherrill had stepped back a few paces and was near the hall door. The next thing, Sherrill advanced very rapidly on my brother, my brother retreated, and I kept in line with Sherrill, and after passing just beyond the door, halfway, he drew back as if to strike. I saw his hand fly up; I did not see a blade was in it; my pistol was not drawn; I drew and fired; my brother fired just the instant I did; I think my brother fired just the moment before I did.

(714) Sherrill fell diagonally with his head towards the end of the porch; at the moment he fell my brother walked around. We went out, loosed the horses, and I said, 'Let's go and surrender at once,' and he said, 'Let's go back and tell Jennie what has happened.' My object in going was to induce him to marry my niece and save disgrace, not to themselves, but to all concerned."

The prisoners appealed from a judgment pronounced upon the verdict of guilty of murder in the second degree.

Robert D. Gilmer, Attorney-General, J. H. Clement, T. C. Linn, and B. B. Miller for the State.

Montgomery & Crowell, Overman & Gregory, T. F. Klutz, R. L. Wright, and C. B. Watson for prisoners.

HOKE, J., after stating the facts: The above statement gives the direct evidence of all the living persons who saw the occurrence, and presents the case sufficiently to a proper understanding of the Court's decision.

In developing their case before the jury, the prisoners proposed to prove by the witness White, one of the prisoners, that his brother, the other prisoner, asked the witness to go with him to Sherrill's to help him persuade Sherrill to marry the witness's niece, and that the witness informed his brother he would go with him for that purpose, and there was no agreement or conspiracy to use force or violence on Sherrill if he declined. To this testimony the State objected. The objection was sustained, and the prisoners excepted.

We are of opinion that this ruling was erroneous and the evidence should have been received. The argument to sustain the objection was put on the ground that the proposed testimony was a mere declaration of the prisoner in his own favor, and as such was incompetent. This was no declaration of the prisoner, but his sworn statement in a matter relevant to the issue. The purpose of the prisoner in going to the home of the deceased, in some aspects of the case, was very pertinent, and the prisoner's testimony of such purpose was relevant as substantive testimony, and the declaration to his brother was relevant as corroborative evidence. *S. v. Hall,* 132 N. C., 1102. (715)

Again, while the judge below in one portion of the charge submitted the question of manslaughter to the jury, in closing the charge he said: "You will consider and determine, upon consideration of all the evidence in this case, and applying the principles of the law as instructed, whether or not the prisoners or either of them is guilty of murder in the first or murder in the second degree." This was no doubt an inadvertence on the part of the court, but the effect, we think, was to withdraw from the jury the question of manslaughter. The prisoners excepted. Where there is evidence admitting a consideration of manslaughter on an indictment of this kind and facts of this character, the prisoners are entitled to have the same submitted under a correct charge, and the failure to do so would be error, because, though the verdict may be for a higher offense, the jury might have convicted of the lower crime if the same had been submitted under a proper charge. We do not think, however, that either of these exceptions presents a case of reversible error, because, assuming the rejected evidence to be true, that in going to the home of the deceased there was no conspiracy to do violence, and that they only went to persuade the deceased to marry their niece, we are of opinion that in considering the entire testimony, including that rejected, and accepting the statements of the prisoners as true, there is no aspect of the case that would justify a verdict of a lesser crime than murder in the second degree. Of this the prisoners were convicted,and the error of withdrawing the question of manslaughter from the consideration of the jury was immaterial. The question of murder in the first degree not

being before us, and an intentional homicide having been admitted by the prisoners on the evidence in this case, the law presumes the killing to be murder in the second degree, and it must be so
(716) declared, unless from the entire testimony the prisoners satisfy the jury that the killing was excusable on the plea of self-defense, or of facts which mitigate the crime to manslaughter. *S. v. Smith,* 77 N. C., 488. In that case, *Faircloth, J.,* speaking for the Court, says: "Homicide is murder unless it is attended with extenuating circumstances, which must appear to the satisfaction of the jury. If A assaults B, giving him a severe blow or otherwise making the provocation great, and B strikes him with a deadly weapon and death ensues, the law, in deference to human passion, says this is manslaughter"; and the case further states, if the "provocation be slight and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is murder." Foster's Crown Law, 291. It cannot be contended here that this is a case of excusable homicide. Two strong, vigorous, and determined men, in the presence of a boy just grown, called him from his bed about daylight in the morning, without arms or means of defense. They were near enough to have seized the deceased at any time during the difficulty, and could have easily overpowered him. The killing was without necessity, and there is no statement or claim by the prisoners that they or either of them were in reasonable apprehension of bodily harm at any time.

Thomas White's evidence:

Q.: You shot him in the back of the head when you could have caught and held him? A.: I could have caught him.

Q.: You say you did not want to hurt him; then why didn't you catch him and keep from hurting him—two great large men like you were? A.: Because he attacked us.

Q.: You were mad, then? A.: No, not mad.

Q.: Not mad, and yet you perferred to shoot him in the
(717) back of the head instead of holding him? A.: I shot him because of the fight on hand. My brother was not struck at all; neither of us hit.

Q.: And yet you shot and killed young Sherrill? A.: Yes, I shot once, and I do not know how many times my brother shot.

Nor is there any well-considered principle of manslaughter to which the conduct of the prisoners could be reasonably referred. It is contended, first, that there was a fight between the parties, and that the homicide should be referred to the anger aroused by mutual combat. It is true that when men fight upon a sudden quarrel, and one kills the other in the heat of passion aroused by the combat, the law ordi-

narily refers such a homicide to the anger, and considers the killing a case of manslaughter. The doctrine, however, has this limitation: that the combatants must fight on equal terms, at least at the outset, and no unfair advantage must be taken.

In Russell on Crimes, p. 729, it is said: "Where the combat is not an act of deliberation, but the immediate consequence of sudden quarrel, it does not, of course, come within the foregoing doctrine; yet in cases of this kind the law may come to the conclusion of malice if the party killing began the attack with circumstances of undue advantage; for, in order to save the party making the first assault upon an insufficient legal provocation from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defense, at least at the outset, and this more particularly where the attack is made with deadly and dangerous weapons."

Again, the same author says, on page 731: "If, after an interchange of blows on equal terms, one of the parties on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. . . . But if the party at the beginning prepared a deadly weapon, and has at the time the power of using it in some part of the contest, and uses it accordingly in the course of the combat and kills the other party with the weapon, (718) such killing will be murder."

And *Bailey, J.,* in charging a jury, in an indictment for malicious cutting, said, among other things: "If persons meet originally on fair terms and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument and inflicts a deadly injury, it is manslaughter only. But if a party enters in a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder."

Accordingly, in *S. v. Ellick,* 60 N. C., 450, we find it declared: "If, on a sudden quarrel, the parties fight by consent at the instant with deadly weapons, and one is killed, it is but manslaughter, provided the parties fight on equal terms and no undue advantage is taken, for the fairness of the fight rebuts the implication of malice and the law mitigates the offense out of indulgence to the frailty of human nature." And, appyling the principle, it is there held, "That where words passed between the prisoner and the deceased, who were sitting on a door-sill, and the prisoner got up; the deceased then got up and reached his hand inside the door and got a stick, which was a deadly weapon, and as he was turning around with the stick the prisoner

stabbed him with a bowie-knife, it was held to be murder." To the same effect is *Price v. State,* 36 Miss. 531.

In several of the decisions establishing the limitation here stated, the weapon was concealed, and mention is made of this fact. But the principle underlying the decisions seems to be that the party commenced the fight with a deadly weapon previously prepared and fought at an undue advantage.

The principle, then, by which an unlawful and intentional homicide is, under certain circumstances, mitigated to manslaughter by reason of the anger aroused in mutual combat, has no application here. The prisoners, armed with deadly weapons, commenced the fight on unequal terms, fought throughout at undue advantage, and killed (719) without necessity. Their conduct can receive but one construction: they intended from the beginning of the combat that it should have a fatal termination. Again, it is urged that the prisoners are entitled to have this view presented: that the deceased caused a final difficulty by making an assault on the Whites; that he had acquiesced in their demand and all had become peaceful and quiet, when the deceased provoked a further altercation by advancing on Chalmers White, was in the attitude of striking him, and that in the anger aroused by that assault the deceased was slain. But we do not think that any such position is open to the prisoners in their testimony or that it has support either in law or fact. In the first place, there was no such pause in this heartrending occurrence as permits its division into two altercations. The whole affair did not occupy five minutes of time. Chalmers White testified (p. 54, record): "From the time we struck the porch until he came down, I presume the whole time would be about four or five minutes before he was lying on his back on the floor, dead." Allowing a reasonable time for the deceased to dress and come to the porch, the time consumed in this fateful interview was indeed short. When the deceased said he would not marry their niece, he "did not love her," both men drew and presented their pistols. The deceased then said he would marry her. Thomas White then seems to have put his pistol up, but this is left uncertain by the testimony. His evidence is as follows: "I read about where my shot hit him, read about it. He was then with his face towards my brother. I could not have shot him in the back of his head from in front of him. I do not know whether he had anything in his hand or not. I did say he was attacking my brother. My brother had a pistol; I do not know where he got it; when he got up from the chair he assumed a threatening attitude; we never put the pistols back in our pockets; had them in our hands. We did not have the pistols drawn until he made the attack. We had them in our hands, but did

not have them covered on him. We had them in our hands for (720) protection."

Q.: And then you shot him, not for what he had in his hand, but because he was attacking your brother? A.: I saw there was a fight. I did not stop to see what kind of a fight.

Q. You shot him in the back of the head, when you could have caught and held him? A.: I could have caught him.

Q.: Didn't you say you didn't want to hurt him? Then, why didn't you catch him and keep from hurting him—two great big men like you? A.: Because he attacked us.

Q.: You were mad, then? A.: No, not mad.

Q.: Not mad, and yet you preferred to shoot him in the back of the head instead of holding him? A.: I shot him on account of the fight on hand; my brother was not struck at all; neither of us hit.

Q.: And just for that, killed young Sherrill? A.: Yes, I shot once, and I do not know how many times my brother shot.

But Chalmers White never put up his pistol till the fatal shots were fired. The deceased was then standing on his own porch, with one armed man on either side, and not allowed to withdraw from their presence even to go into his own door—one of the men, at least, keeping his pistol in evidence all of the time. There was never any pause in this scene, and not for one instant any change of attitude. Here, again, the conduct of the prisoners can receive but one reasonable construction, "Do what we demand and do it now, or your life is forfeited." Any inference, therefore, which depends upon the position that the deceased was the aggressor by bringing on a second altercation, in which he was killed, has no basis in fact, and cannot be maintained. And if it were otherwise, if the deceased did bring on a second altercation, any assault he may have made, under the circumstances just stated, was entirely insufficient provocation to mitigate this killing to manslaughter. The deceased had no knife, and neither (721) of the prisoners say that he had. They do not swear that they thought so. There is nothing but a suggestion that he might have had one. Here is the testimony of Chalmers White: "I then turned and walked to Sherill and told him to come on and go with us. He then seemed very angry and began to advance, and said, 'I will die first.' And as he said that he sprang towards us and forward, and I shot him. My brother fired, I think, about the same time. I do not know who shot first. We shot nearly at the same time. He was very near to me. I thought he was going to strike me with something when he advanced; he was in a striking attitude and an angry frame of mind. I think he was going to strike me, because he was rushing on me; and I

thought I saw something. He could see that I was armed and I thought he was armed, and I did not think he would attack me unless he was. I could not see the knife in his hand. He could have had a knife or something, I could not see; it was a dark, cloudy morning." Again the witness testified: "When he sprang up we both drew our pistols on him. I did not see any knife up to that time. I could not see what he had in his hand."

Q.: Did you see anything in his hand? A.: I could not tell what he had in his hand.

Q.: Did you see the knife? A.: He had his hand thrown back this way (striking attitude), drawn back as though to strike. I could not see what was in his hand.

Q.: Was there anything in his hand? A.: I did not know what he had in his hand. I thought there was something in his hand; I could not tell what it was.

Q.: Couldn't you have seen the flashing of a knife blade as he drew back to strike? A.: It was dark and cloudy. I could not see. He could have a knife and I could not have seen it.

Q.: Will you swear he had anything in his hand? A.: I (722) thought he had something in his hand.

Q.: Will you swear that he had a knife? A.: He had something; I could not tell what it was.

Q.: Was it long or short? A.: I do not know. I can't tell whether it was long or short or anything about it; it was something.

Q.: Was it black? A.: I can't tell. I cannot describe what it was.

And Thomas White testified: "I had sidestepped and kept in a direct line with Sherill, because I did not know what was going on at that time, nor what he was going to do. He continued to advance on my brother, and drew back as if to strike. At the moment he did that, he sprang forward, and that put him just in front of me, or diagonally in front. I drew my pistol and we both fired about the same time. He had his hand in a striking position. I do not know whether he had a pistol or not. I could not see whether there was a knife in it or not."

The mother of the deceased said that the deceased never raised his hand except to ward off the pistol. But, put it as the prisoners claim, and on the facts of this case as disclosed by the testimony, suppose he did raise his hand as if to strike, and was shot down, both prisoners firing at the same time. This was no such provocation as the law deems adequate to reduce the grade of this offense.

In Clark on Criminal Law, p. 197, it is said: "Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind

of a reasonable man. The act must be committed under and because of the passion." Again, at page 198: "Intentional killing is manslaughter if it is committed under and by reason of a passion by what the law deems sufficient provocation. The law does not merely look to see if a man was provoked and enraged, and, if so, re- (723) duce his crime to manslaughter; but it also looks at the provocation, and does not excuse him at all if it was inadequate to excite his passion. The provocation must be sufficient in the eye of the law, or it is murder." Again, on pp. 203, 204: "In all cases the mode of resentment must bear a reasonable proportion to the provocation. A homicide is not reduced to manslaughter where a deadly weapon is used, unless the provocation was explicit."

To the same effect, *S. v. Smith, supra; S. v. Chavis,* 80 N. C., 353.

The suggestion that if there be a reasonable doubt as to which one fired the fatal shot, both must be acquitted, cannot be sustained. The prisoners may have gone to the house without any purpose to kill or do unlawful violence. They had a common purpose, and when they drew their weapons they entered on that purpose unlawfully, and were so manifestly acting together, one in the aid of the other, that a killing by either, under the facts of this case, would inculpate both.

The Court is of opinion that there is no reversible error disclosed in the record, and the judgment of the court below was correct.

No error.

Cited: Dayvis v. Tel. Co., 139 N. C., 93; *S. v. Kendall,* 143 N. C., 665; *S. v. McKay,* 150 N. C., 815; *S. v. Price,* 158 N. C., 648, 651; *S. v. Lance,* 166 N. C., 419; *S. v. Merrick,* 171 N. C., 791; *S. v. Bryant,* 180 N. C., 691.

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(724)

STATE v. MCGINNIS.

(Filed 23 May, 1905.)

Dealing in Futures—Bucket Shops—Police Power—Unlawful Discrimination—Gambling or Wagering Contracts—Constitutional Law—Prima Facie Evidence.

1. Laws 1889, chapter 221, making void all contracts for the sale of articles for future delivery wherein it is not intended there shall be an actual delivery, but only the difference between the contract price and the market value at the time stipulated shall be paid, and Laws 1905, chapter 538,

forbidding the business of running a "bucket shop," are clearly within the police power of the State.

2. The act of 1905, forbidding the business of running a "bucket shop" is not void under the Fourteenth Amendment to United States Constitution, because the seventh section provides that the act "shall not be construed so as to apply to any persons, etc., engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."
3. A purchase for actual future delivery of necessary commodities required in the ordinary course of business, and not for wagering or gambling on the fluctuations of the market, is not prohibited by the "bucket-shop" statutes.
4. Section 7 of the act of 1905 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants; it does not authorize them to engage in any business prohibited by the act of 1889, nor to speculate in cotton or other commodities.
5. The Legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a *prima facie* case that such purchases were void, and other circumstances shall not constitute such *prima facie* evidence, is not a discrimination forbidden by the Fourteenth Amendment.
6. The Legislature has unquestionably power to make the business of carrying on a "bucket shop" indictable.
7. If a provision as to *prima facie* evidence as to certain purchases upon margin were null because not applying to all purchases upon margin, this would in no wise invalidate that part of the statute which forbids carrying on the business of running a "bucket shop," as a statute may be void in part and valid in part.

(725) INDICTMENT against E. C. McGinnis, heard by *Neal, J.*, and a jury, at March Criminal Term, 1905, of WAKE. From a judgment of "guilty" upon a special verdict, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Busbee & Busbee and Argo & Shaffer for defendant.

CLARK, C. J. This is an indictment under chapter 538, Laws 1905, "to prevent dealing in futures."

By chapter 221, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," it was in substance enacted as follows: Section 1 made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section 2 enacted that when the defense provided by that act is set up in a veri-

fied answer, the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section 3 made the parties to such contract, and agents concerned therein, indictable, and section 4 made persons while in this State consenting to become parties to such contract made in another state, and all agents in this State aiding and furthering such contract made in another state, indictable.

Chapter 538, Laws 1905, provides (section 1) that it shall (726) be unlawful to open or establish an office in this State for dealing in futures, as forbidden by aforesaid act. Section 2 makes such act a misdemeanor. Section 3 provides that no person participating in such act shall be excused from testifying, but a party so testifying is pardoned for such offense. Section 4 specifies certain acts which shall be *prima facie* evidence of a violation of this statute. Section 5 specifies what shall be *prima facie* evidence of a contract forbidden by the act of 1889, and section 6 provides what shall be *prima facie* proof of the opening and establishing an office in violation of this act and the act of 1889.

So far, the provisions of both acts clearly fall within the police power of the State, and it is not denied that if nothing further appeared in the statute the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the business forbidden by the above cited statutes, Laws 1889, ch. 221, and Laws 1905, ch. 538.

The business forbidden by the act of 1905 is—to avoid a paraphrasis, and following the usual American method of describing an act by a word or a phrase—the business of running a "bucket shop," which is defined by the Century Dictionary as, "An establishment, nominally for the transaction of a stock-exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in." In *Board of Trade v. Commission Co.*, 115 Fed., 574, the president of the board of trade, in answer to a question, thus defined a "bucket shop"; "It is a place where dealings are had upon the fluctuations in the market price, without any *bona fide* transactions." The definition of "bucket shop" in Webster's Dictionary is, "An office or place where facilities are given for betting small sums on current prices of stocks, petroleum," etc. (727)

In *Smith v. Tel. Co.*, 84 Ky., 664, the Court describes the manner of dealing at a "bucket shop" in full detail, and defines its business, "while purporting to be actual transactions," as being *"in fact*

merely wagers on the market price of some commodity, at some specified time in the future," and, in the absence there of any statute, held that such business was "a species of gambling as well-defined and reprehensible as that of keeping a faro bank or a dice machine, and it is therefore illegal and contrary to public policy." A "bucket shop" is defined (*Bryant v. Tel. Co.,* 17 Fed., 825, and *Fortenbury v. State,* 47 Ark., 192) as "a place where wagers are made upon the fluctuations in the price of grain and other commodities," and in both cases the course of dealings at such establishment is fully described in *Smith v. Tel. Co., supra,* but in all these cases, of course, solely upon the information given the learned judges by the testimony of witnesses, set out in the record.

In *Weare v. People,* 209 Ill., 528, is a recent, full, and able discussion of statutes against "bucket shops," sustaining *Soby v. People,* 134 Ill., 66. Indeed, the term "bucket shop," as well as the business it transacts, is mentioned and denounced in many statutes and decisions, and both the name and the business have become matters of general knowledge. In *Booth v. Illinois,* 184 U. S., 425, it was held that the Illinois statute making all "dealings in futures" gambling contracts and punishable, was within the police power of the State and not prohibited by the Fourteenth Amendment—affirming *s. c.,* 186 Ill., 43.

In *Irwin v. Williar,* 110 U. S., 499, the Court said: "If under guise of the contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between contract price and the market price of goods at the date fixed (728) for executing the contract, the whole transaction is nothing more than a wager, and is null and void." *Wagner v. Hildebrand,* 187 Pa. St., 136; *Jamieson v. Wallace,* 167 Ill., 388; *Wheeler v. Stock Exchange,* 72 N. H., 315; *Clews v. Jamieson,* 182 U. S., 461; *Pickering v. Cease,* 79 Ill., 328; *Bibb v. Allen,* 149 U. S., 481;1 Cook on Stock and Stockholders (3 Ed.), sec. 341.

Freund on Police Power (1904), p. 186, says: "It is well established that if there is no intention to buy or sell, but only to pay or receive differences in value, the transaction is simply betting on the rise and fall of market prices, and hence illegal and void."

While the facts found bring the defendant within the words of the statute, it is contended that the addition of the seventh and last section made the whole act unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, which guarantees the equal protection of the laws. Said section 7 reads: "This act shall not be construed so as to apply to any person, firm, corporation, or

his or their agent, engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business." This section is stated by counsel, and we believe was admitted on the argument, to have been added upon the passage of the bill in the second House. It was doubtless hastily drawn, for it is clearly not germane to the statute, which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a "bucket shop," *i.e.*, dealing in the sale of futures, where "it is not intended by the parties thereto that the articles agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them" that merely the difference between the contract price and the market price of the article at the time specified shall be paid. Such condemned business has no connection with, and the constitutionality of the prohibitive (729) act is in no wise affected by, the provision in section 7, that when any person, firm, or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell "the necessary commodities required in the ordinary course of their business," it shall not be deemed a violation "of this act"—the act forbidding the business of carrying on a "bucket shop."

The defendant, however, contends that the purpose of section 7 is to provide that where any manufactory or wholesale merchandising house shall contract to deliver goods at a future date, such establishment may protect itself, or "hedge" (as it is called), by purchasing a "future" contract for raw commodities, without intending to demand actual delivery of those identical goods, but, by the profit thereby made, to recoup the loss by the rise in price of the same commodity subsequently bought, perhaps for actual delivery nearer home, to save freight. It is enough to say that no such intent is expressed in section 7, and we must construe it as it is written.

But a purchase for actual future delivery of necessary commodities required in the ordinary course of business, and not for "wagering" or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale mercantile establishments as authorized to make *bona fide* dealings in "futures," this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the "ordinary course of such business," when not for speculative or

(730) gambling purposes. That no other business or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on "margin" is not an implied restriction upon others to do an act not forbidden by any statute.

Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

The defendant further contends that by section 5, chapter 538, Laws 1905, proof that nothing was actually delivered at the date of the contract, and that a "margin" was put up, shall be *prima facie* evidence that the contract is a "wagering" one and forbidden by chapter 221, Laws 1889, and that section 7, chapter 538, Laws 1905, providing that this last act shall not apply to purchases or sales by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the Fourteenth Amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence is necessarily a matter left to legislative discretion in the exercise of the police power. There may be good reasons why the purchase of "necessary commodities required in the ordinary course of their business" for future delivery on a "margin," by manufacturers and wholesale merchants, shall not raise a presumption that such dealings are "wagering" contracts, while purchases by them, not of such commodities, or when not "required in the ordinary course of their business," or the purchase by others of any commodities, when made on the deposit of a "margin" and for "future" delivery, shall raise the presumption of a "wagering" contract. Whether

(731) the reason is good and sound for making the purchase of commodities upon "margin" *prima facie* evidence of a "wagering" contract, under a certain state of facts, and providing that upon a different state of facts such purchase upon "margin" does not constitute *prima facie* evidence of a "wagering" contract, is a matter for the Legislature. The courts have no veto power upon such exercise of the police power. *S. v. Barrett, ante,* 630.

But aside from what we have already said, the defendant is indicted for carrying on a "bucket shop" business. The Legislature had unquestionably power to make such business indictable. *Booth v. Ill.,* 184 Ill., 425, and other cases cited, *supra.* The facts found are that the defendant was carrying on the forbidden business. It can in no

wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon "margin" shall under certain circumstances raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence, as to certain purchases upon "margin," were null, because not applying to all purchases upon "margin," this would in no wise invalidate that part of the statute which forbids carrying on the business of running a "bucket shop." The defendant is not indicted for buying commodities for future delivery upon a "margin," nor are manufacturers and wholesale merchants, nor any one else, exempted from the prohibition of carrying on the "bucket shop" business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

Cited: S. v. Gatewood, post, 749; *S. v. Clayton, post,* 733, 736; *Durham v. Cotton Mills,* 141 N. C., 645; *Burns v. Tomlinson,* 147 N. C., 635; *Edgerton v. Edgerton,* 153 N. C., 169; *Harvey v. Pettaway,* 156 N. C., 377; *Rodgers v. Bell, ib.,* 382, 384, 385; *Sprunt v. May, ib.,* 394; *Holt v. Wellons,* 163 N. C., 130; *Randolph v. Heath,* 171 N. C., 386. *Affirmed,* 203 U. S., 531.

(732)

STATE v. CLAYTON.

(Filed 23 May, 1905.)

Gambling Contracts—Futures—Bucket Shops—Prima Facie Evidence —Interstate Commerce

1. The test of the validity of a contract for "futures" which Laws 1889, chapter 221, requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that at the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract and void at common law and indictable under the statute.
2. Laws 1905, chapter 538, makes it indictable to open a place of business to facilitate and carry on the making of such contracts as are made indictable by Laws 1889, chapter 221.
3. Where contracts for future delivery are made, if there is not merely the formal provision in the writing that a delivery will be demanded, but, in fact, the right to require delivery, and an intention to demand it if the exigencies of the party's business shall require it, this is a legal contract,

notwithstanding any mere expectation that delivery will probably not be required.

4. Where parties to a purchase or sale upon margin of commodities for future delivery will not need such commodities in the ordinary course of their business, Laws 1905, chapter 538, section 5, makes the purchase in such cases upon margin *prima facie* evidence that such contract is a wagering contract.

5. Section 7 of chapter 538, Laws 1905, was intended to authorize *bona fide* contracts in the aid of business, but it was not intended to authorize manufacturers and wholesale merchants to gamble by buying commodities for future delivery when the intention is that there shall be no delivery.

6. It is competent for the Legislature to provide that gambling contracts participated in by the defendant in this State, either originating or being ratified here, shall be indictable in our courts, and such contracts are not protected by the interstate commerce clause of the Federal Constitution.

(733) INDICTMENT against M. T. Clayton, heard by *Peebles, J.*, and a jury, at April Term, 1905, of PERSON. From a judgment of guilty upon a special verdict, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Winston & Bryant and Guthrie & Guthrie for defendant.

CLARK, C. J. This is an indictment under chapter 221, Laws 1889, for the purchase, in Person County, this State, of 5,000 pounds of pork for future delivery upon a "margin" from a firm in Philadelphia. The special verdict finds that the pork was not to be actually delivered, but that settlement was agreed to be made upon the difference in value of said pork on 1 July, 1905; that the defendant is a dealer in wholesale merchandise, and that he purchased said pork on a "margin" to protect his contract with customers who had purchased pork from him for actual delivery at a future date. That is, as we understand the findings of fact, the defendant had sold pork, in the ordinary course of his business, to customers to be delivered at future dates, and, to protect himself from the loss by a rise in the price of such pork before the delivery dates, he had bought 5,000 pounds of pork on "margin."

As already pointed out by us in *S. v. McGinnis, ante,* 724, this statute (1889, ch. 221) does not forbid all purchases and sales of commodities for future delivery, but only when under such contracts actual delivery is not intended. If the purchase had contemplated the actual future delivery of the 5,000 pounds of pork, so that out of it the defendant might make his future deliveries (instead of buying meat and holding it with the attendant risk of loss of weight, theft, loss by fire, etc.), it would be a *bona fide* transaction not forbidden by chapter 221, Laws, 1889, and is such transaction as is contemplated by section 7, chapter

538, Laws 1905. But upon the special verdict it affirmatively appears that it was intended that the 5,000 pounds were not to be actually delivered, and that settlement was to be made by paying on 1 July, (734) 1905, the difference in value on that day between the contract price and the market price. This brings the transaction directly within the inhibition of the act of 1889 and the evil thereby intended to be remedied.

Laws 1889, ch. 221, sec. 1, privides that whenever "in fact and notwithstanding the terms expressed in such contract, it is not intended by the parties thereto that the articles or things, so agreed to be sold and delivered, shall be actually delivered or the value thereof paid, but it is intended and understood by them" that instead of delivery there shall be paid by one party to the other merely the difference between the market value, on the day specified, of the article bought and sold and the contract price, such contract shall be void. Section 2 provides that when the verified answer sets up that a contract sued upon is of this nature, the burden shall be upon the plaintiff to prove that it is a lawful contract. Section 3 provides that every party to such contract or the agent of any party in making, furthering, or effectuating the same, and every agent or officer of any corporation knowingly aiding in the furtherance of such forbidden contract, is indictable; and section 4 provides that every person who shall while in this State consent to become a party to any such contract made in another state "shall be guilty of a misdemeanor."

This is a brief summary of the act of 1889, which is very full and complete, and was drawn with great care and consummate skill to avoid any possible evasion or loopholes for escaping its purpose, which was to make punishable all "wagering" contracts, or gambling or betting upon the rise or fall in the prices of any commodity, the Legislature being probably moved not only by the disastrous effects upon those engaging in such gambling, but by the still more disastrous results to producers and manufacturers and consumers by the manipulations of gamblers in "futures" upon the prices of the products of industry. (735)

The test which the statute requires is the "intention not to actually deliver" the articles bought or sold for future delivery. No matter however explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that at the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a "gambling" contract, and is null and void at common law. *Irwin v. Williar,* 110 U. S., 499; *Bibb v. Allen,* 149 U. S., 481; *Clews v. Jamieson,* 182 U. S., 461. The above statute makes it indictable; and chapter 538, Laws 1905, makes it indictable to open a place of business to facilitate and carry on the making of such contracts.

Contracts for the delivery of any article in the future are legitimate, unless there is no intention to deliver. When contracts for future delivery are made, if there is not merely the formal provision in the writing that a delivery will be demanded, but in fact the right to require delivery and an intention to demand it if the exigencies of the party's business shall require it, this is a legal contract, notwithstanding any mere expectation that delivery will probably not be required.

When parties to the purchase or sale upon "margin" of commodities for future delivery will not need such commodities in the ordinary course of their business, the strong probability is that it is a gambling contract, and the statute (1905, ch. 538, sec. 5) makes the purchase in such cases upon "margin" *prima facie* evidence that such contract is a "wagering" contract; but when such purchase for future delivery upon "margin" is by manufacturers or wholesale merchants "of the necessary commodities required in the ordinary course of their business," it is more reasonable to believe that such purchases are *bona fide,*

(736) and in such cases and as to such necessary articles the purchase upon "margin" is not made *prima facie* evidence of a gambling contract. This is a matter of legal procedure within the legislative discretion, as was held in *S. v. McGinnis, ante,* 724.

It is the presence of the intention that no delivery shall be made which stamps a contract, dealing in "futures," as criminal under the statute—a "wagering" contract pure and simple, and not a legitimate transaction. When, however, a person engaged in business buys or sells "futures" with a view not to take, but to avoid risks in his business by reason of possible fluctuation in the commodities which he must need in the ordinary course of that business, and he retains *bona fide* the right to call for delivery, and there is no intention not to exact delivery, this is a valid contract, though he may think it probable that he will not need to call for delivery, if it shall turn out (as he may expect) that he can buy these commodities from time to time nearer home, and thus save freight, being secured against loss by his purchase of futures. The difference is that in this last case the party will need actual delivery from some one, of the very articles and quantity bought as "futures" for the ordinary purposes of his business; that there is, therefore, no gambling feature in the dealing, and though he may expect—indeed, think it probable—that he may secure the actual delivery from time to time from others, there is no intention that he will not in any event call for delivery upon his purchase of "futures," but, on the contrary, there is the positive intention to call for such delivery if he cannot get the articles elsewhere, and more advantageously, as needed.

It is this class of *bona fide* contracts, in the aid of business, and not for "gambling" purposes, that section 7, chapter 538, Laws 1905, was

intended to authorize. That section did not in words authorize, (737) nor can it be construed to intend to authorize, manufacturers and wholesale merchants to "gamble" by buying commodities for future delivery when the intention is that there shall be no delivery.

We are relieved from any difficulty as to the nature of the transaction, in the present case, by the finding in the special verdict that there was no intention to require actual delivery, but, on the contrary, an agreement that on 1 July, 1905, the loser should pay the winning party the difference between the market value on that day and the contract price. This is a "gambling" contract, and the statute does not exempt the defendant from punishment therefor because he is a wholesale merchant and deals in such commodities in his ordinary business.

Nor can it be held that such "gambling contracts" are protected by the interstate commerce clause of the Federal Constitution: 1. The act made indictable is not the purchase in Philadelphia, but the assent to and participation in the illegal transaction by the defendant in this State. When a shot is fired across the State line, at common law the crime is triable in the State where the shot took effect, but by statute the offense may be made punishable by the State in which the person stood when firing the shot. It is for this State "to determine what acts committed within its limits shall be deemed criminal." *S. v. Hall,* 114 N. C., p. 922. 2. It is not a matter of interstate commerce at all, but of criminal law. Such dealings are illegal, irrespective of statute, being contrary to public policy and *contra bonos mores. Clews v. Jamieson, supra;* Cook on Stock and Stockholders (3 Ed.), sec. 341. It is competent for the Legislature to make such acts, participated in by the defendant in this State, either originating or being ratified here, indictable in our courts.

No error.

Cited: Rankin v. Mitchem, 141 N. C., 284; *Burns v. Tomlinson,* 147 N. C., 636, 647; *Edgerton v. Edgerton,* 153 N. C., 169; *Harvey v. Pettaway,* 156 N. C., 377; *Rodgers v. Bell, ib.,* 382, 385; *Sprunt v. May, ib.,* 396; *Pfeifer v. Israel,* 161 N. C., 412; *Holt v. Wellons,* 163 N. C., 130; *Randolph v. Heath,* 171 N. C., 386.

(738) STATE v. LYTLE.

(Filed 26 May, 1905.)

Intoxicating Liquors—Unlawful Sale—Former Conviction—Police Court—Jurisdiction—Trial by Jury—Petty Misdemeanors—Indictment by Grand Jury.

1. Where a tax or license for retailing liquor is required by the State, and another tax or license by the town, selling the same glass of liquor may be a violation of the State law and of the town ordinance, if license has not been obtained from both, and on indictment by the State, a plea of former conviction in the police court for retailing in violation of the town ordinance is invalid.
2. An act of the Legislature giving a police court concurrent original jurisdiction of offenses cognizable by justices of the peace is valid.
3. The act of 1905 creating a police court for the city of Asheville, and providing that it shall, in addition to jurisdiction of offenses cognizable by justices of the peace, "have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of said city below the grade of felony as now defined by law, and all such offenses committed within said city are hereby declared to be petty misdemeanors," and giving a right of appeal to the Superior Court in all cases, is constitutional.
4. The constitutional guaranty of a jury trial is met by the right of appeal which is given from the police court, in all cases, to the Superior Court.
5. The provision in the act creating the police court for the city of Asheville, "that all offenses less than felony, as now defined by law, committed within the said city, are hereby declared to be petty misdemeanors," is valid. The Constitution not having defined "petty misdemeanors," it was competent for the Legislature to define the offenses which should be so classified, provided the punishment therein is not that of felonies.
6. Under Article I, section 13, of the Constitution, indictment by grand jury is dispensed with in the trial of petty misdemeanors.
7. The act creating the police court for the city of Asheville is not unconstitutional in that it declares certain offenses "petty misdemeanors" in that city, and triable without a finding by a grand jury, while it is not so enacted elsewhere.
8. The Superior Court has no original jurisdiction of the offense of retailing spirituous liquor in the city of Asheville without license.

(739) INDICTMENT against Mark Lytle, heard by *Neal, J.*, and a jury, at April Term, 1905, of BUNCOMBE. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and M. W. Brown for the State.
Frank Carter for defendant.

CLARK, C. J. By chapter 35, Pr. Laws 1905, there was created a special court in Asheville to be styled the "Police Court," to be presided over by a police justice, providing for his election, term of office, qualification, and compensation. Section 4 of said act confers upon said court "all the jurisdiction and powers in all criminal offenses occurring within the corporate limits of the city of Asheville which are now or may hereafter be given justices of the peace," and also "exclusive original jurisdiction to hear and determine all offenses and misdemeanors consisting of a violation of any ordinance of said city." Section 5 provides that "said police court shall, in addition to the jurisdiction conferred by section 4 of this act, have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of said city, below the grade of felony as now defined by law, and all such offenses committed within said city are hereby declared to be petty misdemeanors." By section 13 the right of appeal to the Superior Court of Buncombe County is given in all cases.

The defendant, who was indicted in the Superior Court for retailing spirituous liquor without license, contrary to the general law of this State, pleaded former conviction and relied upon the record of his trial, conviction, and sentence in the police court for retailing spirituous liquor in violation of the town ordinance. It does not appear (740) that it was the same sale, but even if it were, the plea of former conviction was invalid, as was held in *S. v. Stevens,* 114 N. C., 878, where it is pointed out that while a town ordinance cannot make punishable an offense made punishable by the State law, yet when a tax or license is required by the State, and another tax or license is exacted by the town, selling the same glass of liquor may be a violation of the town ordinance and also a violation of the State law, if license has not been obtained from both; and, further, the same act may be punishable by the Federal Government if in violation of its statutes, and, indeed, if the purchaser is a minor the same single act may constitute a fourth distinct offense of selling spirituous liquor to a minor—and even a fifth, if the sale is on Sunday. Though there is a single act, it may be thus a violation of five statutes, and when in such case "each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other." *Burwell, J.,* in *S. v. Stevens, supra,* at p. 877, citing *Arrington v. Commonwealth,* 87 Va., 96; *Buble v. State,* 51 Ark., 170; Black Intox. Liq., sec. 555. The ruling in *S. v. Stevens* has been cited and followed in *S. v. Reid,* 115 N. C., 741; *S. v. Robinson,* 116 N. C., 1048 (which was the case of an assault with a deadly weapon and also carrying a concealed weapon); *S. v.*

Downs, ibid., 1067; *S. v. Lawson,* 123 N. C., 742; *S. v. Smith,* 126 N. C., 1059.

The defendant further moved to quash the indictment and also in arrest of judgment, upon the ground that by virtue of the above recited act of 1905, the Superior Court had no original jurisdiction. This presents the real point in the case, which is the constitutionality of section 5 of the act. There can be no question as to the validity of so much of section 4 as gives the police court concurrent original jurisdiction of offenses cognizable by justices of the peace, for the Constitution
(741) does not make the jurisdiction of the latter exclusive. *Rhyne v. Lipscombe,* 122 N. C., at p. 656. Counsel asked us to pass upon the constitutionality of the other clause of section 4, which purports to give to the police court "exclusive original jurisdiction to hear and determine all offenses and misdemeanors consisting of a violation of an ordinance of said city." But that point is not presented by this record, and we would not presume to pass upon the constitutionality of an act of the General Assembly upon an *obiter dictum.* It is too serious a matter to be considered unless absolutely necessary to the decision of a cause, and a statute will then never be held unconstitutional if there is any reasonable doubt. *Sutton v. Phillips,* 116 N. C., 504.

The Constitution, Art. IV, sec. 14, authorized the General Assembly to establish "special courts for the trial of misdemeanors in cities and towns." By virtue of this provision such courts were formerly established in Wilmington and New Bern. By the constitutional amendments of 1875, Article IV, sections 2 and 12, the General Assembly was authorized to establish "such other courts inferior to the Supreme Court," and "allot and distribute" the jurisdiction of the courts below the Supreme Court as it saw fit. Under this article, criminal courts and circuits were established, until finally these courts were, by statute, given the same jurisdiction, civil and criminal, as the Superior Courts, with the right of appeal therefrom direct to this Court. In *Rhyne v. Lipscombe,* 122 N. C., 650, and *Tate v. Comrs., ibid.,* 661, these acts were held unconstitutional so far as they provided for appeals direct from such courts to this Court, and took away the appeal, given by the Constitution, direct from justices of the peace to the Superior Court. Subject to these restrictions, and the further restriction that such courts might be given only concurrent but not exclusive jurisdiction of matters given to justices of the peace by the Constitution, it was held that the
(742) General Assembly might "create courts inferior to the Supreme Court, with all, or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace."

The objection to section 5 is therefore founded upon the Constitution, Art. I, sec. 12, "No person shall be put to answer any criminal charge, except as hereinafter allowed, by indictment, presentment, or impeachment," and section 13, "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for *petty misdemeanors,* with the right of appeal." In the police court there is no jury nor grand jury.

The guarantee of a jury trial is fully met by the right of appeal which is given from this police court, in all cases, to the Superior Court; but the objection is urged that there is no provision for a grand jury. The General Assembly might have provided for this, also, by enacting that upon appeal the action should be quashed unless an indictment is found. It sought, however, to attain the same end by providing that "all offenses less than felony, as now defined by law, committed within said city are hereby declared to be petty misdemeanors."

Laws 1876, ch. 154 (Code 1883, ch. 21), established a general system of inferior courts and gave them jurisdiction (Code, sec. 808) "of all crimes and misdemeanors except those whereof exclusive jurisdiction is given to courts of justices of the peace and except the crimes of murder," etc., and section 11 of said act (Code, sec. 810) provided that "in all issues of fact founded upon trial of *petty misdemeanors* the parties may . . . waive their right to have the same determined by a jury." As these courts had no jurisdiction, either original or appellate, of any offense within the jurisdiction of a justice of the peace, it is clear that "petty misdemeanors" was not a term restricted to offenses cognizable by a justice of the peace. (743)

When the Constitution of 1868 was created, there was no distinct classification known as "petty misdemeanors." At that time "misdemeanor" was a broader term than now, and embraced many crimes that were infamous and done in secrecy and malice or with deceit and intent to defraud, which formerly were punishable corporally, and after 1868 by imprisonment in the State's Prison. Among these, as enumerated in Revised Code, ch. 34, were accessories to felony (section 54); certain grades of arson (section 30); bribery of jurors (section 34); mismarking cattle, larceny (section 57); concealing birth of child (section 28); false pretense (section 67); forgeries (sections 64, 65, and 66); certain larcenies (sections 31 and 32); receiving stolen goods (section 56), and perjury (section 49). By Revised Code, ch. 34, sec. 120, misdemeanors were to be punished as at common law, "but the punishment of the pillory shall be used only for crimes that are infamous, or done in secrecy and malice, or done with deceit and intent to defraud."

Thus, misdemeanors were practically divided into two classes; (1)

Those which, by reason of their heinous nature, might be punished corporally; and (2) those that could not be so punished. The first class, those that could be punished corporally, were not petty. The others, it would not be unreasonable to term petty. Laws 1891, ch. 205, by defining felony as all offenses "punishable by death or imprisonment in the State's Prison," transferred all of the first class, the misdemeanors formerly punishable corporally, into the class of felonies. It was competent for the Legislature to do this and make those crimes felonies. It was equally competent for it, in the act before us, to style the misdemeanors in the second class above as "petty misdemeanors." The punishment to be inflicted for any crime is left entirely to the General Assembly, which can in its discretion affix lesser punishment, even for the four crimes now visited with capital punishment. Const., (744) Art. XI, sec. 2. As it can affix the punishment and can change at will the dividing line between felonies and misdemeanors, there is no constitutional inhibition upon its defining any class of lesser crimes as petty misdemeanors.

The object of the statute creating the police court is to relieve the Superior Courts of petty business, to relieve the taxpayers, and defendants, also, of heavy costs, and to give a speedy trial, lightening jail expenses, and dispensing often with long imprisonment or detention till a term of court comes around with its jury and judge. There is no harm done, since an appeal always lies open to a convicted defendant to the Superior Court, where he has the right of trial by jury; whereas to the acquitted defendant or to one who takes no exception to his punishment, there is a relief from unnecessary delay and costs as well as diminution of court expenses to the public. Indictment by grand jury is still required for other than "petty misdemeanors."

The Constitution not having defined "petty misdemeanors," and there being no well-settled line of demarcation when that instrument was adopted, it was competent for the General Assembly to define and mark the offense which should be so classified. We see no force in the argument that another Legislature may denominate all felonies as "petty misdemeanors," and thus even murderers may be tried without the intervention of a grand jury. Certainly, the General Assembly can reduce the punishment of any and all offenses and leave no offense above the grade of petty misdemeanors, but the punishment must not be that of felony, for the punishment controls the definition. *S. v. Fesperman,* 108 N. C., 880. The judicial department assumes no supervision of the Legislature. The lawmaking body represents the people, and unless an enactment is clearly in contravention of the organic law—the Constitution—the correction of any measure passed by the Legislature must be left to another Legislature. The courts have no such power. We

cannot assume that the Legislature would attempt to evade the (745) Constitution. Lastly, it is suggested that the act is invalid in that it declares these offenses petty misdemeanors in Asheville, and triable without a finding by a grand jury, while it has not so enacted elsewhere. It is not necessary that because there is a police justice trying petty misdemeanors without a grand jury in Asheville there must be the same procedure everywhere throughout the State. In *S. v. Mallett,* 125 N. C., 718, this Court held that the Legislature could authorize appeals by the State to this Court from judgments in the Superior Court upon appeals thereto from the Eastern District Criminal Court, though appeals by the State were not allowed from judgment in the Superior Court upon appeals thereto from the Western District Criminal Court. Upon writ of error to the United States Supreme Court this ruling was affirmed, 181 U. S., 589 (reprinted, 128 N. C., 619), the Court saying on pp. 628, 629: "Each State prescribes its own mode of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no valid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of the same State."

The State Constitution contemplated a diversity of procedure in this particular, when it provided in Article IV, section 14, that "the General Assembly shall provide for the establishment of special courts for the trial of misdemeanors in cities and towns where the same may be necessary." Sections 12 and 13 of Article I are to be construed together. *S. v.* Crook, 91 N. C., 540. When Article IV, section 27, dispensed with indictment by a grand jury, required by Article I, section 12, "except as hereinafter allowed" in the trial of cases before justices of the peace, and when Article I, section 13, also dispensed with it "in the trial of petty misdemeanors," without defining what such misdemeanors (746) were, it left the classification to the General Assembly. Should the General Assembly classify as a "petty misdemeanor" a crime whose punishment is clearly not of that class of offenses, it would be unconstitutional. But this was not done in this act. The Superior Court has no original jurisdiction of this offense, and the motion to quash and in arrest of judgment should have been sustained.

Reversed.

Cited: S. v. Jones, 139 N. C., 619; *Daniels v. Homer, ib.,* N. C., 228; *S. v. Baskerville,* 141 N. C., 816; *S. v. Brittain,* 143 N. C., 670; *S. v. Jones,* 145 N. C., 460; *S. v. Hooker, ib.,* 583, 4; *S. v. Shine,* 149 N. C., 480, 482; *S. v. Lunsford,* 150 N. C., 865; *S. v. Collins,* 151 N. C., 649;

S. v. Ray, ib., 714; *S. v. Brown,* 159 N. C., 469; *S. v. Dunlap, ib.,* 493; *R. R. v. Oates,* 164 N. C., 175; *S. v. Hyman, ib.,* 412, 414; *S. v. Denton, ib.,* 532; *Oil Co. v. Grocery Co.,* 196 N. C., 523; *S. v. Tate, ib.,* 374; *S. v. Freeman,* 172 N. C., 926; *Wells v. Strickland,* 174 N. C., 301; *S. v. Boyd,* 175 N. C., 791; *S. v. Publishing Co.,* 179 N. C., 724; *Sewing Machine Co., v. Burger,* 181 N. C., 244; *S. v. Jones, ib.,* 545.

(747)

MEMORANDA OF CASES DISPOSED OF WITHOUT WRITTEN OPINIONS

RICHARDSON (appellant) v. OIL Co. From Beaufort *Rodman* for plaintiff; *Small & McLean* for defendant. Affirmed.

ROGERS (appellant) v. DISPENSARY. From Hertford. *Cowper* and *Winborne* for plaintiff; *Shepherd* for defendant. Affirmed. (HOKE, J., did not sit.)

BRICKELL (appellant) v. MANUFACTURING Co. (Two cases from Halifax.) *Daniel & Green* and *Shepherd* for appellee. Dismissed under Rule 17.

LASSITER v. R. R. (petitioner). From Northampton. *Mason, Daniel* and *Peebles & Harris* for plaintiff; *Elliott, Day & Bell,* and *Allen* for defendant. Petition to rehear dismissed.

SUTTON v. EDWARDS (appellant). From Green. *Morrill* for plaintiff; *Lindsay* for defendant. Affirmed.

WOOLARD (appellant) v. McGOWAN. From Pitt. *Sugg* for plaintiff; *Skinner* for defendant. Affirmed.

TRIPP (petitioner) v. NOBLES. From Pitt. *Jarvis* for plaintiff; *Skinner* for defendant. Petition to rehear dismissed. (WALKER, J., dissenting).

STATE v. HOCKADAY (appellant). From Vance. *Attorney-General* for State. Dismissed for failure to obtain proper order to appeal *in forma pauperis.*

STATE v. R. R. (appellant) From Franklin. *Attorney-General* for State; *Day & Bell* for defendant. Affirmed.

EDWARDS v. PIPER (appellant). From Wilson. *F. A. Woodard* for plaintiff; *Connor & Connor* for defendant. The Court being evenly divided (CONNOR, J., not sitting), the judgment is affirmed. (748)

THOMASON v. R. R. (appellant). From Vance. *Pittman* for plaintiff; *Bridgers* for defendant. Affirmed, and defendant allowed to answer over.

BOURNE (appellant) v. R. R. *Gilliam* for plaintiff; *Bridgers* for defendant. The Court being evenly divided (CONNOR, J., not sitting), the judgment is affirmed.

STATE v. EDMUNDSON (appellant). From Lenoir. *Attorney-General* for State; *Rouse* for defendant. No error.

MARSHALL v. CORBETT (appellant). From Pender. *Stevens* for plaintiff. Dismissed for failure to print record.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

WILLIAMS (appellant) v. TELEPHONE CO. From New Hanover. *Russell* for plaintiff; *Rountree & Carr* for defendant. Dismissed under Rule 15 for failure to prosecute appeal.

TAYLOR (appellant) v. MCKINNON. From New Hanover. *Meares* for plaintiff; *McLean* for defendant. Dismissed for failure to file brief.

SOUTHERLAND (appellant) v. SCHOOL COMMITTEE. From Wayne. *Parker* for plaintiff; *Grady* for defendant. Affirmed.

STATE v. MCNEILL (appellant) From Robeson. *Attorney-General* for State. Appeal dismissed under Rule 17.

SOLES v. R. R. (appellant). From Columbus. *Lyon* for plaintiff; *Davis* for defendant. The Court being evenly divided (BROWN, J., not sitting), the judgment is affirmed.

JACKSON (appellant) v. R. R. From Robeson. *McIntyre & Lawrence* for appellee. Dismissed under Rule 17.

STATE v. STURDIVANT (appellant). From Anson. *Attorney-General* for State; *McLendon* for defendant. No error.

(749) STATE v. LITTLE (appellant). From Anson. *Attorney-General* for State; *McLendon* for defendant. No error.

STATE v. ALSOBROOKS (appellant). From Union. *Attorney-General* for State; *Redwine & Stack* for defendant. No error.

STATE v. DARGAN (appellant). From Union. *Attorney-General* for State; *Williams & Lemmond* for defendant. No error.

STATE v. MEACHUM (appellant). From Anson. *Attorney-General* for State; *Coxe* for defendant. No error.

STATE v. JONES (appellant). From Anson. *Attorney-General* for State; *Caudle* and *Bennett* for defendant. No error.

STATE (appellant) v. MEACHUM. From Anson. *Attorney-General* for State; *McLendon* for defendant. The ruling below is sustained on authority of *Carr v. Comrs.*, 136 N. C., 125, and *S. v. Sheppard, ante,* 579.

STATE *v.* SPIVEY (appellant). From Guilford. *Attorney-General* for State; *Hobgood* for defendant. No error.

STATE v. LEE (appellant). From Guilford. *Attorney-General* for State; *Staples* for defendant. No error.

STATE v. GATEWOOD (appellant). From Person. *Attorney-General* for State; *Winston & Bryant* and *Guthrie & Guthrie* for defendant. No error, on authority of *S. v. McGinnis, ante,* 724.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

BROOKS MANUFACTURING CO. (appellant) v. CITY OF GREENSBORO. From Guilford. *Scott* and *Barringer* for plaintiff; *Scales, Taylor & Scales* for defendant. Affirmed. (HOKE, J., dissenting.)

THOMPSON v. TELEGRAPH CO. (appellant). From Guilford. Appeal dismissed by consent of appellant.

WORTH (appellant) v. RAGAN. From Guilford. *Scott, Bynum,* (750) and *Barringer* for plaintiff; *Stedman* and *Morehead* for defendant. Affirmed.

REES (appellant) v. SPOKE CO. From Guilford. *Strudwick* for plaintiff; *Stedman* for defendant. Affirmed.

CARTER (appellant) v. R. R. From Guilford. *Barringer* and *Strudwick* for plaintiff; *King & Kimball* for defendant. Affirmed. *Cited: s. c.,* 139 N. C., 500.

CLEGG, ADMR., v. R. R. From Iredell. *Armfield & Turner* for plaintiff; *Caldwell* for defendant. Affirmed.

FOX (appellant) v. TELEPHONE CO. From Davidson. *Raper* for plaintiff; *Robbins* for defendant. Affirmed. (HOKE, J., dissenting.)

DOSS (appellant) v. HUTSON. From Surry. *Carter* for plaintiff; *Holcombe* for defendant. Affirmed.

GINNINGS (appellant) v. HOTEL CO. From Wilkes. *Barber* for defendant. Dismissed for failure to file brief.

HALL (appellant) v. TANNING CO. From Wilkes. *Finley* for plaintiff; *Barber* for defendant. Affirmed.

SCHAFER v. HOTEL CO. (appellant). From Surry. *Shepherd* and *Sparger* for plaintiff; *Carter* for defendant. Appeal dismissed as being premature.

KERNER (appellant) v. EXPRESS CO. From Forsyth. *Patterson* for plaintiff; *Watson* for defendant. Affirmed.

KING v. KERNER (appellant). From Forsyth. *Manly* and *Eller* for plaintiff. Dismissed under Rule 17.

CLICK v. LOCOMOBILE CO. From Forsyth. *Manly* and *Swink* for plaintiff. Dismissed under Rule 17.

PINCHBACK (petitioner) v. MINING CO. From Gaston. *Osborne, Maxwell & Keerans* for plaintiff; *Mason* and *Burwell & Cansler* for defendant. Petition dismissed.

CROWELL (appellant) v. INSURANCE CO. From Mecklenburg. (751) *Stewart* for plaintiff; *Clarkson & Duls* for defendant. Affirmed.

MCGINN (appellant) v. BANKERS' UNION. From Gaston. *Mangum* for plaintiff; *Mason* for defendant. Affirmed.

HILTON (appellant) *v.* COTTON MILLS. From Catawba. *Self & Whitener* for plaintiff. Appeal dismissed by consent.

BOST (appellant) v. COTTON MILLS. From Catawba. *Self & Whitener* for plaintiff; *Feimster* and *Cabell* for defendant. Affirmed.

CASE MANUFACTURING Co. v. MOORE (appellant). From Caldwell. *Bower* for plaintiff; *Wakefield* for defendant. Affirmed.

ROBERTS (appellant) v. ROBERTS. From Caldwell. *Bower* for plaintiff; *Newland* for defendant. Affirmed.

STATE v. SHADE (appellant). From Burke. *Attorney-General* for State; *Avery & Ervin* for defendant. No error.

NORTON (appellant) v. R. R. From McDowell. *Avery* for plaintiff; *Ervin* for defendant. Affirmed.

EDLEY (appellant) v. R. R. From Henderson. *Ewbank* for plaintiff; *Moore & Rollins* for defendant. Affirmed.

BRIDGES (appellant) v. R. R. From Rutherford. *Morrow* and *McRorie* for appellant; *Shaw, Ryburn* and *Shepherd* for appellee. Affirmed.

STATE *v.* COOK (appellant). From Madison. *Attorney-General* for State; *Lusk* and *Jones* for defendant. No error.

STATE v. SARAH J. LYTLE (appellant). From Buncombe. *Attorney-General* for State; *Carter* for defendant. No error.

CURTIS (appellant) v. ELECTRIC Co. From Buncombe. *Merrimon* for plaintiff; *Sondley* and *Martin* for defendant. Affirmed.

(752)

SHITLE (appellant) *v.* R. R. From Buncombe. *Martin* for plaintiff; *Moore* for defendant. Affirmed.

PENLAND (appellant) v. INGLE. From Buncombe. *Davidson, Bourne & Parker* for plaintiff; *Carter* for defendant. Appeal dismissed. (See opinion in defendant's appeal, *ante,* 455.))

CURTIS (appellant) v. R. R. From Swain. *Franklin* for plaintiff; *Moore* for defendant. Affirmed.

WESTFELDT (petitioner) v. R. R. From Swain. *Sondley* and *Martin* for petitioner; *Shepherd, Moore, Hooker,* and *Merrimon, contra.* The Court being evenly divided (HOKE, J., not sitting), the petition to rehear is dismissed.

LEACH v. TELEGRAPH Co. (appellant). From Cherokee. *Dilliard & Bell* for plaintiff; *Whitson* and *F. H. Busbee & Son* for defendant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

WILSON v. BRYSON (appellant). From Jackson. *Shepherd, Axley,* and *Moore* for plaintiff; *Ray* for defendant. Affirmed.

BRANCH (appellant) v. CASUALTY Co. From Wake. *Harris* for plaintiff; *Womack* for defendant. Affirmed.

MATTHEWS v. TELEGRAPH Co. (appellant). From Guilford. Appeal dismissed by consent of appellant.

COWAN v. ICE AND COAL Co. (appellant) From Buncombe. *Craig & Martin* for appellant; *Moore & Rollins* for appellee. After full and careful examination, the Court is of opinion that there is no error presented which gives the defendant any just ground of complaint. The judgment is therefore affirmed. (BROWN J., dissenting.)

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CONSTITUTIONAL LAW—*Continued.*

8. A statute making the keeping of more than a quart of liquor in a certain county *prima facie* evidence of keeping it with intent to sell, does not violate Article XIV, section 1, U. S. Constitution, which prohibits any State from making or enforcing any law which denies any person within its jurisdiction equal protection of the law. *Ibid.*

9. The act of 1905, forbidding the business of running a "bucket shop," is not void under the Fourteenth Amendment to U. S. Constitution, because the seventh section provides that the act "shall not be construed so as to apply to any person, etc., engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business." *S. v. McGinnis*, 724.

10. The Legislature can, in the exercise of the police power, prescribe when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence. Therefore, a provision that the purchase of commodities upon margin under certain circumstances shall raise a *prima facie* case that such purchases were void, and other circumstances shall not constitute such *prima facie* evidence, is not a discrimination forbidden by the Fourteenth Amendment. *Ibid.*

11. The Legislature has unquestionably power to make the business of carrying on a "bucket shop" indictable. *Ibid.*

12. If a provision as to *prima facie* evidence as to certain purchases upon margin were null because not applying to all purchases upon margin, this would in no wise invalidate that part of the statute which forbids carrying on the business of running a "bucket shop," as a statute may be void in part and valid in part. *Ibid.*

13. It is competent for the Legislature to provide that gambling contracts participated in by the defendant in this State, either originating or being ratified here, shall be indictable in our courts, and such contracts are not protected by the interstate commerce clause of the Federal Constitution. *S. v. Clayton*, 732.

14. The act of 1905, creating a police court for the city of Asheville, and providing that it shall, in addition to jurisdiction of offenses cognizable by justices of the peace, "have exclusive original jurisdiction of all other criminal offenses committed within the corporate limits of said city, below the grade of felony as now defined by law, and all such offenses committed within said city are hereby declared to be petty misdemeanors," and giving a right of appeal to the Superior Court in all cases, is constitutional. *S. v. Lytle*, 738.

15. The provision in the act creating the police court for the city of Asheville, "that all offenses less than felony, as now defined by law, committed within the said city, are hereby declared to be petty misdemeanors," is valid. The Constitution not having defined "petty misdemeanors," it was competent for the Legislature to define the offenses which should be so classified, provided the punishment therein is not that of felonies. *Ibid.*

16. The act creating the police court for the city of Asheville is not unconstitutional in that it declares certain offenses "petty misdemeanors" in that city, and triable without a finding by a grand jury, while it is not so enacted elsewhere. *Ibid.*

EVIDENCE—*Continued.*

VENUE.

VERDICTS.