ANNOTATIONS INCLUDE 180 N. C.

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VOL. 141

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1906

REPORTED BY

J. CRAWFORD BIGGS

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 BY THE COURT

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1906

SMITH v. FRENCH.

(Filed 27 March, 1906.)

PLAINTIFF'S APPEAL.

Mortgagor and Mortgagee—Demand—Waiver—Evidence.

1. Where a mortgagor of a chattel has been left and continues in possession and control of the property, and has done nothing to question or jeopardize the mortgagee's right, a demand is necessary before an action to recover the property can be maintained at the mortgagor's expense.

2. This right to demand, however, may be waived or forfeited, and is not required where the defendant has committed acts inconsistent with the title and right of possession in the mortgagee and has conducted himself in such a way as to show that a demand would be wholly unavailing.

3. In an action by plaintiff, holding a chattel mortgage, to recover the property, where plaintiff's agent testified that before suit brought he told defendant, "We had to have some money or the property, and defendant replied, 'If you get it you will get it by the law'," the charge of the court that if the jury believed the evidence, they would answer "No" to an issue as to whether there was a demand, was erroneous.

DEFENDANT'S APPEAL (2)

Counterclaim—Accounting by Mortgagee—Issues.

1. Where defendant, admitting plaintiff's right to possession of the property, under the mortgage to secure a debt of $150, answered further and alleged that there had been seized and turned over to plaintiff, under process in the cause, property to the value of $700, which had been converted and wasted by plaintiff, and tendered an issue as to the value of the property seized, to the end that he might have payment for any excess over and above plaintiff's debt, the court erred in declining to submit the issue, or some proper issue on the question of an account.

2. A counterclaim connected with plaintiff's cause of action or with the subject of the same (Rev., sec. 481, subsec. 1) should not necessarily or entirely mature before action commenced, nor even before answer filed, if the provisions of the statute permit and right and justice require that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation.

ACTION by R. L. Smith & Co. against F. J. French, heard by *Bryan, J.*, and a jury, at November Term, 1905, of CRAVEN.

Plaintiff, holding a chattel mortgage on certain personal property of defendant, a crop, a horse, etc., to secure a debt in the sum of $150, brought this action of claim and delivery for the property, and the same was taken under process in the cause and turned over to plaintiff. At the time of action brought, the note was past due and the right of foreclosure had become absolute. The note is not set out, but the amount seems to be admitted by the parties and is assumed to be $150, for the purpose of this appeal.

Plaintiff filed his complaint alleging ownership of the property and its value; defendant answered, admitting plaintiff's right to possession of the property under and by virtue of the debt and mortgage above referred to; averred that no demand for the property had ever been made on defendant before action was brought, and alleged fur-
(3) ther, that under and by virtue of process in the cause the property embraced in the mortgage to the value of $700 had been seized and turned over to plaintiff, who had wasted and converted the same, and demanded judgment against plaintiff for the value of the property over and above the amount due on the mortgage debt, and for other relief.

The court submitted an issue as to demand, declining to submit other issues, and the jury having answered the issue to the effect that no demand had been made for the property, the court gave judgment as follows: "This cause coming on to be heard, and it appearing to the court that it is admitted in the answer that plaintiffs are owners and entitled to the possession of the property described in the complaint by virtue of a certain mortgage recorded in book 4, page 20, in the office of the register of deeds of Craven County, it is considered and adjudged that plaintiffs are the owners and entitled to possession of said property by virtue of said mortgage. And it further appearing that the jury have found that no demand was made before bringing the action, it is considered and adjudged that plaintiffs pay the costs." From the foregoing judgment, the plaintiffs and defendants excepted and appealed.

D. L. Ward for plaintiff.

W. D. McIver, E. M. Green, and O. H. Guion for defendant.

PLAINTIFF'S APPEAL.

HOKE, J., after stating the case: Plaintiff assigns for error that the judge told the jury "that the demand as claimed and testified to by plaintiff was not an unequivocal demand and was insufficient in law and in substance; that if they believed the evidence they would answer the issue 'No.'" It is very generally held that where a mortgagor of a chattel sas been left and continues in possession and control of the property, and has done nothing to question or jeopardize the (4) mortgagee's right, a demand is necessary before an action to recover the property can be maintained at the mortgagor's expense. Jones on Chattel Mortgages, sec. 443; Cobley on Chattel Mortgages, sec. 509.

This is so held because in such case the possession of the mortgagor, while permissive, is rightful, and it would be unjust to subject him to cost and expense without giving him notice and opportunity to surrender the property without litigation. This right to a demand, however, may be waived or forfeited and is not required "where the defendant has committed acts inconsistent with the title and right of possession in the mortgagee and has conducted himself in such a way as to show that a demand would be wholly unavailing. 24 A. & E. (2 Ed.), 510. Our own decisions are to like effect. *Buffkins v. Eason,* 112 N. C., 162; *Moore v. Hurtt,* 124 N. C., 27.

Applying these principles to the testimony pertinent to the issues, we are of opinion that there was error in the charge of the court, as indicated in the exception. On the trial John Lancaster, a witness for plaintiff, who was acting as agent for the plaintiff at the time of the conversation, testified, among other things, as follows:

Q.: "Before you brought suit, what did you say to defendant?" "I told him we had to have some money or the property, and defendant replied, 'If you get it you will get it by the law.'"

A demand need not be made in technical form. Any words which, fairly interpreted and understood, would convey notice that present delivery is required, will serve the purpose. And so, any words on the part of defendant which, fairly understood, import a denial of plaintiff's right, or express a definite purpose not to deliver voluntarily, will put the defendant in the wrong and justify an action.

While the language of plaintiff's agent may not express with sufficient distinctness a requirement for the present delivery of the property, the question here is not so much whether a demand was (5) made by plaintiff, but whether the right to require such a demand was waived by defendant; and if, under the circumstances stated, defendants or either of them replied, "If you get the property, you will

get it by law," this can only mean that defendants did not intend to surrender the property voluntarily. Such a statement, if made then and there, put the defendant in the wrong and subjected him to an action for the property. No further demand was required.

There is error, and a new trial is awarded.

DEFENDANT'S APPEAL.

HOKE, J. Defendant, having filed an answer admitting plaintiff's right to possession of the property, under the mortgage to secure the debt of $150, answered further and alleged that there had been seized and turned over to plaintiff, under the process in the cause, property to the value of $700, which had been converted and wasted by the plaintiff, and tendered an issue as to the value of the property seized, to the end that defendant might have payment for any excess over and above plaintiff's debt. The court declined to submit the issue, confined the verdict to an issue as to a demand by the plaintiff, and gave judgment as set out in plaintiff's appeal. Defendant excepted.

While the plaintiff in his complaint alleges absolute ownership of the property and demands possession of such owner, the answer and the testimony tend to show that he has not the unqualified ownership, but only a special interest in it, to wit, the right to take it in payment of his debt and to retain only what is necessary for that purpose, when dealt with according to the contract stipulation.

(6) When the debt matured, defendant's right to an account arose as to any excess which might be realized from the property over and above the amount required to satisfy plaintiff's demand, and there is no reason why such an accounting should not be had in the present suit. In this view of the case the answer of defendant might be considered not so much a counterclaim as a limitation on plaintiff's interest in the property; and where the right to account is alleged in the complaint or asserted in the answer, and the evidence establishes its existence, the response to the issue as to ownership should not be "yes," without more, but should be "yes, to secure the debt." And the additional facts required to adjust the rights of the parties may be determined in response to other issues by the jury or by reference, as the case may require. It is the policy of The Code that all matters in controversy should be settled in one action, as far as this may be done consistent with right and justice, and the course here suggested is sustained by authority. *Taylor v. Hodges,* 105 N. C., 345; *Griffith v. Richmond,* 126 N. C., 377. Inasmuch, however, as the defendant's answer goes further and asks judgment for the excess, it may be necessary to treat the defendant's demand as a counterclaim, and, regarding it in this

light, the Court is of opinion that the issue tendered by the defendant, or some proper issue determinative of the account on a correct basis, should have been submitted, and for the purpose stated, that he might have judgment for the excess, if any were found in his favor. If plaintiff, on obtaining possession of the property, sold it, and in doing so observed the methods required by the contract, and the property was bought in good faith by a third person, it would seem that the amount realized at the sale would be the basis for a correct accounting. Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose.

In the Revisal of 1905, sec. 481, a counterclaim is described and declared to be as follows: The counterclaim mentioned in (7) section 479 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Code, sec. 244; C. C. P., sec. 101. Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts. Green on Code Pleading and Practice, sec. 815, and our own decisions fully bear out this statement of the doctrine. *Bitting v. Thaxton,* 72 N. C., 541; *Hurst v. Everett,* 91 N. C., 399; *Lee v. Eure,* 93 N. C., 5; *Wilson v. Hughes,* 94 N. C., 182; *Electric Co. v. Williams,* 123 N. C., 51.

Under the old system of procedure the relief sought in defendant's answer was sometimes obtained in equity by way of cross-bill. 4 Enc. of Pl. and Pr., page 525.

It will be noted that the requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the second class of counterclaims described in the statute—those where, in an action on a contract, the breach of an entirely different and distinct contract is set up by defendant. This, for the very

(8) just and obvious reason that when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to cost by allowing defendant to buy up claims sufficient or more than sufficient to offset his debt. But this limitation is not expressed with reference to counterclaims in the first subdivision of the statute. These must be existent and continue to exist between the same parties in the same right at the time they are offered and they must be then due, that is, not demands to become due in the future. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action—that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself.

As a matter of fact, in nearly every instance such a demand does exist when the action commences, but this is not the requirement of the statute, and if the counterclaim otherwise complies with the limitations of subdivision 1, and is not embraced in subdivision 2, it would seem to be sufficient if it matures at any time before answer filed and might be available if it matures at any time before the trial. There are several decisions in this State which seemingly conflict with this position, but a careful examination will, we think, disclose that they were either cases:

(a) Coming under the second subdivision of the statute, counterclaims by reason of separate and distinct contracts; or

(*b*) Cases which did not arise out of the transaction, the foundation of plaintiff's claim, or had no connection whatever with it; or

(*c*) Cases where no cause of action at all had accrued to defendant, either at the commencement of the action or at the time of trial. Thus, in *Satterthwaite v. Ellis,* 129 N. C., 67, to which we were referred by plaintiff's counsel, that was a cause of action to recover possession of property conveyed in a chattel mortgage before the debt was due. It was simply an action to recover possession of property, without

(9) more, and where no right to a reckoning had arisen or then existed in defendant. Any claim, therefore, for the simple use of the property arose only from the seizure, which was rightful and had no connection with the present application of the property to the payment of the debt which was not then due, nor to a right to the surplus which had not then arisen. So, in *Griffin v. Thomas,* 128 N. C., 310, this being a counterclaim for a breach of warranty, might well come under the second subdivision, and in this case there had been no breach of warranty, either at the commencement of suit or the time of trial, and so no cause of action existed in favor of defendant at all.

In *Phipps v. Wilson,* 125 N. C., 106, which was claim and delivery for personal property, the answer denied plaintiff's title and set up wrongful seizure in the action as a counterclaim; here the plaintiff's demand, as stated in his complaint, was in direct contradiction of defendant's claim, and it was necessary that it should be passed upon before defendant's right could be established. It was therefore manifest error to give judgment on defendant's counterclaim for want of a reply, when plaintiff's complaint or demand was in itself a denial of the defendant's right. As stated by the Court in its opinion, such judgment was error, while the issues raised by complaint and answer were undetermined.

In *Puffer v. Lucas,* 112 N. C., 377, the claim of defendant was for breach of an executory contract, taking its rise subsequent to the commencement of the action, came within the second subdivision, and was directly prohibited by it as a valid counterclaim.

In *Kramer v. Electric Co.,* 95 N. C., 277, an action to recover pay for services, in which an attachment was sued out and levied on defendant's property, defendant set up counterclaim for wrongfully suing out attachment. This was a collateral matter, having no connection whatever with the transaction out of which the plaintiff's demand (10) arose, and so did not constitute a counterclaim at all.

In *Reynolds v. Smathers,* 87 N. C., 24, there is an intimation that there is the difference in the two sections of the statute here pointed out, and in *Ledbetter v. Quick,* 90 N. C., 276, a more decided intimation that the very counterclaim set up here would have been available to defendant.

Even if the present opinion should be found to conflict with some former decision, it is only a question of procedure, not involving a rule of property, and we think it better that our present construction of the statute should be now declared the true one, as more in accord with the spirit and letter of our Code, which, as heretofore stated, designs and contemplates that all matters growing out of or connected with the same controversy should be adjusted in one and the same action.

A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should necessarily or entirely mature before action commenced, nor even before answer filed, if the provisions of The Code permit, and right and justice require that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation.

There was error in refusing to submit the issue tendered by the defendant, or some proper issue on the question of an account.

New trial.

Cited: Slaughter v. Machine Co., 148 N. C., 473; *Gavin v. Matthews,* 152 N. C., 196; *Perry v. Ludwick, ib.,* 377; *Smith v. French, ib.,* 754; *Hilliard v. Newberry,* 153 N. C., 110; *Cheese Co. v. Pipkin,* 155 N. C., 397; *Ludwick v. Perry,* 158 N. C., 114; *Cook v. Cook,* 159 N. C., 50; *Whitlock v. Alexander,* 160 N. C., 474; *Weston v. Lumber Co.,* 162 N. C., 202; *Carroll v. French, ib.,* 514; *Williams v. Hutton,* 164 N. C., 223; *Yellowday v. Perkinson,* 167 N. C., 147; *Carpenter v. Hanes, ib.,* 560; *McLean v. McDonald,* 173 N. C., 431; *Cooper v. Evans,* 174 N. C., 413; *Nance v. King,* 178 N. C., 577; *Cooper v. Hair, ib.,* 658; *Allen v. Salley,* 179 N. C., 151.

(11)

DAVIS v. KERR.

(Filed 3 April, 1906.)

Trusts—Evidence—Question for Jury—Argument of Counsel.

1. Where at the time of the purchase and the conveyance of real estate, the purchaser, in consideration thereof or as an inducement thereto, promises in parol to hold the legal title in trust or for the benefit of another, such promise will be enforced and trust executed, in accordance with its terms, by the court.

2. Where the mortgagee, either in person or by attorney, purchases the property mortgaged, at a public sale, and at the time promises to hold the legal title in trust or for the benefit of the mortgagor, evidence as to his conduct at and subsequent to the sale and his manner of dealing with the property, together with his declarations, are competent to be submitted to the jury upon the trial of an issue involving the existence and terms of an alleged parol agreement to hold the legal title in trust for the mortgagor.

3. In the trial of an issue involving the declaration of a parol trust, if there is any evidence fit to be submitted to the jury, the weight and probative force of such evidence is for the jury, under proper instructions by the court.

4. Witnesses testifying under subpœna are entitled to the same respectful treatment by counsel as are the parties to the cause. While the court does not approve the language used by counsel in this cause, it not appearing that the appellant was prejudiced thereby, the discretion vested in the presiding judge will not be reviewed and a new trial ordered.

DAVIS *v.* KERR.

ACTION by Junius Davis, receiver of the Bank of New Hanover, against J. D. Kerr and others, heard by *Moore, J.*, and a jury at Fall Term, 1905, of BLADEN.

McLean, McLean & McCormick for plaintiff.
E. W. Kerr, Homer Lyon, C. C. Lyon, and Shepherd & Shepherd for defendant.

CONNOR, J. We have not noted plaintiff's several exceptions to his Honor's ruling in regard to the admissibility of evidence, because the questions raised by them are presented upon the demurrer to the entire evidence and motion for judgment of nonsuit. The question pressed and argued in this Court upon the demurrer is whether the entire evidence, if true, was of that character required to engraft a trust upon the legal title to land. The plaintiff contends that proof of declarations of the holder of the title, made antecedent to or at the time of the delivery of the deed, is insufficient to establish a parol trust, unless evidenced by facts and circumstances *de hors* the deed; that in this record the only evidence of the alleged trust is the unsupported testimony of defendant Kerr that Bates promised to take the title and hold for his benefit, conveying to him when he paid the amount of the bid, with interest; that this testimony is denied by Bates; that, in this condition of the case, the question is not one of intensity, which it is conceded would be for the jury, but of character, which must be decided by the (17) court as matter of law. It must be conceded that expressions have been used by this Court which, but for later decisions, would seem to sustain the proposition of the plaintiff. In *Cobb v. Edwards,* 117 N. C., 247, it is said: "The court may declare that there is not evidence of the kind required by law to entitle the plaintiff to the relief sought." It is difficult to conceive of a case in which there would be an absence of some act or conduct of the parties connected with the language used, throwing light upon and either sustaining or contradicting the allegation of the declaration of a parol trust. The question has recently undergone so thorough an investigation, involving a review of our own and cases from other courts, that we do not deem it necessary to review our conclusions or the reasons upon which they are based, in the opinions of *Mr. Justice Walker* in *Avery v. Stewart,* 136 N. C., 426, and in *Sykes v. Boone,* 132 N. C., 199 (95 Am. St., 619). Quoting the language of Mr. Bispham, he says: "When a party acquires property by conveyance or devise, secured to himself under assurances that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the use and benefit of such other person

is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself." Bispham Eq., sec. 218. The principle is illustrated and enforced in a large number of cases in our Reports, many of which are cited and commented upon in the opinions in the cases named. It must be conceded that language is sometimes used by the Court when discussing the cases, both questions of law and fact, which are difficult to reconcile, in regard to the kind and intensity of proof required. In regard to the first question, it is not necessary to discuss the law in this appeal, because, following the principles laid down in *Avery v. Stewart, supra,* we are of the opinion that there
(18) is found in the testimony in this record evidence of such facts and circumstances as were sufficient to take the case to the jury. The relation of the parties, that of mortgagor and mortgagee, the purchase by defendant Kerr at the sale (Bates not being present and Kerr making the only bid), the fact that Kerr remained in possession, that when Mr. Gibson wished to buy a portion of the land Kerr made the trade, fixed the price, and that Bates made the deed under Kerr's directions, etc., much of which is uncontradicted and some of which is supported by Mr. Gibson—these facts are consistent with the existence of some arrangement between Bates and Kerr. It would, without some such explanation, have been a remarkable and inexcusable breach of duty on the part of Bates, representing the bank, to have permitted the land to be sold in his absence and without any representative to see that it brought the amount of the debt, or, at least, a fair price. It is equally difficult to understand why he permitted the defendant to remain in possession from April, 1890, until the failure of the bank, June, 1893, unless some agreement existed between Kerr and himself. Again, except upon the same theory, how is Kerr's interest in and conduct in regard to the sale to Gibson explained? Defendant, it seems, without question, alone paid the taxes until the plaintiff came in as receiver, and continued to do so, although the receiver also paid them. It is true that there is evidence, much of which is uncontradicted, of language and conduct on the part of defendant inconsistent with the allegation that he had paid for the land. The only purpose for which we are at liberty to discuss the testimony is to ascertain whether, admitting the proposition of plaintiff in regard to the kind of evidence required, such is found. Having passed that point and seen that the defendant was entitled to go to the jury, we may not trespass upon their domain. What weight the jury will give to the evidence, how it will be affected in their opinion by the testimony introduced by plaintiff and by
(19) defendant's conduct, are questions solely for them.

This Court has held in *Lehew v. Hewitt,* 130 N. C., 23, that in those cases where the evidence is required to be clear, cogent, and convincing, the court may not decide whether it is so, but must submit the evidence to the jury. In that respect we refer to the opinion in *Avery v. Stewart, supra,* as containing our views. We are, therefore, of the opinion that his Honor correctly submitted the evidence to the jury, and, in the absence of any exceptions, we assume that he explained to them the law and the rules by which they were to be guided in arriving at a verdict. The question of payment was one of fact, and we find no exception to his Honor's ruling in that regard. The orginal debt was due to the bank. Bates was, in the entire transaction, acting for the corporation.

Plaintiff excepts to the language of defendants' counsel in regard to the plaintiff's witness, Bates, and his Honor's course in that respect. Certainly, the language is not to be commended in a judicial investigation. It was not calculated to aid the jury or enlighten the court. Denunciation is not argument, either in the courthouse or elsewhere. There may be a wide divergence of opinion as to the proposition that "this is a sentimental age," and whether we use "mild expressions" instead of "plain, strong language." Certainly, the counsel could not have supposed that he was under the ban of sentimentalism in describing his estimate of the witness. It is exceedingly difficult, as this Court has often said, to draw the line between proper comment and abuse of the privilege conferred upon counsel. This privilege is conferred upon counsel as a sacred trust, to be used only in defense of truth and right. It does not pertain to his personal, but to his official relation as an officer of the court. Any use of it for other than the high purpose for which it is conferred is an abuse. As we have said in *Horner's case,* adopting the language of a judge of this Court, "It is (20) difficult to lay down the line, further than to say that it must, ordinarily, be left to the discretion of the judge who tries the cause," etc. While we do not sustain the plaintiff's exception, because we are not persuaded that any substantial injustice was done, we do not concur in the suggestion made in defendant's brief, "that a witness does not come under the same rule that applies to plaintiff or defendant." If there be any difference, which is not conceded, a witness should be more carefully guarded by the court from assault of counsel. The parties come voluntarily, while a witness is brought in by the process of the court. Both are entitled, as are the court and jury, to have the *testimony* discussed. It is the office of counsel to comment upon, analyze, and discuss their testimony, and in a proper, respectful manner call attention to their demeanor, relation to the parties and the cause. In discharging this duty it is due the court, the jury, the witness, and to

counsel himself, but, above all, to the cause of truth and justice, whose minister he is, to speak temperately and with a due regard to the sacred trust reposed in and the responsibility imposed upon him. Upon an examination of the entire record, we find no reversible error of the law. In view of the pleadings and testimony, we direct that the cost should be equally divided.

Affirmed.

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

Cited: Newkirk v. Stephens, 152 N. C., 502; *Rush v. McPherson,* 176 N. C., 566.

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CAMERON v. HICKS.

(Filed 3 April, 1906.)

Trusts and Trustees—Statute of Uses—Married Women—Contingent Remainders—Ouster—Adverse Possession—Joint Tenants.

1. Where a deed conveyed to a trustee and his heirs certain land "to the sole and separate use of A., wife of C., during her life, and after her death to convey the same to such children and their heirs as she may leave her surviving and to the issue and their heirs of such as may be dead, and if during the life of A. she should desire any or all of the said property conveyed in fee or otherwise, to convey the same according to her wishes, she joining in the conveyance as if she were a *feme sole,* though her husband be living": *Held,* that the trust declared was active and that the legal title upon the trust declared vested in the trustee in fee; that the mode of conveying or appointing the legal title, prescribed in the deed, applied to both the life estate and the fee; that A. was restricted to that mode and could not otherwise divest herself of her equitable estate for life or appoint the fee.

2. Upon the death of the trustee the legal title descended to his heirs with the trust impressed upon it.

3. Where an estate is conveyed to a trustee for the sole and separate use of a married woman and her heirs, and she becomes discovert, the necessity for preserving the separate estate being at an end, the statute executes the use and she becomes the absolute owner.

4. Where an estate is conveyed to a trustee to preserve contingent remainders, the statute will not execute the use.

5. The deed executed by A. and her husband to defendant was a nullity—conveyed no estate, legal or equitable, and the defendant's entrance upon the land was an ouster of the trustee and put the statute of limitations in operation against him.

6. When the right of entry is barred and the right of action lost by the trustee, through an adverse occupation, the *cestui que trust* is also concluded from asserting claim to the land.

7. Where the trustee died in 1875, and the defendant went into possession in 1880, at which time one of the trustee's children was of age, and A., the *cestui que trust*, died in 1901, leaving the plaintiffs as her children: *Held*, the trustee, who was of age, being barred, her cotrustees, who were minors, are likewise barred.

8. The trustees of a trust estate hold as joint tenants, and not as tenants in common, and when one joint tenant is barred, all are barred.

ACTION by D. A. Cameron and others against E. F. Hicks and (22) others, heard by *Ward, J.*, and a jury, at January Term, 1906, of WAYNE.

Edmund Coor on 3 May, 1870, executed to E. R. Cox, trustee, and his heirs a deed conveying the land in controversy "to the sole and separate use of Amanda M. Cameron, wife of John Cameron, during her life, and after her death to convey the same to such children and their heirs as she, the said Amanda, may leave her surviving, and to the issue and their heirs of such as may be dead, such issue to represent their ancestors and take such part as he or she would have taken if living, and if during the life of the said Amanda she should desire any or all of the said property conveyed in fee or otherwise, to convey the same according to her wishes, she joining in said conveyance as if she were a *feme sole*, though her husband be living." Said deed was duly recorded in the office of the register of deeds of Wayne County. The said E. R. Cox, trustee, died 18 June, 1875, leaving surviving certain children and grandchildren, all of whom were either infants or married women, and so remained to the beginning of this action, 11 August, 1902, except one daughter, Florence Virginia Cox, who became 21 years of age 24 October, 1880, and was married to T. J. Newsome 9 December, 1880. On 28 October, 1880, John Cameron and his wife, Amanda Cameron, executed a deed for the land in controversy to the de-
(23) fendant E. F. Hicks, sufficient in form to convey said lands in fee simple with full covenants of warranty. There was evidence tending to show that the said Hicks went into possession of said land, described in said deed, immediately after its execution, and that he and the other defendants claiming under him have remained in possession until the beginning of this action. The deed from Cameron and wife to Hicks recited a consideration of $600. John Cameron died June, 1881. His widow, Amanda, died March, 1901, leaving surviving six children, all of whom, with the exception of A. F. Cameron and J. D. Cameron, the last of whom died since the beginning of this action, are parties

plaintiff herein, together with the children of J. D. Cameron. That all the living children and the children of such as are dead of E. R. Cox, trustee, are parties defendant herein, together with the grantees of E. F. Hicks, to whom portions of the said lands were conveyed as aforesaid. The court charged the jury that if they believed the evidence, they should answer the issues for the plaintiffs, to wit: "That they were each entitled to one-sixth undivided interest of the land in controversy." Defendants excepted and assigned the said instruction as error. From a judgment upon the verdict, defendants appealed.

Dortch & Barham, W. S. O'B. Robinson, Aycock & Daniels for plaintiffs.

W. C. Munroe for defendants.

CONNOR, J. The record, with the exhaustive and well-considered briefs in this appeal, clearly present the questions upon which the rights of the parties depend.

The plaintiffs suggest that it is not necessary for them to combat the principle decided in *Kirby v. Boyette,* 118 N. C., 244. They say that the cases may be distinguished. In *Kirby's case* the declaration
(24) of the trust was for the separate use of the married woman and her heirs, whereas, here, it is for "the sole and separate use of Mrs. Cameron for and during her natural life, and at her death to convey to her children, then living, and the issue of such as were dead." This language, it is insisted, brings the case directly within the principle announced in *Swann v. Myers,* 75 N. C., 585. *Chief Justice Pearson* was clearly of the opinion, in that case, that "a married woman owning an estate for life in a trust estate has the *jus disponendi,* unless there be a restraint upon the power of alienation." "This," he says, "is laid down in all the books." No authorities are cited. The trust in that case was for "the separate use and behalf" of Mrs. Swann for her life, and then over. It is difficult to reconcile this language with that of *Manly, J.,* in *Knox v. Jordan,* 58 N. C., 175. In that case the English rule is discussed, the cases decided by this Court reviewed, resulting in the conclusion that the *feme covert* may alien or encumber her separate estate in execution of powers conferred upon her by the terms of the deed, and if not restricted by the terms may, under the authority of *Frazier v. Brownlow,* 38 N. C., 237, charge the income or profits, etc. The question in regard to the wife's power to deal with her separate estate was before the Court in *Withers v. Sparrow,* 66 N. C., 129, where it was held that she could, "with the assent of the trustee," charge it.

Light is thrown upon the language of *Pearson, C. J.,* in *Swann v. Myers,* by referring to his dissenting opinion in *Harris v. Harris,* 42 N. C., 120, wherein it was held that a *feme covert* entitled to a separate personal estate, in the absence of any restraint in the deed, could dispose of it as a *feme sole,* whether there was or was not a trustee. In that case a slave had been conveyed to a trustee for the separate use of a married woman during her life, with remainder over, etc. The Court, by *Ruffin, C. J.,* held that, in the absence of any restraint upon her right of alienation, she could sell the slave. The decision is put upon the English authorities, citing, also, *Newlin v. Freeman,* 39 (25) N. C., 312, and *Dick v. Pitchford,* 21 N. C., 480. *Judge Pearson* vigorously dissented from the doctrine of "implied power" in the wife, etc. He says: "As the *feme* had only a separate use *for life* in a negro woman . . . of no annual profit, and as, for her maintenance, she had a right to dispose of the profits, and a life estate is only, in fact, a right to the profits, I should have been willing to put this case upon the ground that in disposing of her life estate she disposed of the profits only." He sets forth at length his dissent from the doctrine that, in the absence of any express power to sell the separate estate, the wife may do so as a *feme sole. Ruffin, J.,* in *Hardy v. Holly,* 84 N. C., 661, referring to the question of division of opinion in *Harris v. Harris,* says: "When the question next arose in the case of *Knox v. Jordan,* the Court, as then constituted, without division and without any sort of reservation, repudiated the doctrine of the English courts and adopted that which prevailed in most of the courts of the States; and whether this was wisely done or not, that case has been too often approved and doubtless too often acted upon in matters intimately connected with the interest and comfort of families to admit of its correctness being now called into question." Although the learned judge writing the opinion gave to the question and the authorities, as was his custom, a most careful investigation, the case of *Swann v. Myers* is not cited, nor do we find that the learned counsel who argued the case for the plaintiff, in their exhaustive brief, called it to the attention of the Court. In *Hardy v. Holly, supra,* a mode was prescribed in the deed for the disposition of the property. We have carefully and anxiously examined the authorities and are unable to find any recognition, in those courts which reject the English doctrine, of a distinction between the power of a *feme covert* to convey her "equitable life estate" and her equi- (26) table estate in fee. Professor Pomeroy says that the American courts, in regard to this question, may be divided into two classes. "In the first, the courts have adopted the *principle* of the English doctrine. They regard the wife's *jus disponendi* as resulting from the fact of an

equitable estate over which she is, partially, at least, a *feme sole,* and not as resulting from the permissive provisions of the instrument creating such separate estate. It follows, therefore, when the instrument creating the separate estate imposes no express restrictions, that the wife has a general power of disposing of or charging it, even though no such authority is in terms conferred. This power of disposition, however, does not generally extend to the *corpus* of the land for her separate use in fee; it is confined to personal property, the rents and profits of the land, and *perhaps to her life estate in lands.* In the States composing the second class, the courts have widely departed from the principle of the English doctrine. They regard the wife's power over her separate estate as resulting, not from the existence of an equitable separate estate itself, but from the permissive provisions of the instrument creating such estate. They have accordingly adopted the general rule that a married woman has only those powers of disposing of or charging her separate property which are expressly, or by necessary implication, conferred upon her by the instrument conveying the property or creating the trust, and in determining the extent of these powers the terms of the instrument are to be strictly construed." 3 Pom. Eq. (3 Ed.), 1105; Bispham Eq., sec. 105. Both these writers place North Carolina in the second class. The dissenting opinion of *Judge Pearson* in *Harris v. Harris, supra,* strongly maintains this doctrine. As we have seen, this dissenting opinion was adopted in *Knox v. Jordan,* and it is upon that decision the doctrine of *Hardy v. Holly* is based. In none of the cases following *Hardy v. Holly* is there any reference to *Swann v. Myers,* or suggestion that as to the equitable life estate the *feme covert* may convey without the intervention of her trustee, when the deed requires his coöperation. It is not improbable that, in writing the opinion in *Swann v. Myers,* the *Chief Justice* had in mind the English doctrine by which the *feme covert* was permitted to charge the anticipated income, when not restrained, from her separate equitable estate, which he contrues in his dissenting opinion in *Harris v. Harris* as enabling her to dispose of the entire life estate. However it may be, it would seem clear that, in this case, the distinction cannot be sustained. It will be observed that when the trust is declared "for the sole and separate use," or words equivalent thereto, of a married woman, the courts have uniformly held that, because of the presumed intention of the maker of the instrument, the trust is active and the statute does not execute the use. When, as in *McKenzie v. Sumner,* 114 N. C., 425, there is a simple declaration of a trust, as pointed out by *Shepherd, C. J.,* "there is no reason why the legal title is not vested in the *feme covert* by the statute of uses." Whether the rule should have been

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modified, by reason of our constitutional provision, in regard to the status of married women, as suggested in *Perkins v. Brinkley,* 133 N. C., 154, it is useless to discuss. However this may be, the trust declared by the deed from Coor to Cox is active and the necessity for the separation of the legal from the equitable estate manifest. There were contingent remainders to be preserved and powers to be executed. This question is discussed and so decided, in accordance with all of the authorities, in *Swann v. Myers, supra.* It may be that the correct doctrine is to be found by reading the language of *Ruffin, J.,* in *Hardy v. Holly, supra,* in the light of what is said by *Smith, C. J.,* in *Norris v. Luther,* 101 N. C., 196, and *Clayton v. Rose,* 87 N. C., 106. This would seem to lead to the conclusion that, in the absence of any permissive provision in the deed, the wife could not convey her equitable separate estate, either for life or in fee, as a *feme sole,* but could do so in the manner prescribed for the conveyance of her statutory separate (28) estate, by joining with her husband and privy examination. However this may be, we are not called upon at this time to enter upon this debatable ground.

There is another view of this case which we think conclusive upon the power of Mrs. Cameron to convey any interest in the land. After declaring the trusts, the grantor directs the trustee, "if during the life of the said Amanda she should desire any or all of said property conveyed in fee or *otherwise,* to convey the same according to her wishes, she joining in said conveyance as if she were a *feme sole,* though her husband may be living." In *Swann v. Myers, supra,* the will gave to the trustees the power and directed them "in the soundness of their discretion" to "join with the *cestuis que trust* in making any conveyance of the above property." *Judge Pearson* writing for the Court, construed this language to be a restraint upon the power of alienation as to the fee. This ruling, so far as it refers to the fee, is in harmony with all of our decisions and those of other States, which hold that when a mode of alienation is prescribed in the instrument, it must be followed. *Hardy v. Holly* and *Norris v. Luther, supra; Towles v. Fisher,* 77 N. C., 437; *Mayo v. Farrar,* 112 N. C., 66; *Monroe v. Trenholm, ib.,* 634. This is the only logical conclusion, from the premise stated in the cases in this Court, at which it is possible to arrive.

It will be observed that in our case the mode is expressly prescribed, and applies to conveyances "in fee or otherwise." We therefore do not depart from the principle announced in *Swann v. Myers,* in that respect, in holding that there is to be found in the deed of settlement an express mode prescribed for disposing of either the life estate or the fee. That such was the intention of the maker of the deed is, we think, seen in the

fact that the husband is not required to join in the conveyance, but the wife is to act in that respect as if she were "a *feme sole,* though her husband may be living." It was the manifest purpose of Mr.
(29) Coor to remove Mrs. Cameron, in respect to the sale of this property, from both the influence and protection of her husband, and vest in the trustee the sole power to convey "in fee or otherwise, according to her wishes, she joining in said conveyance." To permit her and her husband to convey the land thus secured to her, without the intervention of the trustee, would be doing violence to the express language and manifest intention of the maker of the deed of settlement. If the land had been conveyed directly to Mrs. Cameron, the Constitution imposed upon her power of alienation the necessity for the assent of her husband. The deed under which she acquires her equitable estate—the right to the sole and separate use of the land—substitutes the trustee for the husband in respect to the conveyance. *Pippen v. Wesson,* 74 N. C., 437; *Scott v. Battle,* 85 N. C., 184.

It is well settled that upon the death of the trustee the legal title descended to his heirs, with the trust impressed upon it. *Clayton v. Rose, supra;* Perry on Trusts, 341. It seems equally well settled that if the trustee, being clothed with a power, as in this case, of conveying the legal title by direction and appointment of the *cestui que trust,* dies before its execution, the power is gone and cannot be executed. Sugden on Powers, 319. In *Barber v. Cary,* 11 N. Y., 397, it is said: "But the power could only be executed on the precise conditions prescribed by the terms of its creation, viz., by and with the consent of H. The first question is whether the death of H., which occurred before the execution of the power, was fatal to the conveyance. The rule of law is settled that when consent of third persons is required to the execution of the power, that, like every other condition, must be strictly complied with. If the person whose consent is necessary die before the execution of the power and without having assented, the power is gone, although his death was the act of God." 22 A. & E. (2 Ed.), 1122. It would seem, therefore, that upon the death of the trustee the condition
(30) upon which Mrs. Cameron could execute the power to direct the conveyance was gone. It may be that no discretion was vested in the trustee, but that he was directed to convey "in fee or otherwise, according to her wishes," Mrs. Cameron may have had, either by the clerk under the statute or by a civil action in the nature of a bill in equity, another trustee appointed with power to convey as she directed. This was not done, and her deed cannot operate as the exercise of her power of appointment. *Towles v. Fisher, supra.*

The suggestion that because the heirs of Mr. Cox were infants, the legal estate did not descend to them charged with the trusts, is met by what is said in *Clayton v. Rose, supra:* "After the death of the original trustee, and when the legal estate had descended, clothed with the trust, to his infant children," etc. It is suggested that upon the death of Mr. Cameron the statute of uses operated by "Legal Chemistry" or "Parliamentary Magic," to execute the use and unite the legal and equitable estates in Mrs. Cameron for life, leaving to the trustee or his heirs the remainder in fee for the purpose of preserving the contingent remainders, and conveying to those who might be entitled upon Mrs. Cameron's death. It is well settled that when there is a conveyance to trustees for the sole and separate use of a married woman and her heirs, and she becomes discovert, the necessity for preserving the separate estate being at an end, the statute executes the use and she becomes the absolute owner. *Monroe v. Trenholm, supra; Stacy v. Rice,* 27 Pa. St., 75; Perry on Trusts, 653. It is equally true that where an estate is conveyed to trustees to preserve contingent remainders, the statute will not execute the use. The legal title must remain in the trustee, because as in this record, no one in existence could call for the legal title. It was uncertain who would be entitled upon the death of Mrs. Cameron, and this uncertainty continued until the moment of (31) her death. *Latham v. Lumber Co.,* 139 N. C., 9. In *Battle v. Petway,* 27 N. C., 576, *Ruffin, C. J.,* says: "Beyond doubt, equity would not compel nor allow the trustee to convey the legal estate to the tenant for life, but require him to retain it for the security of the remainderman. And so in case of a contingent limitation over, it would be the duty of the trustee to retain the title and control over the possession of the trust property; and the court of equity will not take it from him." We therefore conclude that the trust declared in the deed from Coor to Cox was active, and that the legal title upon the trusts declared vested in Cox in fee; that the mode of conveying or appointing the legal title, prescribed in the deed, applied to both the life estate and the fee; and that Mrs. Cameron was restricted to that mode and could not otherwise divest herself of her equitable estate for life or appoint the fee.

The deed executed by Mrs. Cameron and her husband to Hicks was therefore a nullity, conveyed no estate, either legal or equitable. Hicks' entrance upon the land was therefore an ouster of the trustee and put the statute of limitations in operation. At the expiration of the statutory period his possession would have ripened into a perfect title, both as against Cox, if living, and his *cestui que trust* and her infant children. This rule of law is too well established and has been too often enforced with its variant results to be now called into question. *Smith, C. J.,* in

Clayton v. Rose, supra, in applying the principle, where it was sought to bar the *cestuis que trust,* said: "Nor do we think the defendants can protect themselves under a seven years adverse possession with color of title. It is conceded that when the right of entry is barred and the right of action lost by the trustee, or person holding the legal estate, through an adverse occupation, the *cestui que trust* is also concluded from asserting claim to the land. And the correlative must be accepted, that
(32) when the trustee is not barred, neither can the *cestui que trust* be, since as against strangers they are identified in interest. The alleged hostile possession by the defendants began after the death of the original trustee, and when the legal estate had descended clothed with the trust to his infant children, and this disability prevents the statute from starting to their prejudice." In some cases it operates to destroy and in others to preserve titles. Courts may not shrink from enforcing it, and thereby introduce confusion, on account of hard cases. *Kirkman v. Holland,* 139 N. C., 185; *King v. Rhew,* 108 N. C., 696. The doctrine is clearly stated and treated as settled in the opinion from which the plaintiffs seek safety, in *Swann v. Myers, supra.* The resourceful and learned counsel for plaintiffs say that the rule does not militate against their contention in this case, because in *King v. Rhew* the wife was not, as construed by this Court, a party to the deed, while here she was a party, executed it, and submitted to a private examination as provided by the statute. The counsel call to our attention the language of the Court in that case: "The deed, then, can only be regarded as that of the husband; as he had no interest which he could have conveyed, the trustee could have maintained an action at any time against the defendants for the possession of the property." The difficulty in the argument, based upon this language, is found in the fact that a deed made by a married woman otherwise than as she is empowered by the law is as much a nullity as if she had not signed at all, or as if she had signed a piece of blank paper. *Askew v. Daniel,* 40 N. C., 321.

Ruffin, J., in *Scott v. Battle, supra,* speaking of the deed of a married woman without compliance with the provisions of the statute, says: "It prescribes the terms, and without their strict observance the act stands as it would at common law—absolutely null and void." In *Green v. Branton,* 16 N. C., 500, it is said that her deed, not executed as the law requires, is an absolute nullity under which no equity
(33) whatever can be set up. *Towles v. Fisher,* 77 N. C., 438; *Jones v. Cohen,* 82 N. C., 75. If the trustee had sued Hicks for the possession, it is manifest that the deed of Mrs. Cameron could not have been used to bar his action. This is the test by which to ascertain the

character of Hicks' possession as against the trustee, and thus tested, we are of the opinion that such possession was adverse to the trustee, and the statute of limitations was put into operation against the trustee. The reasoning of the Court in *Swann v. Myers,* as to the effect of the deed made by Mrs. Swann upon the right of the trustee to recover possession, is based upon the theory that her deed conveyed the equitable life estate, and is therefore not applicable here. The plaintiffs say that Cox having died in 1875, the legal title descended to his heirs, who were at that time infants and were unable to execute the trust, convey the legal estate, or protect the possession. This is true, and as said in *Clayton v. Rose, supra,* the statute did not run against them; their disability inured to the benefit of the *cestui que trust* and protected their estate against the adverse possession of Hicks. The rights of Mrs. Cameron and her children were absolutely secured by the infancy of the trustees, and no act, either of themselves or persons claiming under them, could destroy or affect their estate. Conceding that the power to convey the estate was suspended by the death of Cox, during the minority of his heirs, and that no ouster under color or otherwise could ripen into title against them, the plaintiffs have no cause to complain of the law which secured their estate from harm by acts of themselves or strangers.

We are thus brought to a consideration of the last question presented by the exceptions: Are the trustees, heirs at law of Cox, barred of their right of entry? At the date of Hicks' entry, 28 October, 1880, they were all, except Florence, under disability, and have so continued until the date of summons, 11 August, 1902. Florence reached her majority 24 October, 1880, and married 9 December, 1880. Hence, for (34) one month and eleven days she was under no disability. The statute ran against her, and it is elementary learning that when the statute begins to run no subsequent disability interferes with it. Hicks and those under him have, therefore, been in the adverse possession twenty-one years and a few months and prior to the beginning of this action. If the heirs of Cox, trustee, held the legal estate as tenants in common, they would recover in respect to their separate interests. The defendants insist that they held as joint tenants, and not as tenants in common. This is not controverted by plaintiff and seems to be sustained by the authorities. "Trust property is generally limited to trustees as joint tenants. . . . Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor. If he has made no disposition of the estate by will or otherwise, it devolves upon his heirs, if real estate, and upon

his executors or administrators, if it is personal estate." Perry on Trusts, 343; 17 A. & E. (2 Ed.), 650; Revisal, sec. 1580. It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the cotenants, as in the case of joint tenancy and coparcenary, is joint, the action must also be joint, and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be separately and distinctly pursued. Joint tenants being seized *per my et per tout* and deriving but one and the same title, must jointly implead and be impleaded. If twenty joint tenants be, and they be disseized, they shall have, in all their names, but one assize, because they have but one joint title." Contenancy, 329. To the same effect is Sedgwick and Wait Trials, etc., sec. 302. It was at one time held in this State that two tenants in common could not join in one demise, because there was no unity of title—one might recover
(35) and the other fail. It was afterwards held, for the reason set out by *Ruffin, J.*, in *Hoyle v. Stowe,* 13 N. C., 318, that they could join in one demise. He says: "It is the universal rule that the title must be truly stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title, the plaintiff must fail." He says that this is "common learning." An examination of the opinion shows the ground upon which tenants in common are permitted to make a joint demise and recover in respect to their interests. *Allred v. Smith,* 135 N. C., 443. The difference is in this: Joint tenants must join in one demise because of the essential unities; tenants in common may join, or, if they prefer, may sue separately, because there is no unity of title. It would seem to follow that joint tenants must recover in respect to their title, and if they fail in that, they cannot recover at all. This is the doctrine of this Court. *Riden v. Frion,* 7 N. C., 577, was an action by three joint owners of a slave. Two of the plaintiffs were barred, the third under disabilities. *Taylor, C. J.,* said: "Whenever the statute of limitations is a bar to the recovery of one of the parties, in such action, it operates against the whole, because the disability of one does not save the rights of the others." The case was approved in *McRee v. Alexander,* 12 N. C., 321, *Henderson, J.,* saying: "In a joint action brought by several, when the defendant avails himself of the bar given to such action by the statute of limitations, all the plaintiffs must bring themselves within some of the savings of the statute; otherwise, the bar is not avoided. The decision on this point are uniform, as far as I know, and I shall not now inquire whether they are founded on the technical reason that, the action being joint, all or none of the plaintiffs must recover, otherwise the judgment does not pursue

the writ and declaration, or whether on the very words of the statute." The learned justice severely criticises the rule. In that case the lessors of the plaintiffs were tenants in common, and the rule so (36) justly criticised, as applied to tenants in common, no longer obtains, although a joint demise be laid, or, under our Code practice, the several interests be shown, either in the complaint or the evidence, the plaintiffs recover accordingly. This cannot be so when the plaintiffs are joint tenants, they must all recover or none can do so. *Montgomery v. Wynns,* 20 N. C., 667. In *Weare v. Burge,* 32 N. C., 169, the same rule is recognized. The statute, Revisal, sec. 374, changes the rule in regard to personalty. (See Clark's Code, sec. 173.) It does not affect the law as to real property. *Expressio unius exclusio alterius.* When we go beyond our own Reports we find the same principle enforced. *Marstella v. McLean,* 7 Cranch., 156, was an action of trespass. *Judge Story* held, for the Court, that if one of the plaintiffs was barred, all were; that if they were compelled to join in the action, that result necessarily followed. 1 Rose's Notes, 156. In *Hardeman v. Sims,* 3 Ala., 747, it is said: "It was contended on the argument that the exception in the statute in favor of infants would take the case out of the statute, notwithstanding one of the complainants was barred by the statute. We understand it to be the settled rule that when a joint right of action accrues to several, the right must exist in all at the time of the action brought. When the statute begins to run as to one of several parties to a joint action, it runs as to all."

The law was so ruled in *Perry v. Jackson,* 4 Term, 516. It is true that the contrary doctrine is laid down in 19 A & E. (2 Ed.), 182. It will be found that the North Carolina cases cited do not sustain the text as construed by plaintiff's counsel. In *Caldwell v. Black,* 27 N. C., 463, the plaintiffs were tenants in common, and while, under the rule prevailing in this State, they might join in one action, yet when thus joined they recovered in accordance with their several rights. In *Carson v. Carson,* 122 N. C., 546, the plaintiffs were tenants in (37) common.

We have given to this subject a most careful consideration, examining the authorities and decided cases from other courts. They are not uniform. In several States it is held that where there is a joint action by tenants in common, if one is barred, the action fails as to all. The true rule would seem to be that, except where the necessity for all parties in interest to join "is founded upon the nature of the interest in the particular property," the plaintiffs recover in accordance with their rights as developed upon the trial; in other cases they must all show a right to recover when the action is brought. Statutes have been enacted

in many of the States, permitting any one or more joint tenants and tenants in common to sue. Pomeroy Code, Rem., 137, note; 11 Am. and Eng. Enc. Pl. and Pr., 771. The possession of Hicks and those defendants claiming under him has continued for more than twenty-one years, during all of which time the statute has been in operation against Florence Cox, now Mrs. Newsome. She is clearly barred, and the conclusion must follow that her cotrustees are also barred.

We think the statute well pleaded. The claim of both plaintiffs and defendants is based upon what may be termed "technical rules of the law." If we should adopt the plaintiff's contention that in respect to this property Mrs. Cameron should be treated as a *feme sole,* there would seem to be no very good reason why we should not find in her deed to Hicks a clear intention to execute the power conferred upon her to convey in fee, and aid its defective execution by adjudging the holders of the legal title trustees for the benefit of the defendants, who appear to be purchasers for value. The plaintiffs were objects of Mr. Coor's bounty, contingent upon Mrs. Cameron's failure to exercise the power of appointment. There is much force in the facts shown by the defendants to sustain an equitable estoppel upon the plaintiffs.

(38) The case is frought with perplexities. Many of the principles of the common law regarding titles to real property are difficult to sustain upon the "reason of the thing." We find wisdom in the language of *Earle, J.,* in *Bertles v. Nunan,* 92 N. Y., 152. To the suggestion that the reason upon which a common-law rule was founded had ceased to exist, he said: "It is impossible now to determine how the rule of the remote past obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist or is not discernible, and yet on that account courts are not authorized to disregard them. They must remain until the Legislature abrogates or changes them, like statutes founded upon no reason, or reasons that have ceased to operate."

When men undertake to place their property out of the usual and fixed channels of alienation and descent, it frequently happens that their best considered plans fail to be accomplished, or, if accomplished, bring about the results not anticipated. There has been no more prolific source of litigation, with difficult questions to be solved, than the creation of trusts for the benefit of married women, and attempting to control the passing of the property into the possession of posterity. To the end that the rights of the parties may be adjudged upon the principles herein laid down, there must be a

New trial.

Cited: *Smith v. Moore,* 142 N. C., 298; *Cherry v. Power Co., ib.,* 409, 410; *McAfee v. Green,* 143 N. C., 416; *Webb v. Borden,* 145 N. C., 197, 201; *Brown v. Brown,* 168 N. C., 13; *Mining Co. v. Lumber Co.,* 170 N. C., 277; *Lee v. Oates,* 171 N. C., 726; *Smith v. Witter,* 174 N. C., 618; *Freeman v. Lide,* 176 N. C., 437, 439; *Wallace v. Moore,* 178 N. C., 177; *Hayden v. Hayden, ib.,* 264.

(39)

BUCHANAN v. HARRINGTON.

(Filed 3 April, 1906.)

Deeds—Estoppel—After-acquired Interest—Partition—Reformation and Correction—Pleadings—Amendments.

1. Where a deed was sufficient in form to convey the grantor's whole interest, an one-fourth interest afterwards acquired by the grantor will, by way of estoppel or rebutter, inure to the use and benefit of the grantee and thereby vest the entire estate in him.
2. In proceeding for partition of land, where the petitioner merely alleged the ownership of five-eighths, evidence tending to show a mutual mistake in the deed under which defendant claimed was properly excluded.
3. If a party demands equitable relief, he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction.
4. In a proceeding for partition, the petitioner might have alleged mutual mistake, by amendment in the Superior Court after the case had been transferred, though it was not originally cognizable by the clerk before whom the proceeding was commenced.

SPECIAL PROCEEDING for partition by J. B. Buchanan and others against A. B. Harrington, heard by *Ferguson, J.,* and a jury, at December Term, 1905, of MOORE.

The petitioners allege that they are tenants in common with the defendant of a tract of land containing 24 acres, they owning five-eighths thereof and the defendant the other three-eighths. The defendant admitted the tenancy in common, but denied the allegation as to the interest of the respective parties, alleging, on the contrary, that the petitioners owned one-half and he the other half. The land formerly belonged to W. B. Watson, and at his death descended to his four children, Virginia, Willie, Garner, and Bessie Watson. The first three for the consideration of $150 conveyed the land (not stating their interest therein) to the *feme* plaintiff on 25 October, 1901, with (40)

full covenants of seizin and warranty. There is nothing in the deed to indicate that they did not have the entire estate in the land. On 11 March, 1902, the plaintiffs conveyed a one-half interest in the land to the defendant, describing it as "containing 24 acres more or less, and adjoining the lands of L. Acree and others, the same being the lands of Virginia Watson, Willie Watson, and Garner Watson, heirs of W. B. Watson, deceased, deeded to L. B. Buchanan on 25 October, 1901." It appears further that on 14 March, 1903, Bessie Watson, for the consideration of $37.50, conveyed her one-fourth interest in the land to the *feme* plaintiff. Issues as to the interests of the respective parties were submitted to the jury, who found for the defendant that he owned a one-half interest in the land. At the trial the plaintiffs proposed to ask the witness, T. N. Campbell, "what land was the deed (to the defendant) intended to convey?" it being the purpose to show by the witness that it was intended to convey one-half of the interest which they alleged that they then had, that is, three-eighths and not one-half of the whole. The plaintiffs then proposed to prove by the witness that it was understood and agreed by the parties, at the time the deed was executed, that the petitioners were selling only one-half of three-fourths, and the defendant was buying one-half of three-fourths. All of this proposed evidence was excluded, and the petitioners excepted.

The court charged the jury that if they believed the evidence they should answer the first issue, as to the *feme* petitioner's interest, one-half, and the second issue, as to the defendant's interest, one-half, which they did. Judgment was entered accordingly, and the petitioners appealed.

W. E. Murchison for petitioners.
Seawell & McIver and W. J. Adams for defendant.

(41) WALKER, J., after stating the case: The parties seem to have conceded that the proper construction of the deed from the petitioners to the defendant is in accordance with the defendant's contention, that it conveyed one-half of the entire interest in the lands, and the words, "the same being the lands of Virginia, Willie, and Garner Watson, deeded to L. B. Buchanan," are merely descriptive of the land and cannot have the effect to limit or cut down the interest which would otherwise pass by the deed, and this we think was a proper concession. Indeed, the very words we have quoted import that the entire interest in the land belonged to the three grantors named in the deed, rather than the contrary. If it be suggested that the *feme* petitioner did not, at the time she conveyed, own the entire estate, but only three-fourths, the answer is that the law will not permit this to change the construction

of the deed as it is written. Matter *de hors* cannot, under the circumstances of this case, be considered for any such purpose. If the deed was sufficient in form to convey one-half of the whole interest, the one-fourth interest afterwards acquired by the *feme* plaintiff from Bessie Watson would, by way of estoppel or rebutter, inure to the use and benefit of the defendant and thereby vest one-half of the entire estate in him. *Taylor v. Shufford,* 11 N. C., at p. 127 (opinion of *Judge Henderson*); *Hallyburton v. Slagle,* 132 N. C., 947; *Carter v. White,* 134 N. C., 466; *Wool v. Fleetwood,* 136 N. C., 467.

The proposed testimony of the witness Campbell was properly ruled out. It was necessarily offered on the theory that the deed of the petitioners to the defendant passed one-half of the entire interest in the land, and that it was necessary to correct it in order that it should speak the truth or conform to the real agreement and intention of the parties. The evidence could have been relevant to the controversy upon no other ground. But the pleadings do not raise any issue to which it was pertinent. If the petitioners desired to have the deed reformed, relying upon their right to the equity of correction, this matter should have been set up by proper averment and a corresponding issue submitted (42) to the jury. They cannot be heard upon such a matter under the general allegations of their pleading, they merely alleging the ownership of five-eighths. If a party demands equitable relief, he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction. *Farmer v. Daniel,* 82 N. C., 152; *McLaurin v. Cronly,* 90 N. C., 50; *Bodenhamer v. Welch,* 89 N. C., 78; *Tuttle v. Harrill,* 85 N. C., 456. If the petitioners had alleged the mutual mistake and prayed for a correction of the deed, so as to show that it passed only a three-eighths interest, the testimony offered by them might have been competent. Such equitable matter might have been alleged by amendment in the Superior Court after the case had been transferred, though it was not originally cognizable by the clerk before whom the proceeding was commenced. *Roseman v. Roseman,* 127 N. C., 497; *Ewbank v. Turner,* 134 N. C., 80, and cases cited.

In the present state of the pleadings the case was in all respects correctly tried.

No error.

Cited: Webb v. Borden, 145 N. C., 194; *Windley v. Swain,* 150 N. C., 361; *Buchanan v. Harrington,* 152 N. C., 335; *Cooley v. Lee,* 170 N. C., 22; *Ford v. McBrayer,* 171 N. C., 425; *James v. Hooker,* 172 N. C., 783; *Olds v. Cedar Works,* 173 N. C., 165; *Baker v. Austin,* 174 N. C., 434; *Holden v. Houck,* 176 N. C., 239; *Bourne v. Farrar,* 180 N. C., 140.

(43)

MAIN v. GRIFFIN.

(Filed 3 April, 1906.)

Contracts—Sales—Warranty—Conditions.

A contract of sale may fix conditions precedent to the existence of any rights under the warranty, if they are reasonable. A failure by the buyer to comply with such conditions is fatal to his remedy for a breach of the warranty, whether he institutes an action himself or sets up the breach in defense to an action for the purchase money.

ACTION by W. F. Main Company against Griffin, Bynum & Co., heard by *Ferguson, J.*, and a jury, at December Term, 1905, of MOORE.

Action to recover the price of certain merchandise sold defendant by plaintiff under a written contract. Certain issues were submitted to the jury. From the judgment rendered, plaintiff appealed.

U. L. Spence for plaintiff.
Seawell & McIver for defendant.

BROWN, J. The jewelry was sold to defendant under the terms of a written contract, the execution of which was proven and the contract was introduced in evidence. According to the terms of this contract the defendant waived all right to claim that the goods did not come up to sample or were not according to order, unless defendant complied with the terms of the warranty and exchange in the contract. According to the terms of this obligation the plaintiff was entitled to notice of any alleged defect in the goods as to quality and to be given an opportunity to remedy any deficiency before defendant could repudiate the entire contract. This is a condition precedent to any action or counterclaim upon the part of the defendant looking to a recovery for a breach
(44) of the warranty upon its part. *Shepherd v. Larkin,* 79 Mo., 264. The contract of sale may fix conditions precedent to the existence of any rights under the warranty, if they are reasonable. A failure by the buyer to comply with such conditions is fatal to his remedy for a breach of the warranty, whether he institutes an action himself or sets up the breach in defense to an action for the purchase money. This is substantially what is held by the authorities. 30 A. & E. (2 Ed.), p. 199, and cases cited; *Nichols v. Wyman,* 71 Iowa, 160; *Furneaux v. Esterly,* 36 Kan., 539. Not only does the answer fail to set up any such defense, but defendant's own evidence shows that no complaint whatever of any defects in the jewelry was ever made by defendant from the date of the receipt of it to the time of the trial. On the contrary, on 16 June, 1902, defendant notified plaintiff that "goods just

received and found all O. K." Independent of any contract, the law would not, after such notice to plaintiff, permit defendants to keep jewelry in possession for more than a year without further complaint to plaintiff as to quality or quantity and then defend upon the ground that the jewelry did not comply with the contract. In admitting evidence of a breach of warranty as to the quality of a few of the articles sold, over the several objections and exceptions of the plaintiff, his Honor erred, as it plainly appears that defendant made no such complaint, and did not pretend to have complied with the terms of the contract relating to warranty and exchange, and no such defense is pleaded in the answer. The real and only defense set up in the answer is to the effect that the defendants were induced to enter into the contract by the false and fraudulent representations of plaintiff's agent. Yet the record discloses that no issue was submitted to the jury embodying such defense, and no evidence whatever appears in the record tending to support it. The plaintiff specifically excepted to the submission of the seventh issue. We think this exception also well taken. The issue is in these words: "What sum, if any, is due the defendants by reason of (45) defendants' counterclaim?" This issue presupposes that the allegations of the "further defense" pleaded in the answer have been established. These allegations are not pleaded as a counterclaim, but more properly as a "defense." If the defendant should be able to make good such allegations, then it could recover as a counterclaim such damages as it has sustained, which in the last paragraph of the answer are set out. But it is plain that before he can recover the $13 damages he must prove the facts alleged in the first and second paragraphs of his further defense.

We do not think the case was tried upon the issue raised by the pleadings.

New trial.

HOKE, J., concurs in result.

Cited: Main v. Field, 144 N. C., 309; *Piano Co. v. Kennedy,* 152 N. C., 197; *Mfg. Co. v. Lumber Co.,* 159 N. C., 611; *Oltman v. Williams,* 167 N. C., 314; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Frick v. Boles, ib.,* 657; *Farquhar v. Hdw. Co.,* 174 N. C., 373; *Poe v. Brevard, ib.,* 715.

MILLER v. RAILROAD.

(Filed 3 April, 1906.)

Contracts—Lex Loci Contractus—Fellow-servant Act—Railroads—Negligence—Defective Appliances.

1. Where the plaintiff entered into a contract of service with the defendant company in this State and his cause of action was based upon a breach of contractual duty, the fact that the injury occurred in another State has no bearing on the case.

2. The validity and interpretation of a contract, as well as liability thereunder, is to be determined by the law of the place in which the contract is made.

3. Where a contract of service with the defendant railroad was made in this State, the provisions of the Fellow-servant Act must be read into the contract, and there being no evidence that the service was to be performed altogether in another State, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract.

4. In an action for damages for negligence in failing to provide a safe and suitable platform upon which plaintiff was to discharge his duties, an instruction that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work, and to exercise reasonable care in keeping the platform in a safe condition, and if they found from the evidence that the patform was in a dangerous and unsafe condition and that this caused the injury to the plaintiff, they would answer the first issue "Yes," was correct.

5. An instruction that if the truck was negligently run into a hole, and thereby the plaintiff was injured, they would answer the first issue "Yes," was correct.

6. On the issue of contributory negligence, an instruction that the jury would answer the second issue "No" unless they found from the evidence that the plaintiff saw that the truck would be run into a hole and could reasonably see that the piano would likely fall, and after such knowledge neglected to remove from a place of danger, was correct.

(46) ACTION by George A. Miller against Southern Railway Company, heard by *Ferguson, J.*, and a jury, at October Term, 1905, of ANSON.

The plaintiff alleged that, being a resident and citizen of the State of North Carolina, he entered into a contract of service in the said State with the defendant corporation, owning and operating railroads in the States of North Carolina and Alabama, and in the performance of the duties assumed by said contract he was, on 1 October, 1903, in Birmingham, Alabama. That at said time some employees of defendant were rolling a truck loaded with a piano along said platform, near which the plaintiff was at work. That by reason of the dangerous,

unsafe, and unsuitable condition of said platform it gave way, and the wheels of the truck broke or fell into a hole, causing the piano to fall upon plaintiff, breaking his leg and inflicting upon him serious and permanent injuries. That it was the duty of the defendant to provide a suitable, safe, and proper place for plaintiff to work; the defendant knew of the dangerous and unsafe condition of said (47) platform, and that by reason of the injuries suffered he has sustained damages, etc. Defendant admitted that the contract was made in the State of North Carolina, as alleged, and that by reason thereof the plaintiff was required to perform duties in Birmingham, Ala. Defendant denied the other allegations and alleged contributory negligence.

The following issues were submitted to the jury:

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

2. Did the plaintiff contribute to his own injury? A. "No."

3. What damages did plaintiff sustain by the injury? A. "$1,999.99."

Judgment accordingly. Defendant appealed.

James A. Lockhart for plaintiff.

W. B. Rodman and G. F. Bason for defendant.

CONNOR, J. His Honor instructed the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work, and to exercise reasonable care in keeping the platform in a safe condition, and if they found from the evidence that the platform was in a dangerous and unsafe condition, and that this caused the injury to the plaintiff, they would answer the first issue "Yes." He further charged the jury that if the truck was negligently run into a hole, and thereby the plaintiff was injured, they would answer the first issue "Yes." That they would answer the second issue "No" unless they found from the evidence that the plaintiff saw that the truck would be run into a hole and could reasonably see that the piano would likely fall, and after such knowledge neglected to remove from a place of danger; to all of which the defendant excepted.

The defendant asked certain instructions which were refused, (48) his Honor charging in lieu thereof: "If you shall be satisfied from the greater weight of the evidence that the plaintiff knew the condition of the platform, the place where the truck wheel ran into the hole, and saw the truck approaching in such a way that the wheel would run into the hole, and could reasonably have anticipated that by the wheels running into the hole the piano would fall, it was his duty to step out of the way, and if he had time to do so, after he saw the danger and failed to do so, he would be guilty of negligence; and

if you find from the evidence these facts, and if the injury was received in consequence thereof, you will answer the second issue 'Yes.'"

The defendant insists that in the absence of any allegation or evidence that the Fellow-servant Law, Rev., sec. 2646, was in force in Alabama, the State in which the injury occurred, the common law is presumed to control; that by the common law the plaintiff assumed the risk of injuries incident to his employment, including such as are caused by the negligence of a fellow-servant. For the purpose of presenting this contention it submitted appropriate prayers, which were refused. It will be observed that the cause of action is based upon a contract of service and breach of a contractual duty. The exact question is presented and decided by this Court in *Williams v. R. R.*, 128 N. C., 286. The action was for injuries sustained in Tennessee by an employee, and the same objection was made to a recovery. *Furches, J.*, said: "We do not see that the fact that the injury occurred in Tennessee has any bearing on the case. The plaintiff's action is not in tort *ex delicto*, but *ex contractu* for breach of contract. For, although tort is alleged, it is based on contract." We have recognized the well-settled principle that "the validity and interpretation of a contract as well as liability thereunder is to be determined by the law of the place in which the contract is made." While the authorities are not uniform in the
(49) application of this principle to contracts of this character, we find the conclusion of the discussion thus stated in Wharton Conflict of Laws (3 Ed.), 478b: "When the action is expressly based upon a breach of contract it seems to be assumed that the law of the place where the contract is made, rather than that of the place where the injury occurs, governs. So, undoubtedly, any defense based upon the express terms of the contract is governed by the *lex loci contractus*, even though the action be *ex delicto*." By the contract of service made in North Carolina the provisions of the Fellow-servant Act must be read into the contract, and there being no evidence that the service was to be performed altogether in another State, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. It would seem, however, from the record that the question is not presented. The negligence alleged is in the failure to provide a safe and suitable platform upon which plaintiff was to discharge his duties, and this question, together with the plaintiff's knowledge of the conditions and conduct in respect to the use of it on the occasion of his injury, were correctly explained to the jury.

Upon an examination of the entire record we find no error in the charge given or the refusal to give the instructions asked. It must, therefore, be declared that there is

No error.

(50)

HORNE v. POWER COMPANY.

(Filed 10 April, 1906.)

Master and Servant—Appliances—Instructions—Contributory Negligence—Electric Companies.

1. It is the duty of the employer to furnish to his employee reasonably safe appliances with which, and a reasonably safe place in which, to discharge his duties and to maintain and keep them in such condition, and there is a correlative duty of the employee to exercise reasonable care in using the appliances and means furnished him.

2. It is the duty of the employer to properly inform the employee of unusual or extraordinary danger and hazard incurred in the employment and the duty of the employee to avail himself of the information thus derived and instruction given him.

3. The court erred in refusing to give defendant's prayer, that "if the jury shall find from the evidence that the plaintiff could have performed his duties in lifting and lowering the lamps by the exercise of reasonable care and prudence, without coming in contact with the iron awning nearby, and that, if he had stood upon the steps attached to the pole in doing his work, without contact with the iron awning, he would have been insulated, and would not have received the shock, then, in placing himself in contact with the iron, he was guilty of contributory negligence."

4. If a prayer for instruction is correct in itself, and there is evidence tending to sustain it, the court should give the instruction either in the form requested or substantially so.

5. When an employee, in the service of an electric company, is provided with implements or apparatus, by the use of which he may be able to avoid injury to himself, a failure on his part to use such implements or apparatus will prevent recovery for any injury received by him which might have been averted by the use thereof.

ACTION by Melvin Horne against Consolidated Railway, Light and Power Company, heard by *W. R. Allen, J.*, and a jury, at October Term, 1905, of NEW HANOVER.

This was an action prosecuted by the plaintiff to recover dam- (51) ages for personal injuries sustained while in the employment of the defendant company. The facts material to the question upon which the appeal is disposed of are: Plaintiff, 23 years of age, had been in the defendant's employment, as motorman and conductor, on its surface railway cars one year. Some five or six months prior to the day of the injury he was, at his own request, assigned to the duty of trimming the arc lamps on the streets of the city of Wilmington. When he was assigned to this duty, Mr. Horton, who was an electrician in the employment of the defendant, explained his duties, went with him four days,

showed him how to trim the lights and fix them. Told him that if he had any trouble about the lights, which he did not understand, to come to him. Plaintiff had nothing to do with wires; he was not an electrician. Horton was not in the employment of defendant company at time of injury. He was introduced, and his testimony tended to corroborate that of plaintiff. Defendant introduced R. Hunt, an electrician in its employment. He testified, among other things, that when plaintiff was taken from the trolley and assigned to the arc lights he instructed him how to do his work; explained his duties and responsibilities in a general way; explained the amount of shock he was liable to get anywhere on an arc circuit. When he reported the shock he had gotten from an arc lamp in the Coast Line building, he told him he must always consider the current as being on the line—never depend upon the insulation. In other words, always consider all wires as bare and live, as a matter of precaution. The defendant maintained a system of arc lights in the streets of the city of Wilmington, together with a system of wires for other purposes not material to be noted. The wires of the several systems crossed at certain points. Those carrying the current to the arc lamps were strung upon poles posted on the edge of the sidewalks as prescribed by the city ordinance.

(52) The lamps were lowered for the purpose of trimming by means of a wire cable connecting with a drum attached to the poles several feet from the ground and operated by attaching a handle or crank made of iron covered with wood where it was necessary to grasp it with the hand of the operator; the wood was held upon the iron rod by means of an iron bolt at the end. The operator ascended the pole by means of wooden steps made by nailing strips across the poles beginning near the ground and continuing upwards a few feet, after which iron steps are attached to the pole. One of these poles was posted at the corner of Front and Dock streets, to which was attached a drum for the purpose of lowering the arc lamps to be trimmed. Near by the pole was an iron frame attached to a store for the purpose of supporting an awning; one of the iron poles of this frame stood within a few inches of the light pole. On 22 February, 1904, plaintiff went to the said pole and went up the first two or three steps which were of wood, the rest of iron. He says: "I had my right foot on the wooden step and the left on the iron step. The distance between these steps I do not know. (Witness showed position in which he was standing.) The crank fits on this side of pole (illustrating by model), and on side next to awning. I went up the pole. I put my handle and hand on there, and put this leg around the pole, which brought my leg between the awning and the pole and steps set on this side. I put my leg in between there, on a peg on that side, and put my right foot on this side, that

brought this leg against the awning. I lowered my lamp down, turned my handle loose and started to go down the pole. I noticed my lamp was not low enough to reach it from the ground. I put myself back in the same position. I took hold of the handle and started to reach the latch. I don't know whether I got hold of it or not; I don't know where I went to—it knocked me senseless."

It appeared from the testimony that the plaintiff was injured (53) by reason of a live wire coming in contact with the light wire from which the insulation had worn off; the causes bringing about this condition originating near the Atlantic Coast Line from a wire belonging to that system. The manner in which the wires came in contact was illustrated by model used in the trial below and in this Court. In view of the disposition which is made of the appeal, it is not material to set forth that phase of the evidence. There was testimony tending to show that, notwithstanding the condition of the wires, it would not have been possible for plaintiff to have sustained an injury if he had not put his leg around the iron pole and his hand had not come in contact with the iron bolt which secured the wood on the handle of the crank. There was evidence tending to show that within a few minutes after the injury a witness ascended the pole and lowered the lamp, as the plaintiff was endeavoring to do, without sustaining injury. There was also evidence tending to show that there were four wooden steps to the pole, two on each side, north and south, the first one 18 inches from the ground and the others 18 inches apart. A witness for the defendant testified: "I have made a test and am sufficiently familiar with the location of the pole to state whether or not a man can lift and lower the arc lamp with this crank and handle without touching the iron awning; and you can raise it and lower it without touching the awning, probably in two or three positions. I made on the same day and afternoon after the accident a personal inspection of this section of the system for the purpose of ascertaining the cause of this accident. In the beginning I found that the arc lamp when it was down at the pole where plaintiff was injured made this contact, and he got the current through the handle to the awning pole. In the meantime, in consequence of information from the Coast Line, I went to the corner of Front and Red Cross streets where the Coast Line offices are located. In examining there I found that there was a telephone wire laying across this opposite primary wire to the other primary wire (54) with which Mr. Horne was connected at Front and Dock streets. This telephone wire was again crossed with another telephone guy wire, the guy wire being again tied up to the Atlantic Coast Line telephone messenger wire, which was a dead ground wire, and where it was tied up to the wire it burned through and gave a dead ground."

Mr. Hunt testified: "I have made a practical test to see whether or not a man can raise or lower that lamp where the plaintiff received his accident without touching the iron awning. He can do it easily. I have seen it done in three different positions. I saw it done today. The awning and pole and framework are exactly today as they were at the time of the accident, except two primary wires are not there now. These primary wires were removed because in doubling the wire to place a motor in Mr. Johnston's store we moved the transformer up on Dock Street above Front Street. I made the test with Mr. Williamson. He did actually raise and lower the lamp in my presence in the several different ways stated."

There was other evidence for both plaintiff and defendant bearing upon the issues. The court submitted the following issues to the jury:

1. Was the plaintiff injured by the negligence of the defendant?
2. If so, did plaintiff by his own negligence contribute to his injury?
3. What damages, if any, did plaintiff sustain?

The defendant requested the court in apt time to instruct the jury: "If the jury shall find from the evidence that the plaintiff could have performed his duties in lifting and lowering the lamps at Front and Dock streets, by the exercise of reasonable care and prudence, without coming in contact with the iron awning near by, and that if he had stood upon the steps attached to the pole in doing his work, with-
(55) out contact with the iron awning, he would have been insulated, and would not have received the shock, then, in placing himself in contact with the iron, he was guilty of contributory negligence, and the jury should answer the second issue 'Yes.'"

His Honor declined to so instruct the jury. There were other assignments of error, which it is not necessary to consider. The defendant duly excepted. Judgment having been rendered upon the verdict, defendant excepted and appealed.

W. Kellum, H. McClammy, Rountree & Carr for plaintiff.
Mears & Ruark and Davis & Davis for defendant.

CONNOR, J. It is the duty of the employer to furnish to his employee reasonably safe appliances with which, and a reasonably safe place in which, to discharge his duties, and to maintain and keep them in such condition, and there is a correlative duty of the employee to exercise reasonable care in using the appliances and means furnished him. These are the cardinal principles upon which the duties and liabilities of employer and employee are based. They include, of course, the duty of the employer to properly inform the employee of unusual or extraordinary danger and hazard incurred in the employment, and the duty of

the employee to avail himself of the information thus derived and instruction given him. These propositions are entirely independent of any question of assumption of risk or the duty of furnishing safety appliances prescribed by statute or by the courts, as in *Troxler v. R. R.*, 124 N. C., 192. The principle is well stated in a recent work on the subject: "At common law, the master impliedly agrees to use reasonable care to provide reasonably safe premises and places in and about which the servant is required to work, to furnish reasonably safe (56) and suitable machinery and a sufficient supply of proper materials, tools, and appliances for the work to be done, and at all times during the continuance of the work to repair and keep in the same safe and suitable condition." Dresser Employer's Liability, 192; *Chesson v. Lumber Co.*, 118 N. C., 59; *Whitson v. Wrenn*, 134 N. C., 86; *Creech v. Cotton Mills*, 135 N. C., 680; *Bottoms v. R. R.*, 136 N. C., 472; *Hicks v. Mfg. Co.*, 138 N. C., 319; *Pressly v. Yarn Mills*, 138 N. C., 410. While some difference of opinion exists as to the manner of applying the principle in the trial of causes, when seeking to fix the legal liability for an injury, the courts are unanimous regarding the general principles. We find no valid objection to his Honor's instruction to the jury regarding the defendant's duty to establish and maintain a system of wires, when charged with electricity, by using every means for the safety and protection of its employees known to science and in general use, and to constantly and repeatedly, at short intervals, inspect its own and other wires liable to come in contact with them. Insulation is a positive duty. There was ample evidence to sustain the plaintiff's contention that there was negligence in that respect. The defendant says, however that may be, it had furnished to plaintiff a perfectly safe place and appliance for the purpose of performing his duty; that before entering upon the performance of the duty he was instructed how to do the work safely, and that after entering upon the employment he was told to regard every wire as bare and live, as a precaution; that, notwithstanding the very peculiar and unexpected conditions by which the wire at the pole on Front and Dock streets became charged with electricity, the plaintiff would have been absolutely safe if he had used with reasonable care and caution the means and appliances furnished him; that if he had obeyed instructions given him it would have been impossible for (57) him to have sustained any injury; that, notwithstanding the proximity of the post to the frame of the iron awning, he had room to stand upon the wooden steps and lower the lamp. It was the office of the third prayer for instruction to present defendant's contention to the jury in that aspect of the case. We are of the opinion that there was evidence which, if accepted by the jury, tended to sustain the defendant's contention. The third prayer for instruction is directed to the

second issue. It presents to the jury the question whether the defendant had furnished a safe method and place for plaintiff to do his work and whether by the exercise of reasonable care and prudence in the use of such method he could have lowered and trimmed the lamp without coming in contact with the iron awning. We think that defendant was entitled to have this question submitted to the jury. There was evidence upon which the jury may have found the fact to be as contended by the defendant. There was also evidence tending to sustain the plaintiff's contention. In this condition of the evidence it became a question for the jury. It was clearly the duty of the defendant to furnish to the plaintiff a reasonably safe place and reasonably safe means to enable him, by the exercise of reasonable care and caution, to do the work in safety. Whether it had done so was a question for the jury. It is true that his Honor said to the jury that it was the duty of the plaintiff to use ordinary care, and "If he failed in this duty, and this was the real cause of the injury, then he would be guilty of negligence, and it would be your duty to answer the second issue 'Yes.'" This was correct, so far as it went, and in the absence of any more specific prayer it would not be open to defendant to complain. The real controversy upon this issue was whether, notwithstanding the negligence of defendant in permitting its wire to become and remain for an unreasonable length of time without insulation, it had, in providing a place and method for doing his work, insulated the plaintiff from contact with the
(58) wire. In other words, defendant contends that it had made a double provision for the safety of its employees, first, by insulating its wire, and if for any reason that failed, by insulating the employee from contact with the wire. That "as a matter of precaution" it had instructed plaintiff "to consider the current as being on the line; never depend upon the insulation; always consider all wires as bare and live." That it had, in addition to this instruction, provided appliances which, if used with reasonable care and caution, insulated the plaintiff from danger. The burden of establishing this contention was upon defendant. We think that if established, with the further fact that plaintiff failed to exercise "reasonable care and prudence" in the use of these means, the defendant is not liable to the plaintiff for the injury sustained. While it is true that parties are not entitled to have their contentions submitted to the jury in the precise language which they may adopt, it is also true that if the prayer for instruction is correct in itself and there is evidence to sustain it, the court should give the instruction either in the form requested or substantially so. "Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the ques-

tions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence." *S. v. Dunlop,* 65 N. C., 288. The rule is clear, and we are quite sure that his Honor was of the opinion that he had complied with it. He did state at length and fairly the contentions of the parties, but upon a careful examination of the charge we do not think that he instructed the jury in substantial compliance with the defendant's third prayer. There appears to have been but little controversy in regard to the condition of the system and the source of the trouble with the (59) wire near the pole on Dock and Front streets. The most seriously controverted phase of the case was directed to the second issue. While, as indicated by the uniform decisions of this Court—certainly of late years—there is no disposition to relax the principles upon which the primary duty of the employer to furnish to and keep in repair reasonably safe ways, appliances, and methods for the performance of the duties of his employees, and to give notice of extra hazards and dangers incident to such work and the machinery used therefor, nor to extend the doctrine of the assumption of risk, we think the correlative duty of the employees to exercise reasonable care and observe that degree of caution which their own safety as well as the interest of the employer demands, to avoid injury, both to themselves and to the public, should be enforced. The rule as applied to employees in the service of electric companies is thus stated: "When the employee is provided with implements or apparatus by the use of which he may be able to avoid injury to himself, a failure on his part to use such implements or apparatus will prevent recovery for any injury received by him which might have been averted by the use thereof." Joyce on Elec., sec. 668. For failure to give the instruction prayed, there must be a

New trial.

Cited: Bradley v. R. R., 144 N. C., 558; *Baker v. R. R., ib.,* 42; *Patterson v. Lumber Co.,* 145 N. C., 45; *Phillips v. Iron Works,* 146 N. C., 217; *Beck v. R. R., ib.,* 470; *Dermid v. R. R.,* 148 N. C., 184; *Nail v. Brown,* 150 N. C., 535; *Penny v. R. R.,* 153 N. C., 302; *Walker v. Mfg. Co.,* 157 N. C., 135; *Kearney v. R. R.,* 158 N. C., 554; *Marcom v. R. R.,* 165 N. C., 260.

(60)

EDWARDS v. GOLDSBORO.

(Filed 10 April, 1906.)

Municipal Corporations—Illegal Contracts—Location of Public Building—Parties in Pari Delicto—Partial Performance—Recovery of Consideration.

1. Where plaintiff subscribed and paid to the defendant city a sum of money for the purpose and with the intent of inducing the city to locate its city hall and market-house near plaintiff's property, with the view of enhancing the value of his property, and the money was accepted by the city with knowledge of said intent, such a contract is void, being against public policy and founded upon an illegal consideration.

2. Where the jury found that the plaintiff paid to the defendant city $600, on agreement that the defendant would locate the city hall and market-house near plaintiff's property; that the city failed to locate a market as agreed, and that the property of the plaintiff has been enhanced $600 by the erection of the city hall, the court did not err in entering judgment for the defendant.

3. Public office in a city is a public trust, to be administered for the equal benefit and advantage of all the citizens of the municipality, and the governing body will not be permitted to contract at any time so as to deprive itself of the free exercise of its judgment and discretion in providing for what may afterwards turn out to be the best interest of all citizens alike.

4. When a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result.

5. When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief; and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or when the contract is against public policy, or *contra bonos mores*, the court will not enforce it in favor of either party, unless there is inequality of condition, or one has been induced by undue influence, etc., to make the contract.

6. To deprive a party of the right to repudiate an illegal contract and to recover money already paid thereon, it is not necessary that the illegal transaction should have been fully executed; it is sufficient for that purpose that there has been a partial fulfillment of the illegal undertaking by the party against whom the action is brought for the recovery of the amount so paid to him.

7. *Quere:* Whether, when money is paid on an illegal contract, the aid of the court can be successfully invoked for its recovery, though the other party refuses to perform any part of the agreement, so that it is wholly executory on his side.

EDWARDS *v.* GOLDSBORO.

ACTION by Asher Edwards against the city of Goldsboro, heard (61) by *Ward, J.*, and a jury, at January Term, 1906, of WAYNE.

The plaintiff in his complaint alleged that by an act of the General Assembly the defendant was authorized to build a city hall and market house, and that plaintiff and other citizens of Goldsboro, who owned real estate therein, and who believed that the location of the proposed public buildings near their property would greatly enhance its value, offered to subscribe and pay to the city divers sums of money amounting in the aggregate to $1,035, if the city authorities would erect said buildings on a site near the property of the subscribers, and the offer was made and the money was afterwards actually subscribed and paid for the purpose and with the intent of inducing the city to locate the buildings at said place and with the view of enhancing the value of their property and receiving the benefit of the said location, and the money was accepted by the city with knowledge of said intent. That plaintiff paid the sum of $600 to the fund for that purpose, and that notwithstanding the receipt of the money by the defendant and its promise in consideration of the sum to locate both buildings at the said place, the defendant has erected the city hall as it promised to do, but has failed and, upon demand, has refused to so erect the market house, but instead has put up fish stalls which have proved to be a real detriment to their property. That the erection of the city hall, while of (62) some, is yet of very little benefit, the location and erection of the market house being the main object of their subscription. The plaintiff demanded the return of the $600 paid by him, and, upon refusal of the defendant to comply therewith, brought this action to recover the same, with interest, and the prayer of his complaint is to that effect. The principal allegations of the complaint as to the subscription and its purpose are admitted in the answer, though the defendant denies that it has not complied with the agreement, and alleges that the structures erected had improved the value of plaintiff's property. It is not necessary to make further reference to the answer. Issues were submitted to the jury which, with the answers thereto, are as follows:

1. Did the defendant city fail to locate and erect a market near the property of the plaintiff as alleged? A. "Yes."

2. Did the plaintiff pay to the defendant $600 on agreement that the defendant would locate the city hall and market house near plaintiff's property? A. "Yes."

3. What amount, if any, has the property of plaintiff been enhanced by the erection of the buildings by the defendant on the location mentioned in the pleadings? A. "$600."

The plaintiff upon the first two findings of the jury prayed, *ore tenus,* for judgment, in the nature of a *mandamus,* to compel the defendant

to locate and erect a market house as it had agreed to do. This prayer was refused, and plaintiff excepted. The court thereupon entered judgment for the defendant that it go without day and recover its costs. The plaintiff excepted and appealed.

Aycock & Daniels and W. C. Munroe for plaintiff.
Dortch & Barham for defendant.

WALKER, J., after stating the case: While the plaintiff, in his complaint, prayed for the judgment to which we think he was legally entitled, instead of a *mandamus,* if the contract with the city had been valid, yet his cause of action was not properly conceived, and he (63) cannot recover the $600 which he subscribed and paid because the contract with the city was broken by it, as it was void, being against public policy and founded upon an illegal consideration. For the same reason, the third issue was immaterial, as constituting the basis for affirmative relief in behalf of the defendants. The enhancement in value of plaintiff's property by the erection of the city hall on the site designated in the contract cannot be used as a counterclaim as the city can gain nothing, either directly or indirectly, by the illegal transaction. It surely cannot benefit in any way by a void contract for, when it is determined that the transaction was invalid, any increase in value of the plaintiff's property becomes a mere incident of the erection of the building at that place, and the case stands the same as if the contract had not been made, and what the city did was merely a voluntary act on its part. There is nothing, therefore, to support the claim for an allowance because of the enhancement, for the reason already stated and for the reason hereafter assigned for denying relief to the plaintiff.

The form of the issues indicates that the court proceeded in the trial upon the theory that the contract was valid, and had been broken, and for this reason submitted the third issue, whereas the case should have been tried upon the opposite idea, that the contract was void, and that no question of damages or other question which presupposed the validity of the contract, such as the enhancement in value of plaintiff's property, was presented. While the third issue was not material in the respect indicated, it is material in another respect, as will hereafter appear. If the contract was void, and plaintiff is not by his relation to the transaction prevented from recovering, it follows that he would be entitled to judgment, as for money had and received to his use, or for money paid upon a consideration which has failed, or upon a condition, compliance with which cannot be enforced, which practically amounts to the same thing. For the same reason as that just given, plain- (64) tiff's prayer for a *mandamus* or coercive process was properly

denied. This sufficiently disposes of all preliminary matters and brings us to the consideration of the real issues involved.

The case naturally resolves itself into two questions, which require discussion: First, was the contract against public policy, or based upon an illegal consideration, and therefore void? Second, the plaintiff being a party to the illegal transaction, if it was illegal, is he in a position to ask for a return of the money, or is he debarred of a recovery, being *in pari delicto?*

The statute provides that the authorities of a town, whether commissioners or aldermen, shall make such orders for the disposition or use of its property as the interest of the town may require. Rev., sec. 2916. *Judge Dillon,* referring to the general duty of municipal officers, with respect to the affairs which they have in charge, says: "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, *so they cannot, without legislative authority, express or implied, be bargained or bartered away.* Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor." 1 Dillon Mun. Corp. (4 Ed.), sec. 97, p. 156. It will be seen, therefore, that public office in a city is a public trust to be administered for the equal benefit and advantage of all the citizens of the municipality, and the governing body will not be permitted to contract at any time so as to deprive itself of the free exercise of its judgment and discretion in pro- (65) viding for what may afterwards turn out to be the best interest of all citizens alike, and especially will it not be allowed by an obligatory agreement to discriminate in favor of one citizen or class of citizens as against another entitled to equality of privilege and benefit, even for a valuable consideration. It must at all times retain freedom of judgment, so that its decisions will be influenced only by a regard for the public welfare. We take it that any contract by which it should be attempted to prevent the city authorities from deciding impartially on a matter affecting the general welfare would be unenforcible. If public trustees or officers may by contract divest themselves of any portion of the essential powers intrusted to them they may just as well alienate all of them, though by degrees, and thus eventually abdicate the exercise of every governmental function. Such agreements are, therefore, contrary to the true principles upon which society is founded and sub-

versive of all well-regulated government. These propositions would seem to be self-evident. "All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Tool Co. v. Norris,* 2 Wall., 45; *Cameron v. McFarland,* 4 N. C., 299; Wharton on Contracts, sec. 403. The leading case of *Martin v. Mayor,* 1 Hill (N. Y.), 546, is one in which the principle was applied and where it appeared that for a consideration public trustees agreed with a lot owner to make certain improvements, which they refused to do. The court held that they might decline to go forward with the improvement on the ground
(66) that it was injurious or unprofitable to the public, and that in this respect they enjoyed a discretion which individuals have no power to control and the trustees no power to part with. It was further said: "To allow that commissioners of streets and highways may bind themselves by contract to subserve the interests of individuals would be a clear violation of public policy. They are officers of municipal corporations, or *quasi* corporations, and in respect to the laying out of streets and highways are primarily bound to consult the interests of the community at large." The doctrine there enforced was that a contract will not be sustained which tends to restrain or control the judgment of public officers, which must always be impartial. But all promises of individuals to pay a portion of the expenses of public improvements do not necessarily fall within the principle and may not be void. The validity of the particular contract will depend, of course, upon whether it has the evil tendency to influence the officer in the discharge of his public duty by trammeling his judgment in matters about which he should be left free to act as the public interest alone may dictate or require. This is the vitiating element, and if the agreement has that tendency in the eye of the law, it makes no difference what is the actual motive in the particular instance or how pure it may be. In *Society v. Philadelphia,* 31 Pa., 175, the rule was said to rest upon the ground that a corporation, acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties, and that this restriction upon the power of a corporation to make such contracts is nothing more nor less than the application of the familiar principle which avoids the contracts of individuals when they are detrimental to the public's rights. This identical question was fully considered by a court of exceptional ability in *Gale v. Kalamazoo,*

23 Mich., 344, in which *Cooley, C. J.*, for the Court, said: "If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from (67) abolishing them when found undesirable, it must have the right, also, to agree that it will not open streets or introduce water for the supply of its citizens except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might in various directions engage it in permanent contracts which, while ostensibly for the public benefit, would impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For if the village might bind itself to one market house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots that all improvements of every description should be so located or made as to conduce to his benefit, irrespective of the general good. It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise."

The Court concludes that the village had incurred no liability (68) to the plaintiff by its breach of the contract, as it was void, being against public policy. We have quoted liberally from the opinion in that case, not only because the personnel of the Court entitles its judgments to the greatest respect, but because the proposition is stated in concrete form and sustained by most cogent reasoning and apt illustration. We do not ignore the fact that there the contract involved the idea of permanency in the location of the market house, but the Court attached no special importance to that feature, but decided the case rather upon the ground that if the agreement was held to be valid, the town commissioners would be deprived of the exercise of that judgment and discretion in the premises so essential to the public welfare. In

our case the promise that the buildings shall remain near the plaintiff's property is, it seems to us, necessarily implied by the nature of the contract, for it could be of little or no benefit to him if they could be removed at any time, even if such a course were practicable. The principle of that case is applicable here, and the closing words of the Court, as quoted by us, clearly so indicate. The question is fully discussed in *Fuller v. Dame,* 35 Mass. (18 Pick.), 472, in which *Chief Justice Shaw,* with his accustomed learning and ability, presents most satisfactory reasons and unanswerable arguments in condemnation of such agreements and proves their invalidity to a demonstration. He argues that it is not a satisfactory excuse to say that when the agreement was entered into the officers or trustees had come to the opinion that the location in question was the best for the interests of the public and for the interests of the corporation. Such an opinion might be changed by new views and new offers. Upon all these questions the influence of the promise of separate and distinct advantage deprived the officers of the power of exercising a free, disinterested, and unbiased judgment. Any influence from any quarter, created by the promise of a sum of
(69) money, to induce them so to contract, and to yield to particular terms, with a view to benefit separate and individual interests, operated as an injury to the public and rendered the contract void. The confidence of the people in the proper transaction of business by its officials could only be safely reposed under the belief that they will fairly exercise their best and unbiased judgment upon the question of fitness, without being influenced by extraneous considerations, having no connection whatever with the accommodation of the public. The conclusion is thus substantially stated: It is obvious that if one large landholder may make a valid, conditional promise to pay a large sum of money to a stockholder or influential citizen on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other landholders may make like promises on similar conditions, and public works, which should be conducted with a view to the public interest and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interest. We regard the reasons advanced in that case as conclusive of the question, and find that the courts and text writers have generally adopted the same views. "A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers, it being contrary to public policy and void as abdicating a public function." Ingersoll on Pub. Corp., 310. The powers conferred upon officers of cities to be exercised for the public good in making improvements demanded by public convenience are continuing and inalienable. 2 Dil-

lon Mun. Corp. (4 Ed.), sec. 685. "This power the city cannot refuse to exercise when public necessity or convenience demands that it shall be done, nor can it be allowed to excuse its failure in this particular upon the ground that it has by contract deprived itself of the right to act." *R. R. v. Louisville,* 71 Ky., 417; *Gas Co. v. Columbus,* 5 Ohio St., 65; *New Haven v. R. R.,* 62 Conn., 257; *Indianapolis* (70) *v. Gas Co.,* 66 Ind., 404; *McKeesport v. R. R.,* 2 Pa., 242; *Milhau v. Sharp,* 27 N. Y., 611; *Matthews v. Alexandria,* 68 Mo., 119. The Court, in *Mayor v. Bowman,* 39 Miss., 682, said: "Even if we suppose the city to have legislative power and control over the liquor license, which it clearly has not, it was not competent for the board to bind the city by a contract taking away the legislative discretion; nor would the exercise of its legislative discretion in violating the terms of the contract subject the city to the payment of damages or a penalty. The authorities on this point are clear, but the reason of the thing is enough." The question has frequently arisen in the establishment of railroad depots. Railway companies are *quasi*-public corporations, and it has been said that the public have an interest in the location of their depots, the public convenience and accommodation being involved. "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void." *People v. R. R.,* 130 Ill., 175. "It seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy." *R. R. v. State,* 31 Fla., 508. Cases and textbooks to the same effect can be cited numerously. We give only a few of them. *R. R. v. Ryan,* 11 Kan., 602; *R. R. v. Seely,* 45 Mo., 212; *R. R. v. People,* 132 Ill., 559; *R. R. v. Marshall,* 136 U. S., 393; *R. R. v. Louisville, supra; Holladay v. Patterson,* 5 Oregon, 177; *Marsh v. R. R.,* 64 Ill., 414; Greenhood on Public Policy, 319; 2 Beach Contracts, sec. 1517.

When a contract belongs to a class which is reprobated by (71) public policy it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result. 15 A. & E. (2 Ed.), 934. We must not be understood as holding that in no conceivable case can a citizen contribute to the expense of erecting a public building. We can easily imagine circumstances where such contributions might be lawful and proper to be considered in determining the best location for the public; but the

donation of money must not be the inducement to the selection of a site, apart from the public interests concerned. Cases which strongly approve the doctrine by which the particular contract in this case is condemned and in which the authorities are reviewed at length are *Woodman v. Innes,* 27 Am. St., 274, and *Lodge v. Crary,* 49 Am. Rep., 746.

This Court has recently had under consideration in *Glenn v. Comrs.,* 139 N. C., 412, a question very similar to the one now presented. The plaintiff in that case alleged that the defendants had contracted to maintain a public bridge over a river at a certain point on his lands for the considerations set forth, and that they were about to abandon the bridge and erect a new one at another place on the river not far away. He sought to enjoin the defendants from constructing the other bridge. This Court held that the discretion of the commissioners could not be thus controlled or coerced. The reasons for this conclusion are fully stated by *Mr. Justice Connor* in the opinion of the Court delivered by him. Citing *Bridge Co. v. Comrs.,* 81 N. C., 491, the Court says: "The essential powers of government, conferred for wise and useful purposes, should remain undiminished and unimpaired in the legislative body itself and pass in full force to its successors. When a contract undertakes to alienate any of these it is inoperative, and as no right
(72) vests, so no obligation is created under it." The two cases are not distinguishable in principle. The Court would be fully as reluctant to give the plaintiff relief in the case at bar as it was in the case cited, because here it is expressly alleged that the money was paid for the purpose of inducing the defendant to erect the buildings near the plaintiff's lands so that the latter would be enhanced in value. This was virtually inducing them to part with a discretion which should have been exercised in behalf of the public, and not of the plaintiff.

This brings us to the consideration of the next question, whether, the contract being void as founded upon an illegal consideration, the plaintiff can recover the money he has paid in part execution of the same. With reference to this subject, certain rules may be taken as settled. The law gives no action to a party upon an illegal contract, either to enforce it directly or to recover back money paid on it after it has been executed. *Webb v. Fulchire,* 25 N. C., 485; *Warden v. Plummer,* 49 N. C., 524; 15 A. & E. (2 Ed.), 997. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. The maxim is *ex dolo malo* (or *ex turpi causa*) *non oritur actio,* and the kindred one is *in pari delicto potior est conditio defendentis.* In such cases the law leaves the parties where it finds them. When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court

will not grant relief (*Wright v. Cain,* 93 N. C., 296), and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or when the contract is against public policy, or *contra bonos mores,* the courts will not enforce it in favor of either party. *York v. Merritt,* 77 N. C., 213; *ib.,* 80 N. C., 285; *King v. Winants,* 71 N. C., 469; *Pinckston v. Brown,* 56 N. C., 494; *Sparks v. Sparks,* 94 N. C., 532. *Chief Justice Smith* said for the Court in the last case: "But the principle is that such an agreement will not be enforced at the instance of either party, (73) not that what may have been done in carrying out its purpose will be undone by the Court. It will not assist when its aid is asked, or, in other words, its provisions 'will not be enforced in this Court'—a court exercising equitable functions. The rule that refuses to compel the execution of such a contract, for similar reasons, refuses to relieve from the consequences of what the parties have done under it, in giving it full effect." The rule is departed from when there is inequality of condition as between the parties, or one of them has come under the subjection of the other, or has been induced by oppression, imposition, undue influence, or improper means to make the contract, in which case he is not equally at fault with the other. While *in delicto* he is not *in pari delicto,* but stands, as it were, *in vinculis. Pinckston v. Brown, supra;* 15 A. & E. (2 Ed.), 1004. When the contract is executory the court will not enforce it, and when executed will not set it aside as against one party at the instance of the other. We need not decide nor inquire whether, when money is paid on an illegal contract, the aid of the court can be successfully invoked for its recovery, though the other party refuses to perform any part of the agreement, so that it is wholly executory on his side. There is conflict of authority upon this question. *Ib.,* 1001; 1 Page on Contracts, sec. 526; Greenhood on Public Policy, p. 80; *Spring Co. v. Knowlton,* 103 U. S., 49; *Knowlton v. Spring Co.,* 57 N. Y., 518; *Kearley v. Thompson,* L. R., 1 Q. B. Div., 742; *White v. Bank,* 22 Pick., 181; Wald's Pollock on Contracts (3 Am. Ed.), 502. We have seen that he may recover where there has been any unfair advantage taken or any imposition practiced. *Webb v. Fulchire, supra.*

But it must not be supposed from what has been said that in order to deprive a party of the right to repudiate an illegal contract and to recover money already paid thereon, it is necessary that the illegal transaction should have been fully executed, as it is quite sufficient for (74) that purpose that there has been a partial fulfillment of the illegal undertaking by the party against whom the action is brought for the recovery of the amount so paid to him. 15 A. & E. (2 Ed.), 1007.

We believe that the law writers and the courts are fairly well agreed upon that proposition. *Kearley v. Thompson,* L. R., 1 Q. B. Div., 742; *Knowlton v. Spring Co.,* 57 N. Y., 518; *Ullman v. Fair Assn.,* 167 Mo., 273; Wald's Pollock on Contracts (3 Am. Ed.), pp. 502, 507; *Hooker v. DePallos,* 28 Ohio St., 251. Especially should this be the law where the party who has thus partially performed the contract in return for the money received by him from the plaintiff cannot be put *in statu quo,* which is the case here. *Lord Justice Fry,* in *Kearley v. Thompson, supra,* for the Court, said: "We hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under the illegal contract can be recovered back." *Chief Justice Coleridge, Lord Esher, Bowen,* and the other eminent judges who sat with them, fully concurred in this view. This has been generally accepted as the correct rule, even by the courts which hold that money paid on an illegal contract may be recovered back where the contract is wholly executory on the other side or as to the defendant. The principle should certainly apply to our case, in which it appears that the defendant has substantially performed the contract in part and cannot be restored to its original position, and that the plaintiff has received a benefit which is not only substantial, but fully commensurate with the amount he has paid on the contract. While he loses the right to have the unexecuted portion of the contract performed, he does not by any means depart from the court empty handed. Having received
(75) an equivalent for his money in the increased value of his property by the placing of the city hall where it is, he has no just ground to complain. We find no error in the conclusion and judgment of the court upon the verdict.

No error.

Cited: Soloman v. Sewerage Co., 142 N. C., 449; *Smathers v. Ins. Co.,* 151 N. C., 103, 104; *Floyd v. R. R., ib.,* 540; *Herring v. Lumber Co.,* 159 N. C., 386; *Sykes v. Thompson,* 160 N. C., 351; *Stehli v. Express Co., ib.,* 506; *Pierce v. Cobb,* 161 N. C., 302; *Parrott v. R. R.,* 165 N. C., 303, 309, 316; *Guilford v. Porter,* 167 N. C., 369; *Courtney v. Parker,* 173 N. C., 480; *Marshall v. Dicks,* 175 N. C., 39; *Rush v. McPherson,* 176 N. C., 565.

ALEXANDER v. TELEGRAPH COMPANY.

(Filed 10 April, 1906.)

Telegraphs—Delivery of Message—Issues—Mental Anguish—Brothers-in-law—Evidence.

1. In an action to recover damages for mental anguish in failing to promptly deliver a telegram, where the telegram was delivered at the defendant's office in Burlington for transmission at 1 o'clock p. m., and was not delivered at Spray until the next morning after 8 o'clock, this made out a *prima facie* case of negligence.

2. There was no error in permitting the plaintiff to testify that the telegram was delivered to him at 9:25 a. m., where the complaint stated that the telegram was not delivered "until after 8 o'clock a.m."

3. In an action to recover damages for mental anguish, where in any view of the evidence it is admitted that the plaintiff is entitled to recover nominal damages, the refusal to submit the issue, "Could the plaintiff by the exercise of reasonable care have reached Burlington in time for the funeral after the receipt of the message by him?" is not error, where the defendant had full benefit of that feature of the case under the second issue as to damages.

4. In an action to recover damages for mental anguish in failing to promptly deliver a telegram announcing the death of plaintiff's brother-in-law and requesting plaintiff to come at once, the jurors were properly instructed that mental anguish is to be proved and not to be presumed.

5. Where there was evidence tending to prove that plaintiff and the deceased were not only brothers-in-law, but very intimate friends, and that most affectionate relations existed between them, and plaintiff was very much affected by reason of his liability to be present at the funeral rites, the court committed no error in submitting the case to the jury on the question of mental anguish.

ACTION by Sam Alexander against Western Union Telegraph Company heard, by *Ward, J.*, and a jury, at September Term, 1905, of ALAMANCE. (76)

This was an action to recover damages for negligence alleged in the delivery of a telegram addressed by Eli Alexander at Burlington, N. C., to Sam Alexander, the plaintiff, at Spray, N. C., announcing to the plaintiff the death of his brother-in-law, and requesting the plaintiff to come at once. These issues were submitted to the jury:

1. Was the defendant guilty of negligence, as alleged in the complaint? Yes.

2. What damage, if any, has the plaintiff thereby sustained on account of mental anguish caused by such negligence? $800.

From the judgment rendered, the defendant appealed.

W. H. Carroll and Brooks & Thompson for plaintiff.
King & Kimball and F. H. Busbee & Son for defendant.

BROWN, J. 1. His Honor properly instructed the jury that in any view of the evidence, if believed, the defendant was guilty of negligence, and to answer the first issue "Yes." The telegram was delivered at the defendant's office in Burlington for transmission at 1 o'clock p. m., 22 November, and was not delivered at Spray until the next morning after 8 o'clock. This made out a *prima facie* case of negligence, and there is nothing to rebut it.

2. The court properly permitted the plaintiff to testify that the telegram was delivered to him at 9:25 a. m., 23 November. There is nothing in the complaint which forbade the reception of the evidence.

(77) It contradicted no alleged fact. The complaint states that the telegram was not delivered "until after 8 o'clock a. m., on 23 November, 1904, too late for the plaintiff to reach his home in Burlington to attend the funeral." As the complaint does not allege the actual time of delivery, in testifying that it was delivered at 9:25 a. m., the plaintiff contradicted nothing that he had alleged.

3. We do not think the court erred in submitting the two issues given, or in refusing issue No. 2 of those tendered by the defendant, which was as follows: "Could the plaintiff, by the exercise of reasonable care, have reached Burlington in time for the funeral after the receipt of the message by him?" The two issues submitted are substantially the same as issues tendered by the defendant. As to the issue which his Honor declined, we think that the defendant had the full benefit of that feature of the case under the second issue as to damages. In any view of the evidence, it is admitted that the plaintiff is entitled to recover nominal damages; therefore, if his Honor in his charge gave the defendant the full benefit of such evidence in mitigation of damages, the defendant cannot complain.

His Honor charged: "The law is, where a party is affected by the negligence of the defendant company, in the telegraph cases, that he must himself exercise reasonable diligence either to avert or minimize the harmful consequence of the company's negligence, and in such cases the mental anguish, which might have been prevented by the exercise of reasonable diligence, would form no ground for a recovery. If the jury shall find from the evidence that the plaintiff, by the exercise of reasonable diligence, could have caught a train from Reidsville on 23 November and been at the funeral and burial, and failed to do so, then he would be entitled to recover the cost of the message, 25 cents, and if you so find, you will answer this issue '25 cents.' The court charges you that,

notwithstanding the previous negligence of the defendant com- (78) pany, if you find it was negligent, if you should find from the evidence that the plaintiff by the exercise of reasonable care could have been at the funeral, then he would be entitled to recover nothing over 25 cents."

We do not see how this phase of the case could have been more clearly or fairly put to the jury than by the language employed. If the defendant has been hurt by the verdict, it is not because the jury failed to understand so lucid an instruction, but doubtless because they were not impressed by the defendant's view of the matter.

4. The remaining assignment of error is to the action of the court in submitting the case to the jury at all in the absence of sufficient proof on the question of mental anguish. There are two reasons why the assignment cannot be sustained: first, because the question is not raised either by motion to nonsuit or prayer for instruction; and, second, because there is evidence of mental anguish appearing in the record.

While the writer of this opinion has occasionally not been profoundly impressed with the reality and poignancy of the mental anguish averred in some cases of this character, as the jurors in some instances appear to have been, yet, he expresses his own as well as the opinion of this Court in saying that there is ample evidence in this case to show mental anguish and to justify his Honor's charge. The jurors were very properly instructed that mental anguish is to be proved and not to be presumed in this case.

As is well said by the able judge who tried it, "A brother's love is sufficiently universal to raise the presumption; but that is not so with respect to a brother-in-law. Such affection may exist, but it is incumbent upon the plaintiff to show it." There was evidence tending to prove that the deceased were not only brothers-in-law, but very intimate friends, and that most affectionate relations existed between them. The plain- (79) tiff states that he felt as near to the deceased as a brother; that they were closely associated; that the plaintiff had been at the house of the deceased a great deal and often applied to him for advice; that they were often together at the home of the plaintiff's father; that they kept up an intimate correspondence when separated; that he was very much affected by reason of his inability to be present at the funeral rites.

The evidence discloses no imaginary or fanciful sentiment. Such affections are sometimes real between men connected by the ties of marriage only. We sometimes see it illustrated in our daily life. While the defendant was not responsible for the death of the deceased, yet it was responsible, according to the findings of the jury, for such mental suffer-

ing as the plaintiff endured from grief at not being able to pay his last sad tribute at the grave of his dead brother and friend.

All the evidence admitted, tending to prove the existence of mental anguish, is clearly competent under numerous decisions of this Court. *Bright v. Tel. Co.*, 132 N. C., 317; *Cashion v. Tel. Co.*, 123 N. C., 267; *Hunter v. Tel. Co.*, 135 N. C., 462 His Honor presented the entire case to the jury with clearness, accuracy, and fairness, and we find

No error.

Cited: Helms v. Tel. Co., 143 N. C., 395; *Hedrick v. Tel. Co.*, 167 N. C., 237.

(80)

FEARINGTON v. TOBACCO COMPANY.

(Filed 10 April, 1906.)

Master and Servant—Duty of Master—Appliances—Evidence—Negligence—Res Ipsa Loquitur—Elevator.

1. An employer of labor to assist in the operation of railways, mills, and other plants, when the machinery is more or less complicated, and more especially when driven by mechanical power, 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 kind and character, and he 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.

2. In an action to recover damages for personal injuries, where there was evidence that plaintiff, an inexperienced hand, was ordered to help truck the tobacco upstairs; that the tobacco was first put on a truck and then pulled on the elevator, the tobacco being piled as high as plaintiff's head; that there were no blocks on the wheels of the truck; that plaintiff stood behind the truck, between the truck and the side of the elevator floor, about 12 or 14 inches of space; that as the elevator was going up, it dropped several inches and the truck slipped and plaintiff was injured: *Held*, there was evidence tending to show a negligent breach of duty on the part of the defendant.

3. Under the doctrine of *res ipsa loquitur* there was evidence to be considered by the jury as to the negligent and defective condition of the elevator.

ACTION by Arthur Fearington, by his next friend, against the Blackwell Durham Tobacco Company, heard by *Shaw, J.*, and a jury, at October Term, 1905, of DURHAM.

The plaintiff on his examination in chief testified as follows: "I was injured sometime in June, 1903; had been at work in the defendant's factory three days before the injury, working in the shipping-room helping to load cases of tobacco in a box car which stayed on (81) the sidetrack in a few feet of the shipping-room. In the evening, Mr. Andrews, superintendent of the defendant, came to me and told me to go uptown and get him some tobacco. When I came up with the tobacco he said, 'Go in and help those fellows truck that tobacco upstairs.' I told him that I had never worked on an elevator. He said, 'Hell! you don't want to work, do you?' And I said, 'I don't want to work like that.' He turned and went off and I went to work where he told me. The first load I carried up with Thomas Fleming, second with Howard Smith and got halfway up the building; the tobacco was put on the truck and then pulled on the elevator; it was in sacks laid across the truck; the truck had wheels and was rolled on the elevator; the tobacco was piled on the truck about as high as my head; I could not look over it; I stood behind the truck, between the truck and the side of the elevator floor; about 12 or 14 inches space was between where I had to stand. (Illustrates the position of his feet, his right foot being slightly in advance of the left.) I had one hand resting on the tobacco sacks; as the elevator was going up I was looking straight up, and the elevator dropped several inches; something gave me a knock on the left leg and I heard the bone break and my right leg shot out behind me; I fell with my face on the truck and right foot out behind me, and caught the iron rod with my left arm. When the elevator dropped the truck did nothing except to slip to me; there were no blocks on the wheels of the truck—ran it right on and left it so; there were no blocks there to put under the truck. They had me upstairs when I remembered anything, and was then carried to the Lincoln Hospital, suffering intensely; it seemed like I had as soon been dead as living. My right foot was broken in two; heel string in foot pulled loose; left leg broken just above the knee. There is a knot on my right side where I fell up against the truck or something else. I left the hospital in about four weeks; was out something like two weeks and then went back and stayed nearly one month. My right foot is stiff and (82) I limp as I walk. Drs. Manning and Carr attended me at the hospital. Dr. Carr is now dead. I suffered all the time I was at the hospital; my left leg gave me a lot of trouble, and pain in my side under my arm; it was nearly a year before I could walk without a crutch. Before I was hurt I was getting $6.25. Since I have gotten out of the hospital I have not been able to do regular work from morning to night. I now stay in a restaurant, but do not do regular work." There was other testimony tending to corroborate the plaintiff's statement. Among other

witnesses, Charles Fleming testified: "There were ten sacks of tobacco on the truck, each weighing about 150 pounds."

At the close of the plaintiff's evidence the defendant moved to nonsuit the plaintiff, and on an intimation from his Honor that he would allow the motion, the plaintiff excepted, submitted to a nonsuit, and appealed.

Manning & Foushee for plaintiff.
Fuller & Fuller for defendant.

PER CURIAM: In *Hicks v. Mfg. Co.,* 138 N. C., 325, it is said to be accepted law that an employer of labor to assist in the operation of railways, mills, and other plants, when 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 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 (83) can be done, in the exercise of proper care and diligence, citing *Whitsell v. R. R.,* 120 N. C., 557, and *Marks v. Cotton Mills,* 135 N. C., 287.

Applying these principles to the facts testified to by plaintiff, there was sufficient evidence tending to show a negligent breach of duty on the part of the defendant.

Under the doctrine of *res ipsa loquitur* there was evidence to be considered by the jury as to the negligent and defective condition of the elevator. *Womble v. Grocery Co.,* 135 N. C., 474; *Ross v. Cotton Mills,* 140 N. C., 115.

Again, there was evidence to show a negligent placing of the truck on the elevator without any appliance or contrivance to hold it in position; and, further, there was testimony to be considered tending to show a negligent order on the part of the foreman in directing an inexperienced hand to go on an elevator, under all the circumstances brought out, leaving him only a space of 12 or 14 inches in which to stand, and without any guards or rails or other means by which the plaintiff could protect or maintain himself in a secure position.

In case negligence of the defendant is established and the question of contributory negligence arises, this order of the foreman would be pertinent also in repelling an imputation of that kind. But so far as now disclosed, there would seem to be very little, if any, evidence of contributory negligence to be considered.

There was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to a jury. To that end a new trial is awarded.

New trial.

Cited: Bradley v. R. R., 144 N. C., 558; *Phillips v. Iron Works,* 146 N. C., 217; *Blevins v. Cotton Mills,* 150 N. C., 498; *Free v. Fiber Co., ib.,* 737; *Helms v. Waste Co.,* 151 N. C., 372; *Mercer v. R. R.,* 154 N. C., 402; *Walker v. Mfg. Co.,* 157 N. C., 135.

(84)

RAY v. RAILROAD.

(Filed 10 April, 1906.)

Railroads—Negligence—Contributory Negligence—Last Clear Chance.

1. It is a negligent act to back a train into a railroad yard where persons, passengers or others, are accustomed to stand or move about, either as a right or in the discharge of some duty, or by permission of the company evidenced by established usage, without warning of any kind and without having some one in a position to observe the condition of the track and signal the engineer or caution others in case of impending peril.

2. While one rightfully, or by permission, on or dangerously near a railroad track is required to look and listen, this obligation may be so qualified by facts and attendant circumstances as to require that the question of contributory negligence should be submitted to the jury.

3. If the plaintiff is at the time rightfully upon the track or sufficiently near it to threaten his safety, and is negligent, and so is brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance.

ACTION by J. C. Ray against Aberdeen and Rockfish Railroad Company, heard by *Ferguson, J.,* and a jury, at October Term, 1905, of SCOTLAND.

There was allegation and evidence tending to show that on or about 26 December, 1900, the plaintiff was a passenger on defendant's train going to Aberdeen, N. C. About a half-mile from Aberdeen the train was run onto a "Y" and backed in towards the depot, and at a point about 200 yards from the depot the train was stopped, and on a call from the conductor, "All off for Aberdeen," the plaintiff and other passengers

(85) alighted, getting off at the rear end of the train. At this point there was no depot or waiting-room, and the defendant's track was some 30 feet from the track of the Seaboard Air Line Railroad. The track on which the defendant's train was then placed, and in the direction in which the same had been backing and towards the depot, inclines gradually towards the track of the Seaboard road, and the two tracks join some distance above the depot. It seems that this depot is used by both roads, but this is not clear from the statement of the case on appeal. A few moments after getting off the train, the plaintiff went down the road towards the depot, walking between the tracks of the two roads, and at a point near where the two roads joined and where they were 3 or 4 feet apart, a train on the Seaboard track came, meeting the plaintiff, and being called to by some one on the Seaboard engine to jump for his life, the plaintiff in the effort to avert injury by the Seaboard train, sprang onto the track of the defendant's road and was struck and seriously injured by the defendant's train, which had backed down the road towards the depot, and in the same direction in which the plaintiff had been walking. No bell was rung or signal given by the train of the defendant which caused the injury, and no one was on the car or elsewhere to keep a lookout and warn a person or signal the engineer of danger, and the noise and smoke of the train on the Seaboard road was such that the plaintiff could not well note what was going on. At the close of the testimony, on motion of the defendant, the court dismissed the action as on judgment of nonsuit, and the plaintiff excepted and appealed.

J. A. Lockhart, E. H. Gibson, and W. H. Cox for plaintiff.
U. L. Spence for defendant.

HOKE, J. Upon the foregoing facts the Court is of opinion there was error in directing a nonsuit, and the plaintiff is entitled to (86) have his cause submitted to a jury under proper instructions. It was a negligent act to back a train onto a railroad yard where persons, passengers, or others were accustomed to stand or move about, either as of right or in the discharge of some duty, or by permission of the company, evidenced by established usage, without warning of any kind and without having some one in a position to observe the condition of the track and signal the engineer or caution others in case of impending peril; and if such an act was the proximate cause of the plaintiff's injury the issue as to the defendant's negligence should be aswered against the company. This was in effect held in *Purnell v. R. R.*, 122 N. C., 832; *Smith v. R. R.*, 132 N. C., 819; *Lassiter v. R. R.*, 133 N. C.,

244. There was evidence tending to show that the defendant's train was backed on the yard where passengers had just alighted, in the direction in which some of them would likely go, without warning of any kind and without having any one to note whether the way was clear. If these facts are established, and it is further shown, as the proximate consequence of such negligent act, that the plaintiff was injured as alleged, the cause of action on the issue as to the defendant's negligence comes clearly within the principle of the above decisions. And on the conduct of the plaintiff, the effect of which is usually determined on an issue as to contributory negligence, we think the question must be submitted to a jury.

In *Sherrill v. R. R.,* 140 N. C., 252, the Court held that while one rightfully or by permission, as stated, on or dangerously near a railroad track is required to look and listen, this obligation may be so qualified by facts and attendant circumstances as to require that the question of contributory negligence should be submitted to the jury, and so we hold here. While the plaintiff is required to be alert and attentive, we think that the approach of the other train, and the noise, steam, and smoke attending it, and the fact that he had just alighted from the defendant's train, which he had just left standing in the yard (87) behind him, and the other attendant facts and circumstances, so qualify his obligation that the jury should determine under a proper charge whether the plaintiff was guilty of contributory negligence in stepping suddenly in the way of the defendant's train, or in having negligently placed himself in a position where the emergency was brought upon him.

In 1 Fetter on Carriers of Passengers, sec. 136, it is said: "So where a passenger is carried beyond a station and into the switching yard, and is struck by an engine on the way out of the yard, it is for the jury to determine whether she, with such knowledge as she possessed of the peril of the place and with the presumption she was entitled to indulge as to the degree of care which the defendant's employes would exrcise for her protection, was herself guilty of negligence which proximately contributed to her injury."

The facts in this case are not unlike those in *Hempenstall v. R. R.,* 89 Hun., 285, where it was held that the question of contributory negligence was for the jury. See, also, *Tubbs v. R. R.,* 107 Mich., 108. If negligence on the part of the defendant is established, and the jury should also find that the plaintiff was guilty of contributory negligence, on the ground that he was negligent in going into a dangerous position without being properly attentive to his own safety, the facts seems to require the submission of a third issue involving the question whether the defendant,

in this instance, negligently failed to avail itself of the last clear chance of avoiding the injury.

The authorities are to the effect that if the plaintiff is at the time rightfully upon the track or sufficiently near it to threaten his safety, and is negligent, and so brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper
(88) lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance. *Lassiter v. R. R., supra; Reed v. R. R.*, 140 N. C., 146; *R. R. v. Cooney*, 87 Md., 261. There was error in directing a nonsuit, and a new trial is awarded.

New trial.

Cited: Hudson, v. R. R., 142 N. C., 202; *Beck v. R. R.*, 146 N. C., 458; *Muse v. R. R.*, 149 N. C., 449; *Bordeaux v. R. R.*, 150 N. C., 532; *Credle v. R. R.*, 151 N. C., 52; *Farris v. R. R., ib.*, 491; *Snipes v. Mfg. Co.*, 152 N. C., 45; *Edge v. R. R.*, 153 N. C., 516; *Zachary v. R. R.*, 156 N. C., 501; *Talley v. R. R.*, 163 N. C., 571, 579; *Gray v. R. R.*, 167 N. C., 437; *LeGwin v. R. R.*, 170 N. C., 361; *Hinson v. R. R.*, 172 N. C., 652; *Dunn v. R. R.*, 174 N. C., 258; *Hudson v. R. R.*, 176 N. C., 493.

HAIRE v. HAIRE.

(Filed 10 April, 1906.)

Dower—Seizin of Husband—Conveyance Before Marriage—Deed Unrecorded.

1. The seizin of the husband in order to support dower must be seizin in law; not only actual or constructive possession, but the legal right to possession.

2. Where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower.

SPECIAL proceedings for dower by Lenore Haire against Owen L. Haire and others, heard by *Ferguson, J.*, and a jury, at December Term, 1905, of ANSON.

The plaintiff moved for judgment upon the admissions in the answer, which was granted, and from the judgment rendered, allotting dower, defendants appeal.

James A. Lockhart for plaintiff.
Bennett & Bennett for defendants.

BROWN, J. According to the answer of Daniel L. Smith, an- (89) swering for himself and infant defendants, W. M. Haire, and his first wife, Christian, on 17 March, 1888, executed a deed in fee for the lands described in the petition for dower to Rosa Smith and Alpha A. Teal; that the grantor delivered said deed in the presence of his wife to the defendant Smith with the declaration that he should keep it; that the said Smith did keep it for the grantees until the death of the grantor; that grantor never knew that the deed was not recorded, and that it was Smith's carelessness that it was not recorded until the day after W. M. Haire's death. After the death of his first wife, the grantor married petitioner, who claims dower in the land. Haire remained on the land up to the time of his death.

The petitioner contends that marriage is a civil contract and constitutes a valuable consideration; that by it the *feme* acquires in the quality of a purchaser an estate for the term of her life in one-third in value of the lands wherein her husband is seized of an estate of inheritance; that since chapter 147, Laws 1885, now brought forward in the Revisal of 1905, secs. 979 and 980, went into effect, the deed of her husband, made prior to the marriage with her, is not operative to defeat her dower unless it was registered before her marriage. She contends that the right of dower is entitled to the same standing before the courts as the rights of purchasers of estates in lands, and for this reason, it being admitted that the deed was not registered, she is, upon the pleadings, entitled to judgment for dower.

The fallacy of plaintiff's contention consists in assuming that she is a purchaser for value within the terms of the act referred to. There is no contract between husband and wife in respect to curtesy or dower. Neither is, therefore, creditor or purchaser as to the other. The wife's right to dower is derived solely from the statute conferring and defining it and not by reason of any contract with the husband. (90) It is given by law and even against the husband's will. *Chief Justice Ruffin* says that the interest the one gets in the property of the other is given by law for the encouragement of matrimony. *Norwood v. Marrow,* 20 N. C., 587. The plaintiff must rest her claim solely upon the seizin of the grantor, her husband. Such seizin in order to support dower must be seizin in law; not only actual or constructive possession, but the legal right to possession. *Redding v. Vogt,* 140 N. C., 562. It follows, therefore, that, if the delivery of the deed, although unrecorded, was sufficient to defeat the husband's seizin, plaintiff's right to dower

must fail. *Blood v. Blood,* 40 Mass. (23 Pick.), 85. At common law, to entitle her to dower, plaintiff must show seizin of her husband during coverture. The unrecorded deed is good against him. By force of it he parted with his right to possession, his seizin in law; so that at no period during coverture was plaintiff's husband both seized and possessed of the land described in the petition. In a case similar to this the Supreme Court of Maine says: "The defendant had no rights in the land which could be affected by the matter of the registry of the mortgage. Her incohate right of dower was no more a *right* of dower in the land than is an acorn an oak. It was immaterial to her so far as legal rights were concerned whether the mortgage was recorded or not. She had no right of dower while her husband lived, and when he was dead she was dowable only of lands of which he had been seized during her coverture, and he was not seized of the land which he had previously conveyed, whether his grantee had caused his deed to be recorded or not." *Richardson v. Skolfield,* 45 Maine, 389.

As a matter of convenient practice, his Honor should have reserved the question presented on this appeal, and have submitted to the (91) jury the issue raised by the pleadings as to the actual delivery of the deed, and had a finding upon that vital matter. Then the case could have been finally determined. As it is, there must be a new trial now to determine that issue.

New trial.

Cited: *Phifer v. Phifer,* 157 N. C., 228.

JOHNSON v. JOHNSON.

(Filed 10 April, 1906.)

Marriage—Annulment—Setting Aside Judgment—Procedure—Parties —Same Counsel Representing Both Parties.

1. A proceeding to set aside a judgment will be dismissed where the same counsel jointly make the motion representing both parties to the action.

2. If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice served upon the other party, and notice to counsel of record in the original action is not sufficient.

ACTION by Adella V. Johnson against W. Mangum Johnson, heard by *Ferguson, J.,* at November Term, 1905, of CHATHAM.

This was a motion by the plaintiff and the defendant, jointly, to set aside a judgment rendered in this cause at May Term, 1905. The motion was denied, and the plaintiff and defendant appealed.

N. Y. Gulley and R. H. Dixon for appellants.
H. A. London, R. H. Hayes, and W. B. Siler, contra.

BROWN, J. This action was brought to annul a marriage contract entered into between the plaintiff and the defendant on 2 December, 1903, upon the ground that the plaintiff was at the time totally incapable to enter into such contract, and also to set aside a deed (92) which the plaintiff had executed to the defendant. Both parties were represented by counsel, and the following issues were submitted to the jury:

1. Was the plaintiff, at the time of her alleged marriage with the defendant, totally incapable to make or to enter into such contract for a proper, legal, and binding marriage, from want of will or understanding? Ans.: Yes.

2. Was the plaintiff, at the time of the execution of her deed to the defendant, incapable of executing a valid deed, for want of reason and understanding? Ans.: Yes.

3. What amount is the defendant entitled to recover by reason of his improvements upon the premises? Ans.: $75.

The notice of the motion to set aside the judgment rendered was served on all the counsel who appeared respectively for the plaintiff and defendant at the trial. It is signed by N. Y. Gulley and R. H. Dixon, "attorneys for Adella V. Johnson and W. Mangum Johnson." The grounds of the motion are that the complaint is not properly verified so as to give the Superior Court jurisdiction as in an action for divorce, and that the cause was tried at the term to which the summons was returnable.

Reasons based upon principles of sound public policy compel us to dismiss this proceeding to set aside the judgment. We are of opinion that the same counsel cannot represent both parties to the action. In so holding, we mean no reflection whatever upon the reputable and eminent counsel, who have undertaken together to represent both parties in making the motion. They have argued strenuously before us that there are no conflicting interests, and that therefore they can properly represent both parties. We are compelled to differ from them.

In *Moore v. Gidney,* 75 N. C., 34, the Court says: "The law does not tolerate that the same counsel may appear upon both sides of an adversary proceeding even colorably, and in general will not permit a judgment so affected to stand, if made the subject of excep- (93)

tion in due time by the parties injured thereby." To the same purport are the cases of *Gooch v. Peebles,* 105 N. C., 411, and *Molyneux v. Huey,* 81 N. C., 113.

To permit both parties to be represented jointly by the same counsel upon this motion would be simply laying the foundation for future complaint, upon the part of the plaintiff or defendant, in case either should be dissatisfied with the action of the court if the judgment should be set aside. If the plaintiff was so feeble-minded that she could not contract a valid marriage, how do we know that she is capable now to take legal action to set aside the judgment? The judgment rendered cannot be set aside by consent. If either party desires to move to set it aside, it must be done in an adversary proceeding after due notice served upon the other party. Notice to counsel of record in the original action is not sufficient. Upon the hearing of such motion, the respective parties must appear by their individual counsel. The counsel in the original action are not proper or necessary parties to a proceeding to set the judgment aside.

Proceeding dismissed.

CONNOR, J., concurring: While I do not dissent from the disposition made of this appeal, I am of the opinion that we should indicate, for the guidance of the parties, our opinion upon the questions raised upon the record and fully argued upon the hearing. The proceeding is anomalous; due regard for orderly procedure requires us to dismiss the motion to the end that the parties may proceed as they may be advised. This Court held in *Lea v. Lea,* 104 N. C., 603, in a well considered opinion by *Mr. Justice Shepherd,* that an action to have a marriage declared void because of a preëxisting disqualification to enter into the
(94) marriage relation, so far as the procedure is concerned, is an action for divorce, as shown by the authorities cited in the opinion. At common law no divorce *a vinculo* could be granted except for causes existing previous to the marriage which rendered the marriage unlawful *ab initio.* While it is true that our statute does not in terms include an action to annul a marriage on account of preëxisting obstacles with action for divorce *a vinculo,* I am of the opinion that in regard to the practice prescribed, the same procedure should be observed. Certainly, the same policy upon which the jurisdictional affidavit is required in one should control the other. It will be observed that the parties, notwithstanding the admissions in the answer, submitted issues, thus treating the allegations as denied—as in an action for divorce. If, as appears from the record, a serious doubt exists as to whether this action was prosecuted in accordance with the requirements of the statute, the par-

ties are left in a deplorable condition. It would seem that if jurisdictional facts are not apparent upon the record, the proceeding would be void so far as it affected the matrimonial relations of the parties, and the court, upon motion of either party, would so decree. This Court has uniformly held that the facts required to be set forth in the affidavit prescribed by section 1563 of the Revisal are necessary to give the court jurisdiction. *Hopkins v. Hopkins,* 132 N. C., 22. It would seem that the same conclusions would follow when it is sought to have a marriage declared void for the causes set out in section 1560 of the Revisal. I concur in the opinion that an adversary proceeding should be instituted and prosecuted by one of the parties, to the end that the other may be properly represented and the court may proceed in an orderly way.

WALKER, J., concurs in the concurring opinion.

Cited: *S. c.,* 142 N. C., 462.

(95)

BYNUM v. WICKER.

(Filed 10 April, 1906.)

Tenants by Entireties—Conveyance by Husband Alone—Injunction Against Cutting Timber—Estoppel.

1. While a husband may, by a deed in which his wife does not join, convey an estate by entireties, so as to entitle the grantee to hold during the husband's life, such deed gives the grantee no right to cut timber on the land.

2. Where a husband and his wife were tenants by entirety of a tract of land, and the husband without the joinder of his wife mortgaged the land and it was sold under the mortgage, and plaintiff holds by mesne conveyances from the purchaser at the mortgage sale, the court erred in refusing to continue to the hearing an injunction against the defendants, who are the agents of the husband and his wife, to prevent their cutting the timber on the land.

ACTION by T. M. Bynum against J. M. Wicker and Milo Fields, pending in the Superior Court of MOORE County, heard by consent by *Moore, J.,* at Wadesboro, on 16 January, 1906, upon a motion by the plaintiff to continue a restraining order, theretofore granted, to the final hearing of the cause. From an order refusing to continue the injunction to the hearing, the plaintiff appealed.

U. L. Spence for plaintiff.
Seawell & McIver for defendant.

CLARK, C. J. Edward Fields and wife were tenants by entirety of the tract in question. Edward Fields, without the joinder of his wife, mortgaged the land to John R. Lane. The land was sold under the power of sale in the mortgage, and the plaintiff holds by mesne conveyance from the purchaser at such sale. This is a proceeding for an injunction against the defendants, who are the agents of Edward Fields and
(96) his wife, to prevent their cutting the timber on said land.

This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law. *Long v. Barnes,* 87 N. C., 333; *West v. R. R.,* 140 N. C., 620. At common law "the fruits accruing during their joint lives would belong to the husband" (*Simonton v. Cornelius,* 98 N. C., 437), hence the husband could mortgage or convey it during the term of their joint lives, that is, the right to receive the rents and profits; but neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired. "He cannot alien or encumber it, if it be a freehold estate, so as to prevent the wife or her heirs, after his death, from enjoying it, discharged from his debts and engagements." 2 Kent Com., 133; *Bruce v. Nicholson,* 109 N. C., 204.

It is clear, therefore, that the timber being a part of the freehold, the plaintiff would have no right to cut the timber, claiming under a conveyance from the husband alone. The husband having conveyed his interest is estopped from interfering with the possession of the premises during the joint lives of himself and wife, and of course so is the wife. Whether, if he should be survivor, his deed is valid as a conveyance of his interest by survivorship, is a point as to which the authorities are conflicting, but we are not now called upon to decide that point, as it is not before us.

In refusing an injunction to the hearing there was
Error.

Cited: Jones v. Smith, 149 N. C., 319; *Greenville v. Gornto,* 161 N. C., 343; *McKinnon v. Caulk,* 167 N. C., 412; *Freeman v. Belfer,* 173 N. C., 583; *Seip v. Wright, ib.,* 16; *Gooch v. Bank,* 176 N. C., 217; *Dorsey v. Kirkland,* 177 N. C., 523; *Moore v. Trust Co.,* 178 N. C., 125; *Odum v. Russell,* 179 N. C., 9.

(97)

FREEMAN v. FREEMAN.

(Filed 10 April, 1906.)

Wills—Rules of Construction—Remainders.

1. The rule of construction, that when the language used by a testator is doubtful, the court inclines to that construction which will make the title to property left in remainder vested, rather than contingent, is not permitted to interfere with the primary rule which requires the court, in all cases, to ascertain and effectuate the intention of the testator, as gathered from the language used, if possible.

2. Where the language of a will is such as to call for construction, the court, with a view of securing a proper construction, puts itself, as far as may be, in the position of the testator, that it may see things from his point of view.

3. The fact that a testator was illiterate, unable to write his name, and the fact that his will was not written by one learned in the law, do not take the case out of the rule that the court must ascertain the intention of the testator by reference to the language used in the will, unless it is so doubtful as to render it necessary to resort to extrinsic evidence.

4. Where a will provided "That the real and personal property, at the death of my wife, shall be sold to the highest bidder, and the proceeds equally divided between all my children that appears personally and claims their part, and this will shall disinherit all of said children who applies through an agent," only the children of the testator who were living at the death of the widow are entitled to share in the proceeds.

ACTION by N. C. Freeman, executor, against Rachel Freeman and others, heard by *Shaw, J.*, at October Term, 1905, of DURHAM.

This is an action by the plaintiff, as executor of Ewell Freeman, asking for a construction of the will of his testator, who died in the county of Wake in 1880, leaving a last will and testament, the material parts of which are as follows:

"3. That my wife, Elizabeth G. Freeman, shall have the sole (98) use of my real and personal estate as long as she may live. At her death Mary Frances, Nancy A., and Rufus W. Freeman shall have one bed, bedstead and clothing, one cow and calf each, before the remainder of my children are entitled to anything.

"4. That the real and personal property, at the death of my wife, Elizabeth Freeman, shall be sold to the highest bidder (graveyard excepted), and the proceeds equally divided between all my children that appears personally and claims their part, and this will shall disinherit all of said children that applies through an agent."

At the time of the death of the said testator he left surviving eight children, three of whom have since died, leaving surviving a number of

children. One daughter, Nancy, who intermarried with Sidney King, died, leaving no children. His son Spencer Freeman resides in Georgia. One son, Rufus W. Freeman, left the State several years before his father's death, unmarried and under circumstances which displeased him; he has not been heard from since. Mary died without issue. That there are now surviving, of the children of said testator, plaintiff N. C. Freeman and defendants Spencer Freeman and Rachel.

His Honor being of the opinion that upon a proper construction of the will only the children of the testator who were living at the death of his widow were entitled to share in the proceeds of the property, rendered judgment accordingly, from which the defendants, grandchildren and Sidney King, surviving husband of Nancy, appealed.

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

CONNOR, J. We fully concur with counsel for appellants that when the language used by a testator is doubtful, the court inclines to that construction which will make the title to property left in remainder
(99) vested, rather than contingent. The authorities cited in the brief amply sustain the position. 2 Fearne Rem., 200; Gardner on Wills, 499. This rule is not permitted, however, to interfere with the primary rule of construction which requires the court, in all cases, to ascertain and effectuate the intention of the testator, as gathered from the language used, if possible. The court will ascertain such intention by giving to nontechnical words their ordinary and popular meaning, assuming that the testator used them in that sense in which they are generally used and understood. It is sometimes said by way of illustrating this principle, "The intention must be found within the four corners of the instrument." To this general rule there is one exception. "Where the will is such as to call for construction, the court, with a view to securing a proper construction, puts itself, as far as may be, in the position of the testator, that it may see things from his point of view. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible." Gardner on Wills, 385. "The rule itself is always subservient to the intention of the testator; and, therefore, if upon construing the whole will, it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment. . . . For if the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to

the property unless they live to receive it, there is no law against such intention, if clearly expressed." 2 Williams Executors, 520-521.

In the light of these elementary principles, we are of the opinion that the testator has clearly expressed his intention in regard to the disposition of his estate. We concur with the appellant that if he had concluded item 4 with the words "all my children," they would have taken a vested remainder. But we may not discard, as (100) without meaning, the words immediately following, "that appears personally and claims their part." The meaning and import of this language, in its ordinary acceptation, is too plain to admit of doubt. Those of his children are to take who shall "appear," that is, who are living at the time fixed for the sale and distribution. The language following is evidently used to make clear, if need be, his purpose to "disinherit all of said children that applies through an agent." We find no such uncertainty in the meaning of the language used as to permit us to go beyond "the four corners" of the will for aid. It is suggested that he was displeased with his son Rufus, who had left home many years before the execution of the will, under circumstances casting disgrace upon himself and family, and that it was his purpose, in using the language, to either disinherit, or require him, as a prodigal, to return home and claim in his own person his part. To adopt this view for the purpose of finding an intention not otherwise seen in the language used, would be exceedingly hazardous. In item 3 he gives Rufus W., together with two of his daughters, certain personal property, attaching no condition to the gift. Attention is called to the fact that the testator is illiterate, unable to write his name, that the will was not written by one learned in the law, and that in such cases the court is moved to search out his real intention. These facts do not take the case out of the rule that we would ascertain the intention by reference to the language used, unless it is so doubtful as to render it necessary to resort to extrinsic evidence.

The conclusion at which we have arrived renders it unnecessary to discuss the claim of defendant Sidney King to the share which would have vested in his wife if she had lived to "appear personally and claim her part." The cases in this Court are reviewed in the well considered opinion of *Shepherd, C. J.*, in *Whitesides v.* (101) *Cooper,* 115 N. C., 570. For the reasons and upon the principles clearly set forth in that case, we are of the opinion that only those who come within the terms of the devise at the death of the life tenant are entitled to share in the proceeds of the land. It is probable the direction that the land, together with the personalty given the widow, be sold at her death and the proceeds divided, worked an equi-

table conversion from the death of the testator, in which event the interest of the deceased children leaving issue, if not contingent, passed to their personal representatives, and they should have been made parties. *Benbow v. Moore,* 114 N. C., 263. In view of the disposition which we have made of the appeal, the question is not material. The judgment must be

Affirmed.

Cited: Satterwaite v. Wilkinson, 173 N. C., 39; *Bowden v. Lynch, ib.,* 207; *White v. Goodwin,* 174 N. C., 727.

COOK v. VICKERS.

(Filed 10 April, 1906.)

Cartways—Eminent Domain—Right of Appeal.

1. Cartways are regarded as *quasi*-public roads, and the condemnation of private property for such a use has been sustained upon that ground as a valid exercise of the power of eminent domain.

2. Section 16, chapter 729, Laws 1901, confers the right of appeal, in proceedings for a cartway, from the order of the commissioners for a cartway.

3. Chapter 729, Laws 1901, does not repeal the provision of section 2056 of The Code (Rev., sec. 2686) relating to appeals in cartway proceedings.

4. Where an appeal is expressly or impliedly given, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statutes may warrant, keeping in view always the intention of the Legislature.

(102) PROCEEDING for a cartway by G. W. Cook and others against James Vickers and others, heard by *Shaw, J.,* at October Term, 1905, of DURHAM.

The plaintiffs, through the road supervisor of the district, filed their petition before the county commissioners for the establishment of a cartway from the residence of George W. Cook, one of the plaintiffs, to the Fayetteville Road, a public highway, over the lands of the defendants, under chapter 729, Laws 1901, relating to public roads and cartways in Durham and certain other counties therein named. The commissioners granted the order, and the defendants excepted and appealed to the Superior Court. The plaintiffs moved there to dismiss the

appeal, which motion was heard at January Term, 1905, and refused by *Judge Peebles,* then presiding. At October term the motion was renewed before *Judge Shaw,* who allowed the same and remanded the proceeding to the board of commissioners of the county, with directions to execute the order theretofore made by them appointing five freeholders to lay out the cartway. The plaintiffs' motion to dismiss was based upon two grounds: (1) That the appeal from the commissioners was premature, as the jury of five freeholders had not carried out the order of the board by laying out the cartway and assessing the damages. (2) That no appeal is allowed by law from the order directing the cartway to be laid out, but only from the assessment of damages by the jury and the decision of the commissioners thereon. The court dismissed the appeal upon the ground that the act of 1901 does not provide for an appeal. The defendants excepted and appealed.

Winston & Bryant for plaintiffs.
Guthrie & Guthrie and Boone, Giles & Boone for defendant.

WALKER, J. The right of appeal, even where property is (103) taken for public use, should not be denied in any case if by fair and reasonable interpretation of the law it can be allowed, and surely we should give a free construction to the statute in favor of the right, as between individuals, one of whom seeks to acquire a right or easement in respect to the other's land. There is not the same reason in the latter case for refusing the right, which is said to hold good in the former, because of the usually long delay thereby caused in the furtherance of public improvements or of works in which the public have a more or less extensive interest. Cartways are regarded as *quasi*-public roads, and the condemnation of private property for such a use has been sustained upon that ground as a valid exercise of the power of eminent domain. The public have the right to use them and are otherwise interested in their establishment and maintenance. 1 Lewis Em. Domain, sec. 167; *Cozad v. Hardware Co.,* 139 N. C., 283. They are laid out, it is true, on application of a particular individual and paid for by him, and are designed primarily and principally for his special accommodation; but, as they are intended also for the use of the public generally, they are for this reason properly considered a part of the public road system of the county (Lewis, *supra*), and are so designated in the Act of 1901, though they are distinguished from public highways proper—being in a certain sense subsidiary to them. As the contest for a cartway is between individuals and is conducted with a view of primarily benefiting one to the detriment, perhaps, of the other, we

would be reluctant to hold that an appeal is denied to the landowner in such a case, while it is given in a proceeding for the opening of a public road, where the people generally are concerned, unless the law imperatively so requires. We do not think it does in this instance.

In the light of what has been said, we will examine the statutes.

Chapter 729, Laws 1901, is an amendment to chapter 581, Laws
(104) 1899. The latter act made no provision for cartways, but left them to be governed by the general law in The Code. Section 10 of the Act of 1901 defines a cartway and section 13 provides how it shall be laid out. Section 14 directs how timber, gravel, and other material may be taken for constructing, improving, and repairing roads, and prescribes the method of making compensation. Section 15 provides for laying out public roads and the assessment of damages. Section 16 gives the right of appeal to the landowner "when he is dissatisfied with the finding of the jury provided for in sections 11 and 12 and with the decision of the county commissioners." Turning to sections 11 and 12 of the act, we find that they do not relate to the taking of land or material or the assessment of damages, so that it is apparent the reference to those sections was a clerical mistake. Section 13 and sections 14 and 15, ch. 729, Laws 1901, do relate to that subject, and were evidently intended for sections 11 and 12. In substituting sections 4 to 20, inclusive, of the Act of 1901 for the sections with corresponding number in the Act of 1899, the draftsman has brought forward sections 11 and 12 of the Act of 1899 with different numbers (14 and 15) and overlooked the fact, in drafting section 16, that a new section relating to the same general subject, namely, section 13, referring to cartways, had been inserted in the Act of 1901. The language of section 16 of the latter act clearly indicates that the Legislature intended to give the right of appeal in all cases where land or material is taken for road purposes, and we must so construe it. The provision in regard to cartways, it is true, is not embraced by sections 14 and 15 of the Act of 1901, being in a separate section which immediately precedes these two, but we cannot think that it was the purpose to give the right in the one case where public interests alone were involved, and deny it in the other where the accommodation of an individual is the main object to be accom-
(105) plished, especially as section 16 is comprehensive enough in its general terms to cover the latter case. The right of appeal in proceedings to establish cartways has existed for so long a time and is so just in itself, that the statute should be given such a meaning as to preserve it, if under the rules of construction it is possible to do so. There can be no doubt of the legislative intent concerning appeals in road cases. The only difficulty we encounter in holding the right to

exist, under the act, in cartway cases, is that section 16 provides for appeals only if the party is dissatisfied with the finding of the jury and with the decision of the commissioners thereon; and there is no provision in section 13 of the act, relating to cartways, for a report by the jury to the commissioners and exceptions thereto, and for a confirmation, revision, or rejection of the report, as in the case of roads. We should not permit this dissimilarity between provisions relating to the two subjects to defeat the leading idea of section 16, that there shall be the right of appeal by the landowner, but should rather construe section 16 in connection with the other sections relating to the laying out of roads and cartways, so as to give proper effect to it with respect to each of the others, according to the nature and requirements of the particular subject-matter and the object to be attained. It is very clear that section 13, as well as sections 14 and 15, was intended to come under the operation of section 16, as practically all the elements of a case wherein an appeal is allowed by that section are present in the case of cartways—the only exception being that, in the latter case, no report is directed to be made to the commissioners. But the appeal is required by section 16 to be taken from the decision of the commissioners, and, in this respect, a distinction has been made by this Court, in construing other statutes, between an appeal in the case of cartways, where it is taken from the decision of the commissioners ordering the cartway to be laid out, and taken before there has been an assessment of damages, and an appeal in the case of a public road or a railroad, where (106) a report is made to the commissioners and the appeal is taken from their decision thereon. This distinction, with the reasons for it, is stated and applied in *Warlick v. Lowman,* 101 N. C., 548; *McDowell v. Asylum,* 101 N. C., 656; *Tel. Co. v. R. R.,* 83 N. C., 420; *R. R. v. R. R., ibid.,* 499; *R. R. v. Warren,* 92 N. C., 622; *R. R. v. Newton,* 133 N. C., 132. It arises out of the difference in the language of the several statutes. Section 16, therefore, confers the right of appeal in proceedings for a cartway according to the nature of the case—that is, by allowing the appeal to be taken, as under The Code, from the order of the commissioners for a cartway, which is treated as their decision in that particular case.

But the right can be sustained upon another ground. The Act of 1901 does not by express terms repeal the provision of section 2056 of The Code (Revisal, sec. 2686), relating to appeals in cartway proceedings. It only repeals all laws or parts of laws in conflict with it. There is no necessary repugnancy between an act providing for the laying out of a cartway, which is silent as to an appeal (if such is the case here), and a general law providing substantially for the same pro-

ceeding, with the right of appeal. An implied revocation is not favored (*S. v. Perkins, post,* 797) and certainly it should not be where it will result in depriving a party of so important a right as that of an appeal by which to review the lower courts, and especially the decisions of statutory bodies not possessing many of the attributes of judicial tribunals, competent to try the questions involved. Conceding it to be true that the right of appeal is purely statutory, and that unless some statute authorizes an appeal the judgment of a court of competent jurisdiction is final, the rule should be very carefully applied in highway cases. "In such cases the statutes should be liberally construed (107) in favor of the right, and every reasonable intendment made in favor of its existence. The power of seizing property is a high one, and the assessment of benefits and damages often involves very important and difficult questions, and it should not be held, where it can be avoided, that the decision of the tribunal of original jurisdiction cannot be appealed from, since it ought not to be presumed that the Legislature meant to place the decision of a tribunal, of the rank of those to which original jurisdiction is usually given, beyond review by higher courts." Elliott on Roads and Streets, 359.

We conclude that the right of appeal from the order of the commissioners is given by the Act of 1901 and by The Code. The case will be tried *de novo* in the Superior Court (*Warlick v. Lowman, supra*), the statute and The Code as to the mode of trial in that court being very much the same.

This is not like a case where the statute is totally silent as to the right of appeal (*R. R. v. Ely,* 95 N. C., at p. 81; *R. R. v. Jones,* 23 N. C., 24), and the reasoning of the cases cited does not apply. Here, there is a general law applicable to this particular class of cases and providing the necessary procedure, which, as we think, was not intended to be repealed by the Act of 1901; and, besides, the general tenor of the last-named act clearly implies that an appeal was contemplated. Where an appeal is expressly or impliedly given, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statutes may warrant, keeping in view always the intention of the Legislature. Elliott, *supra,* 360 and 362; *Blair v. Coakley,* 136 N. C., 408.

There was error in the judgment of the court, which is reversed, with directions to proceed further in the cause according to the rule herein declared.

Reversed.

Cited: *S. c.,* 144 N. C., 313; *Barber v. Griffin,* 158 N. C., 350; *S. v. Dunn, ib.,* 653; *S. v. Haynie,* 169 N. C., 280.

(108)

DAVIS v. SMITH.

(Filed 10 April, 1906.)

Injuries to Adjacent Owner from Water—Pleadings.

Where the complaint alleges that "the roof of defendant's building, a large three-story livery stable, not being provided with gutters, the water collected thereon is thrown against the wall of plaintiff's building adjacent thereto, which keeps the plaintiff's wall moist and wet all the time, and this water has leaked through the plaintiff's wall and injured her building, and the water has collected at the foot of her wall, and this has put her to expense in drainage of her building under orders of the health officer, to which she would not otherwise have been subjected," the demurrer that the complaint did not state a cause of action should have been overruled.

ACTION by Lelia R. Davis against John W. Smith, heard by *Ferguson, J.,* at March Term, 1906, of DURHAM. From a judgment sustaining a demurrer *ore tenus,* the plaintiff appealed.

Manning & Foushee for plaintiff.
R. B. Boone for defendant.

CLARK, C. J. The complaint alleges that the roof of defendant's building, a large three-story livery stable, not being provided with gutters, the water collected thereon is thrown against the wall of plaintiff's building adjacent thereto, which keeps the plaintiff's wall moist and wet all the time, and this water has leaked through the plaintiff's wall and injured her building, and the water has collected at the foot of her wall, and this has put her to expense in drainage of her building, under orders of the health officer, to which she would not otherwise have been subjected. The demurrer that the complaint did not state a cause of action should have been overruled. (109)

The water falling on the defendant's lot, in its natural condition, could run off as nature provided for it, and the lower proprietor could not complain. But when the defendant erected a building, the roof prevented part of the rainfall from being soaked up by the ground, and when the defendant collected it on his roof and discharged it against the plaintiff's wall, or increased the quantity at the foot of the plaintiff's wall, he diverted the water from its usual course and became responsible for any damage caused thereby. *Porter v. Durham,* 74 N. C., 767.

The demurrer also admits the further allegation of the complaint, "that the plaintiff has complained to the defendant at various times

of this condition and has requested him to remedy it; that it could be remedied by the defendant at little cost by putting upon his building proper gutters and drains from the gutters under the sidewalk of Main Street, as the plaintiff has done, but the defendant has persistently refused to do."

In *Shipley v. 50 Associates,* 106 Mass., 194, 8 Am. Rep., 318, it is held that maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes would probably fall upon an adjoining highway renders the owner liable to the person injured. It is there said that "It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail for the party to show that the building was of the usual construction and that the inconvenience complained of was one which, with such roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably, at certain seasons of the year and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. He must at his peril keep the ice or snow that collects upon his roof within his own limits, and is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's (110) land, in the same manner as he would be if he threw them there himself." To the same effect, *Gould v. McKenna,* 86 Pa. St., 297, 27 Am. Rep., 705; *Hazeltine v. Edgmand,* 35 Kan., 202, 57 Am. Rep., 157.

30 A. & E. (2 Ed.), 342, says: "The owner of a building must prevent the water from the roof thereof from falling upon adjoining land belonging to another, and if he fails to do so he is liable therefor." To same purport, *Copper v. Dolvin,* 68 Iowa, 757, 56 Am. Rep., 872; Gould on Waters (2 Ed.), secs. 292 and 293. To throw the water against the plaintiff's wall is to throw it on her land. In *Porter v. Durham, supra,* the Court says that the higher owner "cannot artificially increase the natural quantity of water or change its natural manner of flow . . . in a different manner from its natural discharge." The erection of a large three-story building and the discharge of water from its roof either against the plaintiff's wall or in a volume at the foot of her wall is a "different manner from its natural discharge."

Reversed.

Cited: S. c., 144 N. C., 297; *Cardwell v. R. R.,* 171 N. C., 366; *Yowmans v. Hendersonville,* 175 N. C., 578.

(111)

MOORE v. RAILROAD.

(Filed 10 April, 1906.)

Pleadings—Fellow-servant Act—Master and Servant—Extraordinary Risks.

1. The constitutionality of the fellow-servant act (Rev., sec. 2646) is not presented by a demurrer to a complaint alleging that plaintiff was an engineer in the service of defendant; that the defendant negligently failed to supply a reasonably safe and properly equipped engine, in consequence of which plaintiff was injured.

2. A complaint which alleges that "plaintiff was running his engine under orders at a high rate of speed, when suddenly, in consequence of the defective and worn condition of said engine and gearing and fixtures, carelessly and negligently provided and furnished by defendant as hereinbefore stated, the said wrought-iron cup above referred to was snapped from the driving rod, by reason of the disalignment of said gearing and the loss of motion caused by said defects in said engine, which driving rod was moving at a great rate of speed, horizontally, and was thrown by said driving rod with force and violence from its position and struck the right eye of the plaintiff, permanently destroying the sight of the same," states a cause of action.

3. It is the master's duty to furnish his servant reasonably safe machinery. If he fails to do so, he exposes the servant to extraordinary risks and hazards.

ACTION by John M. Moore against Southern Railway Company, heard by *Ferguson, J.*, at January Term, 1906, of DURHAM. From a judgment overruling the demurrer, the defendant appealed.

Winston & Bryant for plaintiff.
Guthrie & Guthrie for defendant.

BROWN, J. We have been favored with an argument and an elaborate brief in this case by the learned counsel for the defendant, largely devoted to an attack upon the constitutionality of the fellow- (112) servant act of 1897, Revisal, sec. 2646, in which we are asked to overrule *Hancock v. R. R.*, 124 N. C., 222, and other cases sustaining the validity of such act. Were we disposed to consider the matter, we could not do so upon this record, for nowhere, so far as we can see, is such a question presented.

The demurrer, of course, admits the truth of the facts alleged in the complaint, and taking those facts to be true, we are of opinion that the complaint states a cause of action which the defendant is required to answer. The allegations of the complaint aver that plaintiff was an

engineer in the service of defendant; that the defendant negligently failed to supply a reasonably safe and properly equipped engine, in consequence of which plaintiff was injured. The complaint more specifically alleges that plaintiff was running his engine under orders at a high rate of speed, "when suddenly, in consequence of the defective and worn condition of said engine and gearing and fixtures, carelessly and negligently provided and furnished by defendant as hereinbefore stated, the said wrought-iron cup above referred to (being on the said worn and defective side rod), about 3 inches in diameter and weighing about 2 pounds, was snapped from the driving rod, by reason of the disalignment of said gearing and the loss of motion caused by said defects in said engine, which driving rod was moving at a great rate of speed, horizontally—the said cup having been placed on the driving rod in order to hold oil to lubricate the pin which held the side rod—and was thrown by said driving rod with force and violence from its position and struck the right eye of the plaintiff, permanently destroying the sight of the same and impairing his nervous system and doing him other permanent injuries hereinafter set out."

These facts, together with the others set out in the complaint, if established by proof, make out a cause of action. It is universally held (113) at this day that it is the master's duty to furnish his servant reasonably safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. *Hicks v. Mfg. Co.,* 138 N. C., 320; *Pressly v. Yarn Mills,* 138 N. C., 413; LaBatt, sec. 279 (a), 296, 297, 298 (a). The failure to exercise due care in furnishing such machinery is a breach of duty which the master owes the servant. *Tanner v. Lumber Co.,* 140 N. C., 475.

We will not discuss the question of contributory negligence attempted to be presented by the demurrer. That is a defense which will be more properly considered when the facts are found by the jury. Certainly, there are no facts stated in the complaint which the court can as a matter of law declare constitute contributory negligence.

Affirmed.

Cited: Norris v. Mills, 154 N. C., 483; *Steele v. Grant,* 166 N. C., 645; *Dunn v. Lumber Co.,* 172 N. C., 136; *Beck v. Tanning Co.,* 179 N. C., 126.

ALLEY v. HOWELL.

(Filed 17 April, 1906.)

Ejectment—Pleadings—Evidence—Mental Capacity—Exceptions.

1. Where the plaintiff in an action of ejectment, claiming as heir at law of E., alleged and relied upon his legal title only, and there was no averment of undue influence, inadequate consideration, or fraud in the treaty, the court properly excluded evidence offered to prove such, but properly admitted evidence upon the mental capacity of E. to execute the deed under which defendant claimed, and evidence of fraud in the *factum* would also have been competent.

2. It is too late, after the trial, to make exceptions to the evidence, remarks of the judge, or other matters occurring during the trial, except as to the charge.

ACTION by Mary E. Alley and others against T. J. Howell, heard by *Peebles, J.,* and a jury, at October Term, 1905, of IREDELL. From a judgment for the defendant, the plaintiffs appealed. (114)

Furches & Coble and George B. Nicholson for plaintiffs.
L. C. Caldwell and J. B. Connelly for defendant.

CLARK, C. J. This was an action of ejectment, the plaintiffs claiming as heirs at law of Susan Ervin, and the defendant as her grantee. In the complaint the plaintiffs alleged and relied upon their legal title only, and there being no averment of undue influence, inadequate consideration, or fraud in the treaty, the court properly excluded evidence offered to prove such, and also refused prayers based upon the assumption that evidence to that effect had been admitted. There must be *allegata* as well as *probata*. The judge properly admitted evidence upon the question of the mental capacity of Susan Ervin to execute the deed, as that went to the issue whether legal title had passed to the defendant, and evidence (if offered) of fraud in the *factum* would also have been competent. *Mobley v. Griffin,* 104 N. C., 112; *Jones v. Cohen,* 82 N. C., 80; *Young v. Greenlee, ib.,* 346. Fraud (not in the *factum*), undue influence, or want of consideration are matters foreign to an allegation of legal title, and cannot be put in evidence unless the defendant has notice by appropriate allegations in the complaint that he may come to trial prepared to defend an attack on those grounds. This has been the settled practice and rests upon the principle of fair play, that those matters only should be contested at the trial which come within the scope of the allegations. It is true, the averments here omitted were matters of equitable jurisdiction under the former system of pleading, but it is not on that

ground that they are required to be pleaded, but because when the plaintiffs merely allege, as here, that they are "owners and entitled to the possession," the defendant has notice only that his legal title is (115) assailed.

For exactly the same reason an equitable defense cannot be proven unless set up in the answer. *Talbert v. Becton,* 111 N. C., 543; *Hinton v. Pritchard,* 102 N. C., 94; see, also, *McLaurin v. Cronly,* 90 N. C., 50, in which the matter is so clearly stated, citing *McKee v. Lineberger,* 69 N. C., 217; *Shelton v. Davis, ib.,* 324; *Rand v. Bank,* 77 N. C., 152, and *Carpenter v. Huffsteller,* 87 N. C., 273, that further discussion by us is unnecessary. The counsel for plaintiffs are correct in asserting that the distinction between law and equity is abolished—that is, that they are no longer administered in separate forums; but the proposition before us is simply the maintenance of the just and reasonable doctrine that there must be *allegation* as well as proof. The plaintiffs could readily have cured the defect by asking to amend (*Joyner v. Early,* 139 N. C., 49), and if that were refused in the discretion of the court, the plaintiffs could have taken a nonsuit and have brought a new action, with a complaint making the necessary allegations. *Wright v. Ins. Co.,* 138 N. C., 488, passed upon the question of immaterial defects in the pleadings, and also held that the court would give any relief justified by the complaint and proof, whether it was the specific relief demanded or not. It in no wise controverts what is said above. *Stokes v. Taylor,* 104 N. C., 394, and *Fulps v. Mock,* 108 N. C., 601, merely hold that in an action to recover upon a contract, if proof is made upon which a recovery can be had upon a *quantum meruit,* this is not a fatal variance, citing *Jones v. Mial,* 82 N. C., 252.

In *Shelton v. Davis,* 69 N. C., 324, *Pearson, C. J.,* says that one may "sue for a horse and recover a cow" (which Blackstone thought an absurdity), "but he must obtain leave to amend by striking out 'horse,' and inserting 'cow.'" That was a case of variance; but here the defect is greater—the failure to state the true cause of action. In *Rand v. Bank,* 77 N. C., 154, *Pearson, C. J.,* again says that "It cannot be tolerated that plaintiffs should file a skeleton of a complaint and eke out a cause of action" by proof of matters not alleged, and thus convict (116) the defendant of fraud and undue influence, without notice in the complaint of such charges.

There are several other exceptions, but upon examination we find that they do not require discussion, and indeed they are not presented in the appellant's brief. *Jones v. Ballou,* 139 N. C., 527; *Peoples v. R. R.,* 137 N. C., 98; *Currie v. R. R.,* 135 N. C., 535; *S. v. Register,* 133 N. C., 751. We take note, however, that some of these exceptions are to the evidence or remarks of the judge or other matter occurring during the

trial, and that these exceptions thereto were not taken *at the time,* as required by the statute. Rev., sec. 554 (2); *S. v. Pierce,* 123 N. C., 745. It is too late to make such exceptions after the trial, which the statute permits only as to exceptions to the charge, which alone may be made by appellant for the first time in making out his case on appeal. Rev., secs. 554 (3), 591. The statutory requirements as to exceptions are *summarized, Taylor v. Plummer,* 105 N. C., 56, and *Love v. Elliott,* 107 N. C., 718, which have been repeatedly cited since; *Hicks v. Kenan,* 139 N. C., 338.

No error.

Cited: *Gaither v. Carpenter,* 143 N. C., 243; *Witty v. Barham,* 147 N. C., 481; *Kornegay v. R. R.,* 154 N. C., 393; *S. v. Randall,* 170 N. C., 762; *Hudson v. R. R.,* 176 N. C., 496.

(117)

BLACKWELL v. LIFE ASSOCIATION.

(Filed 17 April, 1906.)

Foreign Insurance Companies—Assets—Receiver—Assessments—Void Provisions in Insurance Contracts.

1. A receiver for a foreign insurance company will not be appointed where the company has no assets or property other than assessments to become due, within this State, which can be taken into possession of such receiver.

2. Assessments to become due from policyholders residing in this State will not be, when due, debts or choses in action which the company could enforce.

3. Where the contract of insurance expressly provides that a certain percentage of the assessments shall be set apart for the purposes therein set forth, the court could not through a receiver compel the payment of an assessment to be appropriated to plaintiff's claim, in violation of the terms of the contract and the rights of the other policyholders.

4. A provision in a contract of insurance that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York," is void so far as the courts of this State are concerned.

ACTION by James W. Blackwell against Mutual Reserve Fund Life Association, pending in the Superior Court of DURHAM, and heard by *Ferguson, J.,* at chambers in Greensboro, on 15 February, 1906.

Plaintiff sued to recover amount of premiums paid defendant company, $2,314, on account of assessments upon a policy of $25,000, which he alleges was wrongfully and, in violation of terms of the contract, canceled by defendant. He remitted the excess over $2,000. After setting forth the facts upon which his alleged cause of action is
(118) based, he alleges that defendant having, in compliance with the laws of this State, appointed an agent upon whom service of process could be served, fraudulently and for the purpose of preventing suits being brought in the courts of the State, attempted to cancel its power of attorney. That plaintiff's policy was issued while said power of attorney was in force and while defendant was engaged in soliciting business and issuing policies in this State. That defendant has now in force a large number of policies issued to citizens and residents of this State and that it is collecting assessments or premiums on said policies. That for the purpose and with intent to defraud its North Carolina policyholders, defendant is taking from the State and the jurisdiction of the courts its assets and property. That the Insurance Commissioner of this State has prepared and published a statement showing that the affairs of defendant company are badly managed, that judgments against it for large amounts are unpaid and outstanding. That from said publication and other sources set out in his affidavit plaintiff believes that defendant company is insolvent or in imminent danger of insolvency. For the reasons and upon the grounds thus set forth plaintiff asks that a receiver be appointed by the court to take into his possession a sufficient amount of the property and assets of defendant in this State to satisfy and discharge his claim, etc. An order was duly issued directing defendant to show cause before the judge presiding in the Ninth Judicial District why a receiver should not be appointed as prayed, etc.

The defendant company on the return of said order filed an answer and affidavits in support thereof, denying the material allegations contained in plaintiff's complaint and affidavits. Defendant also denied that it owned any property or assets in this State, and averred that no person residing in this State was indebted to it. That the payment of the assessments made upon policyholders was voluntary, and that by the express terms of the policy, a copy of which is set out, the holder
(119) assumes no personal liability for the payment of said assessments. That by the terms of said policy failure to pay the assessment works a forfeiture thereof, but imposes no other liability upon or against the holder. That said assessments are due and payable at the home office of defendant company in New York. It denies that it is insolvent or in imminent danger of becoming so, setting forth a statement of its assets and liabilities. It avers that it canceled the power of attorney to its agent without any other purpose than to cease doing business in the

State and without any intent or purpose to defraud its creditors or policyholders. His Honor, upon hearing the answer and affidavits, declined to appoint a receiver. Plaintiff appealed.

Guthrie & Guthrie for plaintiff.
Winston & Bryant and Hinsdale & Son for defendant.

CONNOR, J. In view of the admitted facts in regard to the property rights, or rather absence of such rights, within the jurisdiction of the courts of this State, we are relieved from the necessity of discussing the affidavits in regard to the management and solvency of the defendant company. Assuming that, upon the facts stated in the complaint, in the light of the decisions of this Court in which the same defendant was a party, plaintiff has a valid cause of action, and assuming that defendant is in danger of becoming insolvent, we find ourselves confronted with the difficulty in granting the motion for a receiver by the fact that the company has no assets within this State which could be taken into possession of such receiver. The only rights suggested by plaintiffs in this connection are assessments to become due hereafter from policyholders residing in this State. These assessments will not be, when due, debts or choses in action which the defendant could enforce. "The levying of an assessment does not make a member a debtor to the association, authorizing it to bring suit in the event of his neglect or (120) refusal to pay; the only effect of the default is to relieve the association of its obligation to the member." Cooley on Ins. Briefs, 1013; *Ins. Co., v. Stathan,* 93 U. S., 24; 2 May on Ins. (3 Ed.), 341. The law, supported by authority, is thus stated in Bacon on Benefit Soc., sec. 357: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor. The payment of the premium or assessment is only a condition precedent of the liability of the company; the insured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration. Therefore, the insured may pay or not, as he pleases; he has the perfect right to do either, and need give no excuse for his choice. If he does not pay, the contract is ended." While the court would be prompt to protect by any process within its power the rights of a citizen against a foreign corporation, and hold any property within its jurisdiction to meet the demand when established by judgment, it will not do a vain thing and send its officer to chase unsubstantial possibilities. The only effect of the appointment of a receiver in this case would be to embarrass and probably injure other policyholders, without any resultant benefit to plaintiff. If the receiver demanded payment of an assessment and it was refused,

he could not enforce its payment—he having no other right against the policyholder than the defendant company has. If he should seek to enjoin payment to the company, he would be met with the obstacle that if the courts of this State enjoined such payment, the policy would be avoided for nonpayment of assessment. If so declared avoided by the company, this Court would have no power to protect the policyholder by *mandamus* or otherwise. Without pursuing the discussion further, it is manifest that no possible benefit could accrue to the plaintiff, and
(121) much annoyance and injury to innocent persons. "The liability of the members of the mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company and vested with their rights and powers and nothing more." Ald. on Rec., sec. 372. The power of receiver to enforce assessments made upon unpaid stock is based upon the fact that the delinquent stockholder owes a debt to the company for which it could maintain an action; whereas for an assessment upon an insurance policy, as we have seen, no action could be maintained by the company. Again, it seems to be established by the authorities cited in the well-considered brief of defendant's counsel that such assessments as are levied under the provisions of the policies issued by defendant company are, when paid, impressed with a trust for the benefit of the other policyholders. The contract of insurance expressly provides that a certain percentage of the assessments shall be set apart for the purpose set forth therein. We could not, through a receiver, compel the payment of an assessment to be appropriated to plaintiff's claim in violation of the terms of the contract and the rights of other policyholders. The plaintiff has no lien or specific claim to any portion of the assets of the company. This plaintiff, together with thousands of others, has entered into a contract of insurance with a corporation having no capital or assets within reach of the courts of his State, and with but little, if any, substantial guaranties of compliance with its contract. By a very remarkable provision, which if read should have put plaintiff upon notice, the contract declares that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." This is void so far as the courts of this State are concerned. Rev., sec. 4806. It
(122) seems from this account of the dealings between the company and plaintiff that he has expended a considerable amount of good money with a poor prospect of realizing any very substantial returns. The courts of this State in the trial of his cause will adjudge his rights, but it seems that, as others have been compelled to do, he must pursue

his remedy to reach assets of the defendant in the courts of New York. We do not entertain any doubt of the power of the courts of this State, either by attachment or, in proper cases, the appointment of a receiver, to seize and retain any property of a foreign corporation in this State and apply it to the payment of debts due our citizens. The exercise of this power does not involve winding up the affairs of the corporation. It is only for the purpose of securing the fruits of the recovery. The question is fully discussed by *Mr. Justice Walker* in *Holshouser v. Copper Co.,* 138 N. C., 248. We have examined the case of *Ins. Co. v. Phelps,* 190 U. S., 147, cited by plaintiff. The only question decided upon that appeal related to service of process and procedure. It is true that the court of Kentucky appointed a receiver after judgment in an action against this defendant. Whether there was property other than assessments to become due does not appear.

For the reasons set out, his Honor's judgment must be

Affirmed.

Cited: Brenizer v. Royal Arcanum, post, 424.

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(123)

DUNN v. CURRIE.

(Filed 17 April, 1906.)

Executors and Administrators—Transaction with Deceased—Implied Contract—Presumption—Relationship of Parties—Verdict—Appeal and Error.

1. In an action to recover for services rendered by plaintiff and family for defendant's intestate, the testimony of plaintiff that he worked on the land of intestate in cultivating it and on the building, and that he did other work, such as cutting and binding wheat and oats; that his family worked on the farm; that his wife did the cooking, and that he took care of the intestate's house and stock, and that he and his wife nursed him in his last illness, was incompetent under section 1631 of the Revisal.

2. Where the verdict is indivisible, and it cannot be ascertained to what extent the incompetent evidence, which was admitted, influenced the jury, the verdict is vitiated as a whole.

3. This Court cannot decide whether the court below improperly refused to give a prayer for instruction that "if the jury believed the testimony," etc., where all of the evidence is not sent up.

4. In an action to recover for services rendered by plaintiff and his family for defendant's intestate, where there is evidence that plaintiff and his family worked on the intestate's farm, that the wife did the cooking and

he took care of the intestate's house and his stock, and that he and his wife nursed him in his last illness, and that plaintiff's wife was a daughter of the intestate, there is nothing in the relation of the parties disclosed to rebut the implied promise to pay.

5. Certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply, that is, a promise to pay for them; but this presumption is not conclusive and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other.

(124) ACTION by B. T. Dunn against J. C. Currie, administrator of Thomas Bunnell, heard by *Peebles, J.*, and a jury, at September Term, 1905, of MONTGOMERY.

The plaintiff sued to recover to his own use the sum of $243.80 for work done, labor performed, and services rendered by himself and family for Thomas Bunnell, the intestate of the defendant. He testified as follows: "Q.: Did you ever do any work on the land of Thomas Bunnell? A.: I worked on the land in cultivating it; I worked on the building; cannot tell the date; it was worth 75 cents per day." He further testified that he did other work, such as cutting and binding wheat and oats, plowing and mauling; that his family also worked on the farm; that his wife did the cooking and he took care of the intestate's house and his stock, and he and his wife nursed him in his last illness. The plaintiff's wife is a daughter of the intestate. He then testified as to the reasonable worth of the work and labor done by him and his family. All of this testimony was objected to by the defendant in apt time and admitted. The defendant excepted. There was other evidence introduced by the respective parties which is not set out in the case because, as is stated, there was no exception thereto. At the close of the testimony, the defendant requested the court to charge the jury that if they believed the testimony in the case the presumption of a promise to pay for the services rendered is rebutted by the relation of the parties, and the plaintiff is not entitled to recover. This instruction was refused, and defendant excepted. There was a verdict for $232.15 and judgment thereon for the plaintiff. The defendant appealed.

No counsel for plaintiff.
Adams, Jerome & Armfield and W. A. Cochran for defendant.

(125) WALKER, J. The testimony of the plaintiff, which was admitted by the court over the objection of the defendant, was incompe-

tent and should have been excluded. If it did not clearly show a transaction or communication between the plaintiff and the intestate, from which the law would imply a promise by the latter to pay for the services alleged to have been rendered, then it was wholly irrelevant and did not tend to establish the plaintiff's cause of action for work done and labor performed for the intestate. From the fact that labor is performed and services are rendered which benefit another, who avails himself of the benefit thus derived, the law implies both a prior request for the labor and services and a promise on the part of the beneficiary to pay for them what they are reasonably worth. Any dealing or course of conduct on the part of the plaintiff with respect to the deceased which tends to imply this request and the consequent promise to pay the reasonable worth of the benefits received, must of necessity, though indirectly, show a transaction or communcation with the deceased within the evident meaning and intention of the statute. Revisal, sec. 1631. In this case the plaintiff substantially testified to a transaction or communication with the deceased; otherwise, where is there the slightest foundation for the claim that the defendant, as his administrator, is indebted to him? If he did no work for the intestate nor render him any service, there was no implied promise to pay, and he does not allege or rely on an express one. The case, therefore, is governed by the principle announced in *Davidson v. Bardin,* 139 N. C., 1, that the plaintiff is competent to testify as to independent facts, but not as to those which tend to show a personal transaction or communication with the deceased, whereby a liability to him by the latter, either express or implied, would arise. The plaintiff cannot, it is further said in that case, by his own testimony prove an express contract by showing a communication, or an implied contract by showing a personal transaction, as, for example, the rendition of services which were accepted by the (126) intestate or received without objection. To the same general effect is *Kirk v. Barnhart,* 74 N. C., 653. But *Stocks v. Cannon,* 139 N. C., 60, is more directly in point. There the testimony as to services rendered was very similar to that we have here. We find that the same decision has been made by another court upon a like state of facts, it being there held that such testimony is, in substance and effect, a statement that services had been rendered under a contract, or upon request, implying a promise to pay for them, and therefore related to a transaction or communication within the meaning of the statute excluding such evidence. *Boyd v. Cauthen,* 28 S. C., 72. Whether it was competent for the plaintiff to testify as to the services rendered by his wife and children, for the value of which he sues in his own right, we need not inquire, as the verdict is indivisible and the error we have already pointed out vitiates it as a whole. It cannot be ascertained to what ex-

tent the incompetent evidence influenced the jury, all of the items being indistinguishably blended in one amount. *Rowe v. Lumber Co.,* 133 N. C., 444; *Beam v. Jennings,* 96 N. C., 82; *Holmes v. Godwin,* 71 N. C., 306. The instruction requested by the defendant was properly refused. All of the evidence, as the case shows, is not before us. We cannot, therefore, decide whether "if the jury believed the testimony" the implication of a promise which the law ordinarily raises has been rebutted, because we are not informed as to what the testimony was. Upon the evidence which appears in the record we do not think that, if it had all been competent, and a promise could be implied, there was anything in the relation of the parties, so far as we are now advised, which rebuts the implication of the law. As now presented, the case does not fall within any of the adjudged cases upon this subject. *Hussey v. Rountree,* 44 N. C., 110; *Hudson v. Lutz,* 50 N. C., 217;
(127) *Dodson v. McAdams,* 96 N. C., 149; *Young v. Herman,* 97 N. C., 280; *Callahan v. Wood,* 118 N. C., 752; *Avitt v. Smith,* 120 N. C., 392; *Hicks v. Barnes,* 132 N. C., 146; *Stallings v. Ellis,* 136 N. C., 69. These cases establish the principle that certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply—that is, a promise to pay for them; but this presumption is not conclusive, and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other. There is no fixed rule governing all cases alike, but each case as it arises must be determined upon a consideration of all the facts and circumstances, subject, however, to the legal bearing on the liability of the particular relation existing at the time between the parties, as shown in the cases cited and in others of a similar kind decided by this Court. *Young v. Herman,* 97 N. C., 280; A. & E. (2 Ed.), 1061-1063; *Williams v. Barnes* 14 N. C., 348.

There is nothing, though, in the facts of this case, as we view them, to prevent a recovery, if the plaintiff had, by competent evidence, proved that he had performed the services, as alleged, and that the intestate received the benefit of them.

New trial.

Cited: Freeman v. Brown, 151 N. C., 113; *Knight v. Everett,* 152 N. C., 119; *Lowrie v. Oxendine,* 153 N. C., 269; *Hoaglin v. Tel. Co.,* 161 N. C., 399; *Rooker v. Rodwell,* 165 N. C., 82; *Champion v. Daniel,* 170 N. C., 334.

(128)

DURHAM v. RIGSBEE.

(Filed 17 April, 1906.)

Eminent Domain—Condemnation Proceedings—Inability to Agree with Owner—Sufficiency of Petition—Discretion of Municipal Authorities —Legislature—Award of Damages—Exceptions—Jury Trial.

1. In condemnation proceedings, the statement required by Rev., sec. 2580, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by the jury—a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal.

2. It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute.

3. The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither these defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard.

4. The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached.

5. In a proceeding for condemnation of a street, where it appears, upon the coming in of the report of the commissioners, the petitioner excepted because the compensation was excessive, and the defendant excepted solely because it was inadequate, and upon the hearing of the exceptions the clerk reduced the compensation, and the defendant excepted to the order, appealed to the Superior Court, and demanded a jury trial, and the jury rendered its verdict, the defendant's contention that the clerk had no power to fix the compensation and that when he set aside the appraisement he should have appointed other commissioners, is without merit.

ACTION by city of Durham against R. H. Rigsbee and others, (129) heard by *Ferguson, J.*, and a jury, at January Term, 1906, of DURHAM.

This was a proceeding under sections 1943 *et seq.* of The Code, now sections 2580-2588 of the Revisal, for the purpose of condemning land to widen a street.

The defendants demurred to the petition. The demurrer was sustained by the clerk and an amended petition filed. The defendants demurred to the petition as amended. The demurrer was overruled and the clerk required the defendants to answer. Upon the filing of the

answer, the clerk appointed three disinterested freeholders as commissioners to appraise the land described in the petition and plat attached. Upon the coming in of the report, the defendants excepted thereto upon the ground that the valuation placed upon the property condemned was inadequate. The petitioner also excepted upon the ground that the appraisement was excessive. Upon the hearing, the clerk reduced the sum at which the commissioners had appraised the property from $2,500 to $1,750. Whereupon the defendants entered of record the following exception: "In open court the defendants excepted to the foregoing order and decree and every part thereof and appealed to the Superior Court in term and demand a jury trial upon the hearing of the appeal."

Upon the trial in the Superior Court, *Judge Ferguson* affirmed the order of the clerk overruling the demurrer of the defendants. Whereupon the defendants tendered certain issues, which the court declined to submit, and thereupon submitted to the jury the following issue: "What damages have the defendants sustained by reason of taking the land condemned in these proceedings for the purpose of widening Church Street? Ans.: $2,000." From the judgment rendered, the defendants appealed.

Manning & Foushee and R. B. Boone for plaintiff.

(130) *Fuller & Fuller and Pou & Fuller for defendants.*

BROWN, J. 1. We agree with the clerk and his Honor that the demurrer to the amended petition should be overruled, and, further, that the answer sets up no valid defense to a condemnation of the land by the petitioner for the purpose of widening Church Street. It seems to be conceded, although not so stated in the record, that the method of procedure for condemning land prescribed for railroad companies by the Revisal is the method authorized by the petitioner's charter for condemning land for municipal purposes. That being so, a necessary allegation of the petition is that the plaintiff has not been able to acquire title to the land, and the reason of such inability. *Hill v. Mining Co.*, 113 N. C., 259; *Allen v. R. R.*, 102 N. C., 381. It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. While this is a necessary allegation of this petition, it is not an *issuable* fact for the jury to determine. The judge was right in refusing to submit it to the jury. The statute requires such a statement, so that the court may see whether the condemner has made a reasonable effort to acquire title without resorting to the expense of condemnation proceedings and bringing a citizen into court. This statement is the allegation of a

preliminary jurisdictional fact, not triable by the jury— a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal. *Ledbetter v. Pinner,* 120 N. C., 455; *R. R. v. Parker,* 105 N. C., 246; Code, sec. 1945, Revisal, sec. 2584. The purpose of this requirement in the statute is thus stated in *Hill v. Mining Co., supra*: "The statute requires the railroad company when it becomes the actor in such a proceeding, as it may, to state that fact as its justification for summoning to court a citizen whose land it wishes to take by condemnation." The allegation is not required when the landowner is petitioner.

We think the amended petition states facts which plainly in- (131) dicate not only that the petitioner's officers made every reasonable effort to agree with the defendants, but that an agreement was rendered impossible owing to the extravagant value of $30,000 which the petition alleges was placed upon the property by the defendants, as well as by their conduct in declining to meet the committee of aldermen and in sending a threatening message "to look out or they would get themselves put in jail."

These alleged facts are tantamount to a specific allegation in the words of the statute, and plainly show an effort upon the part of the petitioner's officers to come to an agreement, and the reason of their inability to do so. If the amended petition was deficient in this respect, it is greatly aided by the admissions of the answer, for that shows clearly that the petitioner made initial efforts to negotiate, and that the defendants declined to do so. The answer gives the real reason why all negotiations proved abortive, viz.: "That said R. H. Rigsbee is not willing that Church Street should be widened or that this property should be condemned, because he does not believe that it is necessary or to be desired for the public interest that it should be, but that these defendants are willing to sell said property to said petitioner for an adequate price."

It is apparent from a perusal of the answer that the defendants would entertain no proposition except a sale to the city of the entire property, which the city doubtless had no use for. The advisability of widening Church Street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither these defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. 2 Lewis Eminent Dom., sec. 66; *S. v. Jones,* 139 N. C., 616.

The method of taking the land for the public use is within the exclusive control of the Legislature, limited by organic law. The exercise of this power being a political and not a judicial act, the courts cannot help the injured landowner, in a case like this, (132)

where the statute has been strictly followed, until the question of compensation is reached. *People v. R. R.,* 160 N. Y., 225; *Zimmerman v. Canfield,* 42 Ohio St., 463; *People v. Smith,* 21 N. Y., 595.

We therefore think there are no issues to be determined except that of compensation, and that his Honor properly declined to submit any others.

2. Upon the coming in of the report of the commissioners, both the petitioner and the defendants filed exceptions thereto—the plaintiff, because the compensation was excessive; the defendants, because it was inadequate. Upon the hearing of the exceptions the clerk modified the report, reduced the compensation to $1,750, and adjudged the same to be a fair valuation of the property and authorized the plaintiff to enter upon and take possession of the land described in the petition to be used for street purposes on the payment by it of the $1,750. The defendants excepted to the order, appealed to the Superior Court, and demanded a jury trial.

It is contended by the defendants that the clerk had no power to fix the compensation himself, and that when he set aside the appraisement he should have appointed other commissioners. *Hanes v. R. R.,* 109 N. C., 490, is cited as authority for this position. Since that case was decided, however, the act of 1893 has been enacted, by which the rights of all parties to the proceeding are fully protected by prescribing a jury trial in term-time at the instance of either. It is contended by the petitioner that since the passage of that act there is no reason for appointing new commissioners, and that the clerk, being authorized by the statute to modify the report, may do so even as to matter of compensation without jeopardizing the rights of either party to the proceeding.

(133) There is undeniable force in this reasoning. It is not necessary, however, that we should decide it now, inasmuch as the defendants did not move for the appointment of other commissioners. They preferred to exercise their undeniable right to demand a jury trial before the judge in term. Since the act of 1893 (Revisal, sec. 2588), the defendants had a right to demand a jury trial upon the matter of compensation. That act provides in express terms that in condemnation proceedings by any city or town to acquire rights of way for streets, any person interested in the land, or the condemner, shall be entitled to have upon demand the damages assessed by commissioners heard and determined upon appeal by a jury of the Superior Court in term-time. The sole exception filed by the defendants to the report of the commissioners related to the amount of damages assessed. They entered no exception to the order appointing commissioners, and they appear to have waived whatever rights they may have had, except to have the

amount of compensation they are entitled to receive determined by a jury in term. Having appealed to a jury of their country, they must abide the verdict rendered.

No error.

CONNOR, J., concurs in result.

Cited: R. R. v. R. R., 148 N. C., 65, 74; *Abernathy v. R. R.,* 150 N. C., 103; *Jeffress v. Greenville,* 154 N. C., 200; *Power Co. v. Wissler,* 160 N. C., 274; *R. R. v. Gahagan,* 161 N. C., 193; *R. R. v. Oates,* 164 N. C., 174; *Luther v. Comrs., ib.,* 242, 243; *Felmet v. Canton,* 177 N. C., 54.

(134)

DAVIS v. TRACTION COMPANY.

(Filed 17 April, 1906.)

Street Railways—Collisions—Contributory Negligence—Excessive Speed—Obligation of Traveler and Street Car.

1. Where the testimony upon which defendant relied to sustain the defense of contributory negligence was conflicting and different inferences may have been drawn, the court committed no error in refusing to give defendant's prayer that "if the jury believed the entire evidence, they should answer the second issue 'Yes.'"

2. If one be walking along, or crossing, a street-car track, it is not only his duty to turn off when signaled, but to keep a lookout, look and listen for the approach of a car.

3. If a street car is moving at a lawful—that is, not an excessive—speed, and a person enters upon the track, the defendant is required to use ordinary care, give the signals, lower the speed and, if it appear reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the defendant will not be liable for an injury sustained.

4. If, however, the car is moving at an excessive speed—that is, a speed in excess of that prescribed by the city ordinance—and by reason of such excess speed the signals cannot be given or the appliances used by the exercise of ordinary care, the defendant will be liable for an injury.

5. Speed in excess of that prescribed by a municipal ordinance is at least evidence of negligence.

6. A citizen and a street car have, in common, the right to use the street; but as the car must run on the track or not at all, the citizen must change his course and use the unoccupied portions of the street to prevent a collision, and the managers of the car must move at a reasonably safe speed and equip the car with signals and means of controlling it, and use a fender.

ACTION by J. N. Davis against Durham Traction Company, heard by *Shaw, J.*, and a jury, at October Term, 1905, of DURHAM.

(135) Plaintiff sues to recover damages for injuries sustained by reason of alleged negligence on part of defendant's agents in managing its electric railway cars on the public streets of the city of Durham. Defendant denies that its agents were negligent and for further defense alleges that plaintiff, by his own negligence, contributed to his injury, etc. Usual and appropriate issues were submitted to the jury.

Plaintiff testified that on the day of the accident he was driving along one of the streets of Durham in a wagon; that he met two ladies driving a horse and buggy; that he turned to the right to cross the track; not sufficient room on right side for both, or, at least, the ladies did not turn out; he pulled his reins, turned across the road and looked towards town; saw no car in sight close to him and started to cross the track. That he could see only about 75 yards—neither saw nor heard any car; he was sitting in front of the wagon. When he first saw the car it was 6 or 8 feet away, and by the time he turned his head it struck the rear end of the wagon. He thought the speed of the car was "not under" 40 miles an hour. Before crossing the track, he looked back 70 or 75 yards and could not see any car.

There was evidence on behalf of defendant tending to show that the car was not running faster than 14 miles an hour, the ordinance rate of speed. There was also evidence tending to corroborate the plaintiff's statement that the car was running at an excessive rate of speed.

James Parrish, for plaintiff, testified that he saw accident. Saw two ladies in a buggy; two or three vehicles in the street; saw plaintiff had time to cross the track—car was about 20 or 25 yards from him. When he turned to cross the track the car was running from 20 to 25 miles an hour; it did not slacken its speed.

Mr. Seeman, for defendant, testified that when plaintiff was about 25 or 30 feet ahead of car he deliberately turned across the track. Saw him as he drew his lines. He did not observe the car coming.

(136) Near center of track plaintiff looked and saw the car, and about that time it struck him. Witness was on car. Motorman cut off the power and put on brakes. Does not know whether signal was given. It was not a street crossing.

The motorman testified that he saw plaintiff driving along the car track. When first saw him he was 30 or 40 steps off. When within 10 or 12 steps from him, plaintiff turned horse's head across the track. Plaintiff was so near the car that he did not have time to stop it—was drifting down grade. Put on brakes and sounded gong 20 steps from him. Had not started across the track then. Brakes were in good con-

dition. Can hear the gong 75 steps. Running between 10 and 15 miles an hour.

The conductor testified that he was at front of car when it struck the wagon. Plaintiff was traveling beside the track—plenty of room for car to pass without touching his wagon. Car ran three lengths before it stopped—was running about 10 miles an hour; plaintiff going from 4 to 6 miles an hour.

There was other testimony tending to sustain both plaintiff and defendant's witness.

Defendant requested his Honor to charge the jury that if they believed the entire evidence they should answer the second issue "Yes," and to his Honor's refusal, duly excepted. Defendant submitted a series of instructions which his Honor declined, and in lieu thereof, after fully stating the contentions of the parties, instructed the jury: (1) The traveling public has the right to the reasonable use of the streets of the city of Durham, and the street cars operated on said streets not to be run at a rate of speed that will endanger those making such use of the streets. (2) The citizen has the same privilege to use the street for traveling that the street railway company has for running its cars on the streets. The franchise to operate its cars on the public streets of the city of Durham does not give the defendant the right to the exclusive use of the street or any part thereof, and does not excuse it from the obligation to exercise due and proper care to avoid injuring (137) persons who have a right to use the streets. (3) It would not, as a matter of law, be negligence on the part of the plaintiff to attempt to drive across the track of the defendant if he looked back immediately before driving across the track and saw no car within 75 yards. (4) It is not negligence *per se* for a citizen to be anywhere upon such tracks (railway or streets) so long as the right of a common user of the tracks exists in the public. It is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passenger car.

Defendant duly excepted.

His Honor further charged the jury that if they found that the car was running at a higher rate of speed than that prescribed by the ordinance of the city, they should consider such fact as evidence upon the first issue. That if the defendant was operating its car at the time of the accident at a rate of speed not in excess of that prescribed, and if the motorman, upon discovering plaintiff crossing the track, applied brakes to his car, which were in good condition, and was unable to stop it, they should answer the first issue "No." That if the plaintiff undertook to cross the track when the car was so close to him that it could not

be stopped in time to avoid the accident, if not running more than the rate prescribed, the jury will answer the first issue "No." That if they found that the motorman sounded the gong or that the car made sufficient noise to be heard by the plaintiff before attempting to cross the track when so close that a collision could not be avoided by the exercise of reasonable care on the part of the defendant, they will answer the second issue "Yes." That while a person in a vehicle has the same right to the reasonable use of the street that the car has, still the car is compelled to move on its track, and for this reason it is the duty of the plaintiff to get out of the way of the car and to keep a reasonable lookout when going upon the track; and if he fails to do so, and is in-
(138) jured in consequence by such car at a time and under circumstances when, by the exercise of ordinary care on the part of the agents or servants, they could not avoid the injury, he would be guilty of contributory negligence.

The jury found the issues in favor of the plaintiff, assessing his damages at $750. Defendant moved for new trial. Motion denied. Defendant excepted. Judgment and appeal.

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

CONNOR, J. His Honor could not, upon the entire evidence, have properly given the first instruction asked. The testimony upon which defendant relied to sustain the defense of contributory negligence was conflicting, and certainly, upon any hypothesis, different inferences may have been drawn. The instruction prayed, which was substantially a demurrer to the entire evidence, presupposes that, in the view most favorable to the plaintiff, contributory negligence was established as a conclusion of law. The exception to the refusal to so instruct the jury was not pressed in this Court.

The second exception is pointed to his Honor's refusal to give the sixth instruction prayed. "It is the duty of a driver of a private vehicle while on the track, not only to turn off when called upon by a servant of the company, but to listen to whatever signal there may be of an approaching car; and he should also look behind from time to time so that he may, if a car be near, turn off and allow it to pass without hindrance or any slackening of ordinary speed; and if he fails to observe this precaution, he does so at his own risk." There is no valid objection to the legal proposition involved in the instruction, but we think that, in so far as there was evidence bearing upon it, his Honor so instructed the jury. The plaintiff was not injured by failing to
(139) "turn off" the track after he saw or could, by the exercise of

ordinary care, have seen the approaching car, but by attempting to cross the track. There is no suggestion that he lingered upon the track. The defendant's witness says that he was trying to cross the track at the rate of 4 to 6 miles an hour. It must be conceded that if one be walking along, or crossing, a track it is not only his duty to turn off when signaled, but to keep a lookout, look and listen for the approach of a car. The track itself is notice that a car may at any moment approach. We are speaking only of street railways in this connection. The plaintiff says that before trying to cross, he did look, and could see 75 yards; that he saw no car and heard no signal until the car was within 6 or 8 feet of him. That he did not have time then to get off the track. There was evidence that one witness on the car saw plaintiff enter upon the track when the car was not more than 25 or 30 yards away from him; he is corroborated in that respect. His Honor correctly submitted the question to the jury. There is no positive evidence that he did in fact see the car or hear the signal; there was evidence from which the jury may have so found, but it was their province to pass upon the question. The theory of the plaintiff is that he did not see the car or hear the signal until, at the high speed which he fixes, it was impossible to get off or for the car to be stopped. The defendant, denying the excessive speed, insists that he either did see or, by the exercise of ordinary care, could have seen the car approaching, and that in either view he was guilty of negligence in going upon the track, which contributed to his injury.

The third exception is directed to the measure of defendant's duty upon the theory that plaintiff "suddenly and unexpectedly drove his wagon across the track," in which view of the case it is insisted that defendant was only required to use ordinary care to avoid injuring him. The instruction is correct, and should have been given but for the omission of the element of excessive speed which runs through the (140) entire case. It is undoubtedly true that if a car is moving at a lawful—that is, not an excessive—speed and a person enters upon the track, the defendant is required to use ordinary care, give the signals, lower the speed, and, if it appears reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the defendant will not be liable for an injury sustained. If, however, the car is moving at an excessive speed, that is, a speed in excess of that prescribed by the city ordinance, and by reason of such excessive speed the signals cannot be given or the appliances used by the exercise of ordinary care, the defendant will be liable for an injury, and this for the reason that it has, by the excessive speed, brought about a condition which it cannot control. It was therefore proper for his Honor to modify the instruction by inserting the words

"and the car was not running faster than 14 miles an hour." This gave the defendant the benefit of the principle invoked, unless the jury found that the speed was excessive. This Court has held in accordance with many others that speed in excess of that prescribed by the ordinance is at least evidence of negligence, and his Honor so instructed the jury. *Edwards v. R. R.*, 129 N. C., 78. It may be that, under unusual conditions, such as a crowded street or passing a funeral or other procession or other conditions liable to occur in a city, the ordinance speed would be excessive. Certainly, beyond that prescribed, it is always evidence of negligence, and under other than usual conditions the standard of duty in regard to speed would be that of the ideal prudent man.

The fourth exception is directed to the instruction given: "It is not negligence *per se* for a citizen to be on the track, so long as the right of a common user of tracks exists in the public. It is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their (141) part, may not at the moment be able to get out of the way of a passing car." If this instruction was not materially modified, we do not think that it could be sustained. Assuming that with certain modifications, which were explained to the jury, plaintiff and defendant had, in common, the right to use the street, it cannot be that while both are in the enjoyment of such right the duty is not imposed upon either "to exercise such watchful care as will prevent accidents or injuries," etc. No one is legally liable for an accident or, what is equal thereto, an accidental injury. If the injury is the result of negligence, it is not an accident. It often happens that while two or more persons are in the exercise of common rights or the discharge of lawfully imposed duties, an injury is sustained which cannot be traced to an omission or breach of any duty or avoided by the exercise of the degree of care required; such injuries are said to be accidental. The law has no means of tracing them to any breach of duty, and therefore holds no one liable. The usual rule applied to the relative rights and duties of persons enjoying a common right is ordinary care, as railway companies and persons using a public crossing. Each must exercise that degree of care which is used by prudent men under similar circumstances. That being the standard, the question, except in certain well-defined cases, is for the jury to find the facts and apply them. When it is said that the citizen and the street car have a common right to use the highway, regard is had to the elementary law that two objects cannot at the same time occupy the same space. It is, therefore, necessary to formulate such rules based upon common sense and experience as will enable them both to enjoy their common right without undue interference with each other. The car must run on the track or not at all; the citizen on foot or in a vehicle

may change his course easily and promptly, using unoccupied portions of the street—hence, as his Honor correctly said to the jury, he must give way to the car to prevent a collision. This being so, (142) the duty is imposed upon the managers of the car to move at a reasonably safe speed, the maximum of which in Durham is by ordinance fixed at 14 miles an hour; to equip the car with signals and means of controlling it—bringing it to a stop when necessary, and, as prescribed by statute in this State, to use a fender. In view of these principles, his Honor said to the jury that if they found that plaintiff suddently drove across the track in front of the car, and that thereupon the employees of defendant when they saw his danger did all that they reasonably could do to stop the car and avoid the injury, the defendant would not be guilty of negligence, and they would answer the first issue "No." He gave the defendant the benefit of the same principle in his instruction upon the second issue in regard to contributry negligence. "If the jury shall find from the evidence that the defendant's motorman sounded the gong or that the defendant's car approaching the plaintiff made sufficient noise to be heard by the plaintiff before he attempted to cross the track, and notwithstanding either the sounding of the gong or the noise of the car, the plaintiff undertook to cross said railway track when the car was very close to him, and so close that a collision with the plaintiff's wagon could not, by the exercise of reasonable care, be avoided by defendant, then the jury will answer the second issue "Yes." This was equivalent to saying to the jury that if they found defendant's evidence to be true, they should find the issue accordingly. The general principles applicable to such cases were well considered in an opinion by *Mr. Justice Douglas,* in *Moore v. R. R.,* 128 N. C., 455. His Honor's instructions are sustained by the law as announced in that case. The testimony was conflicting, and the jury adopted plaintiff's version of the transaction. We find no reversible error in the record. It is so adjudged.

No error.

Cited: Rolin v. Tobacco Co., post, 304; *Wright v. Mfg. Co.,* 147 N. C., 536; *Norman v. R. R.,* 167 N. C., 543; *Boyles v. R. R.,* 174 N. C., 623; *Sparger v. Public Service Corporation, ib.,* 777; *Lea v. Utilities Co.,* 175 N. C., 465.

(143)

SMITH v. SCHOOL TRUSTEES.

(Filed 17 April, 1906.)

Schools and School Districts—Elections—Registration of Voters—Constitutional Law—Legislature—Taxation by School District—Disposition of School Funds—Discrimination Between Races—Municipal Corporations.

1. An election held pursuant to chapter 204, Pr. Laws 1905, which creates a graded-school district which includes portions only of two white and two colored districts as established by the county board of education, and which includes portions of the territory of two voting precincts, is not invalid because no new registration was ordered for the entire electorate of the new district, where the act directs that the election be held under the laws governing elections for cities and towns, chapter 514, Laws 1899, and chapter 750, Laws 1901.

2. Chapter 204, Pr. Laws 1905, creating a graded-school district and authorizing its trustees to levy a tax and issue bonds when the act is approved by a majority of the qualified voters, is a valid exercise of legislative authority.

3. The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and when accepted and sanctioned by a vote of the qualified electors within the prescribed territory as required by our Constitution, Art. VII, sec. 7, may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose.

4. School districts are public *quasi*-corporations, included in the term municipal corporations as used in Article VII, section 7, of our Constitution, and so come within the express provisions of section 7, that "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc.; nor shall any tax be levied, etc., unless by a vote of the majority of the qualified voters therein." And the principle of uniformity is established and required by section 9 of this article.

5. Section 12 of chapter 204, Pr. Laws 1905, which provides that the trustees shall dispose of the school fund to be realized under the act as to them may seem just, does not confer an arbitrary discretion, but the same must be used as directed and required by the Constitution and in the light of the decision of *Lowery v. School Trustees*, 140 N. C., p. 33.

(144) ACTION by Smith and Jenkins against the Board of Trustees of Robersonville Graded School, heard by *Cooke, J.*, at December Term, 1905, of MARTIN.

This was an action to restrain the authorities of a public school district, known as Robersonville Graded School District, from issuing bonds

and levying a tax under and by virtue of an act of the General Assembly (Pr. Laws 1905, ch. 204) and an election held pursuant to said act.

By consent, duly entered, a jury trial was waived and the cause was tried and determined by the judge presiding.

The act creates a graded school district of defined boundaries so as to include the town of Robersonville, and certain adjacent territory; establishes a board of trustees to hold office for a definite period; fills same by appointment for the first term and provides that the successors of these officers shall be elected by a vote of the qualified voters within the district as their respective terms expire, etc., and confers power on said board as follows:

SEC. 3. That the board of trustees hereby created, and their successors in office, shall be a body politic and corporate by the name and style of the Board of Trustees of the Robersonville Graded School, and by that name shall be capable of receiving gifts and grants, purchasing and holding personal and real estate, selling and mortgaging and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation hereby created. Conveyances to said trustees shall be to them and their successors in office.

SEC. 4. That said board of trustees shall have entire and (145) exclusive control of the graded schools and all public school property in said Robersonville district, and shall prescribe rules and regulations for their own government not inconsistent with the provisions of this act; shall employ and fix compensation of officers and teachers annually, subject to removal by said board; shall make an accurate census of the school population of the district as required by the general law of the State, and do all other lawful acts proper to the management of said school: *Provided,* that all children resident in said district between the ages of six and twenty-one years shall be admitted into said school free of tuition charges, and those desiring to be admitted as pay students may be admitted upon such terms as the board may direct.

SEC. 6. That for the purpose of this act, the board of trustees of said district shall, and they are hereby authorized and empowered, beginning with the fiscal year, 1 June, 1905, and annually thereafter, to levy and cause to be collected a particular tax on all taxable property and polls in said district: *Provided,* said particular tax shall not exceed 33⅓ cents on the $100 valuation of all taxable property in said district and $1.00 on each taxable poll in said district: *Provided,* that the valuation of all property in said district shall be the same as that at which it is assessed for county and State purposes; and *Provided,* that

the taxes levied under this act shall be due, payable, and collectible in like time and manner as are the taxes for county and State purposes.

Section 7 confers power to appoint a tax collector, etc.

SEC. 8. That the board of trustees herein provided shall be and are hereby authorized and empowered to issue bonds of said graded school to an amount not exceeding $3,000, of such denomination and of such proportion as said board of trustees shall deem advisable, bearing interest from date thereof at a rate not exceeding 6 per cent per annum, (146) with interest coupons attached, payable annually, such bonds to be of such form and tenor, and transferable in such way, and the principal thereof payable or redeemable at such time or times not exceeding twenty years from date thereof, as said board of trustees may determine: *Provided,* that the said board of trustees shall issue bonds at such time or times and in such amounts as may be required to meet the expenditures hereinafter provided for in section 9 of this act.

The act further provides that the taxes collected pursuant to the act shall be applied to payment of said bonds and interest thereon and the necessary expenses of the schools within the district, and that proper schools shall be established, etc. The act then directs that an election be held by the qualified voters of the district under the law governing the elections in cities and towns, and if a majority of such qualified voters shall vote for schools, then the provisions of the act shall be in full force and effect. In addition to the terms and provisions of the act referred to, the court finds the following additional facts as pertinent to the inquiry:

1. That the defendants had the district surveyed and laid off according to the description in said private act, and within its boundaries are included portions only of white school districts numbers 23 and 34 and portions of colored districts numbers 14 and 23, as established by the board of education of the county. The whole town of Robersonville is in the district.

2. That the board of trustees ordered an election, appointed a registrar and the judges of election, but did not order a new registration; that the district included portions of the territory of Robersonville voting precinct and of Gold Point voting precinct. That the registrar gave the proper notice of the time for registering the votes. That he referred to the registration books in Robersonville Precinct and Gold Point Precinct and copied from these books into his registration (147) books the names of all the registered voters who were then residing within the boundaries of said school district, and registered anew those persons entitled to register residing in the said district whose names did not appear on the old registration books of said voting

precincts. There were 14 new registrations. That at the election 136 votes were cast, of which 96 were for schools and 40 were against schools. I further find that 96 was more than a majority of the registered voters, as they were registered, for I find that the number of names registered was 181.

3. I further find that the said trustees have levied a tax of 33⅓ cents on the $100 worth of property and $1 on the poll and that they are proceeding to have the same collected, and that the plaintiffs are residents and property-owners and taxpayers in said district.

4. I further find that the trustees are arranging to issue $3,000 of bonds, and that they propose to use $2,500 of the proceeds from the sale of said bonds to pay for a building for a graded school for the white race.

Upon said facts judgment was entered as follows:

"Upon the foregoing . . . I find as conclusions of law: (1) That the defendants or such trustees had the right to authorize the election, but there should have been a new registration, and this failure makes the election void. (2) That the said trustees could not levy a tax, because it is against the Constitution of the State, and that the said act of the General Assembly authorizing them to levy a tax is unconstitutional and void.

"It is therefore ordered and adjudged that the said trustees be enjoined from issuing the said bonds and from collecting any tax on the poll or property, because of the said levy made by them."

Thereupon defendants excepted and appealed.

Gilliam & Gilliam for plaintiffs.

H. W. Stubbs and Winston & Everett for defendants. (148)

HOKE, J. It is not urged against this legislation that its acceptance was made to depend upon the vote of the people within the new school district. Such legislation has so often been sustained in this State that it is no longer an open question. *Cain v. Comrs.*, 86 N. C., 8. Nor is it suggested that any but those who were qualified voters of the territory took part in the election, nor that any who were such electors in the territory were denied registration.

Plaintiffs rest their right to a stay of further proceedings under the act on two grounds: (1) That the election was invalid because no new registration was ordered for the entire electorate of the new district. (2) That the act is unconstitutional in that it delegates legislative power to defendant board.

The Court is of opinion that both positions should be resolved in favor of defendant. As to the first, the legislation bearing on the question is, we think, decisive against the plaintiffs. Section 15 of the act directs that the election be conducted under the laws governing the elections for cities and towns. The laws (chapter 514, Laws 1899, and chapter 750, Laws 1901) provide that a new registration may be ordered by the city or town authorities, but that unless this is required, the registrars appointed for the purpose shall be furnished with registration books, and after taking an oath for faithful performance of duty shall revise the registration books of their wards or precincts so that such books shall show an accurate list of the electors previously registered and still residing therein, without requiring such electors to be registered anew, and then keep open the books at stated periods, in order that any new electors, not before registered, may be properly registered thereon. Here no new registration was required. The registrar and judges were duly appointed and the registrar revised the registration books of the precincts included in the designated territory, transcribed from these books the names of all registered voters who were still (149) residing within the boundaries of the school district, and registered anew those persons entitled to register and whose names did not appear on the old books. The clear intent of the statute is that unless a new registration is ordered, no electors within the territories should be required to register, and there has been a substantial compliance with the law. *DeBerry v. Nicholson,* 102 N. C., 465.

In support of the second position, the plaintiffs contend that the power of taxation is a legislative power which cannot be delegated except to municipal corporations, quoting a clause from Cooley on Taxation as follows: "There is one clearly defined exception to this rule which is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom which tacitly or expressly has been incorporated in the several State Constitutions has made these organizations necessary parts of the general machinery of government." The Court is further referred to several decisions of this State construing acts which conferred this power on municipal corporations, and it is urged that thus far this has only been done in North Carolina in the cases of cities, towns, and counties, the usual or ordinary political subdivisions of the State. It is true that the power of taxation is an inherent and essential attribute of sovereignty, which, under our system of government, is placed in the legislative department, and that Mr. Cooley and other writers on the subject, in referring to it, say that

it cannot be delegated except to municipal corporations. But in using the term "municipal corporations" in this connection these writers do not use the word in its restricted sense of municipal corporations proper, confining it to cities and towns, but in a more enlarged and generally received acceptation, which includes municipal corporations technically so termed, and also public corporations created by the State for the purpose of exercising defined and limited governmental functions in certain designated portions of the State's territory. (150)

These last are termed by authors of approved excellence and decisions of authority to be public *quasi* corporations, and are said to include counties, townships, school districts, and the like. Thus a recent writer, Abbott on Municipal Corporations, sec. 8, says: "Public *quasi* corporations are defined as 'subdivisions of the State's territory, such as counties, townships, school districts, and the like, which are created by the Legislature for public purposes and without regard to the wishes of the inhabitants, are to be included in the class known as public *quasi* corporations.' They are, in essence, local branches of the State Government, though clothed in a corporate form in order that they may the better perform the duties imposed upon them."

Smith's Modern Law Municipal Corporations, secs. 8 and 9; Beach on Public Corporations, sec. 3; Dillon Mun. Corp., secs. 23, 24, 25, give definitions substantially similar, and also classify school districts with counties, townships, and other corporations of like kind. Some of these authors say that such corporations are usually formed or created by general laws; but this is not said to be universal or necessary, and on the question here discussed, the capacity to receive and exercise delegated powers of taxation, the essential feature is that they are, as stated, agencies of the State, incorporated to enable them to exercise certain governmental functions in designated portions of the State's territory. In accord with these text-writers, *Rothrock, Judge,* delivering the opinion of the Court in *Currier v. District Township,* 62 Iowa, 102, says:

"The word municipal, as originally used in its strictness, applied to cities only, but the word now has a much more extended meaning, and when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably."

This decision is an apposite authority on the case now being (151) considered, and holds that under a statute authorizing municipal corporations to issue bonds, a school district is properly called a municipal corporation according to the modern use of the term, and as such may obligate itself by bonds issued under such a statute. Our own Constitution evidently uses this term in the same sense, for in Article VII, being that headed "Municipal Corporations," are included

counties, cities, townships, and in section 7 of the same article, restrictive of incurring debts, it is provided "That no county, city, town, or other municipal corporation shall contract a debt," clearly showing that, as used in that instrument, the broader definition is intended. That Mr. Cooley, in the clause cited by plaintiff, clearly intended the term in its more generally received acceptation is, we think, made clear by the context, for on page 103 of the same work this author says: "Neither can the Legislature confer upon private corporations the power to tax, though it may doubtless create municipal corporations for that especial purpose when not forbidden by the State Constitution to do so." And in another work, Cooley on Constitutional Limitations, p. 264, the author says:

"It has already been seen that the Legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race and by other maxims which regard local government, that the right of the Legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations and to confer upon them the powers of local government, and especially of local taxation, and police regulation usual with such corporations, would always pass unchallenged."

This being the correct definition of municipal corporations as used in the connection stated, and school districts being properly (152) included in the term, in the absence of some restraint in the organic law, the great weight of authority is to the effect that the Legislature, as it has done in this instance, can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and when accepted and sanctioned by a vote of the qualified electors within the prescribed territory, as required by our Constitution, Art. VII, sec. 7, may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose. Thus, in A. & E. Enc. of Law, vol. 27, p. 906, it is said: "Districts for school, highway, levee, irrigation, drainage, and other similar purposes may be, and often are, invested by the State with a corporate character and may be endowed with a taxing power. These are *quasi* corporations, mere subdivisions of the State for political purposes. . . ."

And further:

"As has already been shown, the establishment and maintenance of public schools is deemed to be a legitimate purpose of taxation; and since the State has power to levy school taxes, it can delegate such power to its subordinate political divisions. Usually, the power is

expressly conferred by the State on existing political divisions, or on districts constituted as corporations for school purposes."

In Desty on Taxation, vol. 1, p. 226, it is said:

"As distinct from its power of local assessment, the Legislature may create special taxing districts which may include one or more subdivisions of the State or parts of subdivisions. It is not essential that such districts shall correspond with the territorial limits of such subdivision. So it may create levee districts, school districts, swamp lands, road and highway and other special taxing districts."

The weight of decided cases is with these statements of the doctrine. *McCormac v. Comrs.,* 90 N. C., 441; *Harriss v. Wright,* 121 N. C., 172; *S. v. Sharp,* 125 N. C., 628; *Tate v. Comrs.,* 122 N. C., 812; *Gilkeson v. Frederick Justices* (Va.), 13 Grat., 577; *Kuhn v. Board of Education,* 4 W. Va., 499; *Smith v. Bohler,* 72 Ga., 546; *Landis v. Ashworth,* 57 N. J., 510; *Carson v. St. Francis Levee District,* (153) 59 Ark., 513; *S. v. Leffingwell,* 54 Mo., 458.

In *McCormac v. Comrs., supra, Merrimon, J.,* for the Court, said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the Government, limited and regulated, as it may be, only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the Government whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the Government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the Legislature may, from time to time, in its discretion, abolish them, or enlarge or diminish their boundaries, or increase, modify, or abrogate their powers. It may provide that the agents and officers in them shall be elected by the electors, or it may appoint them directly, or empower some agency to appoint them, unless in cases where the Constitution (154)

provides otherwise, and charge them with duties specific and mandatory or general and discretionary in their character. Such power in the Legislature is general and comprehensive, and may be exercised in a great variety of ways to accomplish the ends of the Government." In *Kuhn v. Board of Education* it is held that "The Legislature has the exclusive power to create independent school districts without the assent of the citizens residing therein, and authorize by law the election of a board of education for such district by the qualified voters resident therein, and to give such board power to make the annual levies for buildings and a board of schools therein."

In *S. v. Leffingwell, supra,* on the suggestion that these districts should be created by general laws, *Wagner, J.,* for the Court, says: "It may be urged that such subdivisions should be created by general laws without resort to special legislation. As a general rule, this is true, but cases might arise where special acts might become absolutely necessary, such as the establishment of a new county or a new school district in some particular locality," etc.

It cannot be maintained for a moment that the corporate purpose and authority given to the board under the act in question are not governmental in their nature. The duty of providing for a system of education is enjoined upon the Legislation in most impressive terms by our Constitution, and is considered of such supreme importance as to require an independent and separate article in that instrument.

As said by *Chief Justice Jackson* in *Smith v. Bohler, supra:* "We think it one of the most important of all the authorities of the county. Education is the corner-stone of a political fabric, especially when that fabric rests on the basis of popular suffrage. Neither roads, court-houses, nor district subdivisions, or other arrangements for good
(155) government are more vital to society. To regulate the instruction of the children who are soon to become the fathers and mothers of the land is a great public trust, second to none confided to the people's agents, and those clothed with power to perform such a work in a county constitute a great county authority, the very head of the list of the fiduciary agents of that county which confides such a trust to them."

There are decisions in other jurisdictions which appear to conflict, and some which do conflict, with the position here maintained; but on examination they will, as a rule, be found to rest on a different principle from that involved by the facts of the case, or to be based on reasons or some special constitutional feature which do not exist with us. Thus in *Morgan v. Elizabeth,* 44 N. J., 573, it is said: "The power of the Legislature itself to erect a taxing district of lesser area than the dis-

trict of which it is a part has been denied in a series of cases in this Court." This statement of the doctrine, while sufficient, perhaps, for the purpose then made, on examination of the authorities cited to sustain it will be found too broad, and these authorities will require the qualification that such a district cannot be formed within an existing political division of the State in which taxes may be imposed, *without regard to special benefits,* unless such district is itself made a political division with appropriate powers of self-government. Accordingly, we find that the New Jersey courts, as seen in *Landis v. Ashworth, supra,* uphold the taxing power of school districts, specially created, for the reason, no doubt, that there, as here, the tax is laid on a principle of uniformity, and for the benefit of all the inhabitants within the designated territory. It is imposed only by a vote of the people themselves and the authorities are given entire control over all matters pertaining to education within the specified district.

The Supreme Court of Alabama has also held that the power of taxation cannot be conferred on a school district (*Schultes v. Eberly,* 82 Ala., 242), and that such districts are not included in the term "municipal corporations" as used in their Constitution. (156)

This decision is rested in part on certain special features of the Alabama Constitution, but is made to depend chiefly on the ground that under the act creating these districts the "cardinal principle of self-taxation" was ignored; and if these districts were allowed the power to tax, the limitations fixed by their Constitution on municipal taxation could be abated.

No such objection can be raised to the act now before us. The tax, as stated, can only be imposed, as required by our Constitution, by a vote of the people within the district, and there is no reason which occurs to us why the limitations on municipal taxation provided in our Constitution do not apply. As we have shown, these school districts are public *quasi* corporations included in the term municipal corporations as used in Article VII, section 7, of our Constitution, and so come within the express provisions of section 7, that "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc., nor shall any tax be levied but by a vote of the qualified voters."

And the principle of uniformity is established and required by section 9 of this article. Only counties, cities, towns, and townships are mentioned in section 9 in terms, but the section is intended to and does regulate the method of taxation and requires that all municipal taxation shall be uniform and *ad valorem.* The agencies are of secondary

importance, and if the General Assembly, under the power conferred by section 14 of the article, change the agencies for levying these taxes, the substituted authority would at once come within the regulation as to the method, and so we hold.

Again, the Supreme Court of Tennessee, in *Waterhouse v. Board of School Trustees,* 55 Tenn., 857, has held that the taxing power can only be delegated to counties and incorporated towns, and not to
(157) school districts. This decision is put on the ground that the Constitution of Tennessee in terms gives the General Assembly the power to authorize "counties and incorporated towns to impose" taxes, without more, and that the express delegation of this power in the cases specified excludes its exercise in other cases. But no such limitation exists with us. Article VII of our Constitution, which relates to the matter of municipal government, after providing for the officers, agents, and boards which shall be ordinarily required as sufficient for the purpose, contains this provision, being section 14: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9, and 13." Section 7, as stated, establishes a limitation on the power to contract debts, impose taxes, etc. Section 9 provides that taxation shall be imposed *ad valorem.* Section 13 prohibits the payment of debts contracted in aid of the Confederate Government. The language of section 14 is very broad in its scope and terms, and the Supreme Court in construing the section has decided that it is not necessary, to effect changes in municipal government, that an act for the purpose should be general in its operation or that it should, in terms, abrogate one article and substitute another in its stead, but that an act of the General Assembly making such change, and local in its operations, must be given effect under this amendment, if otherwise valid. After declaring this as a principle of construction, the Court, in *Harriss v. Wright,* 121 N. C., 179, further holds as follows: In 1875 a constitutional convention amended Article VII in these words: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all the provisions of this article and substitute others in their place,
(158) except sections 7, 9, and 13." Thus was placed at the will and discretion of the Assembly, the political branch of the State Government, the election of court officers, the duty of county commissioners, the division of counties into districts, the corporate power of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or townhip

treasury, the entry of officers on duty, the appointment of justices of the peace, and all charters, ordinances, and provisions relating to municipal corporations.

Our Constitution, therefore, so far from restricting the power of the General Assembly on the matter now before us, has conferred upon that body full and ample power to establish any form of municipal government which the public interests and special needs of a given community may require. It is further urged that to establish such a district and confer powers of taxation within another political division which is also exercising the powers of local self-government, will tend to enhance expense, produce confusion and disorder, and at times perhaps a conflict of authority. It does not appear what were the reasons which induced the inhabitants of this community to procure and adopt the scheme of education established by the act in question, but whether they were well considered or otherwise is of no moment; the question here is simply one of constitutional power. As said by *Nash, C. J.,* in *Taylor v. Comrs.,* 55 N. C., 144: "Whether the Legislature acted wrong or not is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it. That is a matter for 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." We are of the opinion that on reason and authority the act in question is a valid exercise of legislative power, and on the facts found by the court below there was error in the judgment pronounced by his Honor, and the same must be (159) reversed.

While this disposes of the case and determines all questions in which the plaintiffs have shown or claimed any interest, inasmuch as the judge declared that the defendants intend to disburse $2,500 of the $3,000 raised by the sale of bonds for the erection of a school building for the white race, we deem it not amiss to call the attention of the defendants to the decision of this Court made at the last term in *Lowery v. School Trustees,* and reported in 140 N. C., 33, as affecting section 12 of the act. This section provides that the trustees shall dispose of the school funds to be realized under the act as to them may seem just. According to this well-sustained opinion of *Mr. Justice Connor,* it is held to be the law that:

(*a*) The two essential principles underlying the establishment and maintenance of the public school system of this State are: first, the two races must be taught in separate schools, and, second, there must be

no discrimination for nor against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for the purpose.

(*b*) In executing the law the defendant shall not discriminate against either race, but shall afford to each equal facilities. It is not intended by this that the taxes are to be apportioned between the races per capita, but that the school term shall be of the same length during the school year, and that a sufficient number of competent teachers shall be employed at such prices as the board may deem proper. *Dictum* in *Hooker v. Greenville,* 130 N. C., 473, disapproved.

(*c*) The act establishing a graded school for the town of Kernersville is construed to contain a positive direction to establish one
(160) school in which the children of each race are to be taught in separate buildings and by separate teachers, as the Constitution commands.

(*d*) The school district prescribed by Pr. Laws 1905, ch. 11, must include both races, and the taxes levied and collected upon the property and polls of both races in the district must be applied to the support and maintenance of a graded school for the children of both races, and in carrying out the provisions of the act the imperative mandate of the Constitution, that there shall be no discrimination in favor of or to the prejudice of either race, must be observed.

And from this it follows that the discretion conferred upon the defendants by the terms of section 12 is by no means an arbitrary one, but the same must be used as directed and required by the Constitution and in the light of the above decision. There are no facts or data given by which the Court may determine whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds. The defendants, in their sworn answer, aver that they have no desire or intent but to administer their trust in accordance with the law of the land, and it is right that we should act upon this statement till the contrary is made to appear by proceedings duly entered.

This section, as stated, only relates to the disposition of the fund, which is in no way involved in this suit. If defendants, contrary to their avowed purpose, shall endeavor to exercise the authority conferred upon them with an "evil eye and unequal hand," so as to practically make unjust discrimination between the races in the school facilities afforded, it is open to the parties who may be interested in the question, by proper action, to correct the abuse and enforce compliance with the law.

Judgment reversed.

Cited: *S. v. Wolf,* 145 N. C., 448; *Audit Co. v. McKensie,* 147 N. C., 465; *Hollowell v. Borden,* 148 N. C., 256, 258; *Perry v. Comrs., ib.,* 525; *McLeod v. Comrs., ib.,* 86; *Pickler v. Bd. of Education,* 149 N. C., 222; *Venable v. School Committee, ib.,* 121; *Sanderlin v. Luken,* 152 N. C., 741; *Bonitz v. School Trustees,* 154 N. C., 379; 381; *Trustees v. Webb,* 155 N. C., 385; *Ellis v. Trustees,* 156 N. C., 12, 13; *Comrs. v. Bank,* 157 N. C., 193; *Williams v. Bradford,* 158 N. C., 39; *Stephens v. Charlotte,* 172 N. C., 566; *Woodall v. Highway Commission,* 176 N. C., 384; *Williams v. Comrs., ib.,* 557; *Hill v. Lenoir, ib.,* 579; *Dickson v. Brewer,* 180 N. C., 406.

(161)

HARWOOD v. SHOE.

(Filed 17 April, 1906.)

Deeds—Nonperformance of Covenant of Support—Estoppel.

1. Where the failure of the grantee of a deed to carry out his contract of maintenance with the grantor was due to the acts and conduct of the heirs at law of the grantor, they cannot profit by their wrongful acts, although they were not parties to the contract.

2. One who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.

PARTITION proceedings by Howell Harwood and others against John F. Shoe and others, heard by *Long, J.,* and a jury, at Fall Term, 1905, of STANLY.

Defendant Shoe, having pleaded sole seizin as to 50 acres, the case was tried upon the following issues:

1. Did Susan Harwood, at the time of the execution of the deed of 29 December, 1893, have sufficient mental capacity to execute the same? Ans.: Yes.

2. Was the execution of the said deed procured by fraud and undue influence of the defendant John Shoe, as alleged in the complaint? Ans.: No.

3. Did the defendant John Shoe perform the covenant of maintenance of Susan Harwood, as provided in the deed? Ans.: No.

4. If he failed in any particular as to the said contract of maintenance of Susan Harwood, was such failure due to the acts or conduct of the plaintiffs? Ans.: Yes.

5. Is John Shoe the owner in fee and entitled to the 50 acres of land described in the answer? Ans.: Yes.

6. Are the plaintiffs and defendants tenants in common of all the lands described in the petition except the 50 acres? Ans.: Yes.

(162) From the judgment rendered, the plaintiffs appealed.

Adams, Jerome & Armfield and J. Milton Brown for plaintiffs.
R. L. Smith for defendants.

BROWN, J. The learned counsel for plaintiffs contended that they are entitled, upon the issues as answered, to a judgment for plaintiffs, and in his argument stated that he wished to rest his whole case upon that exception to the ruling of the court below.

The jury found in answer to the fourth issue that the defendant's failure to carry out his contract of maintenance of Susan Harwood was due to the acts and conduct of the plaintiffs. But the plaintiffs say that they were strangers to the contract, and that, therefore, they are not to be held responsible for the nonperformance of the contract by defendant Shoe. It is a general rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. If this action were being prosecuted by Susan Harwood to set aside the deed on account of the nonperformance of his obligation by defendant, this rule of law would apply, although the defendant was prevented by a third person, without Susan Harwood's consent, from performing his contract. But the plaintiffs are the heirs at law of Susan Harwood and inherited the land from her. They had a personal and pecuniary interest during her lifetime in a failure by defendant to comply with his agreement. If he failed, the conveyance could be avoided, and they would get the land at her death. The defendant offered evidence tending to prove that during Susan Harwood's life the plaintiffs compelled defendant to leave the land and by force prevented him from carrying out his obligation to her.

(163) The jury accepted defendant's version of the facts.

To permit plaintiffs to recover the land now upon the ground contended for by them and in the face of such a finding by the jury would be to permit them to take advantage of their own wrong.

It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance. This rule applies with especial fitness where the party is impelled by personal interest, as in this case. *Young v. Hunter,* 6 N. Y., 207; *Buffkin v. Baird,* 73 N. C., 283; *Harris v. Wright,* 118 N. C., 422; *Navigation Co. v. Wilcox,* 52 N. C., 481. It would be against good morals, as well as law, to allow plaintiffs to profit by their wrongful acts, although they were not parties

to the contract. *Nemo ex suo delicto meliorem suam conditiorem facere potest.*

A careful examination of the record discloses

No error.

Cited: Whitlock v. Lumber Co., 145 N. C., 125; *Brittain v. Taylor,* 168 N. C., 273; *Huntley v. McBrayer,* 172 N. C., 644; *Hinton v. Brinson,* 180 N. C., 397.

(164)

WRIGHT v. RAILROAD.

(Filed 17 April, 1906.)

Garnishment—Payments in Another State—Jurisdiction—Judgments—Presumption of Regularity—Notice to Defendant.

1. In an action by the plaintiff to recover for services rendered the defendant, payments made by the defendant under garnishment proceedings in another State constitute a good defense, where it appears that the defendant (plaintiff in this action) was personally served with summons in the principal suit, and the only irregularity alleged was in the failure of the garnishee to notify the defendant (plaintiff in this action) of the garnishment.

2. Where it appears that the court had jurisdiction of the subject-matter and the parties, this Court, in the absence of any countervailing evidence, must presume that the case proceeded regularly and according to the course and practice of the court of the State in which it was pending, and that consequently all proper steps were taken to charge the garnishee.

3. Power over the person of the garnishee confers jurisdiction on the court of the State where the writ issued against him, without regard to the "*situs* of the debt," as the obligation to pay his debt clings to and accompanies him wherever he goes.

ACTION by J. L. Wright against Southern Railway Company, heard by *Ward, J.,* and a jury, at October Term, 1905, of GUILFORD.

The plaintiff brought the action before a justice of the peace to recover $133.27 alleged to be due by the defendant as wages for services rendered. The defendant pleaded what is called the "general issue"—that is, it denied the indebtedness. The justice gave judgment against the defendant and it appealed. In the Superior Court it further pleaded payment, set-off, and counterclaim. The defendant did not at the trial deny that it was at one time indebted to the plaintiff in the said amount, but relied, in support of its general denial and the added pleas, upon judgments in two suits, one in a justice's court of Knox (165)

County, Tenn., entitled *Brewing Co. v. Luther Wright & Co.* of which firm plaintiff was a member, and proved that plaintiff in his action, who was a defendant in that one, was personally served with process, the court having jurisdiction of the action, and that judgment was therein rendered against him for $85.10, and othereupon a writ of garnishment was sued out and served on the defendant in this case, Southern Railway Company, after a return of *nulla bona* to the execution which had been issued on the judgment. Defendant appeared in obedience to the process issued against it, and answered by admitting an indebtedness to the plaintiff of $136.29, and alleged that of this sum $52.93 was subject to a prior garnishment issued in another suit against it. Judgment was duly entered against defendant, under the garnishment, for $83.99, which it afterwards paid. The other suit was brought by the plaintiff against the Knoxville Livery and Stock Company, in the Court of Chancery of the same county, in which the defendant filed a cross-bill, and upon the said cross-bill obtained judgment against the plaintiff for $37. Upon a return of *nulla bona* to the execution issued upon that judgment, process of garnishment was sued out against the defendant in this case, Southern Railway Company, and judgment, after appearance and answer, was duly entered against it for $48.25. The defendant railway company, as garnishee, paid on this judgment, $51.90, which was $3.65 more than should have been collected on the principal judgment or the garnishment. This excess was paid by the clerk of the court to the plaintiff, J. L. Wright, who was substantially the defendant in the judgment. So far as appeared in the court below, the proceedings in both suits were conducted regularly. The judge held that the payments thus made by the defendant did not constitute a good and valid defense or support the pleas of payment, set-off, or counterclaim, except as to the sum of $3.65 received by the plaintiff from the
(166) clerk of the Chancery Court, and so instructed the jury and directed them to answer the issue accordingly. There was a verdict in favor of the plaintiff for $133.27, being the amount claimed by him, and judgment thereon. Defendant excepted and appealed.

Taylor & Scales for plaintiff.
King & Kimball for defendant.

WALKER, J. The plaintiff contends that the payments made by the defendant under the garnishment proceedings cannot be set up to defeat his recovery in this action because he was not notified of the process of garnishment. It does not affirmatively appear whether he was or not, but for the sake of argument we will assume that he was not so notified. He was personally served with the summons in the principal action and

(nothing else appearing) we think that was quite sufficient to bind him by the judgment in the garnishment, not that he is precluded by it from showing that the defendant did not owe him more than was adjudged to be due in that proceeding, but the latter is protected by the payment from answering again to the plaintiff for the same debt. It is not pretended that the statute of Tennessee requires that he should be notified. In the absence of any countervailing evidence, we must presume that the case proceeded regularly and according to the course and practice of the court of the State in which it was pending, and that consequently all proper steps were taken to charge the garnishee. This is the well-settled rule, where it appears that the court had jurisdiction of the subject-matter and the parties. Rood on Garnishment, sec. 214; *Grier v. Rhyne,* 67 N. C., 338; *McLane v. Moore,* 51 N. C., 520. No question is made in this case as to the jurisdiction of either of the courts which rendered the two judgments and there is no irregularity or other defect in the proceedings alleged except the failure to notify the (167) defendant in them, who is plaintiff in this action, of the garnishment. This objection is not tenable. One reason for requiring such a notice is to enable the defendant to make his defense, if he has any, to the original action, and thereby prevent his being called upon to pay the debt twice. This, we think, is a most just and reasonable rule, but in all cases where it has been applied, the defendant, not the garnishee, had been brought in by publication, by constructive and not by personal service, and the reason for the rule would perhaps confine it to such cases, unless there is some special defense to the garnishment or some right that could be asserted thereunder. The plaintiff's counsel rely on *Harris v. Balk,* 198 U. S., 215; and that is the only decision cited to us to sustain the point. The Court does say in that case: "But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder." But it is further said: "This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit." We see, therefore, that the principle, as there restricted by the reason

given for it, does not apply when the original defendant has had legal notice of the suit by the personal service of process and a full
(168) opportunity to defend, as he undoubtedly had in the present case. Indeed, the garnishment was not issued until after the time for pleading or answering had expired, and a judgment had actually been entered, thereby cutting off all defenses and fixing the defendant conclusively with liability for the debt. What good, then, would notice have done? He could not have defended if he had been notified, as by his own laches or his failure at the proper time to appear and defend the suit, he had lost his day in court. The defendant does not now deny his liability and he is in no danger whatever of being twice vexed for the same debt, or in any jeopardy of having to make a double payment upon it. The two judgments have been fully satisfied of record, and the plaintiff has received the amount paid in excess of what was due on the last of the two judgments. His creditor has received all that is justly due to him, and no court in any jurisdiction would permit him to proceed against the plaintiff again. In a case like this, where the defendant has been personally served with process in the principal suit, it would be next to impossible to charge him twice on the same liability, as the judgment must first be taken against him before a garnishment issues, and then the money that is collected under the garnishment is applied to the satisfaction of that judgment. Under the statute of Tennessee, a garnishment upon a judgment after a return of *nulla bona* to the execution issued thereon is closely analogous to our supplementary proceedings under the provision of sections 490-493 of The Code (Revisal, secs. 675, 678). These sections of The Code and the Revisal do not require notice to the defendant, though the court may, in its discretion, order notice to be given. *Wilmington v. Sprunt,* 114 N. C., 310. It is said in Rood on Garnishment, sec. 280: "If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by
(169) which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted." However this may be, and we express no opinion in regard to it as being a general rule and applicable to all cases, there is nothing

in this record to show that the plaintiff has been prejudiced by the failure of the defendant, as garnishee in the other cases, to notify him of the garnishments, if it had appeared that such notice had not been given. He has not been deprived of any defense nor of any right, so far as we are informed, which he could have saved if he had received the notice. The case, therefore, is resolved into the simple fact that the debt due by the defendant to the plaintiff has been applied to the payment of a just obligation against him in the State of Tennessee, in suits to which he was made a party by the personal service of process. It would be requiring an innocent party to pay a debt twice if we should now hold the payment to be unavailing, especially in the absence of any sound legal reason for it and of any evidence showing that the plaintiff had a meritorious defense to the garnishment. It would, too, be unjust so to hold.

As to the other question. It has been recently held by the Supreme Court of the United States, reversing *Balk v. Harris,* 130 N. C., 381, that attachment is the creation of local law, and if there be a law of the State providing for the attachment of the debt due to the defendant in the principal suit, then if the garnishee be found in that State, and process be personally served upon him therein, the court thereby acquires jurisdiction over him and can garnish the debt due from him (170) to the defendant as debtor of the plaintiff and condemn it, provided the garnishee could himself be sued in that State. Power over the person of the garnishee confers jurisdiction on the court of the State where the writ issues against him, without regard to the *"situs* of the debt," as the obligation to pay his debt clings to and accompanies him wherever he goes. The Court then concludes that a judgment rendered against a garnishee under such circumstances, which is afterwards paid by the garnishee, must (by virtue of the clause in the Federal Constitution requiring that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, Art. IV, sec. 1) be recognized as a payment of the original debt by the courts of any other State where it is properly pleaded by the garnishee in an action against him by the defendant to whom he originally owed the debt. *Harris v. Balk,* 198 U. S., 215. *R. R. v. Deer,* 200 U. S., 176, following *Harris v. Balk,* is like our case, except in one particular. In that case there was no personsal service on the defendant in the principal suit, but only constructive service by publication, while here he was personally served. Those decisions having been made by the court having jurisdiction to finally construe and apply the clause of the Federal Constitution to which reference has been made and to review the decisions of this Court in respect thereto, we must abide by what is there decided, and certainly to the extent that the cases are binding upon us

as authorities. See, also, *R. R. v. Sturm,* 174 U. S., 710; *Goodwin v. Claytor,* 137 N. C., 224; *Ins. Co. v. Chambers,* 53 N. J. Eq., 486; *Cahoon v. Morgan,* 38 Vt., 234. This disposes of the only two questions presented in the case, as shown by the briefs of counsel, the one as to the right to garnishee the debt due by the defendant to the plaintiff
(171) in Tennessee, and the other as to plaintiff's right to notice of the garnishment.

There was error in the ruling of the court, for which a new trial is ordered.

New trial.

Cited: Wierse v. Thomas, 145 N. C., 268.

LUMBER COMPANY v. RAILROAD.

(Filed 17 April, 1906.)

Carriers—Freight—Illegal Discrimination—Pleadings—Evidence—Exceptions—Overcharges—Money Had and Received—Protest—Interest.

1. The statute (Rev., sec. 3749), which is declaratory of the common law, secures to every person the right to participate in the use of the facilities furnished, or which it is its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination.

2. A common carrier is guilty of unlawful discrimination by the principles of the common law, and the terms of the statute, when it charges one person for service rendered a larger sum than is charged another person for like service under substantially similar conditions.

3. A carrier cannot rightfully charge one shipper $2.50 per 1,000 feet for hauling his logs if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at $2.10 per 1,000 feet in consideration of the shipment of the manufactured products over its railroad.

4. Where a higher charge was paid than that charged other shippers, the payment is not to be considered voluntary, and the excess may be recovered back upon account for money had and received, and it is not necessary that at the time of payment there should have been any protest.

5. In an action by a shipper to recover from the carrier money wrongfully received by reason of an illegal freight charge, the amount of overcharge draws interest.

6. An exception to the refusal of the court to dismiss an action to recover sums paid on account of discriminating overcharges, because the complaint

did not set forth the exact dates of the shipments of logs by plaintiff over defendant's road and did not state the same dates and times that defendant had charged and received a lower rate from other persons, is without merit, where it is evident that defendant was not misled and it did not demand a more specific statement nor ask for a bill of particulars.

7. An exception to the admission of testimony of a witness for that his statements were general and did not fix dates of shipments, etc., is without merit, where the purpose of the testimony was to lay the foundation upon which plaintiff was seeking to show the character of defendant's business, the number of its lines or branch roads, their terminal points, the number, etc., of mills on such lines, its own dealings with defendant.

8. An exception for that the witness was permitted to testify as to logs shipped from a point in South Carolina to Wilmington, N. C., which was interstate and not within the control of the State courts, is without merit.

9. Where the question at issue was whether defendant while charging plaintiff $2.50 per 1,000 for hauling logs 39 miles to Wilmington, was charging other persons $2.10 for the same service under substantially similar circumstances, it was competent to show the rates charged other persons for shipment of logs in car-lots over branches of defendant's road not coming into Wilmington.

10. In the enforcement of the civil right of the citizen, the court must construe the law so that the right is secured and the remedy for its infringement given.

11. An instruction "that the word contemporaneous in the statute did not mean the exact day, hour, or necessarily month, but that it meant a period of time through which the shipment of goods or freight were made by plaintiff at one rate and by other shippers at another rate," is not error where the court in the same connection told the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that during the period of time named in the complaint the discriminating rate was charged.

ACTION by the Hilton Lumber Company against Atlantic Coast (173) Line Railroad Company, heard by *Council, J.*, and a jury, at December Term, 1905, of NEW HANOVER.

Plaintiff sued for the recovery of $3,865.26, alleged to have been unlawfully demanded and paid defendant company on account of discriminating overcharges for shipments of logs over defendant's road from 15 November, 1898, to 30 April, 1901. Plaintiff alleged that between said dates the defendant company, a common carrier, unlawfully charged and demanded of plaintiff an unreasonable and discriminating rate of $2.50 per 1,000 feet for hauling its logs from Musteen's Crossing to the city of Wilmington, a distance of 39 miles, whereas during the said time defendant charged other persons and corporations for shipment of logs for a like distance to said city only $2.10 per 1,000. That, after protest

against such discrimination, plaintiff applied to the Corporation Commission of the State, whereupon said Commission ordered defendant to reduce its rate to $2.10 per 1,000 feet. That between said dates plaintiff shipped logs from said crossing to Wilmington, aggregating 9,663,160 feet, for which it paid at the rate of $2.50 per 1,000 feet, the sum of $24,157.90. That the amount which should have been paid at $2.10 per 1,000 feet would have been $20,292.64, the difference between said amounts being $3,865.26. The plaintiff demanded payment of said amount, etc. Defendant admitted the plaintiff had paid the sum named for hauling logs between said points, but denied that same was either unreasonable or a discrimination. Defendant denied that the rate of $2.10 per 1,000 feet was a reasonable or proper rate for carrying plaintiff's logs and said there was a substantial difference, both in conditions and circumstances, between logs shipped over its road at $2.10 per 1,000 feet and those shipped by plaintiff at $2.50 per 1,000 feet. That the

(174) $2.10 rate applied only to mills to which logs were shipped and from which it was afterwards reshipped in the form of lumber or its manufactured products. The other material allegations were denied.

After the pleadings were read, the defendant moved *ore tenus* to dismiss the action upon the ground that it did not state a cause of action upon which plaintiff was entitled to recover, in that it did not set forth the exact dates of the shipments of the logs, which it claimed to have shipped over defendant's road, and did not state that at the same dates and times the defendant was charging, collecting, and receiving from other persons a lower rate of freight for the same kind of shipments. Motion overruled, and defendant excepted.

Defendant admitted its liability to plaintiff for the sum of $91.98, being the excess of $2.10 per 1,000 feet collected from plaintiff on shipment of logs from 20 March, 1901, to 30 April, 1901, the Commission having fixed the rate at $2.10 on 20 March, 1901, and defendant not having observed or adopted it in shipment of plaintiff's logs until 30 April, 1901. At the conclusion of the plaintiff's evidence defendant demurred and renewed its motion to nonsuit the plaintiff. Motion denied, and defendant excepted.

The court upon the trial submitted the following issues to the jury:

1. Did the defendant unjustly and illegally discriminate against the plaintiff in the matter of freight rates for transportation of logs as alleged?

2. Did defendant unlawfully collect of plaintiff freight from 15 November, 1898, to 30 April, 1901?

3. If so, what sum, if any, is plaintiff entitled to recover?

At the conclusion of the entire evidence defendant renewed its motion for judgment as of nonsuit, which was denied, and defendant excepted. Verdict was rendered upon the issues and there was judgment for plaintiff. Defendant excepted and appealed.

Rountree & Carr for plaintiff.
Junius Davis for defendant. (175)

CONNOR, J. In the complaint some reference is made to an agreement entered into by the Wilmington and Weldon Railroad Company, to whose rights and contracts the defendant succeeded, and the predecessor of plaintiff, in regard to hauling logs. The cause was heard and determined, as appears from the record, upon the sole question whether, during the periods named in the complaint, defendant company demanded and received payment from plaintiff a rate of freight in excess of that charged other persons or corporations for the same service under substantially similar conditions. The learned counsel in his brief says: "The action is not in tort, but *ex contractu.* Plaintiff charges that the defendant required it to pay $2.50 per 1,000 feet for hauling logs in car-load lots a distance of 40 miles, when defendant had a regular, established, and published rate for other portions of its line . . . of $2.10 for the same service, and the same rates applied at Wilmington for all who would agree to give the defendant the output of their mills." The defendant denied the allegations upon which plaintiff's alleged cause of action is founded. It says further, that assuming the law to be as contended by the plaintiff, it has not shown by any competent testimony that at the date of shipments made over its road defendant was charging and receiving from other persons a less rate of freight than that charged plaintiff for a like service in the transportation of like traffic contemporaneous in point of time and under substantially similar circumstances. The record contains exceptions to the ruling of his Honor presenting every phase of these controverted questions. It will be observed that the foundation of plaintiff's claim is not that the rate charged plaintiff was, except in so far as it was related to the lower rate charged, unreasonable. The gravaman of the complaint is that the rate was discriminating and, by reason thereof, unlawful. Plaintiff claims that it has a right to demand of defendant, (1) that it haul the logs at a reasonable rate; (2) that it haul them at the same rate charged other per- (176) sons for hauling logs over the same distance at the same time and under substantially similar circumstances. This right, it charges, defendant has infringed and thereby demanded and received for hauling its logs, between the dates named, the amount sued for, in excess of

the amount which it was entitled to receive. That in good conscience, defendant should repay this amount, and it sues as for money had and received to its use. The agreement referred to in the complaint is eliminated by plaintiff's averment that it is suing to enforce its right at common law, of which section 3749 of the Revisal is but declaratory, to have equality in rates, etc. It will be observed, as said by *Clark, C. J.*, in *Lumber Co. v. R. R.*, 136 N. C., 479 (487), that this statute is substantially like that portion of the English "Traffic Act" known as the "Equality Clause" and the "Interstate Commerce Act." These and similar statutes are said by many of the courts to be but declaratory of the common law, which required all public carriers to serve all persons at reasonable rates and upon equal terms under similar circumstances. However that may be, the fundamental purpose underlying all of this legislation, both in England and this country, is, as said by *Mr. Justice White,* in *R. R. v. Interstate Commission,* 200 U. S., 361, that "Whilst seeking to prevent unjust and unreasonable rates, to secure equality of rates as to all, and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of unjust discrimination, to this extent and for these purposes, the statute is remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all." Referring (177) to provisions in charters of railway companies having for their purpose the guarantee that all persons should have equality of right in the use of facilities afforded by common carriers, *Tindall, C. J.*, in *Parker v. R. R.*, 49 E. C. L., 252 (p. 287), says : "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favor of the public." *Blackburn, J.*, in *R. R. v. Sutton,* L. J., 1869, N. S., 38, 177, after reviewing the several acts of Parliament on the subject, says: "I think the construction of the proviso for equality is equally clear and is that the company may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they do, during the same time, charge to others under the same circumstances." The evil intended to be remedied is the prevention of unjust discrimination, or, to put the proposition affirmatively, to secure to every person constituting a part of the public, an equal and impartial participation in the use of the facilities which the carrier is capable of affording and which it is its duty to afford. It is an elementary rule that statutes shall be so construed as to repress the evil and advance the remedy. We held in this case— *R. R.*

Discrimination Case, 136 N. C., 479—upon the facts set out in the complaint and substantially the same testimony, that the discrimination was unlawful. In other words, that defendant could not rightfully charge the plaintiff $2.50 per 1,000 feet for hauling its logs, if it, at the same time, for the same service under substantially similar circumstances, carried logs for other persons at $2.10 per 1,000 feet in consideration of the shipment of the manufactured products over its road. This proposition the learned counsel does not ask us to reconsider. He contends that the plaintiff has neither alleged nor proven such a state of facts. We have discussed the law only in so far as the general principles governing the right of plaintiff and duty of defendant enable us to approach the decision of the several exceptions of defendant to (178) specific rulings of his Honor. The first exception is to the refusal to dismiss the action because the complaint did not set forth the exact dates of the shipments of logs by plaintiff over defendant's road and did not state the same dates and times that defendant had charged and received a lower rate for shipment of logs from other persons. The argument upon this exception made by defendant's counsel in his brief takes a rather wider range than the causes of demurrer assigned in the record. He says that it is not charged in the complaint that any service of a like kind was rendered contemporaneously by defendant for any other person at a lower rate than was charged plaintiff. The complaint appears to have been drawn with a "double aspect"—that is, eliminating the reference to the agreement, it charges that the rate charged plaintiff was unreasonable. It also avers that a reasonable and proper rate, "having reference to the charges to other shippers and under like conditions and circumstances, would not have been more than $2.10 per 1,000 feet. That the charge to the plaintiff of $2.50 per 1,000 feet when others are charged only the rate of $2.10 per 1,000 for the shipment of logs for a like distance to the city of Wilmington . . . is discriminating and unreasonable. While the charge in respect to the facts relied upon is not so explicit as it may have been, it is evident that defendant was not misled. In paragraph 6 of the answer the defendant "denies that the rate of $2.10 per 1,000 feet would have been or was a reasonable and proper rate of freight under the circumstances, and alleges that there is a substantial difference both in conditions and circumstances between the timber shipped by the plaintiff over the defendant's road at the rate of freight of which the plaintiff complains in its complaint and the rate of $2.10 per 1,000 feet, and the defendant avers that the conditions and circumstances under which the rate of $2.10 per 1,000 feet was charged by it were substantially different, for this rate applied only to mills to which the timber was shipped, and (179)

from which it was afterwards reshipped over defendant's lines in the form of lumber or its manufactured products." If desired, it may have demanded a more specific statement.

In regard to the exception to the complaint for indefiniteness as to dates, etc., defendant might, if it so desired, have asked for a bill of particulars. Revisal, sec. 494. The ruling of his Honor was correct.

We proceed to consider the other exceptions in the order presented in the brief of appellant, omitting any reference to such exceptions as are not argued, except the forty-fourth. Counsel stated that, with that exception, they were abandoned. The fourth to seventh, inclusive, are pointed to the admission of testimony of Mr. Parsley for that his statements were general and did not fix dates of shipment, etc. The plaintiff was, by this testimony, laying the foundation upon which he was seeking to show the character of its business, the number of lines or branch roads of defendant, their terminal points, the number, etc., of mills on such lines, its own dealings with defendant. For those purposes we see no valid objection to the testimony. The sixteenth exception is for that the witness was permitted to testify as to logs shipped from a point in South Carolina to Wilmington, N. C., which was interstate and not within the control of the State courts. We do not perceive how the testimony involved interstate commerce. It was relevant to the issue, and tended to show the manner of dealing by defendant company with persons shipping logs over its lines coming into Wilmington.

Exceptions 21 to 30 present the question whether, for the purpose of showing the discrimination alleged, it was competent to show the rates charged other persons for shipment of logs in car-load lots over (180) branches of defendant's road not coming into Wilmington; for instance, Mr. Hines, who operated a mill at Kinston, to which logs were hauled from other points on defendant's road, was permitted to testify in regard to the rates paid for shipping car-load lots. Mr. O'Berry, at Goldsboro, was also permitted to testify to the same effect. The question at issue was whether defendant, while charging plaintiff $2.50 per 1,000 for hauling logs 39 miles from Musteen's Crossing to Wilmington, was charging other persons $2.10 for the same service under substantially similar circumstances. To give any beneficial or remedial effect to the law, either common law or statute, it must be given a reasonable construction. Certainly, to show that in a few cases and within a short period lower rates were given other persons would not establish unlawful discrimination. It is, therefore, essential to plaintiff's right to recover for it to show that a regular systematic discriminating rate was given. Nor do we conceive that it is necessary for plaintiff to show that the lower rate was confined to persons shipping logs into Wil-

mington. If it is made to appear that during the period named the defendant was giving to mill owners at Kinston, Goldsboro, or other points on its line, a lower rate than that given to persons living in Wilmington, the conditions being substantially similar, such discrimination would be unlawful. To so construe the law as to permit a railroad to charge a person shipping logs in car-load lots to Wilmington, a distance of 39 miles, $2.50 per 1,000, and to charge a person shipping in the same way over the same distance to other points $2.10, in the absence of any circumstances or conditions justifying the discrimination, would practically nullify the underlying principle upon which it is based. The real and pivotal question is whether the differences in charges are contemporaneous in point of time and under substantially the same circumstances. The purpose of the testimony was to establish this proposition. The principle involved is announced by *Blackburn, J.*, in *R. R. v. Sutton, supra:* "When it is sought to show that the charge is (181) extortionate as being contrary to statutory obligations to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other persons or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, week, or month, whatever the period might be. I think it would be necessary to show that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice. . . . It would be of the very essence of the case to prove that the goods were of the same description and came under the same circumstances." We think that the testimony was relevant, and that it was sufficiently definite to go to the jury. The witnesses were asked in regard to rates charged them for longer and shorter distances than that over which plaintiff's logs were shipped. If this was error, we do not perceive how defendant was prejudiced by it.

Exceptions 31 to 34 are to allowing Mr. Parsley to testify that he had seen logs moving on the defendant's branch lines, the objections being that he could not name the dates accurately. The testimony was, in the light of his Honor's charge confining the inquiry of the jury to the dates fixed in the issue, entirely harmless. Exceptions 36 and 37 are disposed of by what is said in regard to exception 16. This disposes of the exceptions directed to the admission of evidence. At the close of plaintiff's evidence defendant demurred and demanded judgment of nonsuit, which was denied. Defendant waived its exception to this ruling by introducing evidence. Assuming that plaintiff had introduced testi-

(182) mony which, for the purpose of disposing of the motion for judgment of nonsuit, was fit to go to the jury, we are brought to a consideration of defendant's motion to nonsuit at the close of the entire evidence. This motion involves the assumption that plaintiff's evidence was insufficient, and that nothing has been shown by defendant to aid the defective condition of plaintiff's case. Assuming that plaintiff has introduced evidence fit to be submitted to the jury to show that between the dates named it paid defendant $2.50 per 1,000 feet for hauling logs from Musteen's Crossing to Wilmington in car-load lots, and that during the same period defendant gave to other persons a $2.10 rate for hauling logs in car-load lots the same distance, and that such lower charge was general—that is, a practice was made of doing so—does defendant's evidence aid the plaintiff in showing either that the conditions were substantially similar, or, if not, whether the conditions justified the difference in the rates? Mr. Emerson, who was defendant's traffic manager, testified that he made the rates on logs hauled over defendant's road. He was shown and identified a number of printed tariffs showing rates at a number of points on the road and branches. He testified that there was at no time a rate of $2.10 per 1,000 feet for logs shipped to Wilmington, a distance of 39 or 40 miles. The only portion of his testimony which could in any aspect aid the defendant is the statement in reply to a question by plaintiff's counsel. "You asked, as I understand it, why it was that we applied a higher rate on logs to Wilmington, N. C., than we applied to other towns over our lines. I will answer that by saying that the revenue received on the product of the logs from the points in Eastern Carolina named in the testimony and for which tariffs have been filed, enabled us to haul the logs to the mill at a lower figure than we felt that we could afford to handle the logs to a mill without getting any of the product. We were prepared to make the same arrangement effective—I will change it. We
(183) offered that if the product of the logs were shipped out, we were prepared to make the same rates effective to the Wilmington mill on the logs on which we received the product as were applied to any other mill on the line of our road." Mr. Emerson, in reply to another question, testified: "The Hilton Lumber Company paid no more for logs they desired to move than would be paid by the Cape Fear or Angola Lumber Company. . . . We have in effect between certain points on the Wilmington and Weldon Railroad, where logs are moving to mills and where we receive for shipment the lumber cut from said logs, rates as per the following table: '40 miles and over 30, $2.10.' You will note that these rates are somewhat lower than the rates we are charging on logs moving to Wilmington and other points where we do

not receive a second movement in the way of lumber cut from the logs moved." The date fixed by witness is 12 November, 1900. He does not state when this rate went into effect—"That they did not apply over the entire Atlantic Coast Line." We omit any reference to the charge of $2.10, which witness said was made by mistake. Assuming that there is sufficient evidence in regard to shipments of plaintiff and of witnesses testifying in regard to shipments from other points to go to the jury, we have, with Mr. Emerson's testimony, this case, presented upon defendant's demurrer: Defendant, operating several lines or branches of railroads in Eastern North Carolina, upon which are located several sawmills, deriving their supply of logs over such lines as are convenient to them, maintains a tariff by which it charges in Wilmington $2.50 per 1,000 feet for car-load lots a distance of 39 miles, and mills at other points $2.10 for the same service, the difference being that it handles the manufactured products of the logs thus shipped at points other than Wilmington, and was willing to make the same rates effective to the Wilmington mill on the logs of which it handled the product. Thus stated, assuming the other conditions to be substantially similar, is the discrimination unlawful? The question is answered by this Court in the defendant's appeal at Fall Term, (184) 1904, *supra*. *Clark, C. J.*, says: "The proposition is that common carrier has a right to charge one person a lower rate of freight than another for shipping the same quantity the same distance, under the same conditions, provided the shipper give the company a consideration (shipping the manufactured lumber subsequently over its line), which its managers think will make good to it the abatement of rate given to such parties. But if this is equality as to the treasury of the company, it is none the less a discrimination against the plaintiff." The authorities are reviewed in the opinion, and we have no disposition to disturb the reasoning or conclusion reached on that appeal. Since the rendition of that decision the Supreme Court of the United States has, in an able opinion, discussed the principles involved in this case and applied them to a correction of the evil of unjust discrimination which goes to the root of the matter; saying that the statute was remedial and to be given a construction which reasonably accomplishes the great public purpose which it was enacted to subserve. "Nor, in view of the positive command of the second section of the act that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself out from the statute in every case by simply electing to be a dealer and transport a commodity in that character? . . . The all-embracing prohibition against either directly or indirectly charging less than the published rate

shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." In an exceedingly strong opinion by *Mr. Justice Doe,* in *McDuffee v. R. R.,* 52 N. H., 430 (13 Am. Rep., 72), it is said: "A common carrier is a public carrier. He engages in a public employment and takes upon himself a public duty and (185) exercises a sort of public office. . . . His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right." After an interesting discussion and review of English cases, the learned justice says: "In charters of common carriers what is called the equality clause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed enacting the common-law doctrine of reasonable equality, and new methods of enforcing it were introduced. And the practice of the English courts on charters and general acts of this kind has been so long continued that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. . . . It seems to have been a result of the anxiety of Parliament that instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly reënacted the common law until it came to be supposed that in such an important matter as the public service of transportation by common carriers the public was indebted for the doctrine of equal right to the modern vigilance of Parliament, instead of the system of legal reason which had been the birthright of Englishmen for many years. A mistake of this kind is of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system and impairs its vigor." After pointing out the tendency sometimes seen to give a narrow construction to such statutes upon the theory that they are changes in the common law, he says: "But the common law of equal right and reasonableness is the ground on which we stand." The action in *Parsons v. R. R.,* 167 U. S., 447, was brought for a violation of the Interstate Commerce Act, and the decision is based upon the language of the statute. It is true that *Mr. Justice Brewer* says: "So, but for the provisions of the Interstate Commerce Act, the plaintiff (186) could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared through any mistake or partiality on the part of the railway officials shippers in Nebraska had been given a less rate." The action

was brought to recover a penalty, and of course it was necessary to show that the provisions of the statute had been violated. In commenting upon this interesting subject, we note the following language in *R. R. v. Interstate Co.,* 200 U. S., 361: "It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without discrimination. Enforcement of all branches of this law is necessary at all times; but the commercial community is most interested today in the prevention of personal discrimination. It is established now, past all qualification, that it is the duty of the common carrier to serve all alike who may ask the same service, so that all shippers from a given point may compete with each other in distant markets upon equal terms. For it is now recognized that the slightest differences in the rate may result in the long run in building up one concern and in ruining its rival. Judge Noyes, in his work on "American R. R. Rates," (187) p. 103, after stating the general doctrine in a note, says: "While the rule of the common law is undoubtedly correctly stated in the text, it has not been followed by several American courts of high standing. In fact, at the present time, it is probable that the weight of American authority is in favor of equal charges to all persons for similar services—even in the absence of statutory provision."

We think that the strict construction heretofore given the act by the Federal courts may be modified to conform to and promote the purpose of the legislation—to enforce by appropriate remedies the great common-law doctrine of equality of service by public agencies of all kinds. The decision referred to points strongly in that direction. However the courts construe statutes making penal or criminal a violation of the equality of right, when we come to deal with the question, in the enforcement of the civil right of the citizen, we must construe the law so that the right is secured and the remedy for its infringement given. This is the keynote of the decisions, both in England and this country. In *Directors v. Evershed,* 3 App. Cas., 1029, *Lord Hatherly* says: "According to the strict meaning of the Acts of Parliament, as interpreted by the decisions, from the very moment that the company charges A a

given sum when B, another person, comes to the company to have the same service rendered under the same circumstances, he cannot be charged one farthing more than has been charged A; he can only be charged precisely what the act authorizes the company to charge, namely, that which has been charged others, and the moment the directors take on themselves to charge less to another person, they must charge less to him, too." *Hays v. R. R.,* 12 Fed., 309; *R. R. v. Wilson,* 18 L. R. A., 105, note. Defendant says there was no evidence tending to show that at the time it was shipping logs and paying $2.50 rate, any other person was shipping under similar circumstances at the $2.10 rate. Mr.
(188) Parsley swore to the payment of the $2.50 rate by plaintiff. It appears that mills were being operated, receiving logs over defendant's line at different points during the time named. Mr. Emerson says that defendant was operating these lines, had a tariff for logs, giving the basis of it; he says that he was traffic manager. Mr. Hines and others say that they were operating mills, shipping logs over defendant's line, etc. It is true that no one says that on any given day logs were shipped and the $2.10 rate paid; but in view of the well-known fact that men do not keep sawmills standing idle or railroads keep cars idle when it can be avoided, nor ship freight without payment therefor, the jury may well have found that they were shipping logs over defendant's lines at the rates fixed by the tariffs. Mr. Hines says: "We own some timber which came over the Coast Line . . . sawed probably two or three million feet." Other witnesses testified to the same effect. It would be impossible for any one to recover for discrimination in freights, unless testimony of this character could be received and submitted to the jury. Whether the testimony was true and what reasonable inferences were to be drawn from it was for the jury. *Interstate Com. v. R. R.,* 168 U. S., 144. We do not think that his Honor was in error in denying motion for nonsuit. His Honor charged the jury: "That the word 'contemporaneous' in the statute did not mean the exact day, hour, or necessarily month, but that it meant a period of time through which the shipments of goods or freight were made by plaintiff at one rate and by other shippers at another rate." To this defendant excepted. His Honor in the same connection told the jury that the burden was on the plaintiff to satisfy them by the greater weight of the evidence that during the period of time named in the complaint the discriminating rate was charged. We find no error in this instruction. His Honor, after defining the duty of the defendant to give equal rates, said: "If, therefore, you find from the evidence in this case that the defendant company extended to shippers
(189) of logs who did agree with defendant that after the shipment

of logs over its line of road, the logs when manufactured into lumber at the sawmill of the shipper would be reshipped over defendant's line of road, even though this was open to all sawmill owners or shippers doing business at any point along the line of the road, and you find that other sawmill owners or shippers who were shipping logs and manufactured lumber over defendant road under like conditions, but who did not accept or agree to the terms so held out or extended, were not given this lower rate, then the court charges you that those accepting the lower rate, if you find from the evidence that any such did, would fix the rate at which other shippers who did not accept the rate would in law be required to pay, and any sum demanded or collected of any shipper, not conforming to such agreement, in excess of the lower rate would be in violation of the law. If, therefore, you find from the evidence in this case that a schedule of shipping rates during the period of time from 15 November, 1898, to 20 March, 1901, was maintained and promulgated by the defendant company, by the terms of which they extended to shippers a rate of $2.10 per 1,000 in car-load lots of lumber shipped over its line within the distance of from 30 to 40 miles, such rate extending only to those who might ship the manufactured product again over defendant's line, and you further find from the evidence that on other portions of the defendant's road it charged other shippers—or charged the plaintiff—$2.50 per 1,000 feet, the shipments made for a like distance and under substantially the same circumstances and conditions and contemporaneously, then the plaintiff would be entitled to have the first issue answered 'Yes.'" Defendant excepted (43d exception).

Whatever cause for criticism to be found in this language is removed by reading it in connection with that immediately following:

"It will not be alone sufficient for the plaintiff to satisfy you from the evidence in the case that two rates of freight were maintained by the defendant company, or, father, that a rate was (190) extended to one class of shippers who might return the manufactured product over their road, and another rate to those who did not elect to accept this rate and do so, but the plaintiff must go further, and satisfy you from the evidence that at the time such rates were maintained (if you find from the evidence they were so maintained), that it was during this period shipping lumber over defendant's road a like distance, under substantially the same conditions, and paying a higher rate of freight to the defendant company than the first mentioned class."

Thus read, we see no error in the instruction given. We find it difficult to discuss the exceptions separately, because in some instances they are interjected between sentences which are connected, and can only be

understood when so read. Many of the exceptions are pointed to the statement of the contention of the parties. The charge is very full, covering several pages in the record. We have given to it a careful examination and are of opinion that it accords with the decision of this Court.

In dealing with the testimony in regard to the charge made the Angola Company, alleged by defendant to have been the result of a mistake, his Honor instructed the jury that if they so found they should dismiss it from further consideration. He further instructed them that having admitted the fact, it was incumbent upon defendant to show that the lower rate, which, unexplained, was discriminating, was charged by mistake. There really seems to be no evidence to the contrary, and it would seem that the particular item had but little effect upon the case. No special instructions were asked by either side. A careful examination of the charge shows that his Honor correctly instructed the jury that if they found the facts in regard to the several rates as alleged by the plaintiff, they must further find, before answering the issue (191) in the affirmative, that the shipments for the lower rate were for a like distance and under substantially the same circumstances; and this we understand to be the test which distinguishes a lawful from an unlawful discrimination. It is not denied that all the shipments of the logs were in car-load lots, nor is it claimed that the cost of handling the freight coming into Wilmington was greater than that going to other points.

The real controversy made upon the first appeal and again presented upon this record is whether, assuming the facts to be as plaintiff claims, the defendant could give a lower rate to such of its customers as shipped the manufactured product of the logs over its line, and, as we have seen, that question has been decided adversely to the defendant's contention. The only case to which our attention has been directed which would tend to sustain the contention is *R. R. v. Com.,* 108 Ky., 628; *S. c.,* 18 A. & E. R. Cases. We have examined that case with care, and think that the dissenting opinion of *Paynter, J.,* in which two of the other judges concurred and which fully sustains the view taken by this Court, and we think supported by authority and reason, is the sound view of the question. The defendant does not controvert the plaintiff's right to recover for money had and received, provided the facts are as alleged. In *R. R. v. Sutton, supra,* the action was for money had and received for a discriminating freight rate charged and paid. It was held in that case that where a higher charge was paid than that charged other shippers, the payment was not to be considered voluntary, and the excess might be recovered back upon

account for money had and received. The authorities are uniform upon this question. It is not necessary that at the time of payment there should have been any protest. As said by the Supreme Court of Alabama in *R. R. v. Steiner,* 61 Ala., 559, in an action like this: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation, and if the shipper pays the rates established in violation of (192) the law to the carrier rather than forego his services, such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge." There seems to be no conflict of authorities upon this question.

His Honor gave judgment for the amount sued for and interest, to which defendant excepted. We think his Honor was correct. The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully and the law implies a promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. Revisal, sec. 1954; *Barlow v. Norfleet,* 72 N. C., 535; *Farmer v. Willard,* 75 N. C., 410. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction.

Upon a careful review of the entire record, we find no reversible error. The judgment must be

Affirmed.

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

Cited: Garrison v. R. R., 150 N. C., 585; *Chatham v. Realty Co.,* 174 N. C., 674; *Public Service Co. v. Power Co.,* 179 N. C., 34; *Jones v. Guano Co.,* 180 N. C., 320; *R. R. v. Power Co., ib.,* 426, 427.

(193)

IN RE BAILEY WILL.

(Filed 24 April, 1906.)

Executors and Administrators—Public Administrator—Priority of Right to Administer.

If, after the lapse of six months, those entitled to take out letters of administration do not apply, it is the duty of the public administrator (Rev., sec. 20) to make application; but none the less, if any one entitled in prior right, as provided in section 3, shall make application at any time prior to the appointment of the public administrator, such person having priority should be appointed unless he is disqualified under section 5.

APPEAL by H A. Sapp, Public Administrator of Forsyth County, from an order of *Peebles, J.*, made at March Term, 1906, of FORSYTH, affirming an order of the clerk of the Superior Court appointing G. M. Bailey administrator *c. t. a.* of the testatrix, Octavia Bailey.

The testatrix, Octavia Bailey, died 2 November, 1904, and on 9 November, her will was probated and the executor therein named, W. O. Cox, qualified. On 19 November a *caveat* to said will was filed and issues made up for trial, but pending the trial the executor died, 4 September, 1905. Prior to filing the will for probate, a brother of the testatrix had applied for administration. On 12 March, 1906, H. O. Sapp, the public administrator of the county, applied verbally for administration *c. t. a.;* on 13 March G. M. Bailey, a brother of the testatrix, gave notice in open court that at noon recess he would apply for letters of administration *c. t a.,* and such application was made in writing on that day, but before it was made and after above oral announcement, H. O. Sapp, the public administrator, made application in writing. On the same day one Walls, with whom the infant child of the testatrix was residing, made written application that letters of
(194) administration *c. t. a.* be issued to the public administrator. The clerk appointed the brother of the testatrix, and the public administrator appealed to the judge, who affirmed the ruling of the clerk. Appeal by H. O. Sapp, public administrator.

Jacob Stewart, F. T. Baldwin, and Lindsay Patterson for appellant.
Watson, Buxton & Watson for appellee.

CLARK, C. J. The Court concurs with the ruling of his Honor, that "the brother of the testatrix had the right to qualify in preference to the public administrator at any time before the latter had been allowed to qualify." Revisal, sec. 20, provides that the public administrator shall apply when those entitled to take out letters of administration have

delayed to do so for six months. The object is to prevent a defect in the administration of estates. But because the public administrator cannot take out letters till after the lapse of six months, it does not follow that he alone can qualify thereafter. Section 20 must be read in connection with section 3, which prescribes the order in which the right to administer devolves. If, after the lapse of six months, those entitled do not apply, it is the duty of the public administrator to make application; but none the less, if any one entitled in prior right, as provided in section 3, shall make application at any time prior to the appointment of the public administrator, such person having priority should be appointed, unless he is disqualified under section 5. His delay in making application is not *per se* a "renunciation of the right to qualify." It is a waiver only if he fail to claim it until six months have elapsed and after the appointment of the public administrator.

The object of section 20 is not to disqualify those entitled under section 3, but merely to provide an administrator if they fail to apply. If those in prior right do apply, notwithstanding the lapse (195) of six months, their priority is not lost, unless the public administrator has been appointed. If the lapse of six months was *ipso facto* a forfeiture absolute of the right of the next of kin to qualify, and not merely a waiver, provided another is already appointed before the next of kin applies, by the same rule the public administrator in this case had lost his right by not applying at the end of the six months as required by the statute. *Hill v. Alspaugh,* 72 N. C., 402. His preference, as well as that of the next of kin, is lost (*Garrison v. Cox,* 95 N. C., 353; *Withrow v. DePriest,* 119 N. C., 541), and it was open to the clerk to appoint the next of kin or any other suitable person. So *quacunque via,* there was

No error.

HAYES v. RAILROAD.

(Filed 24 April, 1906.)

Railroads—Ejection—Issues—Harmless Error—Trespassers—Brakemen—Proximate Cause—Damages—Child's Earnings.

1. In an action to recover damages for forcible ejection from defendant's train, an issue as to whether plaintiff was injured by being "negligently, wantonly and forcibly ejected" was unnecessary where the court submitted an issue as to whether the plaintiff was injured by the negligence of the defendant and an issue as to damages; but it is not reversible error to have submitted all three.

2. Although the plaintiff was a trespasser and wrongfully on defendant's train, and was attempting to perpetrate a fraud by beating his way on top of the car, yet he may recover damages of the defendant for the violence of the brakeman in cursing him and driving him from the top of a rapidly moving train, causing him to fall.

3. It is within the scope of the brakeman's agency to eject trespassers from the train, and, therefore, it follows that if he did it in an unlawful and violent manner, thereby endangering life or limb, the defendant is responsible for his conduct.

4. The fact that plaintiff struck the clearance post on the track and was thrown under the wheels did not make the brakeman's act in forcing plaintiff off a rapidly moving train any the less the proximate cause of the injury.

5. The jury have no right to allow punitive damages unless they draw from the evidence the conclusion that the wrongful act causing the injuries was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on defendant's part.

6. In an action by a 17-year old boy by his next friend to recover for personal injuries, an instruction on the issue of damages which permitted the jury to allow plaintiff for loss of work from the time of the injury until he comes of age, was erroneous, as the father is entitled to his child's earnings until the child becomes of age.

(196) ACTION by Glenn Hayes, by his next friend, against Southern Railway Company, heard by *Cooke, J.*, and a jury, at January Special Term, 1905, of GUILFORD.

This was an action to recover damages for forcible ejection from the defendant's train. The court submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant? Ans.: Yes.

2. Was the plaintiff injured by the defendant company negligently, wantonly, and forcibly ejecting him from its moving train, as alleged in the complaint? Ans.: Yes.

3. What damages is the plaintiff entitled to recover, if any? Ans.: $1,800.

To the second issue the defendant excepted. From the judgment rendered, defendant appealed.

(197) *Brooks & Thompson for plaintiff.*
King & Kimball for defendant.

BROWN, J. 1. The second issue was unnecessary. The entire case could have been presented under the first and third issues, or, in view of the evidence, it could have been better presented under the second

and third issues without the first. But it is not reversible error to have submitted all three.

2. The evidence is somewhat conflicting, but plaintiff's evidence tended to prove that plaintiff, a 17-year-old boy, boarded a mixed freight and passenger train at Greensboro for the purpose of riding to Summerfield. That he and the brakeman sat down on top of a box car side by side and rode a couple of miles, when the brakeman ordered plaintiff to get off the train, cursing him and using violent and threatening language; that the plaintiff remonstrated, saying that he was willing to get off, if he would stop the train, and agreeing to do so when the train stopped at the Battle-ground, the next station; that the brakeman continued cursing, drove him from the top of the train down the ladder along the side of the train, and followed him, stamped on his fingers and finally drove him from the train, causing him to fall, when his leg struck the clearance post, which threw him under the wheels of the car, crushing off his right leg and severely mashing his left foot. The brakeman, according to the testimony of all the witnesses, was on duty as brakeman, and was in the discharge of his usual duties as brakeman at the time of the occurrence. All the evidence discloses that plaintiff was a trespasser and wrongfully on defendant's train, and that he was attempting to perpetrate a fraud on defendant by beating his way on top of the car, with the brakeman's connivance at the start. Yet it seems that under our authorities he may recover damages of the defendant for the violence of the brakeman, although the plaintiff could not recover had he been injured in an accident resulting from negligence, for (198) the company owed him no duty as a passenger. It is said in *Pierce v. R. R.*, 124 N. C., 63, that "a trespasser's wrongful act in getting on a car does not justify making him get off in a manner calculated to kill or cripple him." To the same effect is *Lewis v. R. R.*, 132 N. C., 382; *Cook v. R. R.*, 128 N. C., 333, and authorities therein cited.

3. It was within the scope of the brakeman's agency to eject trespassers from the train, and, therefore, it follows that if he did it in an unlawful and violent manner, thereby endangering life or limb, the defendant is responsible for his conduct. This is so held in *Cook v. R. R., supra,* and many other cases. In *Hoffman v. R. R.*, 87 N. Y., 25, the Court of Appeals of New York says: "In this case the authority to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own." *Higgins v. R. R.*, 46 N. Y., 23; *Rounds v. R. R.*, 64 N. Y., 129; *R. R. v. Flexman,* 103 Ill., 546. See, also, authorities collected in 62 American Reports, 381.

4. The jury accepted the plaintiff's version of the facts by answering the issues in his favor. According to this, the undoubted and immediate cause of the injury was the wrongful conduct of the brakeman in forcing plaintiff off a rapidly moving train. The fact that the plaintiff struck the clearance post on the track and was thrown under the wheels does not make the brakeman's act any the less the proximate cause of the injury. The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it. *Brewster v. Elizabeth City,* 137 N. C., 395. The brakeman must have foreseen the great danger to the
(199) life and limb of the plainti ffin violently forcing him off a rapidly moving freight train, and but for his act the injury could not have occurred. That it was the direct cause would seem to admit of no doubt.

5. It seems from the authorities that, although the wrongful act was committed by a brakeman, the jury may, in the exercise of a sound discretion, under plaintiff's version of the evidence in this case, if believed, award punitive damages, if they see proper to do so. They are not obliged to award them in any case, and should look carefully into the facts and circumstances before doing so. Mr. Thompson says if the agent of the carrier *maliciously* uses unnecessary force in ejecting a trespasser, it may be a case for exemplary damages. 3 Thompson on Neg. (2 Ed.), sec. 3253. This Court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury. *Knowles v. R. R.,* 102 N. C., 59, and cases cited. Punitive damages have been allowed by the courts for the wrongful and violent conduct of brakemen. *Hanson v. R. R.,* 62 Me., 84; *Goddard v. R. R.,* 57 Me., 202; *R. R. v. Candor,* 75 Ga., 51. Also, of engineers. *Cobb v. R. R.,* 37 S. C., 194. It would seem from the authorities that, where the brakeman is acting for the company and within the scope of his agency, the general principles of the law relating to exemplary or punitive damages apply to him as well as to the conductor.

6. Upon the issue of damages the court instructed the jury that "if they come to consider the third issue, they shall allow for damages the loss of the plaintiff by reason of his total disability to work, while totally disabled, and for partial disability since then," etc. We
(200) think this instruction contains error in that it permitted the

jury to allow plaintiff for loss of work from the time of the injury until he comes of age. It is elementary law that the father is entitled to his child's earnings until the child becomes of age. For this error we award a new trial upon the issue of damages.

Partial new trial.

Cited: Stewart v. Lumber Co., 146 N. C., 51, 52, 58; *Jones v. R. R.*, 150 N. C., 480, 481; *Walker v. Walker*, 151 N. C., 167; *Dover v. Mfg. Co.*, 157 N. C., 327; *Smith v. Ice Co.*, 159 N. C., 155; *Webb v. Tel. Co.*, 167 N. C., 490; *Cobb v. R. R.*, 175 N. C., 132; *Cottle v. Johnson*, 179 N. C., 430.

JONES v. RAGSDALE.

(Filed 24 April, 1906.

Deeds—Heirs of Living Person—Fee Simple.

1. A deed conveying land to "J. and her heirs by her present husband, to have and to hold the said land to the said J. and her heirs by her present husband, and assigns, to her only use and behoof," conveys to J. the entire property in fee simple.

2. The Code, sec. 1329 (now Revisal, sec. 1583), providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person.

ACTION to recover land by Carl M. Jones against W. G. Ragsdale, heard upon a case agreed, by *Ferguson, J.*, at February Term, 1906, of GUILFORD.

The court gave judgment for defendant, and plaintiff excepted and appealed.

L. M. Scott and G. S. Bradshaw for plaintiff.
W. P. Bynum and King & Kimball for defendant.

HOKE, J. The facts agreed upon and pertinent to the contro- (201) versy are as follows: On 19 December, 1882, Alexander W. Robbins conveyed to "Zilphia S. Jones and her heirs by her present husband, Levy Jones, the land in controversy . . . to have and to hold the said land and appurtenances thereunto belonging, to the said Zilphia Jones and her heirs by her present husband and assigns, to her only use and behoof."

That at the date of the execution of this deed, Zilphia Jones was the wife of Levy Jones, and they had one living child, Levy Edgar Jones; and thereafter, to wit, on 14 November, 1883, the plaintiff was born to said Zilphia and Levy Jones. That in May, 1898, Levy Edgar Jones died, leaving him surviving his mother and the plaintiff, the father having died in August, 1897. That after the death of her husband, Zilphia Jones conveyed the entire property in fee simple, and by mesne conveyances the defendant has become the owner of all the right, title, and interest of Zilphia Jones, under the said deed from Alex. W. Robbins.

Plaintiff contends that this deed conveyed the property to Zilphia Jones and her then living child, Levy Edgar Jones, as tenants in common, and on the death of Levy Edgar Jones plaintiff became entitled to his share of the property as his heir at law.

Defendant contends that the deed from Alexander W. Robbins conveyed to Zilphia Jones the entire interest in the property, and that under her deed and mesne conveyances he is now the absolute owner.

The deed from Alexander W. Robbins, under the old law, would have passed to Zilphia Jones a fee tail special, which, by our statute, is converted into a fee simple. Revisal, sec. 1578.

As stated in *Marsh v. Griffin,* 136 N. C., 334, "The Code, sec. 1329 (now Revisal, sec. 1583), providing that a limitation to the heirs of a living person shall be construed to be the children of such per-
(202) son, applies only when there is no precedent estate conveyed to said living person." The opinion in that case is decisive of the one before us, and the judgment below is

Affirmed.

Cited: Sessoms v. Sessoms, 144 N. C., 125; *Perrett v. Bird,* 152 N. C., 221; *Harrington v. Grimes,* 163 N. C., 77; *Thompson v. Batts,* 168 N. C., 336; *Revis v. Murphy,* 172 N. C., 581; *Blake v. Shields, ib.,* 629; *Keziah v. Medlin,* 173 N. C., 238.

JONES v. TOBACCO COMPANY.

(Filed 24 April, 1906.)

Master and Servant—Proximate Cause—Shields for Saws—Appliances in General Use—Evidence—General Custom.

1. In an action for damages for personal injuries, the failure of the defendant to provide a shield or covering for a saw running naked, when such protection for the operative is a reasonable protection and in general use,

would constitute negligence, and such negligence would be the proximate cause of the injury the plaintiff suffered, if the shield would have prevented it.

2. In order to show that shields for saws were in general use plaintiff could show this by proving the general custom, or by showing that such a large number of factories and mills used the shields in similar work that the jury might draw the inference of a general custom.

3. Where the only negligence alleged and relied upon by plaintiff was that defendant negligently permitted the saw to remain without shield or hood, and there was evidence tending to prove that defendant did furnish the proper shield, an instruction that "if the jury find from the evidence that defendant did furnish the hood, and the plaintiff refused to use it, and his failure to use it was the proximate cause of the injury, he would not be entitled to recover," is erroneous, for if defendant did furnish the hood, the question of proximate cause does not arise.

ACTION by J. P. Jones against R. J. Reynolds Tobacco Company, heard by *Jones, J.*, and a jury, at December Term, 1905, of Forsyth.

Action for damages for personal injury in which the usual issues as to negligence, contributory negligence, and damages were submitted. From the verdict and judgment rendered, defendant ap- (203) pealed.

J. S. Grogan for plaintiff.

Watson, Buxton & Watson and Manly & Hendren for defendant.

BROWN, J. Plaintiff was a box maker in defendant's factory, and as such operated a circular saw which projected through a table two or three inches and was alleged to be without any board or guard. The plaintiff testified that while at work he "reached out to remove some strips, when my feet slipped from under me and I fell on my elbows, saving my face from the saw; my hand struck the back of the saw and cut off two of my fingers." The specific and only negligence alleged in the complaint and relied upon by plaintiff is as follows: "That defendant, without due care, negligently permitted this saw to remain without guard or shield, although such shield and protection was generally furnished by owners and operators of such machinery, and within a week this defendant had guards on all of its saws."

1. We think there was some evidence of negligence to go to the jury. If the defendant failed to provide a shield or covering for a saw running naked, when such protection for the operative is a reasonable protection and in general use, it would constitute negligence. *Myers v. Lumber Co.*, 129 N. C., 254. The plaintiff undertook to show that such shields are in general use. He could show this by proving the general custom,

or by showing that such a large number of factories and mills used the shields in similar work that the jury might draw the inference of a general custom. *Marks v. Cotton Mills,* 135 N. C., 292. If shields are a reasonable, usual, and proper protection for the operative in the (204) kind of work plaintiff was engaged in, and intended and calculated to prevent the very injury the plaintiff suffered, it is not only negligence not to provide them, but such negligence is the proximate cause of the injury, if the shields would have prevented it.

2. There was evidence introduced by defendant tending to prove that it did furnish the proper shield, hood, or screen for this saw operated by plaintiff, and that he refused to use it. In that connection the judge charged, "But if you find from the evidence that defendant did furnish the hood or screen, as it contends, and the plaintiff refused to use it, and his failure to use it was the proximate cause of the injury, he would not be entitled to recover, and you would answer the first issue 'No.'" To this charge defendant excepted. We think his Honor erred in submitting to the jury any question as to proximate cause in that connection. The negligent act or omission of duty upon the part of the defendant must first be determined before it becomes necessary to ascertain the proximate cause of the injury.

If the defendant did furnish the hood or shield for the saw, then the allegation of negligence is fully met, and the court should have directed the jury, if they so find, to answer the first issue "No." There is then no question of proximate cause to be considered. If plaintiff refused to use the hood, it is his own fault. The defendant discharged its duty when it caused a hood to be put over the saw.

Under the instruction given, the jury are not at liberty to determine that the hood was furnished and then answer the issue no, but before they can so answer it they must proceed to find something else, viz., that the plaintiff's failure to use it was the proximate cause of the injury. If the jury shall find that the defendant furnished the hood or shield, there is no negligence on the part of the defendant proved, and that should end the case.

New trial.

(205)

HAIRSTON v. BESCHERER.

(Filed 24 April, 1906.)

Vendor and Vendee—Abandonment—Estoppel—Specific Performance—Enhanced Value of Land.

1. The vendor in a contract for the sale of real property is treated as holding the legal title as security for the payment of the purchase money and upon failure to pay may proceed to have the land subjected by sale for that purpose.

2. When the vendee remains in possession and the vendor takes no action to enforce payment of the purchase money there is no presumption of abandonment of the right to pay the money and call for a deed.

3. When a contract is bilateral, giving the vendor an action at law for the purchase money or a right in equity to subject the land to the payment of the debt, and both parties acquiesce in the delay, the vendor permitting the vendee to remain in possession of the land after the day for payment fixed by the contract has passed, the vendee making no demand for a conveyance, the court will treat their conduct as estopping either from taking advantage of the delay.

4. A provision in a contract for the sale of real property, stipulating that the failure to make payments as agreed shall cause the forfeiture of all amounts theretofore paid, at most only gave the vendor a right to put an end to the contract by entering. Such a provision cannot, in equity, whose peculiar province is to relieve against forfeitures, bar specific performance.

5. The enhanced value of land is no good reason for refusing the equitable relief of specific performance where it appears that when the plaintiff first made an offer to pay the amount due on the contract the land was worth only $100.

ACTION by Isham Hairston against M. W. Bescherer, heard by *Long, J.*, and a jury, at August Term, 1905, of ROWAN.

Plaintiff sues for specific performance of a contract for sale of real property. The facts as set forth in the pleadings and found by the jury are: Defendant entered into possession of the *locus in* (206) *quo* during 1891, under a contract to purchase, and paid thereon $20. On 13 April, 1895, upon a settlement had, it was found that he owed a balance of $92. The parties thereupon entered into and executed a written agreement, plaintiff promising to pay $2 per month for one year and thereafter $7.50 per quarter until the full amount, with interest, was paid, when defendant agreed to convey the land, being about 2½ acres, to plaintiff. The contract contained the following provisions: "It is covenanted and agreed that if I fail to pay three consecutive

monthly payments for the said first twelve months from date, that the amounts theretofore paid shall be forfeited, and if, after having made all the payments for said twelve months, I shall fail to pay two consecutive quarterly payments, then the amount theretofore paid shall be forfeited." The plaintiff continued in possession of the land and was at the time of bringing this action in possession thereof. Plaintiff did not offer to make the monthly and quarterly payments under the contract to the defendant or to his agent in accordance with the terms thereof. The failure to make said payments was not caused by any act of the defendant or his agent. During 1896 plaintiff offered to pay the total amount due under contract, and demanded that defendant execute a deed for said land; defendant declined to accept said amount and make the deed. That the offer was repeated during 1897 and the deed again demanded, which defendant again refused. The value of the land in 1896 was $100 and in 1897 $500. On the date of the summons herein, 23 July, 1904, the value of the land was $1,000.

There was evidence tending to show that defendant was out of the State a portion of the time and that there was some misunderstanding in regard to the authority of his attorney to receive payments.

(207) Upon the admission in the appeal and the verdict of the jury embodying the foregoing facts, the defendant moved for judgment, that plaintiff was not entitled to specific performance, etc. Motion was refused, and defendant excepted. Thereupon his Honor rendered judgment that the defendant upon payment by the plaintiff of the sum of $92, with interest thereon from the date of the contract, execute and deliver to the plaintiff a deed in fee for the lands mentioned in the complaint, in accordance with the terms of the contract. The defendant excepted and appealed.

Overman & Gregory and E. E. Raper for defendant.
John S. Henderson for plaintiff.

CONNOR, J., after stating the facts: It is well settled by numerous decisions of this Court that when contracts of the character set out in the record are entered into, the relation established between the parties is in many respects similar to that of mortgagor and mortgagee. The vendor is treated as holding the legal title as security for the payment of the purchase money, and upon failure to pay may proceed to have the land subjected by sale for that purpose. *Derr v. Dellinger,* 75 N. C., 300; *Barnes v. McCullers,* 108 N. C., 46. When the vendee remains in possession and the vendor takes no action to enforce payment of the purchase money, there is no presumption of abandonment of the right

to pay the money and call for a deed. In this case the plaintiff, unless a forfeiture was wrought by the language of the contract and his failure to comply strictly therewith, was to pay for one year $2 per month and thereafter $7.50 at the end of each quarter, thus giving him several years to complete his payments. Before the time expired in 1896 he offered to pay the entire amount, and this offer he repeated in 1897. It is manifest that he did not intend to rescind the contract or surrender his rights—he continued to hold possession without any inter- (208) ference on the part of the defendant. Assuming that he was notified by the conduct of the defendant that he would not accept the money and convey, and was thereby put to his action, in the nature of a bill for redemption or specific performance, it would seem that he was entitled to the same time allowed mortgagees to redeem, which is ten years. But as he remained in possession, the statute was not put into operation. Both parties treated the contract as subsisting. No issue was submitted, nor was his Honor asked to find that there was an abandonment by plaintiff of his rights under the contract. We do not find any evidence of such abandonment. *Bynum, J.*, in *Faw v. Whittington*, 72 N. C., 381, says: "Assuming the law to be that a vendee can abandon by matter *in pais* his contract of purchase, it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal, and inconsistent with the contract. The mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment." *Falls v. Carpenter*, 21 N. C., 237. If plaintiff had surrendered possession upon the refusal of the defendant to accept the purchase money and make a deed, quite another question would have been presented. *Taylor v. Taylor*, 112 N. C., 27. Defendant says that plaintiff, by reason of his long delay in asserting his equity, and the largely increased value of the land, should not have a decree of specific performance, but be left to his action for damages for breach of the contract in refusing to accept the money when offered to him in 1896 and 1897. While it is well settled that specific performance is not an absolute right, and rests in the sound discretion of the court, it is equally true that in equity time is not of the essence of the contract. When the contract, as in this case, is bilateral, giving the vendor an action at law for the purchase money or a right in equity to subject the land to the payment of the debt, and both parties acquiesce in the delay, the vendor permitting the vendee to remain in possession of the land after the day for payment fixed (209) by the contract has passed, the vendee making no demand for a conveyance, the court will treat their conduct as estopping either from taking advantage of the delay. The language of *Pearson, J.*, in *Scarlett*

v. Hunter, 56 N. C., 84, would seem to be decisive of the question: "The right to have specific performance is mutual, and when the vendee is let into possession and continues in possession, as in our case, it is taken for granted that the parties are content to allow matters to remain in *statu quo* until a movement is made by one side or the other." In *Holden v. Purefoy,* 108 N. C., 163, where the authorities are reviewed by *Mr. Justice Shepherd,* he says: "But there is here more than mere delay, for Purefoy, having control of the land, actually leaves the same, with the purpose of having nothing more to do with it. We have, then, not simple delay only, but a most significant act as well as an admitted intention of abandoning the property." The last provision in the agreement, at most, only gave the vendor a right to put an end to the contract by entering. Certainly, in equity, whose peculiar province it is to relieve against forfeitures, it cannot be successfully used to prevent plaintiff having relief. This Court has frequently held that similar provisions in contracts of sale, both of real and personal property, do not bar equitable relief. The enhanced value is no good reason for refusing the relief. When plaintiff made his first offer in 1896 the land was worth only $100. *Falls v. Carpenter, supra; White v. Butcher,* 59 N. C., 231. There is

No error.

(210)

DOBBINS v. DOBBINS.

(Filed 24 April, 1906.)

Trial—Credibility of Witnesses—Question for Jury—Tenants in Common—Adverse Possession—Ouster—Disability of Parties.

1. When there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always a question for the jury, and this is so though the testimony may be all on one side and all tend one way. In the latter case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way; but not, upon the evidence, so to answer it, as by such a charge he passes upon the credibility of the witnesses.

2. Tenants in common hold their estates by several and distinct titles, but by unity of possession, and an entry by one inures to the benefit of his cotenants, not only as concerns themselves, but also as to strangers.

3. There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry.

4. Where the proof showed an exclusive, quiet, and peaceable possession by a tenant in common and those under whom he claimed for more than twenty years, the law presumes that there was an actual ouster of the other cotenant's possession, not at the end of that period, but at the beginning, and that the subsequent possession was adverse to the cotenants who were out of possession, which defeats their right to partition or to an ejectment.

5. The disability of some of the parties, during the period when the possession was held by the defendants and those under whom they claim, cannot be permitted to rebut the presumption of the law as to the ouster, where the possession commenced in the lifetime of their ancestor, from whom they claim and who was, at the time the adverse possession commenced, under no disability.

6. *Quere:* What is the true construction of section 146 of The Code (now Revisal, 386) with reference to causes of action founded upon an ouster, which occurred since the date of its adoption in 1868?

ACTION by David Dobbins and R. E. Stafford, Jr., by his next (211) friend, against Sarah Dobbins and others, heard by *Councill, J.,* and a jury, at February Term, 1906, of IREDELL.

Proceeding for partition of land, which was transferred from the clerk, upon the issue of sole seizin raised by the pleadings. The land, which consisted of two tracts, the "Home" and "Holman" tracts, was originally owned by Milas Dobbins, who died in 1863, leaving two sons, Alfred and Augustus Dobbins. Alfred died 25 September, 1878, leaving three children by his first marriage, George, Fannie and John, and two by his second marriage, David (one of the plaintiffs), born 22 January, 1875, and Una May, born 12 April, 1878, and married to R. E. Stafford, 9 April, 1901. She died in August, 1905, leaving a child, R. E. Stafford, Jr., then 3 or 4 years old, who is the other plaintiff. Augustus Dobbins, the other son of Milas Dobbins, took possession of the land when his father died, and has remained in possession until his death in 1901, when his widow, the defendant Sarah Dobbins, continued in possession of the Home tract to the bringing of this suit, and of the Holman tract until 3 September, 1903, her husband having devised all of the land to her by his will, which was duly admitted to probate and introduced in evidence. On 3 September, 1903, she conveyed the Holman tract to the defendant, George B. Nicholson, trustee, for the use and benefit of the other defendants, B. F. Long, D. M. Furches, and A. L. Coble. The trustee took possession on that day and has held it ever since. The court admitted the evidence of the probate of a paper-writing purporting to be the will of Milas Dobbins, the appointment of the administrator with the will annexed and his qualification. The will was not put in

(212) evidence, nor did the nature of its contents in any way appear. Plaintiff objected to this testimony.

At the conclusion of the testimony "the court instructed the jury that, upon the evidence, the plaintiffs were not entitled to recover, and they should answer the issue 'No.'" Plaintiffs excepted. There was a verdict and judgment accordingly, and the plaintiffs appealed.

Armfield & Turner and J. B. Armfield for plaintiffs.
Furches, Coble & Nicholson for defendants.

WALKER, J. When the plaintiffs had rested, there was no evidence of any possession of the lands by the defendants. The only testimony in regard to it came from the defendant's witnesses, and the court could not properly give a peremptory instruction to find for the defendants, when the burden of proof had shifted to them by the paintiff's proof of title in Milas Dobbins and the descent from him to the plaintiffs and his other heirs mentioned in the case. When there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always an open question for the jury, and this is so, though the testimony may be all on one side and all tend one way. In the latter case the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way, but not, upon the evidence, so to answer it, as by such a charge he passes upon the credibility of the witnesses. We disapproved a similar instruction in *Smith v. Lumber Co.*, 140 N. C., 375, and such an instruction has been condemned in many previous decisions, besides being expressly forbidden by statute. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true (213) office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." Code, sec. 413, Revisal, sec. 535. We should be compelled to order a new trial for this error, if it did not clearly appear that the exception to this instruction was not based upon this ground, but was intended to raise the question, whether the bare possession of the defendants (nothing else being proved) was in law sufficient to bar the plaintiffs' right of entry, and to put the case upon its real merits. There is no reference made in the brief of the plaintiffs' counsel to any error in the charge other than the one relating to the character of the defendants' possession and its legal sufficiency to defeat the plaintiffs' recovery. In this case, the error in the form of the instruction was not, perhaps, very material, and seems to have been so re-

garded by the plaintiff's counsel, as there was no serious controversy as to the facts, and a new trial on that ground would be of little or no avail. Before leaving this part of the case, we will remark that the case on appeal was not prepared or revised by the presiding judge, who is always careful and painstaking, and we infer that the charge as given was in proper form and that it was worded by counsel, as it is now, inadvertently, the purpose being to present the real question involved without paying much, if any, heed to matters of form. We will therefore consider the case, as counsel have done in their briefs, as presenting the single question, whether the defendants' proof was sufficient in itself to toll the plaintiffs' entry and defeat their action.

This question has been before this Court so often that it ought not now to be difficult of solution. We undertook at the last term, as our predecessors had frequently done before, to state the principle of law by which such cases are governed. Some misunderstanding has arisen by failing to distinguish between the doctrine of adverse possession as applied to the relation of tenants in common, and as applied in ordinary cases, where there is no such relation, and consequently (214) no privity or fealty as between the parties. The distinction between an actual and a presumed ouster has, perhaps, not been sufficiently taken into account. We will endeavor again to "run and mark the line," and to restate the principle of adverse possession as applicable to tenants in common. Such tenants hold their estates by several and distinct titles, but by unity of possession, because none of them can know his own severalty or, as Littleton puts it, no one of them can tell which part is his own and, for this reason, they occupy promiscuously, the only unity being that of possession. 2 Blk., 192. An entry or possession by one of the tenants inures to the benefit of his cotenants, not only as concerns themselves, but also as to strangers. *Locklear v. Bullard,* 133 N. C., 260; *Carothers v. Dunning,* 3 S. & R., 381. There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. It is needless to do more than to state the simple proposition that such an actual ouster followed by possession for the requisite time will bar the cotenant's entry. But the law goes further, and the rule has been well settled for many years in this State, as it had been before in England, that when one tenant in common has been in undisturbed possession and use of the land for 20 years, in an ejectment brought against him by his cotenant, the jury will be directed to presume an actual ouster when the possession was first taken and consequently to

find a verdict for the defendant. Ouster, or dispossession, says Blackstone, is a wrong or injury that carriers with it the assertion of possession, for thereby the wrongdoer gets into actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal
remedy in order to gain possession of the freehold and damages
(215) for the injury sustained. It is effected by one of the following
methods: (1) Abatement, (2) Intrusion, (3) Disseizin, (4) Discontinuance, (5) Deforcement. The first two consist in a wrongful entry when the possession is vacant—an ouster of a freehold in law. The third, disseizin, is a wrongful putting out of him that is seized of the freehold—an attack upon him who is in the actual possession and turning him out—an ouster from a freehold in deed. The fourth, discontinuance, occurs when the feoffee of tenant in tail holds beyond the life of the feoffor, under a feoffment for a greater estate than the latter can convey, his possession thus retained being considered as an injury to the heir in tail, whose ancient legal estate is thereby destroyed, or at least suspended or for a while discontinued. The fifth and last, deforcement, signifies the holding of any lands or tenements to which another person hath a right, and includes all the others and any other species of wrong whatsoever, whereby he who has a right to the freehold is kept out of possession, but is contradistinguished from them in that it is only a detainer of the freehold from him who has the right of property, but never had any possession under that right. 3 Blackstone, 167 *et seq.* A species of deforcement is, when the ancestor dies seized of an estate in fee simple, which descends to two of his heirs as parceners, and one of them enters before the other, and will not suffer the coparcener to enter and enjoy her moity. 3 Blk., 174; Fitzherbert Nat. Brev., 197. We have thus reviewed this subject to show the nature of an ouster, and in order that we may understand clearly what it is the law means when it is said to presume an ouster. It is a disseizin by one tenant of his cotenant, the taking by one of the possession and holding it against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the exclusion and in denial of the right
of the other. This is what the law presumes, whether it be in
(216) exact accordance with the real facts or not. It is a presumption
the law raises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this Court, and is a most reasonable inference of the law and justified under the circumstances, first, because men do not ordinarily sleep on their rights for so long a period, and, second, because a strong presumption arises that

actual proof of the original ouster has become lost by lapse of time. The period of time requisite to raise the presumption, which anciently was required to be of much greater length than now, has by this Court been fixed at twenty years in analogy to the statute of limitations barring titles. The rule which has long obtained with us was well stated by *Nash, J.,* for the Court, in *Black v. Lindsay,* 44 N. C., 467. "The possession of one tenant in common is in law the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. Possession, then, for twenty years under the above circumstances will amount to a disseizin or ouster of the cotenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession—as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession." There was no more proof in that case than in the one now before us. But in *Thomas v. Garvan,* 15 N. C., 223, the facts were practically identical with those we have here, and the same rule was applied, *Judge Gaston,* for the Court, saying: "The sole enjoyment of (217) property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such a sole enjoyment; and this not because it clearly proves the acquisition of such right, but because from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had. Where the law prescribes no specific bar from length of time, twenty years has been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor. We think the judge who tried this cause was correct in charging the jury that the twenty-one years exclusive possession of the defendant and her deceased husband, since the petitioner became discovert, did raise the legal presumption of an ouster," and barred the plaintiff's recovery. This was followed by *Cloud v. Webb,* 15 N. C., 290, which clearly shows the nature and extent of the presumption: "The possession of one tenant in common is in law the possession of all the tenants in common. One may, however, disseize or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is

adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time, which furnishes a legal presumption of the facts necessary to uphold an exclusive possession." This case was in turn followed by *Linker v. Benson,* 67 N. C., 150; *Covington v. Stewart,* 77 N. C., 148; *Neely v. Neely,* 79 N. C., 478; *Caldwell v. Neely,* 81 N. C., 114; *Page v. Branch,* 97 N. C., 97; *Bullin v. Hancock,* 138 N. C., 198; *Whitaker v. Jenkins,* 138
(218) N. C., 476. The same doctrine was applied in *Fisher v. Prosser,* 1 Cowper, 217, decided by the King's Bench, in which *Lord Mansfield* presided as Chief Justice. It was said by *Justice Aston* in that case: "Now, in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim for an account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?" And by *Justice Willes:* "This case must be determined upon its own circumstances. The possession is a possession of 16 years above the 20 prescribed by the statute of limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession."

The proof in this case showed an exclusive, quiet, and peaceable possession by the defendants and those under whom they claim for more than 20 years—indeed, for more than 40 years—and the law presumes that there was an actual ouster, not at the end of that period, but at the beginning, and that the subsequent possession was adverse to the cotenants who were out of possession. This converted the estate in common, as between the former cotenants, into one in severalty, in the defendants, and defeated plaintiffs' right to partition or to an ejectment.

The disability of some of the parties during the period when the possession was held by the defendants and those under whom they claim cannot be permitted to rebut the presumption of the law as to the ouster, for the possession commenced in the lifetime of their ancestor, from whom they claim and who was at the time under no disability. *Seawell v. Bunch,* 51 N. C., 195. That was a case in which a deed was presumed to have been made after 20 years possession. *Pearson, C. J.,* said: "Presumptions of the kind we are considering are made on the ground
(219) of public policy, in order to discourage litigation of stale demands and to quiet the possession of estates, and this policy would be in a great degree obstructed if, after the presumption had commenced to

arise, it was allowed to be stopped by some intervening circumstance other than an assertion of the right. Where the one party is exposed to an action at the commencement, and the other neglects to pursue his remedy, a subsequent disability cannot be allowed to prevent the principle from being carried out, for otherwise, in a large proportion of cases, it would fail to take effect, and the policy of the law would be defeated. Our conclusion, both from analogy and from the 'reason of the thing,' is that when the presumption has commenced, it is not stopped by a subsequent disability." The two cases are analogous. See, also, *Justice Ashhurst's* opinion in *Fisher v. Prosser,* 1 Cowper, at pp. 219-220. The ruling in *Seawell v. Bunch* is sustained by many cases, but we will only cite a few of them. *Mebane v. Patrick,* 46 N. C., 23; *Pearce v. House,* 4 N. C., 722; *Chancey v. Powell,* 103 N. C., 159; *Frederick v. Williams, ib.,* 189; *Andrews v. Mulford,* 2 N. C., 311; *Anonymous,* 2 N. C., 416; *Copeland v. Collins,* 122 N. C., 619. The rule as to the effect of 20 years possession was adopted in analogy to the statute of limitations, and when that statute begins to run against the ancestor it is not suspended by any disability of the heirs at the time of descent. Wood on Limitations, 11; *Frederick v. Williams, supra.*

The view we have taken of the case makes it unnecessary to consider the question presented by counsel in their argument as to what is ordinarily necessary to render a possession sufficiently adverse to bar a right if continued for the requisite time, and as to whether any change in this respect has been wrought by The Code, sec. 146, Rev., sec. 386. Too many cases have been decided by the Court since that section was enacted as law, in which the rule we have stated as to a presumed ouster has been recognized and applied, for us to hold at this time that (220) the rule has been changed by it, at least where the eviction or ouster took place prior to 1868. *Bryan v. Spivey,* 109 N. C., at p. 70. In that case the ouster was in the same year as in this case, 1863. See, also, *Monk v. Wilmington,* 137 N. C., at p. 327, and *Ruffin v. Overby,* 88 N. C., 369. What is the true construction of section 146 of The Code (now Rev., 386) with reference to causes of action founded upon an ouster, which occurred since the date of its adoption, is left open for future consideration, when the matter is directly presented.

The court correctly charged the jury as to the effect of the facts proved in this case upon the plaintiffs' right to recover.

No error.

Cited: Rhea v. Craig, post, 611; *Church v. Bragaw,* 144 N. C., 129; *Call v. Dancy, ib.,* 498; *Mott v. Land Co.,* 146 N. C., 526; *Clary v. Hatton,* 152 N. C., 109; *Boggan v. Somers, ib.,* 395; *McKeel v. Holloman,*

163 N. C., 136; *Lumber Co. v. Cedar Works,* 165 N. C., 85; *Christman v. Hilliard,* 167 N. C., 7; *Lumber Co. v. Cedar Works,* 168 N. C., 350; *Cooley v. Lee,* 170 N. C., 24; *Holmes v. Carr,* 172 N. C., 215; *Lester v. Harwood,* 173 N. C., 85; *Patrick v. Ins. Co.,* 176 N. C., 665; *Alexander v. Cedar Works,* 177 N. C., 142; *Ruark v. Harper,* 178 N. C., 252; *Adderholt v. Lowman,* 179 N. C., 549.

ISLEY v. BRIDGE COMPANY.

(Filed 24 April, 1906.)

Accidents — Res Ipsa Loquitur — Instructions — Negligence—Questions for Court—Master and Servant.

1. No presumption of negligence arises simply because an accident has occurred. In some cases the fact of an accident is permitted to go to the jury as some evidence to be considered by them, and given whatever effect in their opinion is warranted.

2. Where the doctrine of *res ipsa loquitur* applies, it is simply a matter of evidence, and in order that a party may avail himself of it he must in due time hand up an appropriate prayer for instruction.

3. Where the evidence in any view showed that the injury to the plaintiff was directly caused by the breaking of a chain, the defendant's failure to exercise ordinary care in having the chain properly annealed at proper times for the purpose of preserving its fiber and toughness would in law constitute negligence, and there being no evidence of contributory negligence, the defendant would be liable, and the court erred in leaving the question to the jury to determine on the given state of facts whether there was negligence or not.

4. Where the facts are undisputed and only one inference can be drawn from them, negligence is a question of law to be determined by the court.

(221) ACTION by Warren W. Isley, by his next friend, against Virginia Bridge and Iron Company, heard by *Ward, J.,* and a jury, at September Term, 1905, of ALAMANCE.

Action to recover damages for personal injury received by the plaintiff while in the employ of the defendant. The court submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant as alleged? Answer: "No."

2. What damage has the plaintiff sustained thereby?

From the judgment rendered, plaintiff appealed.

W. H. Carroll and J. T. Morehead for plaintiff.
Brooks & Thompson for defendant.

BROWN, J. The uncontradicted evidence shows that the plaintiff was injured while working in the defendant's mills assisting the foreman in moving a heavy piece of iron weighing about 1,200 pounds. The piece of iron was suspended by chains from an overhead trolley, by which it could be moved. One of the chains broke and a piece of it fell on the plaintiff's leg and broke it. The chain broke in the middle suddenly and gave way all at once.

1. Counsel for the plaintiff, in beginning his address to the jury, insisted that the doctrine of *res ipsa loquitur* applied. His Honor ruled that it did not. This rule is sometimes applied in cases where the circumstances are such that "the thing speaks for itself." No inference of negligence is to be drawn from the fact of an accident, and there is no presumption of negligence arising simply because an accident has occurred. In some cases the fact of an accident is permitted to go to the jury as some evidence to be weighed and considered by them and given whatever effect in their opinion is warranted. We have (222) held that this is simply a matter of evidence in cases where the rule applies, and in order that a party might avail himself of it, he must in due time hand up an appropriate prayer for instruction. *Lyles v. Carbonating Co.,* 140 N. C., 25. This was not done in this case and, therefore, the plaintiff's exception is of no avail.

2. His Honor instructed the jury as follows: "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 or not negligence exists. But where two men of fair minds could come to different conclusions on the question, then the law directs that the jury shall find the facts and determine on the facts and circumstances, when so found, whether or not there has been negligence on the part of the defendant; so, then, if you find that defendant had used the chain in question for two years or thereabouts, and ought to have had knowledge of the properties of iron and the effect of strains and pulls on chains when used in places of like kind as that in question, and that when so used chains are liable to become defective, and that it would be necessary to toughen or repair a chain or replace it with another when it has been used a considerable length of time, then the court leaves it to you to say whether or not it would be negligence to go on using the chain without repairs or replacing the same." The court here explained negligence to the jury. To this charge plaintiff excepted. The court

further charged: "If you find by the greater weight of evidence that the plaintiff was injured by the falling of the cord or cross-bar by reason of the chain breaking, and you further find that the chain which was broken had been used by the defendant for a considerable length of time, say, two years, and had been used in carrying heavy weights from one end of the building to the other, and that said chain was defective (223) and unsafe, and that by long use and strain and pulls by heavy weights it had lost its toughness and elasticity, and you further find that the defendant knew, or ought to, or could have known, it by the exercise of reasonable care and prudence, that it was defective, and that it was liable by long use to lose its durability and toughness and to become impaired and defective, and you find that it could have been annealed and thereby reinstated, and that the defendant continued to use it without its being repaired, and that in so doing the defendant was negligent in that it failed to exercise that reasonable care and prudence that would ordinarily be used by prudent persons under like circumstances and conditions, and you find further that such negligence was the proximate cause of the injury complained of, then the court charges you to answer the issue 'Yes.'" To this charge plaintiff excepted.

It is the settled law in this State that where the facts are undisputed, and only one inference can be drawn from them, negligence is a question of law to be determined by the court. In his charge to the jury his Honor recited a given statement of facts from which no other inference can be drawn than that, if they are true, the plaintiff's injury was caused by the negligence of the defendant. This statement of facts which his Honor put to the jury is supported by evidence, and, if the jury find these facts to be true, his Honor should have instructed the jury to answer the first issue "Yes." His Honor erred in leaving the question to be decided by the jury as to whether there was negligence or not, even if they should find that state of facts to be true. There is no evidence or issue as to contributory negligence, and the whole evidence, in any possible view of it, shows that the injury to the plaintiff was directly caused by the breaking of the chain, and if the defendant company failed to exercise ordinary care and diligence in having the chain properly annealed at proper times for the purpose of preserving its fiber and (224) toughness, then in law that is negligence, and there being no evidence of contributory negligence, the company would be liable for the injury sustained by the plaintiff by reason of the breaking of the chain.

New trial.

Cited: S. c., 143 N. C., 51.

MILLIKEN v. DENNY.

(Filed 24 April, 1906.)

Easement — How Acquired—Dedication—Intention—Evidence—Deeds —Estoppel.

1. An easement may be acquired either by grant, dedication, or prescription.
2. Dedicating may be either by express language, reservation, or by conduct showing an intention to dedicate, which conduct may operate as an express dedication, as when a plat is made showing streets, alleys, or public squares, and land sold either by express reference to such plats or by showing that they were used and referred to in the negotiation.
3. Testimony in regard to the understanding of the public about an alley at the time the plaintiff purchased his lot in 1901 was incompetent where the plaintiff was claiming the right to use the alley by virtue of an alleged dedication eleven years before.
4. Where, on an issue as to the dedication of an alley, a witness when asked regarding the termini of the alley, answered that it was from one street across another street, and that he did not know how much farther, his evidence was properly excluded.
5. The court properly excluded a map made long after the deed by virtue of which plaintiff claimed, where there was nothing connecting the map with the deed or tending to show that the original grantee of the deed knew anything of it.
6. Where, at the time of executing a deed, the grantor neither expressly nor by implication dedicated a strip of land in the deed referred to as an alley to the use of the lot conveyed, thereby creating an easement appurtenant thereto, which passed with the title to the lot to a subsequent grantee, nothing thereafter said or done by the parties would impose the burden on the property.
7. The question whether one has dedicated his land to the use of the public is one of intention. The intention to dedicate must clearly appear, though such intention may be shown by deed, by words, or by acts.
8. A deed of property describing the same as running from a certain stone, 'thence north 84 degrees 22 minutes west, 340 feet along the south side of a 100-foot alley," did not of itself impose an easement on the alley referred to which passes to the grantee or estopped the grantor from closing such alley.

ACTION by J. M. Milliken against G. W. Denny, heard by (225) *Ward, J.*, and a jury, at October Term, 1905, of GUILFORD. From a judgment of nonsuit, plaintiff appealed.

King & Kimball for plaintiff.

Douglas & Douglas and Scales, Taylor & Scales for defendant.

CONNOR, J. When this cause was before us at the Spring Term, 1904, upon demurrer to plaintiff's complaint, we were of the opinion, and so decided, that the mere fact that the deed from George A. Dick, trustee, and Mrs. Mary E. Dick, the beneficial owner, to Mrs. Julia P. Dick called for a "stone," thence north 84 degrees and 22 minutes west 340 feet along the south side of the ten-foot alley, was not *per se* sufficient to impose an easement upon the ten feet of land referred to as an alley, which passed to the owners of the lot conveyed. When the decision of this Court was certified to the Superior Court of Guilford, the plaintiff, by leave of the court, amended his complaint to meet the objection (226) raised by the demurrer, by alleging "That at the time the land was conveyed by George A. Dick, trustee, and Mrs. Mary E. Dick to Mrs. Julia P. Dick, the said grantors in said deed owned said ten-foot alley and the land on Percy and Chestnut streets on the opposite side of said alley from the above described lot, and the said grantors conveyed said lot next Summit Avenue, a part of which was afterwards conveyed to plaintiffs, to Julia P. Dick, and the said land across said alley to George A. Dick, and left the alley open between said lots for the benefit thereof, and because by doing so the said lots were rendered more convenient and more valuable to the owners." They further allege that said alley was opened and dedicated to the use of the owners of said lots and also to the use of the public when said lot was conveyed as aforesaid, and said alley being so opened was being used by the owners of said lots and by the defendants up to the time defendant took a deed therefor and closed said alley. "That said alley was distinctly dedicated to the use of the owners of said lots by being left unconveyed when the said lots were conveyed, as aforesaid, by being open to the use of the owners of said lots and the public generally, by being actually kept open and used by the owners of the lots and the public from the time of said original conveyance, etc. That it was the purpose and intention of Mrs. Dick and her trustee and of the other persons who conveyed either of the lots when the conveyance was made to dedicate said alley to the use of the owners of said lots for all time, and that same was so dedicated." The amendment to the complaint alleges a dedication of the alley by George A. Dick, trustee, and Mrs. Mary E. Dick to the use both of the grantees of the lots and their successors in title and to the public, at the time of executing the deed to Mrs. Julia P. Dick. The manner of dedication, it is alleged, "was by being left unconveyed when the lot was conveyed as aforesaid." It is not very clear from the language of the amend- (227) ment whether the plaintiff claims an easement in the ten feet of land called an alley in the deeds as appurtenant to his lot as a private way, dedicated to the use of both lots, or as a public alley. Of

course, if the land was dedicated to the use of the public, over which all persons, without regard to the ownership or use of the adjoining property, might pass, it became, upon acceptance by the public, a public highway, which excludes the idea of private ownership. No issues were tendered by plaintiff. There being no allegation nor evidence that the way was ever accepted by the public, that is, by the duly constituted authorities, we assume that plaintiff's claim is based upon an easement appurtenant to the lot conveyed by Mrs. Dick to Mrs. Julia P. Dick, the title to which by successive conveyances is vested in him. *Boyden v. Achenbach,* 79 N. C., 539; *Kennedy v. Williams,* 87 N. C., 6. It is elementary learning laid down in all of the books and adjudged cases on the subject that an easement may be acquired either by grant, dedication, or prescription. The plaintiff says that the easement which he claims was acquired by dedication, and that such dedication is evidenced by the fact that the alley was not conveyed when the lots were conveyed. It is well settled that dedication may be either by express language, reservation, or by conduct showing an intention to dedicate; such conduct may operate as an express dedication, as when a plat is made showing streets, alleys or public squares and the land is sold, either by express reference to such plats or by showing that they were used and referred to in the negotiation, as in *Moose v. Carson,* 104 N. C., 431; *Conrad v. Land Co.,* 126 N. C., 776; *Hughes v. Clark,* 134 N. C., 457. The plaintiff here does not allege that any plat was shown or in existence when the lot was conveyed to Mrs. Julia P. Dick, or that there was any agreement made between the grantors and grantees that the alley was to be kept open. He says that the grantors left the said alley open between said lots for the benefit thereof, and because by so doing the said lots were rendered more convenient and more valuable to the owners, "the said alley was (228) opened and dedicated to the use of the owners of said lots." We think that, upon a fair construction of the amended complaint, the plaintiff alleges that, omitting any reference to the title of the trustee, Mrs. Dick being the owner of the entire tract conveyed 14 August, 1890, to Mrs. Julia P. Dick, the lot now owned by plaintiff, by the following description: "Beginning at a stone on Chestnut Street, ten feet south of the southwest corner of George A. Dick's home lot, running thence along Chestnut Street south 3 degrees and 45 minutes west 378½ feet to a stone; thence south 84 degrees and 22 minutes east 316½ feet to a stone on Percy Street; thence north 6 degrees and 39 minutes east 389 feet to a stone; thence north 84 degrees and 22 minutes west 340 feet along the south line of the ten-foot alleyway, containing three acres"; and thereby dedicated said alley to the use of the owners of said lots. It is said in defendant's brief that the lot was given to Mrs. Julia P. Dick, but only

the description is set out in the record, and there is no evidence in regard to the consideration upon which the deed was made. His Honor was of the opinion that upon the whole of the evidence plaintiff was not entitled to the relief demanded, and rendered judgment dismissing the action. Before considering the exception to the ruling of his Honor in this respect, it is necessary to pass upon plaintiff's exceptions directed to the exclusion of testimony. Plaintiff was asked in regard to "the understanding of the public about the alley at the time he purchased." This, upon objection, was excluded. Plaintiff purchased the lot in 1901. We concur with his Honor that the testimony was not competent. The plaintiff was claiming by virtue of an alleged dedication by Mrs. Dick, August, 1890. We cannot perceive how the understanding of the public eleven years afterwards was relevant to that question. Plaintiff was asked regarding the termini of the alley, and his answer showed that he did not know. He says: "From Percy Street across Chestnut
(229) Street, and I do not know how much farther." The ruling was correct. The other exceptions are directed to the exclusion of a map made long after the deed to Mrs. Julia P. Dick. There is nothing connecting the map with the deed, or tending to show that Mrs. Dick knew anything of it. These exceptions are not pressed in plaintiff's brief. We have considered them in examining the entire evidence. They cannot be sustained.

We are thus brought to a consideration of his Honor's ruling upon defendant's demurrer to the evidence. Very much of the evidence is directed to the manner in which the ten feet of land, referred to in the deeds as an alleyway, has been used since the execution of the deed of August, 1890. As twenty years have not passed since that date, plaintiff concedes that he has not established a right to the easement by prescription. We find no evidence of any declaration made by Mrs. Dick or her trustee, George A. Dick, cotemporaneous with or subsequent to the deed. If Mrs. Dick did not, at the time she executed the deed of August, 1890, either expressly or by implication, dedicate the strip of land referred to as an alley to the use of the lot conveyed to Mrs. Julia Dick, thereby creating an easement appurtenant thereto, which passed with the title to the plaintiff, nothing said or done by the persons thereafter could impose the burden thereon. The description in the deeds made by her do not cover the land, therefore the title remained in her, and passed to defendant in the same plight and condition as she held it. We are thus brought to a consideration of the question whether, in the language of the complaint, the strip of ten feet was dedicated "by being left unconveyed when the lots were conveyed." The authorities in regard to acts which will by implication operate to impose an easement upon land are

more numerous than uniform. After reviewing a large number of decisions, Mr. Washburn says: "The acts and declarations of the landowner indicating the intent to dedicate his land to the public (230) use must be unmistakable in their purpose and decisive in their character to have that effect." Easements, 188 (2 Ed.). The question whether one has dedicated his land to the use of the public is one of intention. "There can be no such dedication contrary to the intention of the landowner. The intention to dedicate must clearly appear, though such intention may be shown by deed, by words, or by acts. If by words, the words must be unequivocal and without ambiguity. If by acts, they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner of such dedication." Jones on Easements, sec. 425; 13 Cyc., 451.

We find that the question as to what act or conduct will amount to a dedication of one's land to public use as a highway has been often considered by the courts of this country. *Gibson, C. J.*, in *Gowen v. Philadelphia Ex. Co.*, 5 Watts and S., 143, discussed it at length, drawing the distinction between a dedication and a mere license. An examination of the decided cases discloses that in almost every case where a private right of way was asserted, express language is found in the deed describing and defining such right, the litigation growing out of a difference of opinion. In the absence of any such language indicating that an easement was created over lands of the grantor not included in the description, constituting a perpetual burden upon them, the evidence should be clear and unmistakable. It may well be that as Mrs. Dick owned other land lying back of the lots conveyed, she reserved the alley for her own use, or that, as she was providing homes for her own children, she reserved the alley, conferring upon them a license to use it, without any intention of imposing a permanent easement upon it. The testimony casts no light upon her purpose, and, in the absence of testimony tending to show that she dedicated it, as alleged, there was nothing to be submitted to the jury. The evidence does tend to show that plaintiff and others supposed that the alley was a private way. This was so because of the manner in which it was used, and upon the question (231) of prescription, was both relevant and forceful, but threw no light upon Mrs. Dick's intention in reserving it at the time she executed the deed to Mrs. Julia P. Dick. Mr. Cone, who purchased the lot in 1895, and sold to plaintiff, says that no verbal representation was made to him in regard to the property—he does not remember that any map was shown him. We do not think that the language of Mrs. Dick's deed estopped her from closing the alley, and whatever right she had passed to her grantee, the defendant.

If purchasers wish to acquire a right of way or other easement over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance. It would be a dangerous invasion of rights of property, after many years and after the removal by death or otherwise of the original parties to the deed and conditions have changed, to impose, by implication, upon the slippery memory of witnesses, such burdens on land. No party to the deeds made by Mrs. Dick respecting this property was called. No one testifies to any declaration of either grantors or grantees. The testimony when analyzed leaves nothing to guide us, as to Mrs. Dick's intention, except the language of the deed itself. There is no evidence respecting the value of the property at the date of the deed, or to what extent, if at all, the alley affected its value. It does not appear that it was necessary to the use of the property that a right of way over this alley should attach. It was bounded on two sides by streets. "No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests on necessity, not convenience." 14 Cyc., 1173.

Upon consideration of the entire evidence, we are of the opinion that his Honor properly sustained defendant's demurrer. There is

No error.

Cited: Tise v. Whitaker, 146 N. C., 376; *Green v. Miller,* 161 N. C., 30; *S. v. Hanie,* 169 N. C., 280; *Haggard v. Mitchell,* 180 N. C., 265.

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DUNN v. MARKS.

(Filed 24 April, 1906.)

Defense Bond—Extension of Time for Filing—Premature Appeal.

1. Extension of time to file a defense bond being a matter in the discretion of the judge, no appeal lay, and the motion to dismiss must be allowed.
2. When an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal.
3. Though a cause is docketed too late to be heard on the call of the district to which it belongs, this Court will enter a motion to dismiss, after due notice to appellant, that the trial of the cause below may not be delayed by an invalid appeal.

ACTION by Charles F. Dunn against A. Marks, heard by *Councill, J.,* at December Term, 1905, of LENOIR. From an order granting leave to file a defense bond, and the refusal of judgment by default, the plaintiff appealed.

No counsel for plaintiff.
Y. T. Ormond for defendant.

CLARK, C. J. This is an action of ejectment. At November Term, 1905, the first term after service of summons, the defendant filed his answer, but failed to file his defense bond as required by Rev., sec. 453. No action was had at that term. At December Term the plaintiff moved for judgment for want of a defense bond. The court in its discretion granted sixty days leave to file such bond. From this order and the refusal of judgment by default, the plaintiff appealed. This is a motion to dismiss the appeal on the ground that this was a matter of discretion, from which no appeal lay.

The plaintiff, having made no objection to the failure to file bond at the term at which the answer was filed, it is questionable if the judge ought to have given judgment at a subsequent term without (233) giving the defendant some opportunity to file bond. *McMillan v. Baker,* 92 N. C., 110. Whether or not time should have been given to file bond was a matter in the discretion of the judge. Rev., sec. 512, provides: "The judge may likewise *in his discretion,* and upon such terms as may be just, allow an answer or reply to be made, or *other act to be done,* after the time limited, or by an order enlarge such time." This applies to filing the defense bond required by section 453. *Taylor v. Pope,* 106 N. C., 267.

Extension of time to file a defense bond being a matter in the discretion of the judge, no appeal lay, and the motion to dismiss must be allowed. It is true that in *Kruger v. Bank,* 123 N. C., 16, the Court held that an appeal lay from the refusal of a judgment by default for want of an answer, to which the plaintiff was entitled; but it added that if the court below had granted time to file answer it would have been unreviewable and no appeal would lay.

When an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal, as was done properly by the court below in *S. v. Dewey,* 139 N. C., 560. The judge below, in such cases, may proceed to try the action while the attempted appeal on the interlocutory matter is in this Court. *Green v. Griffin,* 95 N. C., 50. If this were not so, a case could be interminably protracted by taking premature appeals and appeals in matters resting in the discretion of the judge, thus delaying trial till each successive improvident appeal is dismissed. For the same reason, when the appellant does not docket his transcript on appeal in this Court, the judge below may adjudge the appeal abandoned and proceed as if no appeal had been taken. *Avery v. Pritchard,* 93 N. C., 266; *Cline v. Mfg. Co.,*

(234) 116 N. C., 837. When, however, it is doubtful whether an appeal lies, it is best that the court below should await the action of this Court.

Though this cause was docketed too late to be heard on the call of the district to which it belongs, we have entertained this motion to dismiss, after due notice to appellant, that the trial of the cause below may not be delayed by an invalid appeal.

Appeal dismissed.

WEDDINGTON v. INSURANCE COMPANY.

(Filed 1 May, 1906.)

Insurance—Stipulation Against Encumbrance—Waiver—Estoppel—Return of Unearned Premium—Forfeiture—Nonwaiver Agreement—Evidence.

1. A provision in an insurance policy that "This policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," is a just and lawful one, and will be enforced according to its plain meaning.

2. The reply of the company's president and the expression of his regret to the plaintiff that he could not accommodate him, when requested to indorse his note for $300, and his further wishing him "success in his undertaking," is not a waiver of the above stipulation by the company, nor consent that the plaintiff might encumber the property.

3. Notice of an intention on the part of a policyholder to do something contrary to the terms of the contract will not estop the company, although not objected to by it at the time.

4. When an insurance policy provides that the unearned portion of the premium shall be returned upon surrender of the policy, the company is not required to return or tender the unearned portion of the premium before it can insist on a forfeiture, where there has been no surrender of the policy, but the complaint is drawn and the trial proceeded, on plaintiff's part, upon the theory that the policy was valid.

5. In a case of a breach of condition which invalidates the policy, the company is not bound at its peril, upon notice of such breach to declare the policy forfeited or to do or say anything to make the forfeiture effectual, and a waiver will not be inferred from mere silence or inaction on its part. It may wait until claim is made under the policy and then rely on the forfeiture in denial thereof or in defense of a suit brought to enforce payment of it.

6. Where the plaintiff signed a nonwaiver agreement, the law presumes he did know what was in it, and he will not be heard, in the absence of any proof of fraud or mistake, to say that he did not.

7. Where the plaintiff executed a nonwaiver agreement before the adjustment of the loss was undertaken by the defendant's agent, the court properly excluded evidence offered to prove that the agent told him that signing the paper would prevent any difficulty in settling the loss, as it did not tend to show any waiver of the stipulation against encumbrance, the adjuster not then having any knowledge of the mortgage or of any other ground of forfeiture.

ACTION by W. J. H. Weddington against Piedmont Fire In- (235) surance Company, heard by *Webb, J.*, and a jury, at November Term, 1905, of MECKLENBURG.

The plaintiff sued to recover the amount of an insurance policy for $500 issued by defendant to him on 21 October, 1903, for one year on a stock of goods. The policy contained among others, the following provisions material to be stated: "This policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage. If this policy shall become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, or the last renewal, this company retaining the customary short rate." It was written according to the standard form prescribed by the statute. The premium of $11 was paid. On 11 May, 1904, the plaintiff executed a chattel mortgage to the McClelland Paint Company for $867.16 on the said stock (236) which was duly registered. The defendant did not consent to the giving of the mortgage and had no notice thereof until after the stock of goods was destroyed by fire, which occurred in June, 1904, nor until after the nonwaiver agreement hereinafter mentioned was executed, unless certain correspondence between the plaintiff and H. M. McAden amounted to such consent or notice. The plaintiff wrote to McAden on 18 December, 1903, as follows: "I hope you will not think it presumptuous of me in writing this letter and requesting a loan or an indorsement of my note for $300 for twelve months for the following purpose and conditions: I have recently gone in business on my own account and have bought goods on my own credit, standing to the amount of $1,600, and on which I have paid something over $700, and should you favor me to the extent of this loan, I will apply that to my creditors, which will put me in the position of having goods here in my store $1,000 or more, paid for, that I am willing to give you a chattel mortgage on, to guarantee the payment of this $300. I will, of course, keep my stock up to its present standing, and monthly reducing my indebtedness. I am also carrying my goods insured for $1,000; one-half of insurance is placed with your company. I have not been dealing with banks long enough to have any financial standing with them. I

now have a mortgage of $600 on my house and lot, placed there about the first of this month; $300 of it I have used in reducing my indebtedness; other amount remaining in Mechanics Building and Loan Association until I start and complete two rooms on my house. I am willing to thoroughly satisfy your mind, as to my business condition, by showing you through my store, stock, books, invoices, and receipts." On 21 December, 1903, McAden, as president, replied as follows: "I acknowledge receipt of your letter of 18th and note contents with interest. I regret to say that just at this time I am not in a position to
(237) accommodate you in the manner you desire. Regretting not being able to assist you at this time, and wishing you success in your undertaking, I remain," etc. The plaintiff executed a nonwaiver agreement before the adjustment of the loss was undertaken by the defendant's agent. He proposed to prove by himself, first, that he did not know the nature of the contents of this instrument, and, second, that the agent told him that signing the paper would prevent any difficulty in settling the loss. The evidence, on objection of defendant, was excluded. The following issue was submitted: "Is the defendant indebted to the plaintiff upon this policy?" The court charged the jury that if they believed the evidence they should answer the issue "No." Plaintiff excepted. The jury answered the issue "No." Judgment was entered upon the verdict for the defendant, and the plaintiff appealed.

C. D. Bennett and Clarkson & Duls for plaintiff.
Tillett & Guthrie for defendant.

WALKER, J. The validity of the provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrance, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances. "When a person's interests in a property are qualified or complicated, the motive to care for and protect it is weakened; and, following the principle that in a large majority of cases governs conduct, we may expect to find indifference and often neglect where interested vigilance is required to secure safety. When a person insures property where the title is in dispute, or if it be heavily encumbered, there will sometimes exist a dangerous temptation to withhold protection to such a degree as to invite accident, and this may frequently be done without a conscious intent of wrongdoing on the
(238) part of the insured. This fact is always recognized by insurance

companies; and as the success of their undertakings is not based on the exceptional, but the general, principles of business morality, their purpose is to fix relations under the contract that will create no motive on the part of the insured for the commission of crime. It will be found, therefore, that policies generally provide that when the property becomes encumbered, or any change takes place in title or possession, notice of the fact must be given to the company, and its consent had, or a forfeiture will result." Ostrander on Fire Insurance (2 Ed.), sec. 84; *Alston v. Ins. Co.,* 100 Ga., 287; *Ins. Co. v. Bernstein,* 55 Neb., 260; *Lee v. Ins. Co.,* 79 Iowa, 379; *Brown v. Ins. Co.,* 41 Pa. St., 187. It is wholly a matter of agreement, and, when encumbrances are prohibited by the contract, the question of materiality may be regarded as settled. The very nature of the requirement that consent to an encumbrance must first be obtained in order that the policy may remain in force indicates that it is a matter of the first importance to the insurer, to be informed of any such change in the interest of the insured, as it is something that must necessarily control his assent to the continuance of the insurance. It may be said to be of the very essence of this kind of contract that the company should be appraised promptly of any such diminution of interest in the property insured as will tend to lessen the care and diligence in its protection and preservation which the insured would otherwise bestow upon it. The interest of the insured is frequently diminished exactly in proportion as the encumbrance is increased, and it is this fact, which refers directly to the moral hazard of the risk, that chiefly concerns the insurer, and for this reason a frank disclosure of the condition of the property with reference to liens, encumbrance, and title is generally required as a condition to the payment of the loss. This Court has expressly approved this doctrine and sustained the validity of a similar provision in policies of insurance, and for the very reason we have given. In the recent (239) case of *Hays v. Ins. Co.,* 132 N. C., 702, it was held that the existence of an encumbrance on the property insured is a most material fact, and should be communicated to the company, for if made known it would doubtless prevent a longer assumption of the risk. While it is always the duty of the court to enforce contracts as made by the parties, their judgments will usually be tempered with mercy, and express a just partiality for the right; and hence it is frequently found that they are exceedingly reluctant to give effect to arbitrary provisions that are repugnant to the common sentiments of justice, and especially when to do so will result in forfeitures and the defeat of substantial rights. When a warranty or material representation is the subject of contention, the court will generally limit the inquiry to the fact of

whether a warranty or representation exists. If such is found to be the case, and no waiver has resulted, the court has then a plain duty to perform, and this cannot be changed or influenced by any consideration of the manner in which the interests of the parties may be affected. The reasons for the particular provisions of the contract to be enforced can have no significance except as they may explain the intention of the parties. Ostrander on Fire Insurance, sec. 83. It is not difficult to understand why companies should be cautious about insuring property which has been encumbered, when we consider the obvious reason that the contract of insurance is one which depends largely for its value to the company upon the good faith of the insured and the inducement to the insured by reason of his interest in the property to safeguard it in every possible way. In theory, at least, anything which decreases the interest of the insured in the property correspondingly increases the risk. The company wants to keep the owner's interest on the side of the preservation of the property instead of its destruction, and therefore wants the owner to be part insurer with it. *Ins. Co. v. Bernstein, supra.*

But it is quite sufficient, as we have just seen, to defeat recovery upon the policy for a loss if it provides against encumbrances without (240) the company's consent and this provision is violated. "This Court has uniformly held that where it is expressly provided that the policy upon certain contingencies shall be void, effect will be given to such language." *Gerringer v. Ins. Co.,* 133 N. C., 412. "It will be conceded that, when the motive of the parties does not appear conclusively in the contract itself, the courts will not be justified in going outside to find one; but when it is obvious that the intention of the insurer was to stipulate for that vigilance in the care and protection of the property which can arise only from a substantial, personal interest, the courts cannot, in the performance of their duties, disregard the fact. A distinguished jurist once said: 'The judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties. They will not, therefore cavil about the propriety of words, where the intent of the parties appears, but will rather apply the words to fulfill the intent than to destroy the intent by reason of the insufficiency of the words.'" Ostrander on Fire Insurance, sec. 23. The intent is most clearly manifested here, and as the stipulation is a just and lawful one, it will be enforced according to its plain meaning and so as to carry into execution the reasonable purpose of the parties.

We see no evidence in this case of any waiver of this stipulation by the company or of any consent that the plaintiff might encumber the

property. The polite reply of the company's president and the expression of his regret to the plaintiff that he could not accommodate him, when requested to indorse his note for $300, and his further wishing him "success in his undertaking," cannot, surely, be given that effect. If it bore on its face the evidence of any consent at all—and we do not think it does—it would be restricted to a loan and mortgage on the property of $300, whereas the plaintiff encumbered it to the amount of $867.16. This left him only an actual interest, the value of his (241) equity of redemption, of about $750, whereas the total insurance amounted to $1,000. But the expression in McAden's letters, "wishing you success in your undertaking," would seem to refer, not to his success in securing the loan from some other person, for, as far as appears, he did not contemplate such a course, but to the success of the business in which the plaintiff says, in his letter, he had recently embarked "on his own account." The plaintiff had not even intimated any intention of borrowing money from any other person, and certainly McAden was not required to anticipate that he would do so, and especially that he would place a mortgage upon his property to secure the loan, without first complying with the plain requirement of his policy, which was then in his possession. It has been held that notice of an intention on the part of the policyholder to do something contrary to the terms of the contract will not estop the company, although not objected to by it at the time, because the company has the right to infer that the holder of the policy intends at the proper time to obtain the assent of the company to the act before it is done. Ostrander, *supra,* sec. 350; *Ins. Co. v. Sorsby,* 60 Miss., 302; *Worachek v. Ins. Co.,* 102 Wis., 88; *Goldin v. Ins. Co.,* 46 Minn., 473; *Sowers v. Ins. Co.,* 113 Iowa, 551. Even if there had been a clearly expressed purpose to mortgage the property, of which the company had notice, it must be remembered that a mere unexecuted intention to do an act is not only revocable and subject to any change of mind on the part of the insured, but it may fairly be taken for granted that the insured will proceed according to the terms of the policy in doing the act, as the law does not presume that a wrong will be committed. But we find nothing in the language of McAden which implies an assent to the mortgaging of the property, nor is there any element of an equitable estoppel in the case. The plaintiff has shown nothing which should have led him to act in a way that prejudiced him or to alter his position to his own hurt, and which he (242) can justly attribute to any conduct on the part of the defendant, nor is he entitled upon the evidence to say that he acted in reliance upon anything which has been said or done by the company or its president. If he misconstrued the plain import of what McAden said, it is his

misfortune to have done so, and not any fault of the company of which he can now justly complain or avail himself.

It is argued, though, that the company should have returned or at least tendered the unearned portion of the premium before it could insist upon a forfeiture. The policy expressly provides that the unearned portion of the premium shall be returned on surrender of the policy. This is the contract of the parties, and we are not permitted to change it. There has been no surrender of the policy, but the complaint is drawn and the trial proceeded, upon plaintiff's part, upon the theory that the policy was valid and would not, therefore, be surrendered. The condition precedent to the return of the premium has not been performed, but a refusal to comply with it is to be clearly implied. It has been held in a number of cases that in a case of a breach of condition which invalidates the policy, the company is not bound at its peril, upon notice of such breach, to declare the policy forfeited or to do or say anything to make the forfeiture effectual, and a waiver will not be inferred from mere silence or inaction on its part. It may wait until claim is made under the policy, and then rely on the forfeiture in denial thereof or in defense of a suit brought to enforce payment of it. 6 A. & E. (2 Ed.), 939; *Dowd v. Ins. Co.*, 1 N. Y. Supp., 31; *Ins. Co. v. Brecheisen*, 50 Ohio St., 542; *Harris v. Assn. Society*, 3 Hun., 725; *Flynn v. Ins. Co.*, 78 N. Y., 569; *Ins. Co. v. Hull*, 77 Md., 498; *Todd v. Ins. Co.*, 100 N. W. (Mich.), 442. The principle is distinctly recognized and approved by this Court in *Perry v. Ins. Co.*, 132 N. C., 283. See, also, *Alspaugh v. Ins. Co.*, 121 (243) N. C., 290. In *Hayes v. Ins. Co.*, 132 N. C., 702, it is said:

"When the property was advertised for sale under the mortgage soon after the insurance, this terminated the insurance by the agreement in the policy, and the insured in good faith should have gone at once to the agent of the insurer and applied for cancellation of the policy and the return of a ratable portion of the premium." The language of the Court in *Senor v. Ins. Co.*, 181 Mo., 104, seems to answer this position fully: "From the nature of this contract it falls far short of indicating any surrender of the policy, but the reverse—an earnest effort to enforce it. However, conditions have not yet arisen which would require the defendant to make return of the unearned premium as provided in the contract of insurance." The company is not seeking aggressively to avoid the policy in an action to cancel it, but is only attempting to show it to be void to defeat the plaintiff's action. The defense is asserted to meet the attack of the plaintiff—as a shield and not as a sword. *Dowd v. Ins. Co.*, 1 N. Y., Supp., 31. The return of the unearned part of the premium was not, under the circumstances of this case, a condition precedent to a successful insistence upon the forfeiture, and the plaintiff does not sue

in this action to recover the premium, as we have shown. This objection to the plea of forfeiture is not well taken.

Nor do we think the last position taken by the plaintiff's counsel is tenable. It made no difference whether the plaintiff knew what was in the nonwaiver agreement or not. He signed it, and the law presumes he did know what was in it, and he will not be heard, in the absence of any proof of fraud or mistake, to say that he did not. *Cuthbertson v. Ins. Co.,* 96 N. C., 480. "It will not do for a man to enter into an agreement and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor (244) must stand by the words of his contract, and if he will not read what he signs, he alone is responsible for his omissions." *Upton v. Tribilcock,* 91 U. S., 45. The evidence proposed to be introduced to show what passed between the plaintiff and the defendant's agent, Chisholm, at the time the nonwaiver agreement was signed, did not tend to show any waiver. At the time, Chisholm did not know of the mortgage, nor did the defendant. He discovered its existence when he was investigating the loss with a view of ascertaining the amount, and as soon as it was discovered he insisted that the policy was thereby avoided, and proceeded no further with the adjustment. What was said by Webb manifestly referred to the question of settling the amount of the loss, as he could not then have referred to the mortgage so as to have waived the forfeiture, for he was wholly ignorant of its existence. The court properly excluded all the evidence in regard to what occurred when the nonwaiver agreement was executed. We have carefully examined the entire case, and find

No error.

Cited: *Modlin v. Ins. Co.,* 151 N. C., 41; *McIntosh v. Ins. Co.,* 152 N. C., 53; *Watson v. Ins. Co.,* 159 N. C., 640; *Roper v. Ins. Co.,* 161 N. C., 155, 161; *Cottingham v. Ins. Co.,* 168 N. C., 261.

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HEAVENER v. RAILROAD.

(Filed 1 May, 1906.)

Railroads—No Headlight—Continuing Negligence.

In an action for damages for death of plaintiff's intestate, an instruction that if the jury should find that defendant was running its train through town on a track that was much used by the public, both in crossing and in walking thereon, at a rapid rate, at night, without any headlight or other proper signal, and while so running ran over and killed the intestate; and that if there had been a proper light upon the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and would have escaped, and that plaintiff's intestate did not have such notice or warning, and by reason thereof was injured, then such failure to have the headlight or other proper signal was continuing negligence and the proximate cause of the injury, is correct.

ACTION by John E. Heavener, administrator of Walter L. Heavener, against the North Carolina Railroad Company, heard by *Bryan, J.*, and a jury, at January Term, 1906, of CABARRUS.

Action for personal injury caused by alleged negligence of employees and agents of Southern Railway Company, operating defendant's road under lease from defendant.

There was evidence tending to show that on the night of 6 March, 1904, intestate of plaintiff, while walking along the track of defendant in the town of Concord, was run over and killed by the train of defendant's lessee; that the place of the occurrence was between the Buffalo and Cannon mills, a thickly settled portion of the town of Concord, and the track there was used as a common walkway by the mill hands and others. One witness testified: "The mill people use the railroad track as a common walkway. It is very thickly settled along there and the track is used as a path and walkway. I suppose as much as any street in Concord." Another witness testified that the plaintiff's intestate "and

(246) everybody else in that section used the railroad track in coming and going from the mill and in coming and going from the depot, and nobody ever objected to it." That it was a dark and rainy night and the intestate was going along to his boarding-house "like we always go," and he was run over and killed by the train going north, and that said train had no headlight and gave no signal or warning of any kind. Intestate's antemortem statement, received without objection, was as follows: "I was coming up the track from the depot to my boarding place, like we always go. It was raining hard, and I turned my collar up around my neck to keep from getting wet. The first thing I knew the

train struck me, I did not see any light and it didn't have any light, and did not give any signal. The first thing I knew it had struck me."

There was other testimony as to the absence of light and the failure to give any signal. At the request of the plaintiff the court below gave special instruction to the jury as follows:

"If the jury should find from the evidence, the burden being upon the plaintiff to establish it by the greater weight of the evidence, that the defendant was running its train through the corporate limits of the town of Concord along its track, and that this track whereon the train was running was much used by the public, both in crossing the track and in walking on the track, and if the jury should further find from the evidence that on the night alleged by the plaintiff it was running its train at the place above stated, at a rapid rate, without any headlight or other proper signal, and while so running, ran over and killed the intestate; and if the jury should further find from the evidence that if there had been a proper light upon the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and would have escaped, and that the plaintiff did not have such notice or warning, and by reason thereof was injured, then such failure to have the headlight or other proper (247) signal was what the law calls continuing negligence, and would be the proximate cause of the injury, and the jury should answer the first issue 'Yes' and the second issue 'No.'"

There was verdict and judgment for plaintiff, and defendant excepted and appealed.

James A. Lockhart and Montgomery & Crowell for plaintiff.
W. B. Rodman and George F. Bason for defendant.

PER CURIAM: The principle embodied in the special prayer for instructions is in accord with the decision of this Court in *Stanly v. R. R.*, 120 N. C., 514, and others of like import. These cases are decisive in favor of plaintiff's right to recover on the facts presented in the record, and the Court holds there is no error.

In this charge the intestate was not relieved of all obligation to look and listen by reason of the defendant's breach of duty, as in *Cooper v. R. R.*, 140 N. C., 209, cited and relied upon by the defendant. On the contrary, the prayer for instructions assumes that the plaintiff was required to do both, and rests the right to recover on the fact that the intestate was prevented from noting the approach of the train by reason of the defendant's failure to have a light or give any warning of its approach—this fact to be determined by the jury.

No error.

Cited: *Morrow v. R. R.,* 147 N. C., 627; *Allen v. R. R.,* 149 N. C., 260; *Hammett v. R. R.,* 157 N. C., 324; *Shepherd v. R. R.,* 163 N. C., 520; *Hill v. R. R.,* 166 N. C., 597; *McNeill v. R. R.,* 167 N. C., 399; *Horne v. R. R.,* 170 N. C., 648, 661; *Horton v. R. R.,* 175 N. C., 484.

(248)

MEANS v. URY.

(Filed 1 May, 1906.)

Wills—Marriage—Revocation—Republication.

Under Revisal, sec. 3116, the will of a married woman is revoked by another marriage contracted after the will was made, and her verbal declaration, during the last coverture, that said paper-writing was her last will and testament without any further execution thereof, in accordance with the statute, does not constitute a reëxecution and republication of it.

IN the matter of the will of Cameline Means, heard by *Justice, J.,* upon an issue of *devisavit vel non* at September Term, 1905, of CABARRUS. From a judgment in favor of the caveator, Lafayette Ury, the propounder, Edward Means, appealed.

Adams, Armfield, Jerome & Maness for propounder.
L. T. Hartsell and M. B. Stickley for caveator.

BROWN, J. Cameline Means, while the wife of Ephraim Means, made her will, and some time thereafter, being a widow, married Jason Carr, and during such coverture verbally declared said paper-writing to be her last will and testament without any further execution thereof, in accordance with the statute.

The court below adjudged the paper-writing not to be the last will and testament of Cameline Means, upon the ground that it was revoked by her subsequent marriage, and that her verbal declarations could not constitute a reëxecution and republication of it. We think the ruling sound.

In respect to her capacity to make a will, the *feme covert* stands upon the same footing as the *feme sole.* Her will is revoked by subsequent marriage, as much so as if she were a *feme sole* when she made it, and then married. The right of a married woman to make a will is
(249) guaranteed by the Constitution, but that in no way affects the statute declaring that such a will may be revoked by another marriage contracted after the will was made. Revisal, sec. 3116.

Affirmed.

BROWN v. DURHAM.

(Filed 1 May, 1906.)

Municipal Corporations—Defective Sidewalks—Negligence—Unreasonable Length of Time.

1. In an action to recover damages for personal injuries caused by alleged negligence of the defendant city, an instruction that "It would be a breach of duty on the part of the city for it to permit a hole or washout 1 or more feet wide and 8 inches or more deep, and extending 2 feet or more across the sidewalk, adjacent to and opening into a large hole 5 feet or more deep and 4 feet in diameter just out of the sidewalk, to remain without light and without railing or barriers to protect the same for an unreasonable length of time," is correct.

2. An instruction that if the jury found that "The defendant permitted a washout 1 foot or more wide and 8 inches or more deep, extending halfway or more across the path of one of the most populous sidewalks of a much-used street in the city of Durham, and adjacent to a large hole, such as above described, just outside the sidewalk, to remain without being repaired and without rails or barriers and light to guard such a hole, for the space of ten days, this would be an unreasonable length of time," is correct.

3. The test determining when negligence may be defined by the judge as a question of law is where there can be no two opinions on the question among men of fair minds.

ACTION by R. J. Brown against the city of Durham, heard by *Shaw, J.*, and a jury, at October Term, 1905, of DURHAM.

This was an action to recover damages for personal injuries (250) caused by the alleged negligence of defendant corporation. The usual issues in actions of this character were submitted: (1) As to defendant's negligence. (2) Contributory negligence on the part of the plaintiff. (3) Damages.

There was evidence tending to show that on Saturday night, 30 July, 1904, the plaintiff was seriously injured by falling into a hole adjacent to the south sidewalk of Peabody Street. The street was much used by the public. It extended from the residence of J. S. Carr to Union Station, ran parallel with Main Street and was the only street between Main Street and the North Carolina Railroad. The plaintiff was going from Durham to his home in East Durham. He stepped into a washout extending across the sidewalk and fell into the hole. It was about 5 feet or more in depth, 6 to 10 feet wide at the top, and adjacent to the sidewalk. At the bottom of the hole were a stump, roots and rocks. It had been there nine years or more, and was made more dangerous by the city when it raised, graded, and macadamized Peabody Street, two years or

more before the date of the plaintiff's injury. The edge of it next to the sidewalk was perpendicular, the sidewalk having been built up with masonry at that point. There were no rails, guards, or other barriers to prevent those using the street from falling into this dangerous hole, and none had ever been there. There was no light placed at the hole to warn travelers, and the nearest street light (the only one giving any light at that point) was located 110 yards away on Main Street on the "off" side from the hole and up-grade. For some time before the date of the injury, from ten days to two weeks, a washout, caused by the overflow of water across the sidewalk at that point, had been widening and deepening—being about 1 inch deep next to the curbstone and 12 inches or more at the edge of the deep hole.

The plaintiffs' own testimony as to the occurrence and condition is as follows: "I have lived at Durham for nearly fifteen years; (251) was injured Saturday, 30 July, 1904, between 8 and 9 o'clock p. m.; was injured near the old freight depot on the south side of Peabody Street, opposite to where Queen Street enters the same; was on the side next to the depot, going from the city of Durham to my home. There was a sidewalk on the south side of the street. I stepped into the washout across the sidewalk and fell down, and it threw me into a deep hole to the right or south of the sidewalk; the deep hole was close to the sidewalk; did not see the washout before I stepped into it; did not know it was there; was walking on the sidewalk in the usual way; the washout seemed to be about 1 or 1½ feet deep; do not know which foot I stepped with into the hole; stepping into the hole not expecting it, it threw me on my right side on the ground and gave me a kind of a whirl and I went into the deep hole, which had trash, stumps, roots, and some water and rocks in it; it was 6 or 7 feet deep. I think I fell to the bottom of it; fell in the hole in doubled-up condition; no one was with me at the time; there was nothing there to protect me from the hole; it was 4 or 5 feet wide; had never noticed it before; there were some weeds or bushes growing in it when I fell; there was no light there; could not see any light except when I went up at the street car line on Main Street; this would not light hole."

There was evidence on the part of the defendant tending to show that the defendant had no actual notice of the washout across the sidewalk, and that there was light enough at the time, noticed and spoken of by the witnesses, from the electric lights supplied by the defendant for the streets, to enable one to see and observe the conditions at the place of the injury. Verdict and judgment for the plaintiff. The defendant excepted and appealed.

Winston & Bryant for plaintiff.
Manning & Foushee and R. B. Boone for defendant.

HOKE, J., after stating the case: The right of the plaintiff (252) to recover on the facts set out in the case on appeal is fully sustained by the principles announced in *Bunch v. Edenton,* 90 N. C., 431, and *Fitzgerald v. Concord,* 140 N. C., 110, and there is no error in the record—certainly none which gives the defendant any just ground of complaint.

Among other things, the judge below charged the jury that it would be a breach of duty on the part of the city for it to permit a hole or washout 1 or more feet wide and 8 inches or more deep, and extending 2 feet or more across the sidewalk, adjacent to and opening into a large hole 5 feet or more deep and 4 feet in diameter just out of the sidewalk, to remain without light and without railing or barriers to protect the same for an unreasonable length of time. And his Honor further charged: "If you find from the greater weight of evidence that the defendant permitted a washout 1 foot or more wide and 8 inches or more deep, extending halfway or more across the path of one of the most populous sidewalks of a much-used street in the city of Durham and adjacent to a large hole, such as above described, just outside the sidewalk, to remain without being repaired and without rails or barriers and light to guard such a hole, for the space of ten days, this would be an unreasonable length of time."

The second portion of the charge is especially urged for error in that the judge held ten days to be an unreasonable length of time, as a matter of law. We think the charge was clearly correct. There was evidence tending to prove the facts suggested, and, if proved, they are not only sufficient to fix the defendant with notice, but they make out such a clear case of negligence that there could be no two opinions on the question among men of fair minds, and this is the test established by decisions on trials of this character, determining when negligence may be defined by the judge as a question of law. *Russell v. R. R.,* (253) 118 N. C., 1098; *Ramsbottom v. R. R.,* 138 N. C., 38.

There was evidence on the part of the defendant that the street lights provided by the town, while some distance away, at times noticed by the witnesses and generally, gave light enough to have enabled the plaintiff to note the condition of the sidewalk. The plaintiff himself testified, however, that there was nothing to protect him from the hole; that he had never noticed it before and that there was no light there; he could not see any light except when he got up to Main Street on the street car

line. In this conflict of testimony the question as to the effect of the plaintiff's conduct was properly left to the jury under a correct charge on the issue as to contributory negligence.

There is no error, and the judgment below is

Affirmed.

Cited: White v. New Bern, 146 N. C., 451; *Bailey v. Winston,* 157 N. C., 259; *Foster v. Tryon,* 169 N. C., 183; *Sehorn v. Charlotte,* 171 N. C., 541.

STEWART v. RAILROAD.

(Filed 1 May, 1906.)

Railroads—Rules—Experts—Evidence—Time-tables — Train Sheets — Collisions—Presumption of Negligence—Contributory Negligence— "Block System"—Telegraph Stations—Train Crew—Questions for Jury—Appliances—Proximate Cause—Burden of Proof.

1. In an action for death of an engineer the court properly excluded expert testimony as to the construction, application, and effect of the rules prescribed by the defendant for the government of engineers in the operation of trains, as there was nothing in the rules requiring or justifying resort to expert evidence in regard to the meaning of the language.

2. There was no error in excluding a question asked an expert as to whether plaintiff's intestate's engine was running solely by telegraphic orders, as it was the duty of the court to declare the law in regard to plaintiff's intestate's duties upon a construction of the rules and orders.

3. In an action for death of an engineer in a collision, defendant's time-table and train sheets of the day on which the collision occurred were competent to show the movement of trains on that day.

4. When testimony objected to was competent to show the movement of trains on the day of the collision if defendant desired to have the jury restricted in their consideration of it to that particular phase of the case a request to that effect should have been made.

5. The testimony of a witness found by the court to be an expert in the management running and equipment of trains as to what constituted a train crew generally and as to what was a proper train crew for light engines, and that an engine should not be sent out without a conductor, was competent.

6. There is a presumption of negligence arising out of proof of a collision in the daytime.

7. While railroad companies may make reasonable rules for the government of their employees, and it is the duty of the employees to obey such rules, and their failure to do so is evidence of contributory negligence, yet the ultimate standard of duty is fixed by the law and not the rules, and the rules do not absolve the company from all duty to care for the safety of their employees.

8. When the defendant's train dispatcher sent plaintiff's intestate out on an extra with no conductor, to move over a road on which he must meet four trains, all but one of which were running "off time," and that one so running until it reached a certain station, it was its duty, measured by the standard of a prudent man, to keep a lookout for his safety and keep him advised of the movement of approaching trains.

9. In an action for death of an engineer in a collision, there was no error in modifying defendant's special instruction, "That if the jury shall find from the evidence that the system of moving trains on the defendant's road at the time of this injury was reasonably safe and one in general use on railroads in the United States, then the defendant has not been guilty of negligence in this respect, and the jury will answer the first issue 'No,' " by adding, "unless the jury shall further find that the block system was a safer system and was in general use upon railroads of the United States of like character in respect of construction and the amount of traffic as the defendant."

10. It is the duty of a railroad company to establish only such telegraph stations along its line as are necessary for the proper running of its trains, with regard for the safety of its employees and passengers.

11. In an action for death of an engineer in a collision, there was no error in modifying defendant's special instruction, "If the jury found that the rules of the defendant company permitted the running of an engine and tender with a crew of only an engineer and fireman, and such were the standard rules of the American Association of Railways, the defendant was not guilty of negligence in that respect," by adding, "and that the running of an engine with such crew on such a trip as this one was reasonably safe," etc.

12. Where, in an action for death of an engineer in a collision, witnesses testified that the block system tended to give one train exclusive use of the track between certain points, that it induced to safety and economy, and was an additional safeguard, etc., and there was evidence as to the extent of the use of the system, the court correctly refused to charge the jury "That upon all of the evidence it was not negligence to fail to use the Block system," and properly submitted the question to the jury.

13. There was no error in modifying defendant's special instruction. "If the jury found the system of signals and rules for the operation of its trains in use by defendant were the same in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system," etc., by adding, "unless they shall find that such system is safer or 'most approved and in general use' in the United States by railroads of like condition as the defendant."

14. An instruction that "If plaintiff's intestate saw the witness, or by the exercise of ordinary care could have seen him wave his hat, it was his duty to have stopped his engine; and if such violation was the proximate cause of the injury the jury would answer the second issue 'Yes,'" is correct.

15. In an action for death of an engineer in a collision, the burden as to the issue of contributory negligence was on the defendant to remove the presumption that deceased exercised due care for his own safety.

ACTION by Mary A. Stewart, administratrix of S. T. Stewart, against the Raleigh and Augusta and Seaboard Air Line Railway Com-
(256) panies, heard by *Cooke, J.*, and a jury, at October Term, 1905, of WAKE.

Action by plaintiff to recover damages for the death of her intestate by reason of alleged negligence of defendant. There was evidence tending to show that plaintiff's intestate was, on 23 June, 1903, in the employment of defendant as locomotive engineer; had run train No. 6 on the main line; he was given a copy of defendant's book of rules and stood an examination as required by the company, which was put in evidence. At 5:57 o'clock a. m. of 23 June, 1903, he received a telegraphic order from the proper authority in the following words: To conductor and engineman of engine 200: Engine 200 will run extra Johnston Street to Aberdeen, speed 20 miles per hour. A. W. T."

He left Johnston Street Station at 6:10 a. m. on engine No. 200, tender attached, with fireman, traveling southward. Defendant on that day was operating over its road between Raleigh and Hamlet, including Aberdeen, moving northward, the following trains, to wit: No. 66, a first-class train, schedule time leaving Hamlet 8:55 a. m. and Southern Pines 9:45, *there to pass No. 6, a third-class local freight;* Manly 9:48, Vass 9:58. No. 38, first-class mail, leaving Hamlet 7:50, Southern Pines 8:45, Vass 9:04, Cameron 9:14. No. 8, a second-class vegetable express, leaving Hamlet 7:00, Aberdeen 8:15; *there to pass No. 6,* Southern Pines, 8:25, Vass 8:45. No. 6, a third-class local freight, leaving Hamlet 6:10, arriving Aberdeen 8:15, leaving Aberdeen 9:10, *and is passed there by No. 8 and 38,* Southern Pines 9:45, *and is passed there by No. 66;* Manly 10:05, Vass 10:25. The foregoing is the schedule put in evidence for the several trains moving northward between Raleigh and Hamlet, between 6:10 and 12 m. All of these trains were regular, run by time-table and known by number. No. 200 was an extra, run by telegraphic orders (record, pp. 17, 18). At Sanford the engineer on No. 200 received at 8:33 a. m. the following order: "To engineman and conductor, extra 200, south: No. 8, engine 659, will wait at Vass until 10 a. m. for extra 200, south"; also, "No. 66, engine un-
(257) known, will run 40 minutes late, Hamlet to Sanford, and 30 min-

utes late, Sanford to Johnston Street." No other orders were given No. 200. Time-table 23 June, 1903, was introduced by defendant and showed the movement of trains. "Extra 200 left Johnston Street station 6:10 a. m., arrived at Sanford 8:33, Cameron 9:10, left 9:21, arrived at Vass 9:38, left 10:02." No. 6 left Hamlet 7 a. m., arrived at Aberdeen 8:18, left 9:33, arrived Southern Pines 9:47, left at 10.

No. 8 left Southern Pines 9:42, arrived at Vass 9:59 and passed extra 200. The conductor of No. 6 received at Aberdeen the order in regard to moving of No. 66—same as received by No. 200. No meeting place was made for No. 6 and No. 200 extra.

F. W. Taylor, defendant's operator at Vass, testified that Stewart, the plaintiff's intestate, came into his office and asked if he could not get more time on No. 8; that he wired dispatcher asking for more time on No. 8 for 200 extra; he answered that No. 8 would be there in a few minutes and that it passed Vass at 9:59. As Stewart was going out of the door of his office, the witness asked him how much time he had on No. 66, and he replied that he had 40 minutes on 66, and was going to try to make Southern Pines. The witness did not remember that anything was said about No. 6. He left at 10:02. The witness reported to train dispatcher, who wired him to go out and see if Stewart was gone, and he had gone. The witness reported to dispatcher, who told him to try to get Niagara or Manly over the telephone, which he did, but failed. There was a private telephone at both places. The witness was unaware of the movement of trains, except what Stewart told him. He put out white board of semaphore when Stewart left Vass, which (258) signifies safety and is a signal to go on.

C. W. Jones, the defendant's operator at Southern Pines, testified that No. 6 left there at 10 a. m. and that he reported at 10:02 to train dispatcher at Raleigh, who immediately asked him to stop it; he tried by use of telephone, but could not do so; he had no orders for No. 6.

No. 8 ran one hour late from Hamlet to Cameron. This was communicated to No. 6. Stewart was given a clearance card at Sanford.

Page, the conductor on No. 6, testified that he arrived at Southern Pines at 9:47 and left at 10 o'clock, passed Manly at 10:06, and at 10:12 collided on the curve with No. 200 extra, when Stewart was killed. The witness had orders that No. 66 would run 40 minutes late; had no orders in regard to extra No. 200. Manly is 6.7 miles south of Vass, Southern Pines 1.5 miles south of Manly, making 8.02. There is no telegraph office at Manly—a siding there. Niagara is a siding, being near Southern Pines, having no telegraph office. No. 200 had no conductor or flagman. It was going to Aberdeen to be used as a shifting engine. By the rules, "extras are distinguished as passenger extras, freight extras, and

working-train extras." Defendant was operating over the road from Norlina to Hamlet, on 23 June, 1903, fifteen trains during the twenty-four hours, including extra No. 200. Defendant did not maintain the block system in the operation of its trains. Telegraph offices were maintained at an average distance of 6 miles between Hamlet and Raleigh. The rules, 382, 383, provide that all extra trains are of inferior class to all regular trains of whatever class. A train of inferior class must in all cases keep out of the way of a train of superior class. Defendant introduced a large number of rules, not necessary to set forth at this point. It introduced the depositions of six witnesses, being general managers and superintendents, in regard to the use of the block system by their own and other roads and systems of railroads in this coun-
(259) try. The general import of this testimony tended to show that the block system was in use on roads having a very heavy traffic, and when two or more very fast passenger trains are moving within short distances of each other, but that they do not consider it necessary for the protection of trains on single-track roads when the number of trains was not large. Several of the witnesses thought about 15 to 20 per cent of the mileage of railroads used the block system. They agreed in the opinion that it tended to minimize the danger to operatives of roads using a single track and which is much crowded with traffic, and that it was an additional safeguard.

Defendant introduced George Lutterloh, who testified that on the day of the collision he was at work in his field near the track. That he saw two trains coming from opposite directions; knew there was no siding near Niagara and knew they would run together. Ran to the track; No. 200 was coming round the curve; he went upon the track about 250 yards ahead of train. That engineer blew whistle as he came through the cut. Witness waved a large straw hat across the track; engineer was hanging his head out of the window, did not slack up, had plenty of time to do so after witness waved hat. Saw the fireman looking at him and saw the collision. Witness thinks the engineer saw him, because he blew the whistle. Stewart was running fast. Plaintiff introduced Mr. B. R. Lacy, who qualified himself as an expert locomotive engineer, and testified: "A train crew ought to consist of an engineer, a fireman, a conductor, and a flagman; but it depends entirely upon how many cars, as to how many brakemen you want. I do not think an engine ought to be sent out without a conductor. A light engine ought to have an engineer and a fireman and a conductor. I think there was a great deal more risk in trusting one man with one watch than in trusting two men with two watches. I cannot tell you the degree, but if two men
(260) are intrusted with an engine, both watching the schedule and

both with watches that have been examined by your examiner, there is very much less danger than intrusting the train with one man to look after the engine, to look at the schedule and his watch also. I am familiar with the rules under which the Seaboard runs. Under these rules it is not possible to have a head-on collision without somebody violating some of them. If there had been a conductor on extra No. 200 he would never have let engineer leave the station. You have never heard of a head-on collision with a conductor and engineer on such a train. Know the curve on which the collision occurred. It was so that the engineer had to get almost on it before he could see the other train. According to Lutterloh's testimony, the curve would appear on the fireman's side of the engine."

Plaintiff alleged that the defendant was negligent in the following particulars: "(*a*) In that defendant sent intestate upon the said trip without furnishing a conductor and flagman for the said engine and tender which he was driving. (*b*) In that defendant failed to arrange a meeting place for extra 200, the train which plaintiff's intestate was operating, and train No. 6, which was moving in an opposite direction. (*c*) In that defendant's operator and agent at Vass failed to promptly notify the train dispatcher at Raleigh of the arrival at and contemplated departure of extra 200 from Vass. (*e*) In that defendant's agent and operator at Southern Pines failed to notify the defendant's train dispatcher at Raleigh of the arrival of No. 6 at Southern Pines and the departure of said No. 6 from said station. (*f*) In that defendant permitted extra 200 to leave Vass and No. 6 to leave Southern Pines without giving to the crew of either train any knowledge of the movements of the other, when said trains were moving in the opposite direction and at a time when said defendant should have known that said trains would collide. (*g*) In that the crew of No. 6 violated rule (261) 309 of said defendant in leaving Southern Pines in less than 20 minutes after another train, No. 8, moving in the same direction, had left said station. (*h*) In that the crew of No. 6 violated rule No. 405 of said defendant in leaving Southern Pines before the arrival and departure of No. 66, a passenger train which was delayed 40 minutes and was moving in the same direction. (*i*) In that defendant failed to have and maintain telegraph offices and operators for the government of their trains and in the management and protection thereof at Manly, Niagara, and Lake View stations on the said road. (*j*) In that defendant did not deliver unto the said Stewart and the persons having charge of the said northbound train, which collided with said Stewart's engine, full, perfect, and proper orders to govern the running of said engine and northbound train No. 6. (*l*) In that while that portion of defendant's line

of railroad upon which said collision occurred was much used and was congested with the traffic of very many trains, defendant neglected and failed to adopt and use in operation of said train said Stewart was operating, and the train with which he collided and of its other trains, that system of signals, telegraphic, electric and mechanical devices, services or operatives, rules and regulations, commonly known as the 'block system,' which was at said time in general use, and was a necessary and proper safeguard and protection of the safety of the operatives of the defendant's trains."

Defendant denied that it was negligent in either respect, and alleged that plaintiff's intestate was guilty of contributory negligence in that he violated the orders of the company, failed to observe the signals that were given to him, and failed to stop when signaled by Lutterloh, and was guilty of contributory negligence in other respects. The specific exceptions and assignments are set out in the opinion, together with such portions of the judge's charge as are excepted to. There was a verdict for the plaintiff upon all of the issues. Motion for new trial denied.
(262) Judgment and appeal.

W. C. Douglass, Busbee & Busbee, and R. N. Simms for plaintiff.

Pou & Fuller, Womack, Hayes & Pace, and Murray Allen for defendant.

CONNOR, J., after stating the case: It will be well to dispose of certain exceptions pointed to his Honor's ruling upon objections to the admissibility of testimony before proceeding to discuss the instructions given to the jury and the refusal to give several of those asked. These exceptions are grouped in defendant's brief because, as said, they present practically the same questions of law.

A number of rules prescribed by the company for the government of engineers in the operation of trains were introduced by defendant. It was shown that they were contained in a book, a copy of which was delivered to and in the possession of plaintiff's intestate. After qualifying Mr. Lane, chief train dispatcher, as an expert in the knowledge of the rules of the company relating to the management of trains, he was asked to explain the effect of various rules, to designate which rules were applicable to an existing state of facts and to state the duty of an employee under these rules upon certain hypothetical facts. This class of testimony was, upon objection of plaintiff, excluded, for that the rules being in writing, their construction, application, and effect were for the court. The learned counsel for defendant concede that his Honor's ruling is based upon a correct principle, but insist that there were a number of

terms and expressions used in the rules which have a peculiar and restricted meaning known to and understood only by those who operate trains. They do not cite any authorities to aid us in the decision of the question. It is well settled that where terms of art or language peculiar to certain trades, business, etc., are used in writings, (263) parol evidence may be introduced to show how, among persons engaged in such trade, etc., such terms are understood, to aid the court in interpreting the instrument. 1 Greenleaf Ev., 280. When this is done and technical terms, abbreviations, etc., are explained, it becomes the duty of the court to interpret the instrument in the light of such testimony. In doing so, it may not call to its aid expert testimony. 1 Greenleaf Ev., 277. We find nothing in the rules requiring or justifying resort to expert evidence in regard to the meaning of the language used. While there are a large number of rules and, to one not familiar with the operation of trains, not so clear as might be desired, we see no reason why they may not be interpreted by giving to the language used its ordinary meaning and significance. The question was so decided in *R. R. v. Stoelke,* 104 Ill., 201, in which it was said: "The law and not the rules of the company define negligence. In the next place, it was asking the witness to construe the rule, which was not within the domain of verbal evidence." Treating the rules as a part of the contract of service made by defendant with plaintiff's intestate, it is clear that, being in writing or, what is the same thing, print, their construction is for the court.

Exception 7. Defendant proposed to ask Mr. Lane whether extra No. 200 was running solely by telegraphic orders. The question was, upon objection, excluded, and defendant excepted. Mr. Lane testified that regular trains were run on schedules, and extras on telegraphic orders. The orders which plaintiff's intestate received on 23 June, 1903, were put in evidence by defendant, and its witness, through whom the orders came, testified that no other orders were given him. He met and passed No. 38 at Cameron without orders. Defendant contended that Stewart was bound, in the movement of his train, by the rules which were put in evidence, and that the special order did not in any way modify (264) or abrogate such rules. We were of the opinion on the former appeal (137 N. C., 687) that as a conclusion of law, in the light of the rules, No. 200 was running solely by telegraphic orders. It was competent and defendant was permitted to introduce all orders and rules of which Stewart had notice. It became the duty of the court to declare the law in regard to Stewart's duties and rights upon a construction of such rules and orders. Mr. Lane could not aid the court in that respect. He could not give his opinion, but only state facts, which he was permitted to do. There was no contradictory testimony in regard to the

orders and rules. We concur with defendant's counsel that the special orders to Stewart did not abrogate the rules. The question is, What was his duty in the light of the order and the rules? We shall discuss this question when we reach the exceptions to his Honor's instructions to the jury. The exception cannot be sustained. We have examined exceptions Nos. 17, 18, and 19, and do not find any harmful error, if error at all. There was no suggestion that the rules were unreasonable, and his Honor, in his charge, treated them as binding upon plaintiff's intestate, constituting the measure and standard of his duty in operating his train.

In regard to exceptions 26 and 27, it is sufficient to say that the time-table and train sheets of 23 June were put in evidence, showing when No. 6 and No. 8 left Aberdeen. The testimony objected to was competent to show the movement of trains on the day of the collision. If defendant desired to have the jury restricted in their consideration of it to some particular phase of the case, a request to that effect should have been made. The same is true in regard to exception 30. Exceptions 28 and 29 are abandoned in the brief. Exceptions 31 to 34, inclusive, refer to the admission of testimony of Lacy, who was found by the court to be an expert as to the management, running, and equipment of trains. (265) He was asked as to what constituted a train crew generally, also as to what was a proper train crew for light engines, and testified that an engine should not be sent out without a conductor. To the questions and answers the defendant excepted, insisting that the testimony was not within the rule admitting opinion evidence. "An experienced railroad man, who has made a business of the running and management of railroads, is as fairly an expert as one skilled in any other art, and he may give testimony as an expert in questions of railroad management. The running and management of railways is so far an art, out of the experience and knowledge of ordinary persons, as to render the opinion of ordinary persons skilled therein admissible in evidence." Rogers Ex. Test., sec. 104, where cases are cited illustrating the extent to which this class of testimony has been received. Lawson Ex. Ev., rule 22, and illustrations. In *Ogden v. Parsons,* 23 How., 167, it is said: "What was a full cargo for the ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment in such matters."

In *McRary v. Turk,* 29 Ala., 244, *Rice, C. J.,* said: "Upon such a question as the sufficientcy of the number of the officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons having an opportunity of personal observa-

tion and of forming a correct opinion and testifying to the facts derived from that observation, is admissible. The effect of admitting such opinion, as evidence, is not to submit to the decision of the witness a point which the jury alone can try, but merely to assist them in judging of a question of common sense as well as science, with which the witness may reasonably be supposed, on account of his superior opportunities for becoming acquainted with it and forming a correct judgment, to have been more competent to judge than they themselves." The opinion of a machinist that machinery was unsafe was admitted in (266) *R. R. v. Shannon,* 43 Ill., 338. The decisions in which the general principle is applied are not uniform. We are of the opinion that the weight of authority and the reason of the thing sustain his Honor's ruling. 12 A. & E. (2 Ed.), 436. The order upon which plaintiff's intestate operated the engine was directed to "Conductor and engineman" —as was also the order in regard to meeting No. 8 at Vass.

Defendant's counsel requested his Honor to instruct the jury that if they found all of the evidence to be true, to answer the first issue "No," and to the refusal to do so excepted. This exception presents defendant's contention in regard to the several allegations of negligence. If there was evidence fit to be considered by the jury tending to sustain any one of the allegations, it is conceded that his Honor could not have properly given the instruction. The controversy in this aspect of the case is narrowed to the duty which defendant owed to Stewart, in the light of the conditions shown to have existed on 23 June, 1903. There was a presumption of negligence arising out of the proof of a collision in the daytime. *Wright v. R. R.,* 127 N. C., 229; *Stewart v. R. R.,* 137 N. C., 687, in which *Clark, C. J., said*: "If there were facts consistent with the absence of negligence on the part of the defendant, still there would be a conflict with the presumption of negligence," citing *Coffin v. U. S.,* 156 U. S., 459. His Honor could not, therefore, have instructed the jury as requested unless the uncontradicted evidence was sufficient as matter of law to rebut the presumption. The train dispatcher knew when Stewart reached Vass that No. 66 was running 40 minutes late, that the schedule required that No. 66, a first-class train, should pass No. 6, a third-class train, at Southern Pines. The dispatcher further knew that Stewart, when he reached Vass, wanted "more time on No. 8," which he had orders to pass there. It will be noted that Stewart's order (267) stated that No. 8 would wait until 10 o'clock for his train. When he arrived there at 9:38, No. 8 was not there. The dispatcher knew that No. 6 was at Southern Pines at 9:47. He wired operator at Vass that No. 8 would soon be there. It was due at Vass on schedule at 8:45, and was therefore running more than an hour late. In this condition

of the trains we look for some rule by which No. 6 should have been governed. Was it to wait at Southern Pines until No. 66 had passed, or to go on its schedule? The defendant says that it should have proceeded on its schedule. The only rule which seems to throw light upon the question is 405, which is as follows: "A train starting from its initial station on each division, or leaving a junction, when a train of the same class running in the same direction is overdue, will proceed on its own time and rights and the overdue train will run as provided in rule 388 or 389." Rule 388 directs that passenger trains following each other must keep not less than 10 minutes apart. Rule 389 directs that freight trains must keep 10 minutes apart. Whether rule 405 applies in other respects, it certainly does as controlling No. 6 in the conditions existing when it reached Southern Pines. It was a third-class freight, while No. 66 was a first-class train. Mr. Lane, one of defendant's witnesses, says that it was the duty of No. 6 to proceed on its schedule from Southern Pines, and his Honor so charged the jury in special instruction No. 21. But plaintiff says that defendant was guilty of negligence for that, when Stewart asked the train dispatcher at Vass for more time on No. 8, it put him on notice that he intended to proceed from Vass immediately upon the arrival of No. 8, and knowing that No. 6 would proceed on its own time, and if Stewart left Vass at the same time a collision would occur, he should have notified Stewart to remain at Vass.

While it is true that railroad companies may make reasonable rules for the government of their employees, and that it is the duty of (268) the employees to obey such rules, and their failure to do so is evidence of contributory negligence, it is equally true that the ultimate standard of duty is fixed by the law, and not the rules; that the rules do not absolve the company from all duty to care for the safety of their employees. Independent of the statute of 1897, abolishing all assumption of risk by employees of railroads, no assumption of risk against defendant's negligence would be recognized. When the defendant's train dispatcher sent Stewart out on an extra, with no conductor, to move over a road on which he must meet four trains, all but one of which were running "off time," and that one so running until it reached Southern Pines, it was its duty, measured by the standard of a prudent man, to keep a lookout for his safety, keep him advised of the movement of approaching trains. The measure of this duty was increased when the dispatcher learned that, having obeyed instructions to Vass, in the absence of any further orders, he intended moving from there immediately after No. 8 passed, and that, we think, was the reasonable construction of his request for "more time on No. 8." It was certainly a question for the jury to decide whether with this information before him the dis-

patcher should not have immediately notified Stewart that No. 6 was on time and leaving Southern Pines. While he may, in the absence of any suggestion to the contrary, have reasonably relied upon Stewart's knowledge of the rules and schedules, yet when notified that for some reason Stewart was going forward, it seems to us that it is a reasonable requirement that he should have warned him of his danger. His failure to do so was at least evidence of negligence, and proper to be considered by the jury.

His Honor, at the request of the defendant, in the light of Lane's testimony, instructed the jury that the order in regard to No. 66 "enabled No. 6 to proceed from Southern Pines ahead of No. 66." This was Lane's construction of the rules, and in the absence of any other evidence, accepted by his Honor. The plaintiff excepted to the (269) evidence. This, of course, goes for nothing, as the plaintiff does not appeal. After answering the question, Lane proceeds to give an illustration of the practical operation of the rule. He says that the order received by Stewart that No. 66 would run 40 minutes late "makes the schedule time of the trains named between the points mentioned as much later as the time stated in the order, and every other train receiving the order is required to run with respect to this later time, the same as before required to run with respect to this later time, as can be easily added to the schedule time; that the order 40 minutes late could be added to the schedule time." On page 159, Rule Book, we find this identical language used by way of illustration. We also find in the same connection, "No. 41, engine 228, waits for train at Moncure until 10 a. m. for No. 6, engine 549." "The train of inferior right is required to run with respect to the time specified, the same as before required to run with respect to the regular schedule time of the train of superior right." This language, as well as the reason of the thing, appears to us to mean that the schedule of No. 66 was fixed by the order to arrive at Southern Pines at 10:25, being 40 minutes added to the regular schedule, 9:45. That this change in the schedule of No. 66 operated to make a like change in that of No. 6, thereby causing the regular schedule of both trains to correspond, and leaving Southern Pines as the passing point as fixed in the time-table. This is certainly the practical operation of the rule requiring any other train receiving the order to run with respect to this later time. Construed otherwise, No. 6 has no passing point with No. 66, and in the absence of any other orders, it is to feel its way along the road without any knowledge whatever in regard to No. 200 extra. It is manifest that the construction which we have indicated was put upon the rule by Stewart and Taylor, the operator at Vass. There is no other explanation of their language and conduct. Taylor says: "Just as he was

(270) going out of the door, I turned around and didn't even get out of my seat, and asked him how much time he had on No. 66 and he replied back to me from the door, that he had 40 minutes on 66 and he was going to try to make Southern Pines. This was the last word he spoke to me." It is impossible to understand this language otherwise than by putting the construction upon it that they both understood that No. 66 was the controlling train, and that its schedule made the schedule of No. 6 at Southern Pines. No. 66 was a first-class train; No. 6 a third-class local freight. To say that both these men knew that No. 6 was leaving Southern Pines at the same time that Stewart was leaving Vass, is to conclude that they were insane or demented. That they were neither is conceded. With 40 minutes on No. 66, Stewart had 25 minutes to make Southern Pines, a distance of 8 miles. We think it manifest that such was his understanding, and we further think that, if he had read the example and illustration in his book of rules (p. 159) he would have reasonably come to that conclusion. It is in this case a significant fact, shown by the defendant's evidence, that while other trains were notified of conditions between Vass and Southern Pines, No. 6 had no notice that No. 200 extra was out, and No. 200 had no notice of the movement of No. 6. It is equally manifest that the failure to advise them was the cause of the collision. As we have said, this condition was permitted to continue after the operator at Vass knew Stewart was leaving on what is claimed to be the time of No. 6, and the dispatcher had knowledge of conditions which put him upon notice. The train sheet introduced shows that he had notice of the arrival and departure at each station of every train. There was other evidence, the testimony of Lacy in regard to the crew and that of witnesses in regard to the block system, which we will discuss in connection with the charge.

The defendant asked his Honor to instruct the jury that if they believed the entire evidence, the plaintiff's intestate was guilty of
(271) contributory negligence. To the refusal to give this instruction, the defendant excepted. The burden of proof on this issue was upon the defendant, and it is conceded that the court could not direct an affirmative finding, unless the evidence relied upon to sustain it is uncontradicted, and so clear that but one reasonable inference could be drawn from it. There was undoubtedly evidence tending to show negligence on the part of the plaintiff's intestate, unless he was running solely on telegraphic orders, and then it would seem that he should have asked for orders at Vass before proceeding. It would seem, however, that, taking that view of the evidence, he may have reasonably relied upon the conduct of the defendant's dispatcher in regard to his request for time on No. 8. The defendant further says that he was guilty of

contributory negligence in not stopping when signaled by Lutterloh. The prayer in this respect assumes that he saw Lutterloh, and in defiance of his signal drove forward to his death. We do not think his Honor could have so found as a fact; it was a question for the jury. His Honor gave at the request of the defendant the following instructions in regard to contributory negligence:

"If the jury shall find from the evidence that though there might have been a safer way of operating the defendant's trains, but that notwithstanding this fact, if plaintiff's intestate had followed the rules of the company he would have been safe, and that his neglect in violating the rules, which if followed would have been safe to him, was a proximate cause of his death, then the intestate was guilty of contributory negligence, and you will answer the second issue 'Yes.'

"If the jury shall find from the evidence that the intestate was running an extra train under an order limiting his speed to 20 miles an hour, and that he ran his engine from Vass to the point of the accident at a greater speed than 20 miles an hour, and that this (272) was the proximate cause of his death, and that had he confined himself to the speed named in the order the meeting of the trains would have taken place on a straight track under such circumstances that the collision might have been avoided, then the intestate was guilty of contributory negligence, and the jury will answer the second issue 'Yes.'

"29. If the jury shall find from the evidence that the witness, George Lutterloh, was in a position to see that a collision was imminent, and endeavored to stop the intestate in time to avert the same, and that the intestate saw him or could have seen him by the exercise of ordinary care, and disregarded his efforts and continued to run the engine, thereby immediately and directly bringing about the collision, which he might have averted had he heeded the warning, he was guilty of contributory negligence, and the jury will answer the second issue 'Yes.'

"31. If the jury shall find from the evidence that the intestate was running an extra train from Johnston Street to Aberdeen, and that he had had no orders against No. 6, and that No. 6 was a regular scheduled train, and that he ran upon the time of No. 6 without such orders, then the intestate was guilty of a violation of the rules of the company.

"(*b*) If the jury shall find from the evidence that the intestate was running an extra train, and that No. 6 was a regular scheduled train, then under the rules of the company it was his duty to clear the schedule of No. 6, and if he failed to do so he was guilty of a violation of the rules of the company.

"(*c*) If the jury shall find from the evidence that the intestate left Vass at 10:02, and that the schedule time of No. 6 at Manly was 10:05,

and that he was running an extra train without orders against No. 6, and that No. 6 was a scheduled train, and that the intestate could not clear any of the sidings before reaching Manly five minutes before the schedule time of No. 6, he was guilty of a violation of rules 390 (273) and 383, which the court will read to the jury.

"(*d*) If the jury shall find under the instructions just given by the court that the intestate violated any of the rules of the company and that such violation was the proximate cause of his death, then he was guilty of contributory negligence, and the jury will answer the second issue 'Yes.'"

His Honor in his general charge instructed the jury in regard to contributory negligence, to which there was no exception. We are of the opinion that he gave the defendant the benefit of all to which it was entitled upon the second issue. He gave all that was requested except the first, which would have taken the question from the consideration of the jury. He gave a large number of special instructions at the defendant's request upon the first issue. To his refusal to give others, the defendant excepted. We will examine them in their order.

Exception 39. "That if the jury shall find from the evidence that the system of moving trains on the defendant's road at the time of this injury was reasonably safe and one in general use on railroads in the United States, then the defendant has not been guilty of negligence in this respect, and the jury will answer the first issue 'No.'" This he gave after adding, "unless the jury shall further find that the block system was a safer system and was in general use upon railroads of the United States of like character in respect of construction and the amount of traffic as the defendant company." The criticism made by defendant of the modification of this instruction is that there was no evidence to sustain it. We have examined with care the depositions upon this question. They abundantly show that the block system used in moving trains increases safety and relatively decreases the danger of collision. This must be so upon the reason of the thing. It is difficult to tell to what extent the depositions show that the system is in general use. A number of railroad systems are named as using it. We are unable to (274) tell the mileage, etc., of such roads. It is true that the witnesses generally describe the conditions in respect to number of trains run per day and the number of tracks. Certainly, it would not show a general use of any system that only a few persons or corporations are using it. It is equally true that, as a matter of common observation, we know that in obedience to legislation, both State and National, and the ruling of commissions and courts and as a matter of necessity for the security of life and property, railroad companies are rapidly adopting all such

methods, systems, and improvements shown to reduce the number of accidents from collisions. What was regarded a safe system in this respect ten years ago would now be regarded as utterly insufficient. In respect to such questions the courts seek to secure the highest practicable safety for the public and employees. We think that there was evidence fit for the jury upon the general use of the block system, which, if enforced, prevents such disastrous collisions as the one shown by this record.

Several instructions were asked in regard to the duty of defendant to maintain telegraph offices along its road. His Honor declined them, and in lieu thereof, instructed the jury: "It is the duty of a railroad company to establish only such telegraph stations along its line as are necessary for the proper running of its trains, with regard for the safety of its employees and passengers, and if you find that the defendant's telegraph stations were sufficient for this purpose, then the defendant has been guilty of no negligence in that regard." We think that this was a correct charge and covered the instructions asked.

Defendant requested his Honor to instruct the jury that if they found that the rules of the defendant company permitted the running of an engine and tender with a crew of only an engineer and fireman, and such were the standard rules of the American Association of Railways, the defendant was not guilty of negligence in that respect. The instruction was given with the words, "and that the running of an engine with such crew on such a trip as this one was reasonably safe," etc. (275) We find no error in the charge as given. Defendant requested his Honor to charge the jury, "that upon all of the evidence in this case it was not negligence to fail to use the block system." To the refusal defendant excepted. One witness testified that the system tended to give one train exclusive use of the track between certain points. Another, that it induced to safety and economy—an additional safeguard, etc. The same witnesses testified as to the extent of the use of the system. In the light of the decisions of this Court in *Greenlee v. R. R.*, 122 N. C., 977, and *Troxler v. R. R.*, 124 N. C., 192, often cited with approval, his Honor correctly refused to give the instruction. He properly submitted the question to the jury. *Stewart v. R. R.*, 137 N. C., 687.

Defendant requested his Honor to charge that if the jury found the system of signals and rules for the operation of its trains in use by defendant were the same in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system, etc. The instruction was given with the words, "unless they shall find that such system is safer or most approved and in general use in the United States by railroads of like condition as the defendant." To this language defendant excepted. Defendant contends that the language

used by his Honor does violence to the well-settled principle that the employer must use such appliances as are in general use, and not the most approved appliances. If his Honor has, inadvertently, placed upon the defendant a heavier burden in this respect than the law permits, it is reversible error. In *Bottoms v. R. R.*, 136 N. C., 472, we held that it was error to charge the jury that the employer must use "the best approved devices and appliances for arresting sparks." It will be observed that in *Bottoms' case* no reference was made to the "general use," which is an essential element in defining the test by which the duty is imposed. The *Chief Justice,* in that case, reviews the several
(276) decisions of this Court. In *Witsell v. R. R.,* 120 N. C., 557, the Court made the test to use "all known and improved machinery." This was held error, this Court saying that the rule requires the use of "all such improved appliances which are in general use." The reasoning of the interesting opinion by the present *Chief Justice* shows clearly that the being in general use is the test. His Honor evidently had that test in view in giving the instruction. It was not the "most approved," but "the most approved in general use." We do not think the jury could have been misled by the instruction as given.

In regard to the testimony of Lutterloh, his Honor instructed the jury that if Stewart saw the witness or by the exercise of ordinary care could have seen him wave his hat, it was his duty to have stopped his engine, and if such violation was the proximate cause of the injury they would answer the second issue "Yes." This was correct.

There are fifty-seven exceptions in the record. All of them are not assigned as error in the case on appeal. We have examined the record and briefs of counsel with care, and while it is not practicable to set out and discuss each exception with the instruction asked, modified and given, or refused, we are of the opinion that the case has been fairly submitted to the jury. It was tried by counsel of learning and experience. Every point was contested in the lower court and here. The jury have upon a full and fair charge found the facts. It may not be improper to say that while many rules were introduced and commented upon, we are impressed, as said by the *Chief Justice* on the first appeal, with the view that No. 200 extra was running solely under telegraphic order, and that the engineer was entitled to have such orders at each station. His last recorded words to the operator at Vass show that he regarded the road clear to Southern Pines—that he had 40 minutes on No. 66. This may account for his failure to take notice of Lutterloh's warning. Certain it is that No. 6 was the only train which
(277) seemed to have been overlooked by every one. No orders were

given to it or others in regard to it. This was the cause of the collision. The case, stripped of all complications, comes to this: Some one overlooked No. 6.

The law raises the presumption that it was the negligence of some of defendant's agents. The jury have found in accordance with this presumption. On the second issue the burden was on defendant to remove the presumption that Stewart exercised due care for his own safety. *Cogdell v. R. R.*, 132 N. C., 852. The court gave defendant every instruction asked, save one, upon this view of the case. The jury found the issue against defendant and we think that there was evidence to sustain the verdict.

We find no error in his Honor's rulings. The judgment must be Affirmed.

Cited: Overcash v. Electric Co., 144 N. C., 577; *Gerringer v. R. R.*, 146 N. C., 36; *Winslow v. Hardwood Co.*, 147 N. C., 279; *Bennett v. Mfg. Co., ib.*, 622; *Dermid v. R. R.*, 148 N. C., 195, 197; *S. v. R. R.*, 149 N. C., 478; *McMillan v. R. R.*, 172 N. C., 859.

RANKIN v. MITCHEM.

(Filed 8 May, 1906.)

Contracts—Agreements to be Reduced to Writing—Question for Jury—Sales—Delivery—Gambling Contract—Futures—Mutuality.

1. Where at the time defendant proposed to draw up the contract a complete verbal agreement had been made between the parties, and the contract was reduced to writing and signed by plaintiff Rankin and the defendant, the fact that plaintiff's partner did not sign it does not invalidate either the oral or written contract.

2. Where the parties orally agree upon the terms of a contract and there is complete assent thereto, the suggestion to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. The question is largely one of intention.

3. In an action for damages for breach of contract by defendant in the purchase of 160 bales of cotton to be delivered by plaintiff on a fixed date, evidence that on the date fixed, plaintiffs notified defendant that they had the cotton at L. and were ready to deliver according to contract, and that defendant asked for extension of time for the delivery, and that plaintiff made two other tenders, is amply sufficient to support the finding that plaintiffs were ready, able, and willing.

4. Where the plaintiffs agreed to sell to defendant 100 bales of cotton at a fixed price, to be delivered on 20 February, and the defendant agreed to pay for the same, and there was a further clause in the contract that plaintiffs "agreed to take the cotton off the hands of defendant at the market price on 20 February," this last clause is a unilateral promise not binding or intended to bind the defendant, and only intended to bind the plaintiffs, and the contract is not a gambling one on its face.

5. Where the contract was not a gambling one on its face, the court properly left to the jury to ascertain the underlying intention of the parties to the contract—whether it was the intention that there should not be an actual delivery of the cotton, but that the contract should be settled by the payment of the difference between the contract price of the cotton and the price of the same quality and grade of cotton at the time named for the delivery.

(278) ACTION by J. C. Rankin against D. W. Mitchem, heard by *Cooke, J.*, and a jury, at September Term, 1905, of GASTON.

This was an action to recover damages for an alleged breach of contract on the part of the defendant in the purchase of 100 bales of cotton.

The following issues were submitted:

1. Did plaintiffs contract with the defendant to sell and deliver him 100 bales of strict middling cotton at Lowell, N. C., on 20 February, 1905, for the price of 9⅝ cents per pound? Answer: Yes.

2. Was the time for the delivery of said cotton extended by mutual consent of the parties until 10 April, 1905? Answer: Yes.

(279) 3. Were the plaintiffs ready, able, and willing to deliver said cotton to the defendant at the time agreed upon for the delivery? Answer: Yes.

4. Did defendant refuse to receive and accept said cotton? Answer: Yes.

5. What damage have plaintiffs sustained by reason of defendant's refusal to receive said cotton? Answer: $949.55

From the judgment rendered, defendant appealed.

O. F. Mason and Burwell & Cansler for plaintiffs.

A. G. Mangum and Tillett & Guthrie for defendant.

BROWN, J. The controversy in this case as presented involves the consideration of the following contentions: Was the contract between the parties completed? Were the plaintiffs able, ready, and willing to deliver the cotton according to agreement? Was the contract a wagering contract?

1. The evidence for the plaintiffs is clear that a parol contract was entered into by plaintiffs on the one part and defendant on the other

part, whereby plaintiffs contracted to sell and deliver to defendant at Lowell on 20 February, 1905, 100 bales of cotton at 9⅝ cents per pound, and equally clear that defendant contracted to take and pay for the same. The proposition to sell seems to have been made by Rankin, who took Robinson in as a copartner in the transaction, with the consent of the defendant. At the time that defendant proposed to draw up the contract a complete verbal agreement had been made between the parties, and the contract was reduced to writing and signed by plaintiff Rankin and the defendant. The fact that Robinson did not sign it does not invalidate either the oral or written contract. The contract had been fully completed between the parties, and the reducing it to writing was not to make a new or different contract, but evidently to preserve the written evidence of what had already been assented to. The plaintiff Robinson affirmed what his copartner had done, for, according to Rankin's evidence, Robinson was en route to Charlotte and left Ran- (280) kin to fix up the writing, and told Rankin after he "got it fixed up to phone him at Charlotte and he would buy the cotton." It seems to be generally held that a binding contract may be made between parties, although there is an understanding that it is to be reduced to writing, which writing is not completed by the signatures of all the parties. In *Sanders v. Fruit Co.,* 144 N. Y., 209, the Court of Appeals of New York said: "Letters and telegrams which constitute an offer and acceptance of a proposition, complete in its terms, may constitute a binding contract, although there is an understanding that the agreement must be expressed in a formal writing, and one of the parties afterwards refuses to sign such agreement without material modification." Where the parties orally agree upon the terms of a contract and there is complete assent thereto, the suggestion to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. The question is largely one of intention. From the plaintiff's evidence it is plain the parties intended to contract and did contract before the written evidence of it was drawn up, and that defendant afterward recognized the contract by asking an extension of time. The subject is fully discussed in 29 L. R. A., 431, note. The court very properly left it to the jury to determine whether the contract was made between the parties as alleged.

2. It is further contended by the defendant that the evidence is insufficient to warrant the finding of the jury in response to the second and third issues. The plaintiff's evidence, if believed to be true, establishes facts amply sufficient to support those findings. Rankin testified that on 20 September he personally notified defendant that they had the cotton at Lowell and were ready to deliver it according to contract, and

(281) that defendant asked for an extension of time for the delivery and payment of the cotton. The plaintiff further testified that again on 20 March he tendered the cotton; that he had it at Lowell and offered to deliver it there or at Charlotte or Gastonia. Defendant asked plaintiff to carry it longer. At request of defendant, plaintiffs carried it until 10 April, when the cotton was again tendered and defendant refused to take it and pay for it. According to Rankin's testimony, he then had the cotton at Lowell ready to deliver. The jury appear to have accepted Rankin's evidence as true, and, having done so, they could do nothing less than find the second and third issues for the plaintiffs, as their evidence proves three tenders and two extensions at defendant's request.

3. The defendant contends that the contract is, in any view of the evidence, a wagering contract and void. Among other issues, defendant tendered the following: "Was the said contract illegal and void?" We think it would have been better had his Honor submitted the issue. It would have called the jury's attention more pointedly to the principal controversy in the case. But under the instruction given on the first issue, the defendant, so far as it was a matter for the jury, was given the full benefit of this defense, as appears by the following extract from the charge: "And if the jury shall find that the said contract was entered into by the defendant, but they shall further find that it was the understanding, agreement, and intention of the parties that there should not be an actual delivery of the cotton, but that the contract should be settled by the payment of the difference between the contract price of the cotton and the price of the same quantity and grade of cotton at the time named for the delivery, by and to the one side or the other, according as the difference might be, they will answer the first issue 'No.'"

The contention that the contract is void on its face is based upon the written contract, as follows: "This contract and agreement, made (282) and entered into this 1 December, 1904, by and between D. W. Mitchem, of the first part, and S. M. Robinson and J. C. Rankin, of the second part, all of Lowell, N. C., witnesseth: That the said S. M. Robinson and J. C. Rankin agree to sell to D. W. Mitchem 100 bales of strict middling cotton, average weight 500 pounds, the price to be 9⅝ cents per pound. This cotton to be delivered on 20 February, 1905, at Lowell, N. C. The said D. W. Mitchem, in consideration thereof, agrees to pay to the said S. M. Robinson and J. C. Rankin 9⅝ cents per pound, landed at Lowell, N. C. In witness whereof, both parties have signed, this 1 December, 1904. S. M. Robinson and J. C. Rankin agree to take the cotton off the hands of D. W. Mitchem at the market price on 20 February, 1905. (Signed) D. W. Mitchem, John C. Rankin." It is the last

clause which the defendant contends vitiates the contract and discloses *per se* a gambling purpose. We admit that the contract does look suspicious, and of the clause referred to compelled defendant to let plaintiff take the cotton off his hands at market price on 20 February, as well as compelled plaintiffs to do so, it would be plainly a gambling contract and void on its face. The plaintiffs alone were bound by this clause of the contract, if anybody was bound by it, while both parties were bound by the first and second clauses. A reading of the instrument plainly indicates that it was the intention of the parties that both should be bound by the first two clauses, but only the plaintiffs by the last. There is no mutuality in this last clause and consequently no consideration to support it. It is very similar to the contract in *Quick v. Wheeler,* 78 N. Y., 300. There the plaintiff and defendant entered into a written contract, the first clause of which provided for the sale and delivery by the plaintiff to the defendant of certain timber, which was fully performed. The contract then provided as follows: "And I, said Wheeler, also agree to pay said Quick 4½ cents per foot for from 6,000 to 15,000 feet of the same kind and quality of tie timber, as aforesaid, and delivered at the place aforesaid during the winter, to be paid on 1 (283) June, 1874." The contract was signed by both parties, but there was no agreement on the part of the plaintiff to deliver the last quantity of timber, and although the plaintiff subsequently undertook to make deliveries in accordance with said clause of the contract, the Court said: "This contract when made was not binding, as it was based upon no consideration. The plaintiff parted with nothing and there was no mutuality. There was not that consideration which mutual promises give a contract. The plaintiff did not bind himself to sell and deliver the tie timber. Hence this contract can be treated only as a written offer on the part of the defendant to take and pay for the timber upon the terms stated. Story on Sales, sec. 126; Chitty on Cont., 15; 1 Parsons on Cont. (5 Ed.), 475; *Tuttle v. Love,* 7 Johns. (N. Y.), 470. This written offer could be revoked at any time before performance or a binding acceptance by the plaintiff." See, also, *Oil Co. v. Kirk,* 68 Fed., 791 *R. R. v. Dane* 43 N. Y., 240; *Campbell v. Lambert,* 51 Am. Rep., 1; *Cherry v. Smith,* 39 Am. Dec., 150.

Under this interpretation of the contract the last clause therein is a unilateral promise not binding or intended to bind the defendant, and only intended to bind the plaintiffs, and it does not purport to obligate the defendant to do anything. In order to make an agreement valid and binding, the promises must be mutual, or, if unilateral, then there must be other sufficient consideration moving from the one party to the other. The insertion of the last clause cannot be said to be *conclusive* evidence

of the *intention* of both parties that the contract should be discharged only by a payment of the difference between the contract price and the market price of the cotton on the day fixed for delivery. That being so, the matter is to be settled by ascertaining the real underlying (284) intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling deal, in which the parties contemplate no real transaction as to the article to be delivered? The purpose and underlying intent his Honor properly left to the jury, the contract not being a gambling one on its face. *S. v. Clayton,* 138 N. C., 733. There are no exceptions to the evidence, and those to the charge are without merit.

No error.

Cited: Edgerton v. Edgerton, 153 N. C., 170; *Harvey v. Pettaway,* 156 N. C., 377; *Rodgers v. Bell, ib.,* 382; *Elks v. Ins. Co.,* 159 N. C., 624; *Pfeifer v. Israel,* 161 N. C., 412; *Holt v. Wellons,* 163 N. C., 128; *Randolph v. Heath,* 171 N. C., 386; *Orvis v. Holt,* 173 N. C., 234.

MACHINE COMPANY v. TOBACCO COMPANY.

(Filed 8 May, 1906.)

Contracts—Damages—Loss of Profits.

1. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed.

2. The law seeks to give full compensation in damages for breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient certainty.

3. In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation.

4. In an action for damages by reason of defendant's failure to exhibit plaintiff's cigarette machine at the St. Louis Exposition, as it had contracted

to do, the court erred in charging the jury that they might allow plaintiff damages suffered by the loss of profits it would have made if the contract had been performed and the loss of the benefits that would have accrued to it in increased sales of its machine, etc., in the absence of evidence that plaintiff had secured any contracts for the purchase of its machines if these proved satisfactory when exhibited, or that plaintiff would have made any particular number of sales, or any other proof which would enable the jury by any certain and reliable standard to estimate the losses.

ACTION by Winston Cigarette Machine Company against Wells- (285) Whitehead Tobacco Company, heard by *Jones, J.*, and a jury, at December Term, 1905, of FORSYTH.

In August, 1903, the defendant, being a manufacturer of cigarettes and desiring to advertise its brand, contracted with the plaintiff, who is the maufacturer of the Briggs cigarette machine, that if the plaintiff would furnish one of the machines well equipped for the purpose, the defendant would operate and exhibit it at the St. Louis Exposition in 1904. The plaintiff alleged that it performed the contract on its part by preparing the machine for exhibition, and did so at considerable expense, but that the defendant, just before the exposition was opened and when it was too late to make other arrangements to have its machine exhibited, refused to operate and exhibit the machine at the exposition as it had undertaken and promised to do, without any reasonable or valid excuse for so doing. The defendant admits the contract as alleged, except that it alleges there was a condition precedent annexed to it, namely, that it could procure free, or without any charge therefor, such space in the exposition building as was needed for the purpose of operating and exhibiting the machine, and that this it failed to do without any fault on its part. Plaintiff alleged that by reason of the breach of the contract by the defendant it has not only sustained damages in the way of money actually paid out to put the machine in readiness, but that (286) it has suffered further damage by the loss of profits it would have made if the contract had been performed, and the loss of the benefits that would have accrued to it in increased sales of its machines, by the exhibition of said machine at St. Louis, while in actual operation, and by the advertisement of its peculiar features and its advantages over other machines of a like kind. The issues submitted to the jury, with their answers thereto, were as follows:

1. Did the defendant contract to exhibit at the St. Louis Exposition the cigarette machine of the plaintiff, known as the Briggs machine, as alleged in the complaint? Ans.: Yes.

2. Did the defendant fail and refuse to carry out the contract aforesaid, as alleged in the complaint? Ans.: Yes.

3. What amount, if any, is plaintiff entitled to recover for the construction and preparation of the machine contracted to be delivered to defendant for exhibition? Ans.: $211.

4. What amount, if any, is plaintiff entitled to recover for the failure of defendant to exhibit the machine at the Universal Exposition, as alleged in the complaint? Ans.: $5,000.

Upon the queston of damages, so far as it related to the fourth issue, the material part of the charge to the jury was as follows: "In answering this issue the court charges you that if you find the defendant violated its contract by failure to exhibit the machine at St. Louis, as agreed upon, the plaintiff would be entitled to at least nominal damages. And by nominal damages I mean a penny or some such small amount. And if the plaintiff has failed to show you by the greater weight of the evidence that its damages exceed a nominal amount, you should answer the fourth issue one penny, or some other small amount. Now, the plaintiff contends that, at the time of the execution of this contract both parties had in contemplation the profits that would result to them from such an exhibition, that is, the sale of defendant's cigarettes would be in-
(287) creased by such exhibition, and the sale of plaintiff's machine for making cigarettes would be increased, and thereby the anticipated and probable profits of both would be materially increased; and that by failure of defendant to comply with its part of the contract the plaintiff has lost the sale of many machines, and consequently the profits that would naturally follow a sale. In this branch of the case, gentlemen, the court finds it very difficult to lay down a certain rule by which you are to be governed in ascertaining and measuring the plaintiff's damages, if you should first find it has suffered damages by reason of defendant's failure to exhibit the machine at St. Louis. The plaintiff contends that this contract to exhibit at St. Louis had some value, and that the conduct of the defendant has deprived it of the value and profits which would naturally have grown out of the exhibition had defendant complied with its contract. A party seeking to recover profits for breach of contract is not required to prove, either that profits would have accrued, or the amount of them, by any other or higher evidence than one is required to produce in any other civil action. So, if the plaintiff has made it appear by a fair preponderance of the evidence that profits would have resulted from an exhibition of the machine at St. Louis, and if it has produced such evidence as will authorize a jury upon legitimate and proper inference to ascertain the amount of profits which would have been made, it would be entitled to recover such amount of damages as the jury may honestly and consistently believe due it by reason of the breach."

There was no evidence that the plaintiff had secured any contracts for the purchase of its machines, if they proved satisfactory when the model

was exhibited and operated at St. Louis, nor was there any evidence that the plaintiff would have made any particular number of sales, nor was there any other proof which would enable the jury by any certain and reliable standard to estimate the losses, unless the evidence hereinafter stated is sufficient for that purpose. It was shown that the (288) plaintiff had another offer for the exhibition of its machine, but declined the same because of the contract with the defendant. There was also evidence tending to show that the machines sold for $1,600 apiece and that the company had already sold from 150 to 160 of them in different parts of the world. That they were advertised usually by operating them where they could be seen by those interested in the purchase of such machinery and that one is constantly kept in New York on exhibition, as it is found necessary to prove the value of the machine to those who may buy, by the actual operation of a machine in their presence. This particular machine which was to be exhibited at St. Louis had been exhibited elsewhere. The exhibition of them usually led to sales and almost all of them had been sold by reason of their value being demonstrated in the presence of the purchasers. The Briggs machine will turn out 125,000 to 150,000 cigarettes per day and is of simple construction. It costs about half as much as the Bonsack machine. About fifty of them are in operation. The plaintiff had intended to make an exhibit of one of its machines at St. Louis before the contract to do so was made with the defendant, and had decided to spend between $5,000 and $6,000 on the exhibition and operation of the machine at the exposition. Plaintiff further offered evidence tending to show that it would have cost $5,000 to exhibit and operate the machine itself, which it had intended to do before contracting with the defendant, and that it did not have the time and opportunity to make the required preparation for doing so after it was notified by the defendant that it would not perform the contract on its part.

Exceptions were taken by the defendant to his Honor's rulings and charge upon the fourth issue. There was a judgment upon the verdict, and defendant appealed.

Manly & Hendren and Watson, Buxton & Watson for plaintiff.
Lindsay Patterson and Connor & Connor for defendant.

WALKER, J., after stating the case: There is no serious objec- (289) tion made by the defendant to the rulings and charge of the court upon the first, second, and third issues, and, after a careful perusal of the charge and an examination of the rulings of the court, so far as they bear upon those issues, we are satisfied that no exception can well be taken thereto. The defendant frankly and fully placed its right to the

favorable consideration of this Court upon its exception to that part of the charge which relates to the fourth issue, and around this single question the contention of the parties was waged. While the inquiry we are about to make is important, it is by no means a novel one and does not open up any new field of legal investigation. It involves, not the discussion of any new principle, but merely the application of one of some antiquity to the actual facts of this case. We usually experience difficulty in adjusting even a well-settled rule to any particular state of facts, but those in this case are so few and so simple that we should have little or no embarrassment in reaching a correct conclusion. Generally speaking, the amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for its breach. *Benjamin v. Hilliard,* 23 How., 149; *Mace v. Ramsey,* 74 N. C., 15. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. *Ashe v. DeRosset,* 50 N. C., 299; *Griffin v. Colver,* 16
(290) N. Y., 489. It is the rule last stated which principally raises the doubt as to whether profits of the future should be included in any estimate of damages. They may be necessary to completely indemnify the injured party and they may also answer the other requirement, in that the loss of them may naturally be expected to proximately result from a breach of the contract; but there still remains another important element to be considered, and that is whether there is any reliable standard by which they can be ascertained, for we have seen that the damages must be certain, and this certainty which is required does not refer solely to their amount, but also to the question whether they will result at all from the breach. It is clear that whenever profits are rejected as an item in the calculation of damages, it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. *Griffin v. Colver, supra.* "The law may, and often does, fail of doing complete justice, from the imperfection of its means for ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design. Such a doctrine would tend not only to make the law itself odious, but to corrupt its administration, by fostering a disregard of the just rights of parties. In actions upon contract, especially, and in those nominally in tort, but substantially upon contract, courts have thought it generally safer, upon the whole, to adopt certain definite rules for the

government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion, or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen to present, and as might approximate compensation, and to frame thereon rules of (291) law for the measurements of damages, though it might be evident that further damages must have been suffered, which, however, could only be estimated as matter of opinion, and must, therefore, be excluded under the rules thus adopted." *Allison v. Chandler,* 11 Mich., 542. It will be seen, therefore, that the earlier rule which excluded profits altogether, as an element of damages, as being in their very nature too uncertain to be considered (Hale on Damages, 72) has been modified so as to permit their inclusion in the assessment if they are proximate and certain. The doctrine of Domat, as adopted by Sedgwick, that "The law does not aim at complete compensation for the injury sustained, but seeks rather to divide than satisfy the loss," has not been accepted by the courts as the true principle by which to measure the compensation for a breach, but may be safely said to have been rejected, for the law does seek to give full satisfaction in damages, including gains prevented and losses sustained, so far as is consistent with a just regard for the rights of the party who has broken the contract and, what is of more importance, for reasonable certainty in the administration of legal principles. In pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case furnishes a standard by which their amount may be determined with sufficient certainty. Illustrations of this principle are to be found in several cases heretofore decided by this Court. In *Mace v. Ramsey,* 74 N. C., 11, the defendant contracted to furnish the plaintiff a boat to carry passengers, who were expected to arrive on an excursion train, from Morehead City to Beaufort and other points in the harbor. The plaintiff was allowed to recover profits prevented by defendant's breach of his contract because their loss was not only the proximate result of the breach as being within the reasonable contemplation of the parties, but because it appeared that the plaintiff had already engaged enough passengers for the (292) boat to be furnished by the defendant, and this fact introduced the element of certainty, into the question of damages. The damages were thus made certain, both in their nature and in respect to the cause from which they proceeded. The distinction between such profits as can be thus definitely ascertained by some standard furnished by the contract itself or by the law, and those for the calculation of which there is

no standard, but which are shadowy, uncertain and speculative and therefore incapable of legal computation, is clearly recognized in *Willis v. Branch,* 94 N. C., at p. 149, where it is said by the Court: "If the plaintiff had existing engagements for theatrical entertainments, that were disappointed by the injury, damages sustained on that account might be embraced, but not for such as he might probably have had. The instruction given by the court was far too broad and indefinite—it embraced speculative damages, arising indirectly and remotely as a possible consequence of the trespass. Such damages are not recoverable." So in *Oldham v. Kerchner,* 79 N. C., 106, where the defendant failed to deliver corn to the plaintiff at his mill to be ground at a stipulated price, under a contract to that effect, the Court held that the profits the plaintiff would have made should be included in the damages allowed by the jury, as the difference between the cost of grinding and the contract price furnished a sufficiently certain standard by which to measure the damages and was the true rule applicable to the facts of that case. "It is now well established (the Court says, at p. 111) that the profits which a plaintiff would have made if the contract had been complied with, is the measure of damages for its breach, in cases like the present. There are, of course, cases not within the rule, as where the profits are speculative and incapable of accurate ascertainment, or so remote that they cannot be supposed to have been within the contemplation of the parties, or where
(293) they depended on facts of which the defendants had no notice, and which, therefore, could not have been in their contemplation." And in *Lewis v. Rountree,* 79 N. C., 122, the Court held that the contract being for the sale and delivery of a specified number of barrels of rosin at a stipulated price, which was bought for the purpose of being resold in another market, the profit that would have been realized if the contract had been fulfilled was recoverable as a part of the damages, it being the difference between the price to be paid and the market price where it was to have been resold, which rendered it capable of being estimated with reasonable certainty, and therefore not contingent or speculative. This modification of what appears to have been the former rule as to profits is strikingly illustrated in the recent case of *Johnson v. R. R.,* 140 N. C., 293. The plaintiff sued to recover damages for the negligent destruction of his box factory by the defendant, it having been set on fire by sparks emitted from defendant's engine. It was shown that the plaintiff had outstanding and unfilled orders for a large number of boxes, and we held, contrary to the ruling below, that the profits which would have been made upon those contracts were proper to be considered in computing the damages. The question is fully discussed by *Mr. Justice Connor,* who delivered the opinion of the Court, and the distinction to be observed in such cases clearly defined. The same principle is also recognized and

applied in *Tompkins v. Cotton Mill,* 130 N. C., 347. The rule as thus declared by this Court has been generally, if not universally, adopted in the other States and in the Federal jurisdiction. Hale on Damages, p. 72, *et seq.; Aber v. Bratton,* 60 Mich., 367; *Masterton v. Mayor,* 7 Hill, 61; Sutherland on Damages, sec. 64; *Allison v. Chandler, supra; McKinnon v. McEwan,* 48 Mich., 106. In the case last cited, the Court says: "There are undoubtedly many cases where upon the breach of a contract the injured party is entitled to recover as damages the profits he would have made had the contract not been broken. Where a party is to perform labor from which a profit would arise as the (294) direct result of the work done at the contract price, such profits may be recovered. Or, where a party is to furnish and deliver material under a contract and is prevented. The principles recognized in this class of cases are well established and have been applied in a great variety of cases. So in cases of tort the loss of profits may be allowed." While anticipated profits may be recovered in cases of the class we have mentioned, where there is a certain method afforded by which they can be estimated, we believe the courts are well-nigh unanimous in holding that when they are of an uncertain, contingent or speculative character, they are not to be allowed in compensation for the injury. This principle is stated concretely by *Mr. Justice Bynum,* with his usual terseness and vigor, in *Sledge v. Reid,* 73 N. C., at p. 443, as follows: "In an action of covenant for not furnishing machinery for a steam mill, at a stipulated time, the plaintiff cannot recover in damages the estimated value of the profits he might have made, if the covenant had been complied with, because they are too vague and uncertain to form any criterion of damages. Such has been the uniform course of decisions in this State. We think they are founded upon the soundest principles and sustained by the weight of authority." The authorities to sustain this proposition may be numerously cited. *Boyle v. Reeder,* 23 N. C., 607; *Foard v. R. R.,* 53 N. C., 235; *Roberts v. Cole,* 82 N. C., 292; *Walser v. Tel. Co.,* 114 N. C., 440; *Lumber Co. v. Iron Works,* 130 N. C., 584; *Memphis v. Brown,* 20 Wall., 289; *Aber v. Bratton, supra; Hair v. Barnes,* 26 Ill. App., 580; *Red v. Augusta,* 25 Ga., 386; *Pennypacker v. Jones,* 106 Pa. St., 237; *Willingham v. Hoover,* 74 Ga., 233; *Greene v. Williams,* 45 Ill., 206; *Bingham v. Walla Walla,* 13 Pac., 408; 1 Joyce on Damages, sec. 1285. Summing up the law upon this subject, it is said in *U. S. v. Behan,* 110 U. S., 338: "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured (295) party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already

expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of *Chief Justice Nelson,* in *Masterton v. Mayor,* 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary." But that Court has expressly repudiated the claim that the possible or even probable benefits of a business yet *in fieri* can afford a safe rule by which to estimate damages. There was said to be so much uncertainty in such a rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that it was not believed proper to entertain it. *The Amiable Nancy,* 16 Wheaton, 560; *La Amistad de Rues,* 5 Wheaton, 385. *Judge Story* said
(296) that, independent of all authorities, he was satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible where there is no certain standard to guide the jury. The rule would be in the highest degree unfavorable to the interests of the community and the subject would be involved in utter uncertainty. The computation would proceed upon contingencies, and would require a knowledge of markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the vigilance and activity of the party who it is supposed would have made the profits and much upon the momentary demand and other considerations purely speculative. After all, it would be a mere calculation upon conjectures and not upon facts. *Schooner Lively,* 1 Gallison, 315. Any such estimate would be based upon imaginary and uncertain profits depending upon a variety of circumstances, the failure of any one of which would subvert the whole calculation and, for this reason, they would be too remote and indeterminate to enter into the measure of damages. *Mfg. Co. v. Rogers,* 19 Ga., 416. Should the rule contended for prevail, the breach of a very simple contract, or failure in some part, might bring ruin upon the party in default, by leaving the damages to

the unbridled discretion of the jury, when in fact no such loss was contemplated. The adoption of such a rule would, therefore, be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly provide for such enlarged responsibility. This they may do by liquidating the amount when the damages cannot be otherwise ascertained and are such as the law will not allow because of their uncertainty. *McKimmon v. McEwan, supra.* It is one of the very cases where parties may agree upon the amount of damages to be recovered upon a breach. "Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary (297) standard, as by market value or the like, but are wholly uncertain the law favors a liquidation of the damages by the parties themselves, and where they stipulate for a reasonable amount, the agreement will be enforced." Hale on Damages, 133. But in the absence of some standard fixed by the parties when they make their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances and which are perhaps merely fanciful, to be considered by the jury as part of the compensation. Speaking of such profits *Chief Justice Bleckley,* in *Kenny v. Collier,* 79 Ga., 743, once said: "If anything is speculative, remote and contingent, it is the net income of a business never begun. That anticipated profits from a business intended to be carried on by the plaintiff upon the premises cannot be allowed, is as well settled as anything can be in an age of legal skepticism," citing *Giles v. O'Toole,* 4 Barbour, 261; *Greene v. Williams,* 45 Ill., 208, and other cases. "The recovery of profits which might have been made in a new business cannot be sustained, because it cannot be proven that they would have been realized." Sedgwick on Damages, sec. 183, and cases cited; 3 Sutherland on Damages (3 Ed.), p. 2136; *Trust Co. v. Mfg. Co.,* 77 Md., 202-235; *Ice Co. v. Jenkins,* 58 Ill. App., 519. But we do not see why case of *Jones v. Call,* 96 N. C., 337, which discusses and applies the principle we have been considering to a case identical with this in its main features, is not decisively against the plaintiff's contention. There it appeared that the plaintiff, a manufacturer of patented tobacco machines, was stopped from manufacturing by the wrongful act of the defendant, and it was held that, while he could include in his damages for the wrong profits on machines already sold but not manufactured, he could not recover estimated profits of the business, as they were too speculative, conjectural, and remote to constitute a basis for computing damages. Such anticipated profits, it was said, involve too many contingencies, the failure of any one of which (298) might prevent their realization. They are not, therefore, susceptible of exact ascertainment or of being proved with reasonable certainty. We are unable to distinguish the two cases. So in *Eisenlohr v. Swain,*

35 Pa. St., 107, where the defendants had failed to advertise a sale as they had contracted to do, it was held that the plaintiff could not recover for any loss of a better bargain than he made at the sale, as it was speculative. It could not be known how many bidders would have attended the sale if it had been advertised, or whether they would have come, and if any, how many. The supposed profit which he alleged was prevented by the defendants' wrong, was too contingent and illusory. The case of *Stevens v. Yale,* 72 N. W., 5, was much like the one last cited. The defendant failed to advertise, as she had contracted to do, that her wares could be purchased at the plaintiff's drug store, but inserted in her advertisement the name of another druggist. He sought to recover the profits he would have made out of the advertisement contracted for. They were ruled out, as too uncertain and conjectural for a safe estimate of his loss.

A party who has broken his contract cannot, we admit, escape liability because of the difficulty there may be in finding a perfect measure of damages. In this case it appears that the jury, by their verdict, have said that the defendant violated the contract without any just cause or legal excuse. The claim that it was to have free space in the exposition building was either negatived by the jury or it was found by them, upon the evidence, of which there was an abundance to support the finding, that the free space could have been had for the asking. While the bad faith of the defendant would ordinarily entitle it to little consideration from the Court, it cannot have the effect to reverse a well-settled rule of law, which must be general in its application. We should administer the law as we find it. Its proper administration will sometimes apparently work individual hardship, but this is true of all general rules. It
(299) is a much less evil than to construe it to meet the supposed injustice of the particular case or merely to redress a wrong, because we may think it is of so grievous a nature that it should be, in this way, specially rebuked, without regard to the strict principles of the law which have been adopted for all cases. "It is then an established rule to abide by former precedents, *stare decisis,* where the same points come again in litigation, as well to keep the scales of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non just dare.*" Broom's Legal Maxims (8 Ed.), p. 147. The defendant, it is true, has willfully broken the contract at a time too late for the plaintiff to repair

the wrong or retrieve the resulting loss, but this should not change the rule of law, although it may justly provoke our condemnation of the act. "Our duty," said *Baron Alderson,* "is plain. It is to expound and not to make the law—to decide on it as we find it, not as we may wish it to be." *Miller v. Salomons,* 7 Ex., 541. It is not our province to invent new rules for avoiding hardship, however unjustly we may think a party has been dealt with, but to discover and be governed by those rules which were adopted by our predecessors for their guidance. The authorities we have cited strongly support our conclusion, some by direct similitude and others by consequential reasoning and clear deduction, and as they are quite uniform to the same point, they ought to have weight with us and be respected as precedents, in order that the law may be known.

The perfect agreement of many judges upon one and the same (300) proposition is cogent proof of its correctness.

We have examined the cases cited by the learned and able counsel for the plaintiff in their excellent brief and in the argument before us, and do not think that, with one or two exceptions, they conflict at all with our view. Those that do so conflict are not in accord with the decisions of this Court nor with the great weight of authority upon the subject, if their value as precedents is not also impaired by later expressions of the courts where they were decided.

There was error in the charge of the court upon the fourth issue. The verdict will stand as to the other issues, but as to the fourth, a new trial is awarded.

New trial.

Cited: Smith v. Lumber Co., 142 N. C., 35; *Mfg. Co. v. Oil Co.,* 150 N. C., 152; *Hardison v. Reel,* 154 N. C., 278; *Steel Co. v. Copeland,* 159 N. C., 562; *Lumber Co. v. Mfg. Co.,* 162 N. C., 398; *Finch v. Michael,* 167 N. C., 323; *Hardware Co. v. Buggy Co., ib.,* 425; *Lumber Co. v. Fur. Co., ib.,* 566; *R. R. v. Mfg. Co.,* 169 N. C., 160; *Oil Co. v. Burney,* 174 N. C., 386; *Hardware Co. v. Machine Co., ib.,* 483; *Nance v. Tel. Co.,* 177 N. C., 317; *Cotton Mills v. R. R.,* 178 N. C., 220; *Storey v. Stokes, ib.,* 414; *Newby v. Realty Co.,* 180 N. C., 54.

ROLIN v. TOBACCO COMPANY.

(Filed 8 May, 1906.)

Master and Servant — Children — Illegal Employment — Negligence— Proximate Cause—Questions for Jury—Contributory Negligence of Children.

1. The employment in a factory of a child under 12 years of age, either knowing his age or failing to have the certificate of his parents in regard to his age, in violation of the provisions of chapter 473, Laws 1903, is very strong, if not conclusive, evidence of negligence, in an action for injuries to the child by the operation of one of the machines in the factory.
2. Where there is evidence from which a jury may reasonably have drawn the inference that the child was acting in the line of his employment at the time of his injury, the question of proximate cause must be submitted to the jury.
3. A child under 12 years of age is presumed to be incapable of so understanding and appreciating dangers from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence.
4. Contributory negligence on the part of a child is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his age may be expected to possess; and this is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury.
5. Chapter 473, Laws 1903, as incorporated in Revisal, secs. 3362-4, makes the prohibition dependent upon "knowingly and willfully" employing a child, the original act not containing these words.

(301) ACTION by Willie Rolin, by his next friend, against R. J. Reynolds Tobacco Company, heard by *Jones, J.*, and a jury, at December Term, 1905, of FORSYTH.

Action for damages for personal injuries sustained by plaintiff while in defendant's employment. Plaintiff testified: "I commenced work for the defendant about a year ago, May, 1904. I went in there one Monday morning. Mr. Nichols, boss man in the room, spoke to me and asked me if I wanted to weigh fillers. I told him 'yes.' He took me over and put me to weighing; then he put me to cutting lumps on a table. They were making 3-inch work. I worked at that place three days in one fortnight, and in the second fortnight six days. After cutting lumps I then was a sweeper on the floor. I cleaned up about machines and around on the floor. That evening at 4 o'clock we got out of the factory. The weigh-boy went down the house to wash his hands. The man that run that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh-boy ran up and threw a piece of cut tobacco in the machine. I reached my hand

in there to take it out. He pulled the lever and run and the machine caught my hand and tore it off. I don't know the fellow who took me out of the machine. Mr. Nichols took me up in the house above, and said, 'Did you not tell me you were 12 years old?' I said, 'No.' I was 11 years old in June, 1903. When cutting off lumps I was 12 inches away from the machine. No one explained to me the dan- (302) gerous character of the machine, nor told me anything about it. I was born 4 June, 1892. I would not have been hurt if the boy had not pulled the lever. The machine was set, and you had to pull the lever that made it work and set it. At the time I was hurt I worked by the side of John Dillon all that day. Table and truck between me and the machine. The lever is in front of the machine. I did not get a lump and try to press it in the machine. He, Dillon, had pressed a lump that day for me. It was not after quitting time when I was hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine. I saw others cleaning up the machine and I did so. No one ever asked me to clean up the machine or do anything about it. It was a part of my duty to clean up around the machine. Will Hairston is the name of the boy that pulled the lever of machine on me. He is working down there in the factory now. There was a belt attached to the machine running at the time. No one told me to clean up around the machines. Other boys were at work cleaning up." There was other evidence in regard to plaintiff's age, extent of injury, etc. At the conclusion of the evidence defendant demurred and moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted. Judgment. Appeal by plaintiff.

L. M. Swink for plaintiff.
Manly & Hendren for defendant.

CONNOR, J., after stating the case: The plaintiff bases his right to recover on the facts admitted by the demurrer upon two propositions: That his employment by the defendant, he being under 12 years of age, was in violation of the provisions of chapter 473, section 1, Laws of 1903, prohibiting employment of children under 12 years of age, was *per se* negligence, or at least evidence of negligence, and that such (303) negligence was the proximate cause of the injury sustained by him.

The appeal, for the first time, presents to us for construction and application the act passed by the Legislature for the protection of young children by expressly prohibiting their employment in mills and factories. The first section is plain, and calls for no construction by the Court. It provides: "That no child under 12 years of age shall be employed

in any factory or manufacturing establishment in this State." The provision in regard to oyster-canning factories is not material to any question presented by this appeal. The second section prescribes the hours during which persons under 18 years of age shall work. The third section provides that parents of children seeking employment shall give certificates in regard to their age, and makes any person knowingly and willfully violating the provisions of the act indictable, etc. The act is the result of the well-considered, and, we think, wise conclusion of the General Assembly, reflecting and crystallizing into law the will of the people of the State. It is, therefore, not only your duty, but in entire harmony with our judgment to give to the statute such a construction and application as will effectuate the intention of the General Assembly, remedy and prevent the continuation of an evil which threatens the welfare of the young children, and, thereby, the best and highest interest of the State.

Referring to and applying the provisions of an act in almost the same language as ours, the Court of Appeals in New York, in *Marino v. Lehmaier,* 173 N. Y., 530, says: "It has been said of the last century that it was the age of invention. Machines had been devised and constructed with which very many articles used by mankind were manufactured. Numerous factories had been established throughout the country filled with machines, many of which were easily operated, and the practice of employing boys and girls in their operation had become extensive,
(304) with the result that injuries to them were of frequent occurrence. We think it is very evident that these reasons induced the Legislature to establish definitely an age limit under which children shall not be employed in factories." The Supreme Court of Tennessee, in *Queen v. Dayton,* 95 Tenn., 458, held that the employment of a minor within the age prohibited by the statute was negligence; that the breach of the statute was, actionable negligence. In *Perry v. Tozer,* 90 Minn., 431, it is said: "Authorities of the highest respectabilitiy hold that the violation of a statute prohibiting the employment of a child in a hazardous occupation, when such employment is prohibited by law, establishes a right to recover for negligence; hence, in such cases liability is to be presumed from the employment in disobedience of law. . . . Unless we can say that the statute has no effect in a suit for damages when the law has been violated, we are required to hold that the employment which the Legislature positively forbids furnishes evidence tending to show, at least presumptively, that one of the causes of the injury in this case was the violation of the Statute, in analogy to the well-known doctrine that ordinances regulating the hitching of horses, the speed of trains in cities, or other subjects of municipal control, are held to be evidence to sustain

the charge of negligence. . . . It is well settled that a wrongdoer is at least responsible for the results likely to occur, or resulting as a natural consequence from his misconduct, or such as might have been reasonably anticipated."

We have, in accordance with the uniform current of authority, held that the violation of a town ordinance regulating the speed of trains and street cars is at least evidence of negligence. *Norton v. R. R.*, 122 N. C., 910; *Edwards v. R. R.*, 129 N. C., 78; *Davis v. Traction Co., ante,* 134. The principle was applied to the violation of a statute requiring fire escapes to be maintained in houses rented to tenants. *Willy* (305) *v. Mulledy,* 78 N. Y., 310 (34 Am. Rep., 536), *Erle, J.,* saying: "Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy." In *Marino v. Lehmaier, supra, Parker, C. J.,* in a concurring opinion, says: "Against such accidents the State attempted to guard this boy, among others. But the defendant disregarded the law and employed and gave directions to one of the subjects of the State in violation of the State's policy, and the outcome of it was an injury to the child, which could not have happened had the law been observed. In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other facts, as evidence tending to show negligence on the part of the defendant." The learned *Chief Justice* cited a number of cases to sustain his conclusion. Before the passage of the statute the present *Chief Justice,* in *Ward v. Odell,* 126 N. C., 946, speaking for two members of this Court, said that, notwithstanding there was no statute prescribing the age within which children should not be employed in mills and factories. "There is an aspect in which the matter is for the courts, that is, whether it is negligence *per se* for a great factory to take children of such immature develop-men of mind and body and expose them for twelve hours per day to the dangers incident to a great building filled with machinery constantly whirring at a great speed." The same line of thought is expressed and sustained by numerous authorities in *Fitzgerald v. Furniture Co.,* 131 N. C., 636. Certainly, with the positive prohibition imposed by the Legislature against the employment of a child under 12 years of age, there can be no question that such employment is very strong if not conclusive evidence of negligence. If the age is known to the defendant, the employment is a positive defiance of the law; if the (306)

employment is without pursuing the method prescribed and so easily followed, to learn the truth, its failure to do so gives it but little, if any, better status. Independent of the statute, the courts have uniformly held, and the text-writers so declare, that the employment of young children either upon or in buildings where dangerous machinery is operated imposes the duty of carefully explaining to them the danger and constant warning and watchfulness for their protection and safety. It is not an unreasonable burden upon employers, because they take children into their service with full knowledge of the risk to which they are exposed, and should be required to take the consequence of such employment.

We do not entertain any doubt that, upon the evidence before the court, the question of defendant's negligence should have been submitted to the jury. Defendant says that, notwithstanding its negligence, no cause of action accrued to plaintiff, because the injury was not the proximate cause of such negligence, but of an entirely unforseen and unavoidable agency—the other boy pulled the lever. It does not appear whether this boy was under 12 years of age. It has been frequently held that when persons negligently left dangerous machines or other instrumentalities exposed to the interference of children, and by reason thereof they have sustained injury, such result should have been contemplated as reasonably probable, fixing liability on the original negligent act. In this connection it is said in *Marquette Coal Co. v. Dielie,* 110 Ill. App., 684, referring to the same suggestion made by defendant: "If plaintiff was injured while absent from the post of duty, or while violating his orders, or if it was carelessness or negligence for him to run between the sides of the moving cars and the mine wall, still, in our judgment, those facts would not prevent a recovery under the second count. The stat-
(307) ute absolutely forbids the employment of a child of that age in a mine. One reason, no doubt, is that immature children are liable not to understand the significance and importance of the regulations prescribed for the mine and the employees therein; they may thoughtlessly disobey orders or expose themselves to peril or do acts which would be careless in an adult. The company which violates the statute ought not to be allowed to screen itself from liability because the child has been injured by reason of those childlike traits which give rise to the statute. . . . Such statutes are sustainable under the police power of the State, and should be so construed as to accomplish the object sought to be attained and to correct the evils sought to be remedied. Holding the employers of children in violation of this statute to a strict liability for injury that may happen to the child while engaged in such inhibited employment ought to have a wholesome influence tending to check the evils against which this legislation is directed." The

Court concluded: "We hold defendant assumed all risk of injury to the boy arising from his employment of the boy."

The Court of Appeals of New York, in *Hickey v. Taaffe,* 105 N. Y., 36, after discussing the duty of giving such instruction as will enable him to fully understand and appreciate the danger incurred, says: "If a person is so young that even after full instructions he wholly fails to understand them and appreciate the dangers arising from want of care, then he is too young for such employment, and the employer puts or keeps him at such at his own risk." It is, therefore, a question for the jury to say whether, upon competent testimony, the plaintiff was given that full and careful instruction in regard to the danger incident to his employment, and whether he was capable of understanding such danger after instruction.

Morris v. Stanfield, 81 Ill. App., 264, was an action by a minor for injuries sustained by an unprotected saw. The defendant contended the proximate cause of the injury was the interference of (308) another person. The Court said: "If appellee was under 13 years of age and was employed in appellant's factory, every day of his employment was a separate and distinct violation of law. . . . If it was negligence to put a boy under 13 years of age at work in a factory within a few inches of an unprotected buzz-saw, any act of negligence of a fellow-servant not willfully intended to injure appellee, that brought him in contact with the saw, was a concurrent act of negligence. Such act may have been the immediate intervening cause, but the unlawful employment, continuing, was in combination with the intervening act, a proximate cause of the injury."

The principal was applied in *Nagel v. R. R.,* 75 Mo., 653: "The defendant owned or had control of a turntable located in a portion of the town where children were in the habit of playing. The turntable was not locked or otherwise fastened. The plaintiff's child with other children was playing upon it when the child was killed." In passing upon one of the defendant's exceptions the Court said: "It is also urged that the objection to the evidence should have been sustained because the petition shows that the plaintiff's son was injured by the acts of other children in revolving the turntable. This point we think is not well taken. If the defendant was negligent in not securing the turntable so that it could not be revolved by children to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured will not excuse the defendant if such act ought to have been foreseen or anticipated by it. That it ought to have been foreseen and provided against is shown by the case of *Koonce v. R. R.,* 65 Mo., 592."

In *R. R. v. Fort,* 84 U. S., 553, in which a parent was suing for injury sustained by his son, a boy of 16 years of age, the Court said: "This boy occupied a very different position (from an adult.) How could he be expected to know the peril of the undertaking? He was a mere youth without experience, not familiar with machinery. Not being able (309) to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collet to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so."

In *Lynch v. Nurdin,* 41 E. C. L., 422, it appeared that the defendant's servant left a horse and cart unhitched on the street. The plaintiff with other children was playing with the horse and climbing onto the buggy when the plaintiff was hurt by the horse moving away. To an action for damages the defendant said that the plaintiff brought the injury upon himself. *Denman, C. J.,* after discussing the conduct of the defendant's servant in leaving the horse unhitched, said: "But the question remains, Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child acting without prudence or thought has, however, shown these qualities in as great degree as he could be expected to possess them."

In *Iron Co. v. Green,* 65 Southwestern (Tenn.), 399, the same defense was made, that the plaintiff's wrongful employment of the child was not the proximate cause of the injury. *Beard, J.,* said: "Defendant had no right to employ this minor. While in its employment on its premises and foolishly playing with panels, the property of the company, too heavy for his strength to hold, yet with boyish heedlessness dis- (310) regarding this fact, this injury is inflicted upon him. Had he not been employed by this defendant there is no reason to suppose that he would have been on its premises when the temptation occurred to him to prank with these panels to his serious hurt. In each of the propositions presented by the respective parties to the suit we think there is causal connection between the employment and the injury."

The doctrine is thus stated by Bailey in his work on Personal Injuries,

1291: "When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children wherever they go must be expected to act upon childish instincts and impulses, a fact which all persons who are *sui juris* must consider, and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character and one likely to do an injury to the child itself or to others, is liable in damages for injury resulting, which is a natural result of the original wrong, though there may be an intervening agency between the defendant's act and the injury." For this statement of the law the author cites a number of cases, among others *Lynch v. Nurdin, supra,* which Mr. Beach says is the leading English case on the subject and has been generally followed in this country, both in the Federal and many of the State courts. Cont. Neg., secs. 137-140; *R. R. v. Stout,* 2 Dill., 294; Fed. Cas. No. 13504, 84 U. S., 667. This was one of the series known as *"The Turntable Cases,"* 75 Mo., 653. The case was tried by *Judge Dillon,* and on appeal *Mr. Justice Hunt* said: "The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. . . . The charge was in all respects sound and judicious."

In *Queen v. Dayton Coal Co., supra,* it is said: "Of course, (311) we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable, simply on account of the employment in violation of the statute."

The learned counsel for defendant cite us to a number of cases more or less in conflict with the line of authorities which we have noted. In a few cases it is held that the statute prohibiting the employment of young children does not change the rule in respect to negligence, and that in such actions the rules and principles governing prior to the passage of the statute prevail. They are clearly out of harmony with the best considered and, we think, sound view. Several of them, upon the peculiar facts in the record, hold as a matter of law that the violation of the statute was not the proximate cause of the injury. In other cases the alleged negligence was in the failure of defendant to box or otherwise protect machinery in the manner required by statutes, wherein it is held that plaintiff's recovery for injury sustained is barred by working with such machines in the presence of obvious danger, etc. The distinction between such cases and ours is pointed out in *Am. C. and F. Co. v. Armentraut,* 214 Ill., 509: "The distinction is that in those cases the

employment of a servant was lawful. Here the employment was unlawful. The injury resulted from the unlawful employment and while appellee was engaged in doing the precise thing that appellant directed him to do."

Defendant relies upon the decision of this Court in *Hendrix v. Cotton Mills,* 138 N. C., 169. There the plaintiff was a boy of 12 years of age, hence not within the protection of the statute. The plaintiff, at the time of the injury, was, at the request of another boy, doing something entirely out of his line of employment. He was accustomed to the elevator. It must be conceded that expressions are to be found in the opinion tending to sustain the defendant's contention, but we think the cases
(312) may be distinguished. Plaintiff says: "After cutting lumps, I then was a sweeper on the floor. I cleaned up about machines and round the floor. That evening at 4 o'clock we got out of the factory. The weigh-boy went down the house to wash his hands. The man that ran that machine went down the house to clean up another machine. I was cleaning up that one I worked at. The weigh-boy ran up and threw a piece of cut tobacco in the machine. I reached my hand in there to take it out. He pulled the lever and ran, etc. . . . It was not after quitting time that I got hurt. If it was, all hands had not gotten out of the factory. No one told me to clean up the machine; I saw others cleaning up the machine, and I did so."

There is much in this testimony from which a jury may reasonably have drawn the inference that the child was acting in the line of his employment. It may be that we do not correctly interpret his testimony, but it impresses us, with our knowledge of the alertness and desire of children to be useful, as this child, by seeking employment, showed himself to be, that he thought it was his duty to take the piece of tobacco out of the machine. Certainly, it is not a necessary or even a fair interpretation of his conduct that he was wanton and reckless. Is it not rather the conduct of a boy seeking to discharge his duty to his employer? It was for the jury to draw such inferences from his testimony as are reasonable. *R. R. v. Stout, supra.*

We think a reasonable construction of his conduct in taking the tobacco out of the machine is that he was, or reasonably supposed that he was, discharging his duty. He was, it seems, required to clean up the machine. We should hesitate to conclude that the other boy willfully and, therefore, wickedly threw the lever, deliberately intending to crush the plaintiff's hand. It is more in accordance with childish impulse that he did it to frighten the plaintiff and see him jerk his hand back. While it was a reckless and wanton act, it was one of the freaks and
(313) pranks which might not unreasonably be anticipated from leav-

ing boys together in a mill, surrounded by dangerous machinery. It was for that reason, among others, that the Legislature prohibited the employment of children in such places. The fact that the statute was enacted, as we know, after several ineffectual efforts, puts an employer upon notice that in the eye of the law, based upon experience, it was dangerous to life and limb of children to be so employed and exposed to the very kind of danger by which the plaintiff was injured. To permit the defendant to escape liability for violating the statute by saying that it did not anticipate this particular condition, with its disastrous results, would be to nullify the law. Of course, it did not anticipate this particular condition or result; if it had done so, the employment would have been not negligent, but criminal. Neither did the servant who left the horse unhitched in *Lynch v. Nurdin,* 41 E. C. L., 422, anticipate that children would play with and frighten the horse and cause the plaintiff to suffer injury; but the Court held that he ought to have done so—so in the *Turntable cases* the same defense was made.

If the plaintiff be required to show that, in every negligent act, the particular result was in fact anticipated, it would be difficult to maintain any action for injury sustained by the negligence of another. *Drum v. Miller,* 135 N. C., 204. The law leaves the decision of the question of proximate cause to the jury, except when upon the facts but one inference could be drawn, as in the *Turntable cases* and many others in the Reports.

The State says to employers that they must not take the children under 12 years of age into their mills and factories; that to do so endangers their lives and limbs, dwarfs them mentally, morally, and physically; that it is upon the children that the permanent power and welfare of the State depend. They must not, below the tender and immature age fixed by the statute, be brought into contact with iron and steel machinery propelled by the powerful agencies of steam or electricity. Considered from any point of view, the right of (314) the child to have the opportunity to grow to at least the age named in the statute in a pure atmosphere, without danger of mutilation of body, dwarfing of mind, and to attend the schools provided by the State, the legislation is founded upon a wise and humane policy.

Its violation, followed by injury, gives a cause of action to the child upon the elementary principle that "whenever the common law or a statute imposes on one a duty, if of a sort affecting the public within the principle of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom; or, if the matter of the law involves only the interest of individuals, any one who has received harm from another's disobedience

may have his suit against him for damage." Bishop Noncontract Law, sec. 132; Comyn's Dig., 453; *Greenlee v. R. R.,* 122 N. C., 977; *Troxler v. R. R.,* 124 N. C., 189.

The defendant says, whatever its breach of duty may have been, the plaintiff was negligent and by such negligence contributed to his injury. The authorities cited by the learned counsel, applied to the conduct of an adult or one not within the protection of the statute, fully sustain their contention. But when we come to measure the duty of the child in regard to the exercise of care for his safety, an entirely different principle controls. Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine, to say that a child of 12 years comes within that class. Adopting the standard of the law in respect to criminal liability, we think that a child under 12 years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act, or conditions produced by others, as to make him guilty of contributory negligence. Mr. Labatt says: "The essential and controlling conception by which a minor's right of action is determined with reference (315) to the existence or absence of contributing fault is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible." Master and Servant, sec. 348. It is in such cases a question for the jury. 4 Thompson Neg., sec. 4587; Beach Cont. Neg., sec. 136. "Whether he could be guilty of contributory negligence or not was a question of fact to be determined by the jury, dependent upon the other fact whether it had been shown that the deceased had capacity to be guilty of contributory negligence. Between 7 and 14 a child is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity." *T. C. and C. Co. v. Enslen,* 129 Ala., 336; *Glover v. Gray,* 9 Ill. App., 329.

In several cases it is held that when a statute is violated and results in the injury of the child, the defense of contributory negligence is not open to the defendant. *Am. C. and F. Co. v. Armentrout, supra.* The better view seems to be otherwise. The Tennessee Court, after discussing the question, concludes: "It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. "As the standard of care thus varies with the age,

capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and (316) capacity." 7 A. & E., 409; *Plumly v. Birge,* 124 Mass., 57.

His Honor erroneously sustained the demurrer to the evidence. In the light of the testimony he should have submitted the case to the jury, instructing them that if they found the facts as testified to, the defendant was guilty of negligence in employing the plaintiff, either knowing his age, or failing to have the certificate of his parents as provided by the statute; that if they found that such negligence was the proximate cause of the injury, they should answer the first issue "Yes." In regard to the alleged contributory negligence of the plaintiff, he should have instructed the jury in accordince with the principles announced by the authorities herein cited. The jury could take into consideration the age, intelligence, and knowledge of the plaintiff in regard to the machine, and his capacity to know and appreciate the danger.

We have given to the questions presented upon this appeal a careful examination. It is the first time that we have had occasion to construe the statute, and it is conceded that the courts of other states are not uniform in the construction given similar statutes. It is a matter of importance to employers of labor in mills and factories to know the standard of their rights and liabilities. The industrial life and development of the State are not only consistent with, but promoted by, the exclusion of young children from mills and factories. The child, educated and developed before beginning work of this kind, becomes not only more useful and efficient, but in all respects a better citizen.

While not necessary to the decision of this appeal, we note that the first section of chapter 473, Laws 1903, is omitted from the Revisal. The statute, as incorporated in sections 3362-63-64, Revisal, makes the prohibition dependent upon "knowingly and willfully" employing a child. The original act, in declaring the prohibition, did not contain these words. Section 3, making the employment of the child a misdemeanor, properly required the act to be done "knowingly (317) and willfully." The omission of section 1 was doubtless an oversight. It may be of importance in the trial of actions, such as this, for injuries sustained, in regard to the burden of proof. We simply note this change to the end that if the General Assembly should desire, they

may restore section 1, which, under the language of the enacting and repealing clauses of the Revisal, would seem to be repealed.

Error.

Cited: *Leathers v. Tobacco Co.*, 144 N. C., 343, 350; *Starnes v. Mfg. Co.*, 147 N. C., 558; *Hunter v. R. R.*, 152 N. C., 689; *Rich v. Electric Co., ib.*, 693; *Pettit v. R. R.*, 156 N. C., 127; *Ensley v. Lumber Co.*, 165 N. C., 692; *Alexander v. Statesville, ib.*, 534; *Hauser v. Furn. Co.*, 174 N. C., 465; *Holt v. Mfg. Co.*, 177 N. C., 175.

MARTIN v. HOUCK.

(Filed 8 May, 1906.)

False Imprisonment—Unlawful Arrest—Arrests Without Warrant—Police Officers.

1. Under Revisal, sec. 3178, an officer may arrest for a felony without a warrant, if he knows or has reasonable ground to believe that a felony has been committed and that a particular person is guilty, and he also believes that he will escape if not immediately apprehended.

2. Under Revisal, sec. 3177, an individual may arrest for a felony without a warrant if the offense has been committed in his presence and he knows, or has reasonable ground to believe, the suspected party to be guilty.

3. Under Revisal, sec. 2939, the right of a police officer to arrest when he has no warrant is confined necessarily by the statute to the limits of the town.

4. In an action for false imprisonment and unlawful arrest, the defendants cannot justify on the ground that they were summoned by their codefendant, the chief of police, where it appears that the arrest was made outside of the limits of the town, without warrant, and there was no evidence tending to show that a felony had been committed.

5. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats.

(318) ACTION by S. C. Martin against Calvin Houck and others, heard by *Oliver H. Allen, J.*, and a jury, at November Term, 1905, of CALDWELL.

This action was brought to recover damages for an unlawful arrest and false imprisonment. The defendant Calvin Houck was a police-

man of Granite Falls, when he was informed that the plaintiff had stolen a pair of shoes from a store while it was on fire. He and his codefendants, J. O. Deal and George Lefevers, who acted as deputies, went to the plaintiff's house, which was two miles from the town, in the night and after the plaintiff and his wife had retired, and arrested him, after searching the house at plaintiff's request, as the State's evidence tended to show. The plaintiff's wife was compelled to dress in the presence of these strangers. The plaintiff, when accused of stealing the shoes, denied his guilt, but voluntarily agreed to go with the defendants to town and answer the charge. The defendants then told him that he need not go that night if he would come to town the next morning, which he promised to do. He went to Granite Falls the next morning, but no warrant was ever issued, and no accusation made against him for stealing the shoes. The defendants had no warrant for the plaintiff when they went to his home for the purpose of arresting him, nor does it appear that any formal charge was ever made against him, before or after the arrest. There was evidence on the part of defendants to show that, while they had entered his house that night, they had not arrested him. The defendants offered to prove that the plaintiff was seen with a pair of shoes two weeks after the night of the fire, and further that the defendant Calvin Houck had been told by A. M. Martin of a report made to him (Martin) that the plaintiff had stolen shoes from the burning building. This testimony was excluded, (319) and defendants excepted. The court instructed the jury upon the law as applicable to the different phases of the case, and to this part of the charge there was no exception. The defendants requested the court to instruct the jury as follows: "That in no view of the case could they return a verdict against the defendants Deal and Lefevers, they having been summoned by Houck, who was the chief of police of the town of Granite Falls, to go with him in search for stolen goods, and that there was no testimony that either of the defendants Deal or Lefevers in any manner attempted to arrest the plaintiff or in any manner restrained or assisted to restrain him of his liberty." The court refused to give this instruction, and the defendants (Deal and Lefevers) excepted. The court, in lieu of said instruction, charged the jury as follows: The arrest, if made at all, is admitted to have been made outside the town of Granite Falls, and no authority being shown for a policeman of Granite Falls to arrest outside of the town limits by the evidence in this case, the defendants Deal and Lefevers were not required to obey Houck; and if the plaintiff was actually arrested and the defendants Deal and Lefevers were present and participated in it, they would be liable. Defendants excepted.

The jury found, under issues properly submitted, that the defendants did unlawfully arrest the plaintiff, and assessed his damages at $200. Judgment was entered upon the verdict, and the defendants appealed.

Lawrence Wakefield and E. B. Cline for plaintiff.
W. C. Newland for defendants.

WALKER, J., after stating the case: The court in its charge fully explained to the jury the law applicable to the power of an officer to arrest without a warrant, and also instructed them as to the (320) powers of a town policeman. The only two exceptions made to the charge are really the same in substance and are sufficiently presented in the exception noted.

The statute provides as follows: "As a peace officer, the constable shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct." Revisal, sec. 2939. "Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable, or officer of police upon information to assist in such arrest." Section 3177. "Every sheriff, coroner, constable, officer of police or other officer, intrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person shall escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest." Section 3178. "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law." Section 3182.

We see, therefore, that an officer may arrest for a felony without a warrant, if he knows or has reasonable ground to believe that a felony has been committed and that a particular person is guilty, and he also believes that he will escape if not immediately apprehended; while an

individual may arrest in such a case, if the offense has been (321) committed in his presence and he knows, or has reasonable ground to believe, the suspected party to be guilty.

A policeman, as a peace officer, is given within the town all the powers of a constable in the county, and as a ministerial officer he has the power to serve process directed to him by the court.

In this case it appears that Houck had no warrant; so that he was not acting as a ministerial officer. What, then, are the powers of a constable in the county which he has under the statute as a peace officer? "In executing warrants (a constable) is a ministerial officer; in the apprehension of those who violate the law, he is a conservator of the peace. By the original and inherent power he possesses, he may, for treason, felony, breach of the peace, and some misdemeanors less than a felony committed in his view, apprehend the supposed offenders *virtute officii,* without any warrant." *S. v. Freeman,* 86 N. C., 685.

A police officer was not known to the common law, and therefore he can exercise only such powers as are given by the statute. His right to arrest when he has no warrant is confined necessarily by the statute to the limits of the town. *S. v. Freeman, supra; S. v. Sigman,* 106 N. C., 278; *Sossamon v. Cruse,* 133 N. C., 470. So that Houck cannot justify the arrest of the plaintiff as an officer, for he did not arrest in the town and had no warrant; and his codefendants, consequently, cannot justify under him.

This will free the charge of the court of any error, unless the defendants can justify as individuals, upon the ground that they had good reason to suspect that the plaintiff had stolen the shoes. Larceny is a felony. The statute provides that any one may arrest a person who he knows or has reasonable ground to believe has committed a felony; but the offense must have been committed in his presence. The shoes are not alleged to have been stolen in the presence of the defendants. So that statute does not apply. We need not inquire whether the statute, in this respect, is exclusive of the common-law right of a person to arrest another who is suspected of having committed a felony, (322) and that question is not therefore decided. It is sufficient to dispose of this case that we hold, as we do, that if the common-law rule still exists, the defendants cannot justify under it, as the evidence is not legally sufficient for the purpose. At the common law, in every case of treason and felony the supposed offender may be apprehended without warrant, if such a crime has been actually committed, and there is reasonable ground to suspect him to be guilty. In such a case the party making his arrest will not be liable to an action, though it should ultimately appear that he was mistaken and the person sus-

pected was innocent. But if no such crime was committed by any one, an arrest without warrant by a private individual would be illegal. 1 Chitty's Cr. Law, 15; *Neal v. Joyner,* 89 N. C., 287; *S. v. Campbell,* 107 N. C., 948. The foregoing doctrine was declared by *Lord Tenterden* in *Beckwith v. Philby,* 6 B. and C., 635, which seems to be a leading case upon the subject. In *Ashley's case,* 12 Coke, 90, it was resolved that, if felony is done and one hath suspicion upon probable matter that another is guilty of it, he may arrest the party so suspected, to the end that he may be brought to justice; but in such case three things are to be observed: (1) That a felony be done; (2) that he who doth arrest hath suspicion upon probable cause, which may be pleaded, and is traversable; (3) that he himself, who hath the suspicion, arrest the party. He cannot command another to do it, for suspicion is a thing individual and personal, and cannot extend to another person than to him who hath it." The law on this subject is set forth with great clearness and fullness in Voorhees on Arrest, sec. 112. The principle is thus stated in *Holly v. Mix,* 3 Wendell (N. Y.), 351: "An arrest of a felon may be justified by *any person* without warrant, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested. If an innocent person be arrested upon suspi-
(323) cion by a private individual, such individual is excused, if a felony was in fact committed, and there was reasonable ground to suspect the person arrested; but if no felony was committed by any one, and a private individual arrested without warrant, such arrest is illegal; a police officer, however, having general authority to arrest, would be justified without having a warrant, if he relied upon information from another on which he had reason to rely." *Brockway v. Crawford,* 48 N. C., 433; *Kennedy v. State,* 107 Ind., 144; *Brooks v. Com.,* 61 Pa. St., 352; *Wright v. Com.,* 85 Ky., 123; *Long v. State,* 12 Ga., 293. There is no evidence in this case tending to show that a larceny had been committed, and none to show that the plaintiff had stolen the shoes. *S. v. Rutherford,* 8 N. C., 457. What Martin told the defendant he had heard somebody else say is hardly sufficient proof of the fact that a larceny had been committed for submission to the jury. It is no legal proof at all, and the case was totally devoid of evidence that any such crime had been committed, even when we consider the evidence, offered and excluded, that the plaintiff was wearing a pair of new shoes two weeks after the fire. It was not shown that any shoes had been taken, nor, if any had been taken, were those worn by the plaintiff identified as the stolen property or a part of it, nor were any stolen goods found at his house. There was no serious attempt to establish the essential fact that a felony had been committed.

There was abundant evidence to show that the plaintiff had been unduly restrained of his liberty by Houck and the other defendants who were present and participated. In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. This principle is reasonable in itself, and is fully sustained by the authorities. Nor does there seem that there should be any very formal declaration of arrest. If the officer (324) goes for the purpose of executing his warrant, has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and the officer, in the execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body. It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered or there is reasonable ground to apprehend that coercive measures will be used if he does not yield, the offense is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats. Voorhees on Arrest, secs. 274, 275, 276. The evidence shows that the defendant Houck said to the plaintiff: "Consider yourself under arrest. You must go back to Granite Falls with us." Plaintiff asked for his warrant, when Houck replied: "That is all right about the warrant. You must go to Granite Falls with us." Plaintiff then said: "I will go with you." There was still other evidence showing that he submitted to the control they attempted to exercise over his person, and that he was made to act contrary to his own will. It is clear, we think, that there was no error in the charge with respect to the question whether or not there was an arrest. There was ample evidence, also, of the participation of the defendants Deal and Lefevers. It would not serve any useful purpose to state the evidence in full. (325)

We have not failed to observe that there is no evidence of any reasonable apprehension that the plaintiff might escape or that he was attempting to escape. The fact is that he was at his home, apparently unconscious that he was being pursued or that he was even suspected of

having committed a crime. Nor have we overlooked the fact that the defendants never made any charge against the plaintiff before a magistrate on the next day after the arrest, and did not in any respect comply with the requirements of the statute. Their conduct was not only illegal, but extremely reprehensible, and they have, under the circumstances, been very lightly dealt with by the jury. The verdict is but a small recompense to the plaintiff for the grievous wrong inflicted upon him and his family.

We can find no error in the rulings and charge of the court.

No error.

Cited: Powell v. Fiber Co., 150 N. C., 17; *Brewer v. Wynne*, 163 N. C., 322; *Riley v. Stone*, 174 N. C., 602.

DICKERSON v. SIMMONS.

(Filed 8 May, 1906.)

Statute of Frauds—Mortgage Sale—Memorandum—Mortgages—Redemption—Tender.

1. A party acquires no enforcible right as the successful bidder at a sale under a mortgage made by the agent of the mortgagee where the statute of frauds is set up as a bar and no memoranda of the sale was made by the agent.

2. A blank deed in the ordinary form prepared by the agent of the mortgagee at his office after the sale, a distance of 100 yards away, and not signed by the mortgagee, or any one else as his agent, and in no way referring to the printed advertisement, is not a compliance with the statute.

3. The advertisement of a mortgage sale being a mere offer to sell, standing alone, nothing else appearing on it, and there being no written memorandum connected with it showing a price bid and a purchaser, is not a contract to convey land nor a note or memorandum of a contract to convey to a particular individual.

4. A party to whom an equity of redemption has been conveyed has the same right to redeem that his grantor had, and the right to pay the mortgage and have it canceled.

5. An unconditional tender on the day when the mortgage debt falls due, called the law day, discharges the lien of the mortgage, although the debt survives as a personal liability.

6. Where, after the maturity of the mortgage debt, the mortgagor, after making a tender, which was not accepted, did not bring suit to redeem and

pay the money into court, the lien of the mortgage still subsists, even if the attempted foreclosure is void. Its only effect is to stop interest and costs accruing after the tender.

7. A mortgagor may preserve his right to redeem against any purchaser by giving him notice of the tender before or at the sale.

8. The phrase, "keeping his tender good," does not mean that defendant must have paid the money into court. But the debtor must be ready, able, and willing at all times to pay the debt.

ACTION of ejectment by S. M. Dickerson against Allen Sim- (326) mons, heard by *Jones, J.*, and a jury, at November Term, 1905, of SURRY. From the judgment rendered, the defendant appealed.

J. M. Bodenheimer for plaintiff.
W. F. Carter for defendant.

BROWN, J. The court submitted the usual issues in ejectment, and, as stated in the record, "plaintiff moved for judgment upon the whole evidence." His Honor granted judgment. We assume from this that his Honor instructed the jury that upon the whole evidence, if believed to be true, to answer the issues for plaintiff.

The land in controversy belonged to W. W. and J. L. Ashburn as tenants in common. They mortgaged it to E. S. Dickerson. On 9 September, 1902, W. W. Ashburn conveyed his equity of redemption to defendant. On 13 December, 1902, E. S. Dickerson by his agent, W. L. Reece, sold the land under the mortgage, and (327) defendant bid it off for $260. The mortgagee, E. S. Dickerson, refused to execute the deed to defendant and repudiated the sale, and again sold the land under the mortgage on 22 April, 1903, when it was bid off by and deed made to plaintiff.

1. We are of opinion that defendant acquired no enforcible right as the successful bidder at the sale of 13 December, 1902, made by Reece for the mortgagee, inasmuch as the statute of frauds is set up as a bar. No memorandum of the sale whatever was made by the agent, and consequently none was signed. In order to charge a party upon such a contract it must appear that there is a writing containing expressly or by implication the material terms, and it must be signed by such party or his agent lawfully authorized. The only memorandum relied upon by the defendant is a blank deed in the ordinary form, prepared by Reece at his office after the sale, a distance of one hundred yards away, and is not signed by E. S. Dickerson, or any one else as his agent, and in no way refers to the printed advertisement. That this is not a compliance with the statute is plain to us and in accord with the authorities.

Hall v. Misenheimer, 137 N. C., 187; *Gwathney v. Carson,* 74 N. C., 5; *Mayer v. Adrian,* 77 N. C., 83.

It is not contended that there was any note or memorandum made on the printed advertisement, or any writing whatever signed by the mortgagee or his agent, showing who bought the land, price paid, or terms of sale. The advertisement is only an offer by the seller to sell. The auctioneer is the agent of the plaintiff to sell, and the law constituted him the defendant's agent, when he became the last and highest bidder, to complete the sale by meeting the requirements of the statute. This the auctioneer may do by entering the amount bid on the advertisement and signing thereon the purchaser's name. *Proctor v. Finely* (328) 119 N. C., 536. Then both seller and purchaser are bound.

As no memorandum whatever was made in this case, neither is bound. The "party to be charged" in this case is the seller. The advertisement, being a mere offer to sell, standing alone, nothing else appearing on it, and there being no written memorandum connected with it showing a price bid and a purchaser, cannot in any sense be called a contract to convey land or a note or memorandum of a contract to convey to a particular individual. This case differs from *Proctor v. Finley, supra,* relied on by defendant. In that case the auctioneer entered the name of the party sought to be charged on the margin of the printed advertisement; this showed by a memorandum that a sale had been made under the advertisement, and that the offer to sell had been accepted. It stated the amount bid, and the name of the purchaser being duly signed thereto, it thereby became a completed contract to sell and convey land, binding under the statute. That case is no authority to support defendant's contention.

2. It is in evidence that shortly after the sale of 13 December, 1902, the defendant duly and unconditionally tendered to E. S. Dickerson, the mortgagee, the full amount on the mortgage debt, some $416.50, which Dickerson refused to accept. There is also evidence tending to prove that defendant gave due notice of this tender at the sale in April, and forbade the selling of the land, and it is contended, therefore, that plaintiff had knowledge of defendant's equity. In his answer defendant avers that the sale to plaintiff, the son of the mortgagee, was a sham; that he was not a *bona fide* purchaser for value, and that he had due notice of defendant's rights; that defendant has kept his tender good by being able, ready, and willing to pay said mortgage debt at any time, and defendant prays that he be allowed to redeem the land by paying the debt. As a tenant in common of the equity of redemption, the defendant has the same right to redeem that his grantor had and the

right to pay the mortgage and have it canceled. Boone on Mort- (329)
gages, p. 49; 25 A. & E. (1 Ed.), 288. This brings us to consider
the effect of the alleged tender. It is well settled and universally held that an unconditional tender on the day when the mortgage debt falls due, called the law day, discharges the lien of the mortgage, although the debt survives as a personal liability. 20 A. & E. (2 Ed.), 1062, and cases cited; *Shields v. Lazear,* 34 N. J. Law, 496. As to the effect of a tender made, as in this case, after maturity, there is much conflict of authority. In those jurisdictions where the mortgage is treated simply as a security to a debt, the rule is that a mortgage is discharged by a proper tender made at any time before foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail the lien of the mortgage is not discharged by the tender, the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien, when it is not accepted, he must bring his suit for redemption and pay the money into court. North Carolina, Massachusetts, New Jersey and other states are classified as jurisdictions which adhere to the common law. 20 A. & E. (2 Ed.), 1063. In the first-named jurisdictions it is held that, where tender is made after the law day, a sale under the power is void even as to a *bona fide* purchaser for value. *Cameron v. Irwin,* 5 Hill (N. Y.), 272-6; Pingree on Mortgages, sec. 1342. The contrary is held in Massachusetts and some other courts which adhere to the common law. Jones on Mortgages, 1798, and cases cited. Those courts regard the power as one coupled with an interest which cannot be revoked, and hold that a sale under the power, after an unaccepted tender, transfers the legal title to the purchaser, and that the tender is merely a foundation for a suit in equity for redemption. It seems, therefore, that in those states a *bona fide* purchaser for value and without notice of tender gets a good title. It is also held that a mort-
gagor who has notice of an intended sale and allows it to proceed
without objection, cannot afterwards show a tender or even a (330)
payment in full of the mortgage debt and thereby defeat the
title of a *bona fide* purchaser for value without notice. *Cranston v. Crane,* 97 Mass., 459; Jones on Mortgages, sec. 1798. It has been determined expressly by this Court that "the unaccepted tender of the amount due on a debt secured by mortgage does not discharge the lien of the mortgage unless the tender be kept good and the money paid into court. Its only effect is to stop interest and cost accruing after tender." *Parker v. Beasley,* 116 N. C., 1. The defendant after making the ten-

der did not bring his suit to redeem and pay the money into court, and, therefore, under the authorities cited the lien of the mortgage still subsists, even if the attempted foreclosure is void. There are cases in the State where the wife's land has been pledged as security for the husband's debt wherein it seems to be held that a tender of payment or an extension of time of payment for value will discharge the lien even as against a *bona fide* purchaser for value without notice. The decisions are based upon the relation of principal and surety and do not apply to a case where the land belongs to the principal debtor. Notwithstanding the conflict between the courts as to the effect of a tender made after the law day, it seems to be agreed by all that a mortgagor may preserve his right to redeem against any purchaser by giving him notice of the tender before or at the sale. *Cranston v. Crane,* and Jones on Mortgages, *supra.*

It is unnecessary, in view of the allegations of the answer and the evidence of the defendant, to decide what effect a previous tender has upon the title when the purchaser buys in good faith, for value and without notice. This defendant alleges and testifies that he gave due notice at the sale and, further, that plaintiff is not a *bona fide* purchaser for value. It may become necessary to determine the question if the jury find such allegations against the defendant. His Honor erred in not submitting proper issues to the jury, to the end
(331) that these controverted facts might be determined.

We think the following issues substantially are necessary to be determined by the jury, viz.:

1. Did defendant tender to E. S. Dickerson the full amount due on the mortgage debt prior to the sale to plaintiff, as alleged in the answer?
2. If so, did plaintiff have notice thereof at the time of his purchase?
3. Is plaintiff a *bona fide* purchaser for value?
4. Did defendant keep his tender good?
5. What is the yearly rental value of the land?

If the defendant contests the payment of interest since the tender, the date of the tender must be determined by the jury, unless the date is agreed upon. It may be well to say that the phrase, "keeping his tender good," does not mean that defendant must have paid the money into court. It seems that payment into court is only authorized or required when there is a statute requiring it or when there is a suit pending to redeem the land, and where the effect is to discharge the mortgage lien. But the debtor must be ready, able, and willing at all times to pay the debt. He may retain the money in his own possession, but the identical money need not be kept on hand, and if, by making

use of the money, he is not ready to pay the debt in current money at any time when requested, the effect of the tender is destroyed. 28 A. & E. (2 Ed.), 40.

New trial.

WALKER, J., concurs in result.

Cited: *Lee v. Manley,* 154 N. C., 248; *Love v. Harris,* 156 N. C., 93; *Weathersbee v. Goodwin,* 175 N. C., 237; *Everhart v. Adderton, ib.,* 405; *Debnam v. Watkins,* 178 N. C., 239.

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PUETT v. RAILROAD.

(Filed 8 May, 1906.)

Railroads—Passengers—Argument of Counsel—Evidence.

1. The right of a passenger to recover against a carrier for its neglect to carry him to his destination rests not only upon contract, but the duty so to carry him is imposed by law, and for a breach of it he may recover in tort.

2. The trial judge has a large discretion in controlling and directing the argument of counsel, but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case.

3. In an action for injuries to a passenger owing to the drunken conduct of the engineer, the testimony of a witness that "when he started to get on the train at the station the conductor told him not to get on, as it was dangerous to do so; some negroes were in the car," was competent as some evidence tending to show that the conductor knew of the drunken condition of the engineer and fireman before he left, and the court erred in excluding the statement that "it was dangerous."

ACTION by Walter Puett and wife against Caldwell and Northern Railroad Company, heard by *Oliver H. Allen, J.,* and a jury, at November Term, 1905, of CALDWELL.

Plaintiffs brought this action to recover damages for injuries caused by the negligence of the defendants. They had purchased tickets and boarded the train at Lenoir, intending to go to Collettsville, ten miles distant. The nature of the injury can be best described by stating the testimony of the *feme* plaintiff, Mrs. Martha Puett, which was as follows: "On the night of 27 February, 1905, my husband, W. R. Puett, and myself boarded the train at Lenoir to go to Collettsville, and paid

our fare. It was a dark, foggy and rainy night. The train had gone about three miles from Lenoir when it stopped. While the train (333) was standing on the track, it was jerked backward and forward in a violent manner several times. After the train had been stopped some minutes, the engineer came back into the car where the passengers were, with a light in one hand and a pistol, which he flourished, in the other. He was cursing and swearing because some one had stopped the train. He seemed drunk and mad. I got off the train because I was afraid. I was afraid of being killed. He said nothing to me, but only came through the car, where the passengers were, cursing. He did not say anything that frightened me. My husband was there, and I had my baby with me. My husband, myself and baby, after getting off the train, walked about one-half mile to the house of Mr. Martin, and next morning walked to Collettsville, about seven miles away. It shocked me and gave me a headache, and I was sick about three months, and during that time was taking medicine. The engineer did not say anything to me." There was evidence tending to show that the conduct of the engineer was so violent and threatening that the conductor set the brakes and placed the train in charge of a man by the name of Pope, who was an officer of the defendant. He then went to Lenoir to get another engineer and fireman. While he was gone, the engineer, in a drunken condition, entered the car and inquired for the man who had locked the train, and threatened to kill him. The engineer had jerked the train back and forth with the engine several times and alarmed the *feme* plaintiff. He then cut loose the engine and started up the mountain. Pope then said: "If he goes up he will do harm. I have done everything that I can do." When he left with the engine he threatened "to go to the top of the mountain and then come back and run through the train." Pope (the officer in charge of the train after the conductor left) went into the car, where the plaintiffs were seated, and told the passengers "that they had better watch out." He then repeated to them what the engineer had threat- (334) ened to do, and most of the passengers left the train. The defendant introduced no evidence.

There were exceptions to evidence and to the charge of the court, and also to the refusal to give instructions, but they need not be set out, in the view taken of the case by this Court.

It is stated in the case that during the argument of the plaintiff's counsel he commented on the declaration of Pope to the passengers, when he was stopped by the court. This is one of the errors assigned.

Post Clarke testified: "When I started to get on the train at Lenoir, the conductor told me not to get on it, as it was dangerous to do so.

Some negroes were in the car." The defendant objected to the statement of the conductor "that it was dangerous," and it was excluded. Plaintiff excepted.

There was a verdict for the defendants. Judgment was rendered thereon and the plaintiffs appealed.

Lawrence Wakefield and Edmund Jones for plaintiffs.
J. H. Marion and W. C. Newland for defendant.

WALKER, J., after stating the case: The right of the plaintiffs to recover was not seriously questioned, provided the jury had found the facts to be as alleged in the complaint. The court charged the jury upon the theory that there might be such a recovery if they found the facts to be as the witnesses testified they were. The right of a passenger to recover against a carrier for its neglect to carry him to his destination rests not only upon contract, but the duty so to carry him is imposed by law, and for a breach of it he may recover in tort, and the liability then is, of course, independent of the contract. Fetter on Carriers, p. 11, sec. 5, and notes, and p. 1337; sec. 535; *Hansley v. R. R.,* 115 N. C., 602; Code, sec. 1963; Revisal, sec. 2611. We are not now referring to the measure of damages, for that question is not before us. In the *Hansley case* the rule as to compensatory damages in such cases seems to have been agreed upon by all the judges, though there was a division of opinion among them as to exemplary damages. (335) We will not even intimate whether the plaintiff is entitled to recover punitive damages in this case, if he is entitled to recover at all, but leave that question open for decision when it is presented.

We think that his Honor erred in interrupting and stopping counsel in his argument. The comment he was making upon the declaration of Pope seems to us to have been clearly within his right. What Pope said, at the time the plaintiffs were in the passenger coach, was a part of the *res gestæ.* It occurred at the very time that the plaintiffs left the car, and tended to explain why they left and to show that they had good cause for leaving, in that they had a reasonable apprehension of danger if they remained. It also tended to corroborate the plaintiffs as witnesses. It was not merely a statement of Pope as to what had occurred, which would be hearsay, but a declaration made at the time the drunken engineer left with his engine, he having made the threat to return and "run through the train." It was an integral part of the whole transaction, as much so as the conduct of the engineer and the act of the plaintiffs, and was required to complete the story of what had been done. Being thus competent, material, and relevant, there can be no

doubt of the right of counsel to make proper comment upon it in his address to the jury. This was all that he was doing when admonished by the judge to stop, which he did, as he should have done, in submission to the intimation of the court. But this client was thereby prejudiced, and prevented, through his chosen counsel, from developing his case before the jury. The judge has a large discretion in controlling and directing the argument of counsel (*S. v. Caveness,* 78 N. C., 484), but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. *S. v. Miller,* 75 (336) N. C., 73. What is here said is subject, however, to the restrictions imposed by Laws 1903, ch. 433; Revisal, sec. 216. The right to argue the whole case has been expressly conferred by statute. Rev. Code, ch. 31, sec. 57, par. 15; Code, ch. 4, sec. 30; Revisal, sec. 216. The history of this legislation is well known to the bench and bar. *S. v. Miller, supra.* The reason of the court for stopping counsel is not given. We assume, and we think not unreasonably, that the learned judge who presided at the trial thought the comment improper, as the declaration of Pope was immaterial. Entertaining this opinion, it was proper to interfere as he did. But we think the declaration was material and a proper subject of comment.

We do not see why the testimony of the witness Post Clarke, which was excluded by the court, was not competent and relevant. It was ruled out, we are informed, because it was supposed to be too uncertain as to the source of danger. The witness stated, it is true, in the same connection, that there were negroes on the train; but it does not appear that he intended to imply that the conductor referred to them as dangerous. He was merely stating the fact of their presence, without regard to its relation with what the conductor had said. Nor does it appear that the negroes were intoxicated or misbehaving themselves. The evidence fails to disclose anything to which the conductor could have referred, except the drunken condition of the engineer and fireman. He may not have intended to refer to that, but in the absence of proof of any other source of danger, what he said is competent as some evidence to be considered by the jury, tending to show that he knew of their condition before he left Lenoir. What he really did mean may be explained at the next trial.

In unduly restraining the argument of counsel and in excluding competent evidence as herein stated, there was error in law.

New trial.

Cited: Irvin v. R. R., 164 N. C., 17.

(337)

WESTHALL v. HOYLE.

(Filed 16 May, 1906.)

Judgments—By Consent—In Vacation—Oral Agreement of Counsel.

1. Where it was agreed in open court, by counsel of both parties, that this case be continued till next term upon payment of the costs of the term by the defendant in ten days, and that if the costs were not paid within ten days the plaintiff should have judgment for the amount of his claim, and that the judgment might be signed out of term, a judgment signed in thirty days in vacation was valid; it is not a conditional judgment, nor was it entered contrary to the course and practice of the court.

2. A judgment entered by consent in vacation is valid, though the agreement in open court by counsel was not reduced to writing, nor entered on the minutes, if it is not denied.

ACTION by W. H. Westhall against J. S. Hoyle and another, heard by *W. R. Allen, J.*, at December Term, 1905, of BURKE, upon a motion to set aside a judgment theretofore rendered. From an order setting aside the judgment, plaintiff appealed.

Self & Whitener for plaintiff.
Witherspoon & Witherspoon for defendant.

CLARK, C. J. It was agreed in open court, by counsel for both parties, that this case be continued till next term upon payment of the costs of the term by the defendants in ten days, and that if the costs were not paid within ten days the plaintiff should have judgment for the amount of his claim, and that the judgment might be signed out of term. This agreement was not reduced to writing nor entered on the minutes, but it is not denied. That judgment can be entered by consent in vacation is well settled. *Bank v. Gilmer,* 118 N. C., 670, and a long list of cases there cited, and many cases since. (338)

This is not a conditional judgment, but it is absolute in its terms. That it was to be signed upon a certain condition does not invalidate it, as the contingency happened. This, too, is discussed and held in *Bank v. Gilmer, supra.* The defendants "cannot object to action which could not have been taken but for their assent and which was based upon it." *Hawkins v. Cedar Works,* 122 N. C., 91—citing *Benbow v. Moore,* 114 N. C., 263; *Bank v. Gilmer,* 118 N. C., 688. In *Benbow v. Moore* this Court sustained a judgment signed by *Judge Connor,* by virtue of such consent, not only in vacation, but out of the district. Here the judgment was signed in thirty days and within the district. *Hahn v. Brinson,* 133 N. C., 7, is merely a repetition of the

familiar doctrine that the court will disregard any alleged oral agreement between counsel, if denied, for it will not try an issue of veracity, which could have been avoided easily, either by putting the agreement in writing or by causing it to be entered on the minutes. But this agreement is not denied, and the judgment signed in vacation was valid. *Molyneux v. Huey,* 81 N. C., 112; *Shackleford v. Miller,* 91 N. C., 185; *McDowell v. McDowell,* 92 N. C., 229, in neither of which was the consent in writing nor entered on the minutes.

This judgment was not entered contrary to the course and practice of the court, and it was error to set it aside as an irregular judgment. The consent of counsel is stated in the judgment and is binding upon the defendants in the absence of fraud and collusion. *Hairston v. Garwood,* 123 N. C., 345.

Reversed.

Cited: Mann v. Hall, 163 N. C., 60; *Gardiner v. May,* 172 N. C., 198; *Chemical Co. v. Bass,* 175 N. C., 430.

(339)

AIKEN v. MANUFACTURING COMPANY.

(Filed 16 May, 1906.)

Additional Parties—Power of Court—Discretion—Appeal.

The action of the court below in denying, without giving any reasons, plaintiff's motion to make an additional party defendant is not reviewable, where such party is a proper but not a necessary party.

ACTION by Purl Aiken, by his next friend, against Rhodhiss Manufacturing Company, heard by *Justice, J.,* at March Term, 1906, of BURKE. From the denial of a motion to make an additional party defendant, the plaintiff appealed.

Avery & Avery for plaintiff.
No counsel for defendant.

PER CURIAM: The plaintiff moved to amend the summons and complaint by making the Fidelity and Casualty Company of New York a defendant, and for process against said company. The plaintiff, upon the facts set out in his complaint, might have brought his action against the defendant and the said Casualty Company. The said company is

not, however, a neccessary party, for the plaintiff may prosecute his action against the defendant alone. His Honor denied the motion without giving any reasons. As there is a presumption in favor of the correctness of the ruling, we assume his Honor denied the motion in the exercise of his discretion. As the Casualty Company is a proper, but not at all a necessary party, his Honor had the right to exercise his sound discretion, which is not reviewable. *Jarrett v. Gibbs,* 107 N. C., 304; *Henderson v. Graham,* 84 N. C., 496.

Affirmed.

Cited: Wood v. Kincaid, 144 N. C., 395; *Clark v. Bonsall,* 157 N. C., 274; *Spruill v. Bank,* 163 N. C., 45; *Guthrie v. Durham,* 168 N. C., 574, 576; *Joyner v. Fiber Co.,* 178 N. C., 635.

(340)

ALLEN v. RAILROAD.

(Filed 16 May, 1906.)

Railroads—Crossings—Contributory Negligence.

Where the plaintiff's evidence was to the effect that his intestate walked on the railroad crossing and was killed by the defendant's train, and that the intestate at a point 20 yards from the crossing, by looking, could have seen down the railroad 200 yards in the direction from which the train approached, and that the intestate did not look, listen, or turn her head, and was paying no attention to the train, the court was correct in giving an adverse intimation as to the plaintiff's right to recover.

ACTION by J. B. Allen, administrator of M. A. Allen, deceased, against Atlanta and Charlotte Air Line Railway Company heard by *Justice, J.,* and a jury, at September Term, 1905, of CLEVELAND.

Quinn & Hamrick for plaintiff.
George F. Bason and W. B. Rodman for defendant.

PER CURIAM: The plaintiff's evidence was to the effect that the intestate walked on the railroad crossing and was killed by the defendant's train, and that the intestate at a point 20 yards from the crossing, by simply looking, could have seen down the railroad 200 yards in the direction from which the train approached. The testimony of the plaintiff further showed that the intestate did not look, listen, or turn

her head, and was paying no attention to the train. On this testimony, the court was clearly correct in giving an adverse intimation as to the plaintiff's right to recover.

No error.

Cited: *Mitchell v. R. R.*, 153 N. C., 117; *Exum v. R. R.*, 154 N. C., 411; *McNeill v. R. R.*, 167 N. C., 399; *Horton v. R. R.*, 175 N. C., 484.

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(341)

BIVINGS v. GOSNELL.

(Filed 16 May, 1906.)

Ejectment—Evidence—Handwriting—Experts—Qualification—Harmless Error—Declarations—Res Gestæ.

1. It was improper to permit, over objection, a witness to testify as a handwriting expert, where the record does not disclose that the witness qualified himself as an expert or that he was asked any questions tending to qualify him.
2. In an action of ejectment, erroneous admission of certain original deeds because not properly proved does not present reversible error where certified copies of these deeds from the registry were subsequently introduced in evidence without valid objection and the case on appeal does not disclose that they were necessary to make out the plaintiff's case, or in what way they worked to the injury of the defendant.
3. In an action of ejectment it was not error to allow a witness for the plaintiff, who testified that he rented the land from M. and held the same for one year under that lease, to testify further that M. said to the witness, at the time of the renting, that he was acting for the plaintiff, it being a part of the act of taking and holding possession, a part of the *res gestæ*.

ACTION of ejectment by Mary M. Bivings and others against William Gosnell, heard by *Councill, J.*, and a jury, at October Term, 1905, of POLK. From a judgment in favor of the plaintiffs, the defendant appealed.

Sol Gallert for plaintiffs.
McBrayer & McBrayer for defendant.

HOKE, J. There seems to be some force in the objection of the defendant to the evidence of the plaintiff's witness, M. O. Dickinson, who was allowed on the trial to testify to his opinion of the handwriting (342) of T. F. Birchett, a former clerk of the Superior Court of

Rutherford County, by comparing his signature to the probate of a deed from William Garrett, Jr., to James Morris, dated 7 December, 1833, offered in evidence by the plaintiff, with the signature of said Birchett to other records of the court, while he was clerk, which were in evidence in the case and admitted to be genuine, or certainly not denied. The records were such as the law permits to be used for the purpose of a comparison of handwriting. *Tunstall v. Cobb,* 109 N. C., 316. But the witness does not seem to have qualified himself as an expert, or to have been asked any questions tending to qualify him as such. This was very likely done, and omitted from the case on appeal by inadvertence; but the record as it now stands does not disclose that it was done, and the admission of the evidence over the defendant's objection was improper.

Objection was also made to another deed from William Garrett to James Morris, dated 14 April, 1834, on same ground. While there may have been an erroneous ruling in the admission of these deeds, the same we think, does not present a reversible error, and for two reasons: First, the plaintiff subsequently offered certified copies of these deeds from the registry of Rutherford County, and while the defendant objected to their admission, and excepted, it is nowhere set out or suggested wherein the copies were defective or improperly admitted. These copies, therefore, being in evidence without valid objection, the error, if any, as to the original deeds became immaterial. Again, the case does not disclose that these deeds were necessary to the plaintiff's case. He was seeking to establish his title by adverse occupation under color, and, so far as appears, there were other deeds and muniments of title amply sufficient to make good his claim by adverse possession and for the requisite length of time. The burden of showing error is on the appellant, and as the case on appeal does not disclose that these deeds were necessary to make out the plaintiff's cause, or in what way they worked to the injury of the defendant, the verdict and judgment against him will not be disturbed on account of their admission. (343)

Again, it is urged for error that S. C. Cantrell, a witness for the plaintiff, who testified that he rented the land from one James Morris and held the same for one year (about 1870) under that lease, was allowed, over the defendant's objection, to testify further, that James Morris said to the witness, at the time of the renting, that he was acting for the plaintiff. This testimony, we think, was competent as accompanying and characterizing the witness's occupation and possession of the property. The declaration of the tenant would be clearly competent for such purpose, and the declaration of Morris made to the tenant, assented to and acquiesced in by him, is equally competent. It was a

part of the act of taking and holding possession, a part of the *res gestæ*. In 1 Greenleaf on Ev., sec. 108, it is said: "Again, the occupation of land is a merely physical act, capable of various interpretations, and may need to be completed by words in order to have legal significance. What a man says when he does a thing shows the nature of his act and is a part of the act; it determines its character and effect. Tenancy is a continuation of acts in a certain relation to another, and declarations during the tenancy by a man that he is a tenant, and of a particular person, may be put as a part of the *res gestæ* so far as it is necessary to learn the significance of the act." Our own authorities are to like effect. *Shaffer v. Gaynor,* 117 N. C., 15; *Kirby v. Masten,* 70 N. C., 540.

It is sometimes held that declarations characterizing and accompanying possession are only admitted when in disparagement of title, and are only to be sustained on the ground that they are declarations against interest. Greenleaf and other authorities intimate to the contrary. But conceding this to be the correct ground, this evidence is admissible, for the qualification means in disparagement of the declarant's title.
(344) His interest would be to hold as owner, and when he declares, as accompanying his entry or characterizing his possession, that he enters and holds as tenant, this is characterizing an act and giving it its true significance, and is likewise in disparagement of the declarant's title. It will be noted that this declaration was at the very time of the renting, and it also appears, we think, by fair interpretation of the evidence, that the parties were then upon the land. Certainly, nothing is shown to the contrary, and, as we have heretofore stated, the burden is on the appellant to establish error, or the results of the trial will not be disturbed.

No error.

Cited: Steadman v. Steadman, 143 N. C., 350.

HOBGOOD v. EHLEN.

(Filed 16 May, 1906.)

Corporations—Stockholders—Unpaid Subscriptions—Law of Domicile —Property for Stock—Fraud.

1. In an action by a trustee in bankruptcy of a corporation to recover from the stockholders the unpaid stock subscriptions, on the ground that they had attempted to pay for the stock in property of no real value, in order to show the motives and purposes which prompted the parties in forming

the corporation and the fraudulent character of the transaction, it was material to show the antecedent steps and how the defendants came into the enterprise.

2. Where a corporation was organized under the laws of another State, the liability of the organizers and stockholders for the debts of the corporation when in bankruptcy is to be determined by the law of the State of its domicile.

3. In the absence of charter restrictions, a corporation may take property, which is reasonably necessary for its legitimate business, in payment of its stock, but when so received the property must be taken at its reasonable monetary value. Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholder individually, who sells the property, as for an unpaid subscription.

ACTION by F. P. Hobgood, trustee in bankruptcy of the Ronda (345) Lumber and Manufacturing Corporation, against W. B. Ehlen and others, heard by *Jones, J.*, and a jury, at December Term, 1905, of FORSYTH.

This was an action brought by the plaintiff, trustee in bankruptcy of the Ronda Lumber and Manufacturing Corporation, against the defendants, who were the subscribers to and holders of the stock of said corporation, to recover from them the amount of their unpaid stock subscriptions, the plaintiff alleging that the defendants had attempted to pay for the stock in property which had no real value. The plaintiff had a judgment below, and the defendant W. B. Ehlen alone appealed.

These are the issues submitted:

1. What amount of stock was issued to W. B. Ehlen in the Ronda Lumber and Manufacturing Corporation? Answer: $50,300, par value.

2. What amount of stock was issued to W. H. McElwee in the Ronda Lumber and Manufacturing Corporation? Answer: $19,500, par value.

3. What amount of stock was issued to Robert Hickerson in the Ronda Lumber and Manufacturing Corporation? Answer: $19,500, par value.

4. Was the Ronda Lumber and Manufacturing Corporation organized and its stock issued in conformity with the laws of Delaware? Answer: Yes.

5. Was there an intent to defraud and cheat on the part of the defendants, or either of them, in the organization and issuing of the stock in the Ronda Lumber and Manufacturing Corporation to the defendants or others? Answer: Yes; all.

6. What was the value of the property of the Ronda Pin and Bracket Company at the time of the organization of the Ronda Lumber and Manufacturing Corporation? Answer: $896.63.

(346) 7. What is the amount of the indebtedness of the Ronda Lumber and Manufacturing Corporation? Answer: $38,983.92.

8. In what amount is the Ronda Lumber and Manufacturing Corporation indebted to W. B. Ehlen? Answer: $20,637.80.

9. What is the amount of assets in the hands of Hobgood, trustee? Answer: $5,769.36.

L. M. Swink, Lindsay Patterson, and Manly & Hendren for plaintiff.
Busbee & Busbee, E. J. Justice, and Stedman & Cooke for defendant.

BROWN, J. The first ten exceptions appearing in the record relate to matters connected with the relations existing between Ehlen and his codefendants prior to the organization of the Ronda Lumber and Manufacturing Corporation. It is insisted that such matters are not material to the issues, and that the evidence was irrelevant and calculated to prejudice the jury against Ehlen. We think the evidence was material and the exceptions are without merit. In order to show the motives and purposes which prompted the parties in forming the corporation, and the fraudulent character of the transaction, it was material to show the antecedent steps and how the defendant Ehlen came into the enterprise.

The remaining exceptions raise the question of the sufficiency of the evidence. The defendant insists that the court should have instructed the jury that there was no evidence as to him to warrant an affirmative answer to the fifth issue, which involved the question of fraud. We think the whole controversy hinges on the correctness of that ruling. The corporation known as the Ronda Lumber and Manufacturing Corporation was organized by the defendants under the laws of the State of Delaware, which contains the following provision: "Section 14. Any corporation existing under any law in this State may issue stock for labor done or personal property or real estate or leases thereof; (347) in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate, or leases shall be conclusive." Public Laws of Del., vol. 2, part 1, 1901, p. 292. The liability of the defendant, as an organizer and stockholder, for the debts of the bankrupt corporation is, therefore, to be determined by the law of Delaware, the domicile of the corporation. Thompson Liability of Stockholders, sec. 89.

In consequence of the ruling of the judge below, it is unnecessary that we should determine that constructive fraud is sufficient to support the finding of the jury. Upon this issue the court charged as follows: "The law under which this case is to be tried is the law of Delaware, and I

charge you that where fraud is referred to in that statute, 'actual' and not 'constructive' fraud is meant. Constructive fraud, as distinguished from actual fraud, is inferred from illegal or improper acts that result in loss or injury to others. Actual fraud is established by competent proof of corrupt purposes, wicked or unlawful intent to cheat another or others. Applying it to this case, constructive fraud would be that kind of fraud that might be inferred from an overvaluation of property conveyed to the corporation, in the absence of proof of actual intent to defraud. The directors of the Ronda Lumber and Manufacturing Corporation having placed a valuation on the property conveyed and set over to said corporation, and issued stock therefor, if you believe the evidence, their action in that matter is conclusive as to the value of said property, unless you find that this was done in actual fraud. It is not enough for the jury to find that the property was valued at too much by the directors of the Ronda Lumber and Manufacturing Corporation, but in order to answer the fifth issue 'Yes' you would have to go further and find fraudulent overvaluation."

We think the facts and circumstances in evidence amply sufficient to be submitted to the jury upon the issue of actual fraud, and warranted their finding. It is very difficult to prove actual fraud in many cases. It is frequently necessary to seek out the earmarks or (348) badges of fraud and present them to the jury as evidence from which they may infer it. A bare recital of the facts which the evidence tends most strongly to prove will suggest to the impartial mind, it seems to us, that the animating purpose in forming the corporation was to float a lot of worthless stock with the design to cheat and defraud an unsuspecting public, as well as to give a fictitious credit to a worthless concern. Not only was Ehlen's stock issued to him in direct violation of the statute for so-called services to be performed, but the entire capital stock issued was "water," pure and simple. In or about April, 1902, the defendants, Hickerson and McElwee, as copartners, began a small lumber business in the town of Ronda, N. C., under the firm name of "Ronda Pin and Bracket Company," and this business was continued by McElwee and Hickerson until it was absorbed by the Ronda Lumber and Manufacturing Corporation. The tangible assets of this partnership were valued by the jury at $896.63. In September, 1902, the defendant Ehlen proposed to the defendants McElwee and Hickerson to form a corporation under the laws of the State of Delaware, with a capital stock of $50,000, and that the corporation should take over the assets and good-will of the partnership and pay therefor its total authorized stock, to wit, $50,000. The defendant Ehlen was to finance the corporation, and by the word "finance" it was meant that he was to loan

to the corporation the money on which it was to do business and to take therefor the note of the corporation. This was agreed to by all the defendants, but in a few days this agreement was modified by increasing the capital stock of the corporation to $100,000 and agreeing that the defendants should receive that amount in payment for the assets of the partnership instead of $50,000. The only consideration for this increase in value was the agreement of Ehlen to finance the company to a larger extent—that is, he was to loan it more money on which
(349) to do business. It was further agreed that Ehlen was to have 54 per cent of the stock, and the remainder to be equally divided between Hickerson and McElwee. In accordance with these contracts, the defendant Ehlen employed Messrs. Bayard & Coe, of Baltimore, to organize the corporation, and these gentlemen obtained the services of the Delaware Charter and Guarantee Company to secure a charter under the laws of the State of Delaware, and the company did, on 29 September, 1902, obtain a charter for the bankrupt corporation with authorized capital stock of $100,000, divided into 2,000 shares of the par value of $50 each, and by the terms of the charter the amount of capital stock with which the corporation would commence business was fixed at $1,000, this being 20 shares. This stock was subscribed for as follows: Six shares by Richard H. Bayard, one of the attorneys employed by the defendant Ehlen; 6 shares by Josiah Marvel, an official or employee of the Guarantee and Trust Company of Wilmington, Delaware, and 8 shares by Andrew Marvel, also an official of the Guarantee and Trust Company. At the first meeting of the stockholders, held at Wilmington, Del., on 1 October, 1902, the stock subscribed for in the name of Andrew Marvel was assigned to W. E. Ferguson, private secretary of the defendant Ehlen. The organization was effected by the election of the following persons as directors: Richard H. Bayard, Josiah Marvel, and W. E. Ferguson; and at the directors' meeting, held on 13 October, the following persons were elected officers: Josiah Marvel, president; Richard H. Bayard, vice president; W. E. Ferguson, secretary and treasurer. The defendants thereupon presented to the stockholders and directors of this corporation the proposal hereinbefore mentioned; the directors accepted the proposition, valued the property of the Ronda Pin and Bracket Company at $100,000, and authorized the corporation to issue to the defendants its entire capital stock, to wit, $100,000, and in accordance therewith, on 14 October, a certificate was issued
(350) to defendants for 2,000 shares of the capital stock, and thereupon the corporation took over the business of the Ronda Pin and Bracket Company. On 29 October, 1902, the certificate issued to the defendants was surrendered to the corporation and canceled, and in lieu

thereof, and in accordance with the agreement between the defendants, certificates were issued in the amounts and to the following named persons: W. B. Ehlen, 1,006 shares; W. H. McElwee, 390 shares; Robert L. Hickerson, 390 shares; William E. Ferguson, 8 shares; Richard H. Bayard, 6 shares; Bayard & Coe, 194 shares; Josiah Marvel, 6 shares. Prior to the formation of the corporation and on 19 September, 1902, the defendants Hickerson and McElwee took an inventory of the Ronda Pin and Bracket Company, and ascertained that the total value of the partnership property was less than $900. The result of this investigation was communicated to Ehlen. The directors who said that, in their judgment, this property was worth 100,000, knew nothing of the property they were valuing save such information as they gathered from the defendant Ehlen and the defendant McElwee; none of these directors were ever at Ronda, nor did they make any inquiries other than from Ehlen and McElwee. The proposition made by the defendants to the corporation and which was accepted by the corporation, and upon which the stock was issued, purported to convey, in consideration of the receipt of the stock, the property, assets, and good-will of the Ronda Pin and Bracket Company; but as a matter of fact the evidence shows there was an agreement in parol by which the corporation was to pay the owners of the Ronda Pin and Bracket Company, to wit, McElwee and Hickerson, in cash for all its tangible assets, and, after the organization of the corporation, this was done; so as a matter of fact, the only thing obtained by the corporation for its entire capital stock was the good-will of the Ronda Pin and Bracket Company. The defendant Ehlen did not own any of the property of the Ronda Pin and Bracket (351) Company, neither did he pay anything therefor; but he was to pay for his stock in the new corporation by his services in suggesting the scheme and loaning to the corporation the money upon which to do business. On 10 January, 1905, this water-logged craft, being no longer able to float, was forced into bankruptcy and plaintiff elected trustee. According to the finding of the jury, the concern owes about $19,000 to general creditors, exclusive of $20,000 to Ehlen.

The language of *Mr. Justice Shiras* in *Lloyd v. Preston,* 146 U. S., 630, comes to mind as being especially appropriate in reviewing the evidence in this case: "The bare statement of the facts pertaining to the organization of the company fully justifies the opinion that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature."

We have not been cited to any decisions from the courts of Delaware defining the word fraud in the statute quoted, but his Honor construed it to mean actual fraud, and the defendant cannot complain of that

ruling. In New Jersey it is held that "any device by which the stock of a corporation passes to a stockholder as fully paid without payment in full, either in cash or property purchased to the amount of the value of the stock, such as an intentional overvaluation of property on the understanding that a portion of the stock issued shall be returned for distribution among the directors voting for a purchase of the property without payment by them, constitutes actual fraud against the creditors of the corporation." *Bank v. Brick Co.*, 70 N. J. Eq., 722. It is also held that an owner of stock in a corporation issued in consideration of a transfer of property, the valuation of which is *wholly* speculative, visionary, and imaginary, is liable to creditors. *Trust Co. v. Turner,* 111 Iowa, 664. In *Douglas v. Ireland,* 73 N. Y., 100, it is held that, to charge the stockholder with the debts of the corporation, it must be shown that the property was not only purchased at an overvalua-
(352) tion, but it must be also shown that the purchase was in bad faith and to evade the statute; and that to show this it is only necessary to prove: first, that the stock issued exceeded in amount the value of the property in exchange for which it was given; and, second, that the directors or trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value.

The general rule in all the States is that a subscriber to the stock of a corporation is under a liability to pay therefor, which liability, so far as creditors are concerned, can only be extinguished by actual payment or a valid release. *South Milwaukee Co. v. Murphy,* 112 Wis., 614; 26 A. & E. (2 Ed.), 912. This is founded upon the theory that the capital stock is the fund or resource with which the corporation is enabled to transact its business and upon the faith of which persons give credit to the corporation. It is a trust fund for the benefit of creditors. The public has a right to assume that the capital stock has been or will be paid for in money or money's worth when necessary to meet corporate liabilities. Has the stock of this corporation ever been paid for in money, or its worth, by any one? So far as we can see, not a single share has been paid for. The organizing directors were the agents and employees of these defendants, employed by them for no other purpose than to issue the stock and take over the insignificant concern known as the Ronda Pin and Bracket Company in payment of the entire 100,000 capital stock. The defendants were to all intents and purposes both buyer and seller. These "men of straw" were mere automatons that moved when defendants pulled the string. The will of the defendants was their will, and they exercised no independent judgment. There is no evidence that they paid a dime for the few shares of stock assigned to them. These

were doubtless given to them in order to qualify them as directors, so they could pass the resolutions prepared in advance for them, and register the will of their employers. One of the most sig- (353) nificant indications of fraud is disclosed by the examination of McElwee. Notwithstanding the written agreement of 13 September, 1902, provides that the business and assets of the Ronda Pin and Bracket Company are to be turned over in payment of stock in the new corporation, and notwithstanding the directors of the latter so accepted it, there was at the same time a secret agreement between Ehlen and his codefendants that the latter were to be paid in cash $895.65, the total inventoried assets of the Pin and Bracket Company, and given their stock in addition. So it appears that the new corporation got nothing whatever from McElwee and Hickerson in payment for their stock except the so-called *good-will* of the Pin and Bracket Company. What was the *good-will* of this infant industry of only six months duration with assets under $900 worth? Plainly nothing. In *Camden v. Stewart,* 144 U. S., 104, the Supreme Court of the United States places its estimates upon the value of such an asset in the following language: "The experience and good-will of the partners, which it was claimed were transferred to the corporation, were of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection."

The record discloses the proposition made by the defendants to their employees, the board of directors of the bankrupt corporation, to pay for the entire capital stock of $100,000 in the following manner:

1. To turn over the entire business and assets of the Ronda Pin and Bracket Company to the corporation.

2. To turn over to the corporation any and all options that defendants McElwee and Hickerson held upon timber land.

3. The defendant McElwee was to give his services for six months from the date of the organization of the corporation in obtaining options on timber rights.

4. The defendant Ehlen was to bear the expenses of the or- (354) ganization of the corporation over and above $250 and was to "finance" it.

The corporation did not get the assets and business of the Ronda Pin and Bracket Company, but only its good-will, as we have already shown. The assets were paid for in cash and the good-will is worthless. McElwee and Hickerson owned no options at the time. They only had some "in view," and of those only one ever materialized. These "options in view" cannot support the issuance of the stock, for the statute uses the words "real estate or leases thereof." If the options had been "in hand," much less "in view," they would not come within the terms

"real estate or leases thereof," for an option is neither. The defendant McElwee agreed to give his services for six months from the date of the organization in obtaining options on timber. This was a plain violation of the statute, which uses the words "labor done." The directors had no power to accept prospective services, which might be worthless to the corporation, in payment for its stock. Ehlen's proposition to finance the corporation means simply to loan it money, and his other proposition, to bear the expenses of the organization over and above $250, cost him nothing, as there is no evidence that he was called upon to pay a penny on that account. So it seems to us that the evidence is conclusive that this dummy board of directors at the instance of these defendants issued $100,000, the entire capital stock of the corporation, and received nothing whatever of value in payment for it. The law seems to be well settled, and the consensus of all the authorities is to the effect that, in the absence of charter restrictions, a corporation may take property, which is reasonably necessary for its legitimate business, in payment for its stock, but when so received the property must be taken at its reasonable monetary value. Although a margin may be allowed for an honest difference of opinion as to value a valuation grossly excessive, knowingly made, while its acceptance may bind the cor-
(355) poration, is a fraud on creditors, and they may proceed against the stockholder individually, who sells the property, as for an unpaid subscription. *Lloyd v. Preston,* 146 U. S., 630. All the authorities are collected in 26 A. & E. (2 Ed.), 1013.

Applying the settled principles of law to the facts of this case as found by the jury, we have no hesitation in holding that the defendants Ehlen, McElwee, and Hickerson are liable for their unpaid subscription to the capital stock of the bankrupt corporation to the extent that it is necessary to pay the just claims of its creditors. If it should turn out that the judgment rendered against these defendants is larger than is necessary for such purpose, it may be corrected in the future and the necessary order made upon petition to the Superior Court.

Affirmed.

Cited: Whitlock v. Alexander, 160 N. C., 468, 469; *Bernard v. Carr,* 167 N. C., 482; *Goodman v. White,* 174 N. C., 401.

TWITTY v. SOUTHERN RAILWAY COMPANY.

(Filed 16 May, 1906.)

Carriers—Freight—Refusal to Receive for Transportation—Penalties.

In an action to recover the penalties alleged to have been incurred under Revisal, sec. 2631, for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station on 27 January and tendered the charges, and the agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight until 8 February: *Held*, that there was a refusal "to receive for transportation," and the action is brought under the proper statute.

ACTION by R. M. Twitty against Southern Railway Company, heard by *O. H. Allen, J.*, at February Term, 1906, of RUTHERFORD, upon the following agreed facts:

1. This was an action instituted by plaintiff in the court of (356) H. S. Taylor, justice of the peace in Rutherfordton, N. C., on 31 January, 1905, for the recovery of four days penalties at $50 per day, aggregating $200, under the provisions of section 1964 of The Code (section 2631 of the Revisal of 1905).

2. That on 27 January 1905, plaintiff sent 1,000 pounds of cotton-seed meal to the agent of Southern Railway Company (defendant) at its regular depot or station at Rutherfordton, N. C., together with the correct amount of money to prepay the freight upon said 1,000 pounds of cotton-seed meal to its destination, and plaintiff tendered said cotton-seed meal for shipment to Rev. J. Seagle, at Hendersonville, N. C., also a regular depot or railway station or shipping point on the line of the defendant railway company within this State; and with the tender of said freight for shipment plaintiff also tendered the money to prepay the said shipment of freight from Rutherfordton to Hendersonville.

3. That some few days prior to the date of tender of said freight for shipment plaintiff had ascertained from the agent of the defendant railway company at Rutherfordton, who was C. T. Hamrick, the exact amount of money necessary to prepay freight shipment, but after plaintiff had received this information from defendant's agent, Hamrick, defendant transferred said Hamrick to another station or depot on the line of its railway, to wit, Henrietta, and one C. W. Kitchens was sent by defendant to take the place of the said C. T. Hamrick as agent of the defendant company at Rutherfordton.

4. That when plaintiff delivered the 1,000 pounds of cotton-seed meal for shipment as stated above, and tendered the money to prepay the freight upon the cotton-seed meal to Hendersonville, the agent of de-

(357) fendant railway company, the said C. W. Kitchens, who had but recently assumed the position of agent, refused to accept the money tendered to prepay freight and stated to the drayman who brought the 1,000 pounds of cotton-seed meal to defendant's depot that he did not have the time then to look up the freight rates and that the drayman could leave the cotton-seed meal in the defendant's warehouse, and when he (the defendant's agent) had ascertained the freight he would be ready to make the shipment; but defendant's agent gave plaintiff no receipt and no bill of lading for said cotton-seed meal and did not offer to ship the cotton-seed meal until 8 February, 1905.

5. That daily plaintiff called defendant's agent and requested that the cotton-seed meal be received for shipment, but each time defendant's agent, Kitchens, informed plaintiff that he was too busy with other work to ascertain the freight rates.

6. The said cotton-seed meal remained at the defendant's warehouse until 8 February, 1905, when defendant's agent informed plaintiff that he was ready to make the shipment, received from plaintiff the amount of money necessary to prepay the freight and shipped the cotton-seed meal as originally requested.

His Honor gave judgment for $200, being the penalty for four days and being the full amount claimed, and the defendant appealed.

Sol. Gallert for plaintiff.
George F. Bason for defendant.

BROWN, J. The defendant admits its liability for negligence in the brief filed, in these words: "The defendant has never pretended that it is not liable to a penalty, and does not now make any such contention." The defendant contends that the suit was brought under the wrong statute, admitting that it is liable for the penalties denounced (358) in section 2632. It is contended that there was no refusal to receive the freight for shipment.

We are of opinion upon the facts agreed that there was a refusal by the agent "to receive for transportation when tendered." It was the duty of the agent to receive the freight and give a bill of lading for it. That is a "receiving for transportation." The agent received the freight for storage on 27 January and kept it until 8 February, but under a fair interpretation that is not a compliance with the statute. The fact that the agent did not know the freight rates is no excuse. It is his duty to know them. At least, he could readily have telegraphed and ascertained, and need not have refused to give a bill of lading on that account.

We think, under the authorities and the facts agreed, the suit is brought under the proper statute. *Carter v. R. R.*, 129 N. C., 213; *Currie v. R. R.*, 135 N. C., 535.

Affirmed.

Cited: Reid v. R. R., 149 N. C., 425; *Garrison v. R. R.*, 150 N. C., 583, 592; *Reid v. R. R., ib.*, 758; *Lumber Co. v. R. R.*, 152 N. C., 73, 75; *Reid v. R. R.*, 153 N. C., 492, 496; *Tilley v. R. R.*, 162 N. C., 40.

MORGAN v. HARRIS.

(Filed 16 May, 1906.)

Pleadings—Frivolous Demurrer—Right to Answer.

1. Under Revisal, sec. 512, the court in its discretion, upon motion for judgment for want of an answer, may permit the defendant to answer or demur.
2. In an action to set aside a deed for fraud, a demurrer upon the ground that, as the plaintiff had only a life estate by reason of the "testamentary deed" to her daughters, and the conveyance to defendants complained of provided that the "grantees shall not be in full and lawful possession till her death," the plaintiff had no cause of action, is frivolous, where the "testamentary deed" was not absolute, but was subject to revocation upon certain conditions (if valid at all), and had neither been delivered nor recorded.
3. A frivolous demurrer is one "which raises no serious question of law."
4. Under Revisal, sec. 506, when a demurrer is overruled, the defendant is entitled to answer over as a matter of right, "if it appear that the demurrer was interposed in good faith."
5. When the demurrer or answer is frivolous, the plaintiff is entitled to judgment, unless the court in the exercise of a sound discretion permits the defendant to answer over.
6. The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable.

ACTION by Rebecca Morgan against E. C. Harris and others, (359) heard by *O. H. Allen, J.*, at September Term, 1905, of McDOWELL. From judgment rendered, both sides appealed.

Sinclair & Johnston and W. T. Morgan for plaintiff.
Justice & Pless for defendants.

CLARK, C. J. This is an action by an old woman, 80 years of age, to set aside a deed, her execution of which she alleged had been procured by the conspiracy, fraud, and misrepresentation of the male defendants, the said deed being in favor of the wife of one of them, who was her sister, and falsely reciting that $200 had been paid, when nothing had passed. She averred that she signed the deed upon defendants' representing to her that it was a will devising said land to her two daughters, the defendants well knowing that she had already executed a paper, "in the nature of a testamentary deed," giving said land to her two daughters, upon certain conditions and stipulations as to her support and maintenance and reserving right and authority to cancel said paper upon the violation of such conditions, which paper had not been delivered to said daughters nor recorded, but had been put in safe keeping, for delivery, it seems, after her death.

(360) The case being reached for trial, and there being no answer filed, the plaintiff moved for judgment. The court, instead, permitted the defendants to answer or demur. This was in the discretion of the court. Revisal, 512. The defendants thereupon, instead of denying the serious allegations in the complaint, demurred upon the ground that as the plaintiff had only a life estate by reason of the "testamentary deed" to her daughters, and the conveyance to defendants complained of provided that the "grantees shall not be in full and lawful possession till her death," the plaintiff had no cause of action. The "testamentary deed" (so called) was not absolute, like that to *feme* defendants, but was subject to revocation upon certain conditions (if valid at all), and had neither been delivered nor recorded. Both papers were set out as exhibits to the complaint, and the demurrer is clearly frivolous and was probably interposed for delay, that the death of plaintiff might remove the witness to the alleged fraud.

The judge properly overruled the demurrer, but erred in not holding the same frivolous, and he could have signed the judgment tendered by plaintiff. *Cowan v. Baird,* 77 N. C., 201. A frivolous demurrer is one "which raises no serious question of law." *Johnston v. Pate,* 83 N. C., 110; *Dunn v. Barnes,* 73 N. C., 273; *Hurst v. Addington,* 84 N. C., 143; *Porter v. Grimsley,* 98 N. C., 550.

When a demurrer is overruled, the defendant is entitled to answer over as a matter of right, "if it appear that the demurrer was interposed in good faith." Revisal, 506. But when the demurrer or answer is frivolous, the plaintiff is entitled to judgment, unless the court in the exercise of a sound discretion permits the defendant to answer over. This was not done here, because the judge did not hold the demurrer

frivolous, and leave to answer was, therefore, not necessary. The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (*Walters v. Starnes,* 118 N. C., 842; *Abbott v. Hancock,* 123 N. C., 89), where the reasons are given. The plaintiff's appeal must, therefore, be dismissed; but when the case goes back with this judgment holding the demurrer to be frivol- (361) ous, the plaintiff will be entitled to judgment by default, unless the court below is of opinion that in the exercise of a sound discretion the facts justify permission to answer over. Revisal, 1279.

In plaintiff's appeal: Appeal dismissed.

In defendants' appeal: Modified and affirmed.

Cited: Parker v. R. R., 150 N. C., 435; *Kearnes v. Gray,* 173 N. C., 557; *R. R. v. Brunswick,* 178 N. C., 256.

WHITTEN v. TELEGRAPH COMPANY.

(Filed 16 May, 1906.)

Telegraphs—Production of Message—Evidence—Hearsay—Damages.

1. In an action for damages for failure to promptly deliver a telegram, when the plaintiff proposed to prove the contents of the telegram by parol and the defendant objected, the court had the right to order the production of the telegram, which defendant's counsel admitted he then had in his possession.

2. The court has power to order the production of a paper which contains evidence pertinent to the issue and which is in the possession or control of the adverse party.

3. In an action for damages for mental anguish in failing to promptly deliver a telegram announcing the illness of plaintiff's father, it was not competent for the plaintiff to testify that when he arrived at his home he was told that his father, who had just died, had inquired for him and expressed his desire to see him before he died, as this was hearsay; but if the person who gave the plaintiff the information had been introduced as a witness and testified as to what the father had said and as to his conversation with the plaintiff in regard to it, the evidence would have been competent on the question of damages.

ACTION by S. E. Whitten against Western Union Telegraph (362) Company, heard by *O. H. Allen, J.,* and a jury, at January Term, 1906, of McDOWELL.

On 18 October, 1904, at 7:30 p. m., the plaintiff's brother delivered to the defendant at Greenville, Tenn., a telegram addressed to the plaintiff at Marion, N. C., which read as follows: "Father cannot last much longer; think it best to come." The defendant was requested to rush the message, and there was evidence tending to show that, if the defendant had not handled the message negligently, it would have been received by the plaintiff in time for him to have taken the next train out from Marion and to have reached the bedside of his father before he died. The negligence of the defendant was denied in the answer, but admitted on the trial. Only two questions need be stated:

1. The plaintiff proposed to prove the contents of the telegram by parol. The defendant objected, whereupon the plaintiff asked for a rule on the defendant's counsel, who admitted he then had the original in his possession, to produce it. The defendant's counsel agreed to produce it, if the plaintiff would introduce another paper which the defendant's counsel then had in his hand. This the plaintiff refused to do, and the court having intimated that the rule would be issued and the defendant be given time to produce the telegram, the defendant's counsel submitted to the ruling and excepted, at the same time stating that he would waive notice and produce the paper, which he did.

2. There was evidence tending to show that the plaintiff's father knew the plaintiff had been telegraphed to come, and more than once he had expressed his anxiety to see and talk with him before he died. The plaintiff testified to the mental suffering he had endured, when he arrived at his home in Greenville and was told that his father, who had just died, had called for him before his death, and he found that by reason of the negligence of the defendant he was deprived of the privilege of seeing his father. The evidence was admitted over the objection of the defendant and an exception noted.

(363) The following are the issues, with the answers thereto:

1. Was the defendant guilty of negligence, as alleged in the complaint? Yes.

2. Did the plaintiff contribute to his own injury? No.

3. What damage, if any, has the plaintiff sustained on account of mental anguish alleged in the complaint? $500.

There were certain instructions prayed by the defendant as to the first issue, and they were given, and others, as to the second issue, which were substantially given. Judgment was entered upon the verdict, and the defendant appealed.

Sinclair & Johnston and W. T. Morgan for plaintiff.

F. H. Busbee & Son, W. R. Whitson, and G. H. Ferons for defendant.

WALKER, J., after stating the case: If there ever was any merit in the first exception, there is none now, as the negligence of the defendant was admitted after the objection to the ruling was made, and it was agreed that the first issue should be answered "Yes." But if there had been no such admission, the exception could not be sustained. It is too clear for discussion that the court had the right to order the production of the telegram, and that it exercised its power in that respect reasonably and with moderation. The power thus to order the production of a paper, which contains evidence pertinent to the issue and which is in the possession or control of the adverse party, has long been recognized to exist in courts of common-law or equitable jurisdiction. It is essential to the due administration of justice, and there is nothing in it prejudicial to the rights of the other party under the law. McKelvey on Evidence, 350. It is expressly given by statute. Code, sec. 1373; Revisal, sec. 1657. See, also, Clark's Code, sec. 578, and notes; *McDonald v. Carson,* 95 N. C., 377; *McLoud v. Bullard,* 84 N. C., 515. As was said in the latter case, "The defendants had ample notice of the plaintiff's motion, and indeed appear to have come prepared to (364) respond to it."

The second exception is well taken. It was not competent for the plaintiff to testify as to what he was told, when he arrived at his home, his father had said. This was nothing but hearsay. It was argued that it was a part of the *res gestæ,* and was corroborative of the evidence that his father knew that the plaintiff had been notified to come home and had expressed himself as anxious to see the plaintiff. We are unable to see how it is competent on either ground thus stated. If the person who gave the plaintiff the information had been introduced as a witness and testified as to what had occurred—that is, as to what the father had said and as to his conversation with the plaintiff in regard to it—the evidence would have been competent on the question of damages, especially if it had been shown that the mental anguish of the plaintiff had been increased by reason thereof. Such a communication to the plaintiff must in some degree have aggravated his suffering. He was necessarily pained to discover, when he arrived in Greenville, that his father had died without his having had the consolation of seeing him. How much more would his disappointment and distress be intensified by the knowledge that his dying father had inquired for him and expressed a desire to see him before the end had come, and was filled with anxiety lest he should arrive too late. It tended to show the existence of deep paternal affection and also the tender and close relation subsisting between father and son, and consequently the natural effect that the knowledge of the inquiry which the father had made for him

would have upon the son. It is not unreasonable to suppose that the disappointment of having failed to reach his home, under such circumstances, until it was too late to see his father alive and to receive his final blessing and his parting message, which he could well infer from what he had heard, awaited him, added something to the poignancy (365) of his sorrow, and if so, he is entitled to have it considered.

The defendant must have contemplated from the very nature of the message that a failure to deliver it would cause mental anguish, and the damage proposed to be shown by the evidence is such as may fairly be considered to be within the range of those damages contemplated by the parties, as it should have been reasonably expected to result from the defendant's wrong in failing to transmit and deliver the message in proper time. Such additional anguish as the plaintiff may have suffered by hearing what his father said is not unusual in such cases, and cannot be regarded as of such an exceptional and extraordinary nature as to require that it be brought specially to the attention of the company. We find that the question has been decided in *Tel. Co. v. Evans,* 1 Tex. Civ. App., 299, in which case the Court says: "This suit was instituted to recover damages for the mental anguish claimed to have been caused appellee's wife by her failure to see her son before his death, and we are not prepared to say that the jury would not be authorized to conclude that this anguish would be increased by the knowledge that her son wished to see her and was unable to do so. In such case the damage would be for the injury thereby caused the wife, and not for any damage that might have been suffered by the son." *Tel. Co. v. Lydon,* 82 Texas, 366, indirectly furnishes support for our ruling. "While juries (says the Court in that case), in the absence of any evidence on the subject, may act upon their own knowledge of the affection subsisting between a mother and her son still the admission of evidence upon the subject may be proper, and we cannot say that proof of a special regard, felt and shown by a mother for one of her children, may not be properly considered by the jury, in connection with other circumstances in estimating the feelings of the child toward the parent."

If it be competent to show the actual state of feeling between (366) parent and child, why is it not equally competent to prove a statement of the father's expression of his anxiety to see his son, which was brought to the knowledge of the latter, as tending to show the father's affection for the plaintiff and the naturally increased disappointment of the plaintiff that he had, by the negligence of the defendant, been unable to gratify his father's dying wish? The greater the affection existing between them, the greater the anguish of the one when deprived of the consolation which comes from personal communion with

the other in the supreme moment of his death. A question somewhat similar to this was decided in *Bright v. Tel. Co.*, 132 N. C., 317, where we held that in order to show the existence of mental anguish, it was competent to prove the close relation of the parties concerned, such as that the one stood *in loco parentis* to the other, and further, and what is more to the point in this case, that the person thus standing in that relation to the plaintiff, whose husband had just died, would have responded to the message if it had been delivered, and gone to her succor and as far as he could assuaged her grief by his presence and sympathy.

The cases cited by the defendant's counsel seem to have been decided upon grounds quite distinct from those which should exclude the evidence because of irrelevancy, and the cases we have cited from the same State are much more to the point. We have considered the relevancy of the evidence, if properly presented to the court, as it may and no doubt will become a question in the case at the next trial. The defendant is entitled to another jury as to the third issue, for it was not competent to prove what the father said, by hearsay.

New trial.

Cited: Helms v. Tel. Co., 143 N. C., 395; *Penn v. Tel. Co.*, 159 N. C., 315; *Evans v. R. R.*, 167 N. C., 416; *LeRoy v. Saliba*, 180 N. C., 17.

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McGOWAN v. INSURANCE COMPANY.

(Filed 16 May, 1906.)

Insurance—Pleadings—Misjoinder of Causes

Where a complaint alleges that plaintiff had been induced to take out fifteen policies on the lives of herself, her children and grandchildren by means of certain false and fraudulent representations made to her by the defendant's agents that they were ten-year tontine policies; that after paying her weekly assessments for ten years, when she demanded performance it was refused, and she discovered that the policies did not mean what the defendant's agents had represented to her, a demurrer on the ground of misjoinder of causes of action should have been overruled.

ACTION by Mary A. McGowan against Life Insurance Company of Virginia, heard by *Bryan, J.*, and a jury, at March Term, 1906, of MECKLENBURG. From a judgment sustaining the demurrer, the plaintiff appealed.

Thos. W. Alexander for plaintiff.
W. B. Rodman and Morrison & Whitlock for defendant.

CLARK, C. J. The plaintiff alleges that she, a widow with little education and scant means, had been induced to take out fifteen policies on the lives of herself, her children, and grandchildren, by means of certain false and fraudulent representations made to her by the defendant's agents that they were ten-year tontine policies; that after paying, faithfully, her weekly assessments for ten years out of her scanty earnings, when she demanded performance it was refused, and she discovered that the policies did not mean what the defendant's agents had represented to her, and she brings this action to recover the damages she has sustained.

The defendant demurred on the ground of misjoinder of causes (368) of action. The demurrer should have been overruled. There are the same parties and one series of transactions, forming one course of dealing, and though the policies may have been taken out at different times and through different agents, the complaint (whose allegations must be taken as true on a demurrer) set out one connected story. The same false representations, in behalf of the same defendant, are alleged as to all the policies. To divide up such an alleged wrong as the plaintiff avers was committed on her by the defendant, into fifteen separate actions, would needlessly consume the time of the courts in "threshing over the same straw" and would be a great imposition upon the plaintiff. The whole matter can be better disposed of in one action. If fifteen separate actions had been brought, they should have been consolidated and one trial had.

"All the causes of action arose out of transactions connected with the same subject of action," Revisal, sec. 469, and hence were properly joined. *Solomon v. Bates,* 118 N. C., at p. 316. There, the same "subject of action" was the plaintiff's loss of his deposits. Here, it is the plaintiff's loss of her premiums, procured from her by a series of false representations, of the same purport and for the same end, made from time to time by the defendant's agents. The same process of reasoning which would divide this action into fifteen actions, one upon each policy, would further subdivide each of those into an action on each monthly payment on each policy.

The same matter has been recently discussed and the authorities reviewed. *Fisher v. Trust Co.,* 138 N. C., 224. Even if the false representations as to each policy constituted a separate cause of action, and

were not part of the same connected series of dealings, on page 239 of that case it is said, quoting from *Judge Ashe* in *King v. Farmer,* 88 N. C., 22: "Where the different causes of action are of the same character and between the same parties, plaintiff and defendant, and no others, and no additional expense or trouble will be incurred by (369) 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."

The order sustaining the demurrer must be

Reversed.

WALKER, J., concurring in result: The transactions between the plaintiff and the defendant were separate and distinct from each other. There was not one and the same transaction or a series of transactions connected with the same subject of action. The case does not, therefore, fall within the provision of the first subdivision of section 469 of the Revisal, unless we are prepared to hold that all transactions between the same parties of whatever kind or description may be so classified, simply because the plaintiff may in the end have one judgment upon all his separate causes of action. If this be so, there was no use in adding the other six subdivisions. The forceful argument of Mr. Whitlock made it clear to me that subdivision 1 has no bearing upon the question. In this case, the causes of action are all of the same general description, and there is no reason why subdivision 1 should apply.

But my opinion is that the joinder of the several causes of action can be sustained under subdivision 3 of the same section, which authorizes the uniting of causes of action sounding in tort, without regard to their number or to their nature, and, too, without regard to whether they arose out of the same transaction or transactions connected with the same subject of action. I do not think the case bears any resemblance to *Fisher v. Trust Co.,* 138 N. C., 244. In *Solomon v. Bates,* 118 N. C., 311, the several deposits made by the plaintiff, by the course of dealing with the bank, were of course finally merged into one, for the recovery of which, *in solido,* the suit was brought. There were (370) not, therefore, several causes of action, but there was only one cause of action, for the recovery of the single deposit, though the ground of recovery may have consisted both in a continuing, deceitful representation as to the condition of the bank, and mismanagement on the part of the directors. But even that decision could well be sustained under subdivision 3 of section 469, if the complaint should have been construed as embracing several distinct causes of action. The quota-

tion, in the opinion of the Court, from *King v. Farmer,* 88 N. C., 22, presents a case which falls within one of the last six subdivisions and not within subdivision 1.

CONNOR, J., concurs in the concurring opinion.

Cited: Hawk v. Lumber Co., 145 N. C., 50; *Groves v. Ins. Co.,* 157 N. C., 564.

VANDERBILT v. JOHNSON.

(Filed 16 May, 1906.)

Wills—Defective Probates Cured—Ejectment—Adverse Possession—Evidence—Costs.

1. Chapter 52, Private Laws 1885, enacted to cure the defects in the probate of the will of John Strother, is valid and effectual, no vested rights intervening.

2. Evidence that the father of defendant and his son built a house and fenced in a part of a tract of 50 acres, sowed grass on 2 acres of it, inclosed another lot, and that they have been in possession of this house and clearing under the grant ever since it was issued; that they occupied and used the house and inclosed land as well as the remainder of the 50 acres every year, winter, spring, and summer, while attending to their cattle, hogs, sheep, and goats; that others used the house and inclosure by their permission while grazing in the same range; that they gave in the land for taxation and paid taxes on it, is sufficient evidence of adverse possession.

3. In an action of ejectment the court erred in giving judgment against the plaintiff for any part of the costs where the plaintiff recovered two tracts of the land to which the defendants set up title.

(371) ACTION by George W. Vanderbilt against D. L. Johnson and others, heard by *Councill, J.,* at Spring Term, 1906, of HENDERSON.

The plaintiff brought this and another action to try the title to property described in his complaints. The complaints contained the usual allegations in such cases, and the answers denied them. By consent, the cases were consolidated and referred. The referee made his report of the evidence and his findings of fact and conclusions of law. Exceptions to the report, so far as it affected the case of the plaintiff against Johnson, were filed by both sides. On the hearing of the case by the judge upon the report and exceptions, the exceptions were all

overruled and the report confirmed. The judge then undertook to apportion the costs, and the plaintiff excepted to the judgment confirming the report and also to the disposition made of the costs. The plaintiff appealed.

Merrimon & Merrimon for plaintiff.
Smith & Schenck for defendant.

BROWN, J. The plaintiff claims title under a grant to David Allison, 29 November, 1796, and connected himself with this grant by a chain of mesne conveyances, all of which cover the land in dispute. In deraigning his title, the plaintiff offered in evidence the will of John Strother, dated 22 November, 1816. The will is attested by two witnesses, but was admitted to probate in Tennessee upon the testimony of one only. The General Assembly of North Carolina at its session of 1885 enacted an act to cure the defects in the probate of this will, and to ratify and validate the orders of the probate courts of this State in regard thereto. Private Laws 1885, ch. 52. The referee held that the act "has not the effect to cure and make valid the pro- (372) bate of said will." In this we think there is error. We are of opinion that the act is valid and effectual for the purpose for which it was enacted. The reasons for the passage of the act are set out in the preamble and show the great importance of the measure to very many citizens of our State.

The defendants do not claim under a deed executed by the heirs at law of John Strother, before the passage of the act, and therefore no vested right intervenes. Legislation validating the probate of deeds, curing defects in privy examinations of married women and the like, has been very common in this State, and has been uniformly upheld. *Gordon v. Collett,* 107 N. C., 364; *Tatom v. White,* 95 N. C., 453, and cases cited therein. We see no reason for declaring the act invalid.

2. While holding the act void, the referee nevertheless held that the plaintiff had made out a perfect title by color and adverse possession to all the lands described in the complaint, except the 50-acre tract described in the grant, dated 17 June, 1873, from the State to W. F. Johnson and others, under whom the defendant claims. In respect to such grant, the referee finds as a conclusion of law that said grant is color of title, and that W. F. Johnson and those claiming under him have been in the actual adverse possession under known and visible lines and boundaries for more than seven years prior to the commencement of this action. The plaintiff contests the correctness of this ruling upon the ground that the evidence of possession is insufficient. The evidence tends to prove

that W. F. Johnson, father of the defendant, D. L. Johnson, and his said son, built a house, and fenced in a part of this tract, sowed grass on two acres of it; inclosed another lot for salting stock, and that they have been in possession of this house and clearing under the grant ever since it was issued; that they occupied and used the house and inclosed land as well as the remainder of the 50 acres every year, winter, (373) spring, and summer, while attending to their cattle, hogs, sheep, and goats; that others used the house and inclosure by their permission while grazing in the same range; that they gave in the land for taxation and paid taxes on it. An examination of the evidence fully sustains the findings of fact made by the referee, and discloses a character of possession which exposed the defendants to an action of ejectment at any time for more than seven years before suit brought. *Reynolds v. Cathens,* 50 N. C., 439; *Shaffer v. Gaynor,* 117 N. C., 21.

The weight to be given to the statement of one of the witnesses, "that the defendants were in possession of the land," standing alone and unqualified by any testimony as to acts of possession, is commented on and decided in *Bryan v. Spivey,* in a well-considered opinion by *Justice Shepherd,* 109 N. C., 68. In this case, however, the acts of possession are so abundant and so continuous as to indicate that the witness was correct in his conclusion instead of erroneous, as in *Cox v. Ward,* 107 N. C., 513, relied on by the plaintiff.

The court erred in giving judgment against the plaintiff for any part of the costs, as the plaintiff recovered two tracts of the land to which the defendants set up title. *Moore v. Angel,* 116 N. C., 843; *Ferrabow v. Green,* 110 N. C., 414; *Horton v. Horne,* 99 N. C., 219; *Field v. Wheeler,* 120 N. C., 264.

The judgment of the Superior Court is modified in respect to costs. The plaintiff is entitled to recover all the costs of that court. With this modification the judgment of the court below is

Affirmed.

Cited: Cotton Mills v. Hosiery Mills, 154 N. C., 467; *Weston v. Lumber Co.,* 160 N. C., 268; *Campbell v. Miller,* 165 N. C., 53; *Christman v. Hilliard,* 167 N. C., 7; *Swain v. Clemmons,* 175 N. C., 243; *Patrick v. Ins. Co.,* 176 N. C., 665; *Vaught v. Williams,* 177 N. C., 82.

(374)

CARTER v. TELEGRAPH COMPANY.

(Filed 16 May, 1906.)

Telegraphs—Evidence—Agency—Office Hours—Waiver of Office Hours—Negligence.

1. In an action for damages for failure to promptly deliver a telegram summoning a physician, it was competent for the physician to testify that had he received the telegram he would have gone at once.
2. In an action against a telegraph company, a charge that if the agent at the railroad station received the message and sent it to another station, and it was there received by the agent who occupied the office and was using the wires and instruments of the defendant company, the latter was the agent of the defendant and responsible for reasonable dispatch in the delivery of the message, is correct.
3. A telegraph company has the right to fix hours during which its offices shall be open, provided they are reasonable.
4. The failure to notify a sender of a telegram of the nondelivery thereof is evidence of negligence. If for any reason it cannot deliver the message it becomes its duty to so inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency.
5. Where a message on its face appears to be urgent, the fact that it is offered for transmission after office hours will be no defense to the company if the agent accepts it without reserve.
6. Where a telegraph company undertakes to deliver a telegram at other than its office hours it thereby waives the benefit of its office hours.
7. The receipt of the message without demur or objection on account of its being after office hours was an implied agreement to deliver it with reasonable dispatch, and the failure to deliver within a reasonable time raised a presumption of negligence, and the burden was upon the telegraph company to rebut this presumption, and the court could not have directed a verdict in favor of the defendant, but it was for the jury to say from the circumstances in evidence whether the defendant's agent could reasonably and practicably have delivered the message earlier.

ACTION by W. S. Carter and wife against Western Union Tele- (375) graph Company heard by *Ferguson, J.*, and a jury, at November Term, 1905, of CHATHAM. From a judgment for plaintiffs, the defendant appealed.

H. A. London & Son for plaintiffs.
F. H. Busbee & Son and W. A. Montgomery for defendant.

CLARK, C. J. The plaintiffs reside at Spout Springs, a railroad station 17 miles from Sanford, and the *feme* plaintiff, being in family way,

had engaged the professional services of Dr. I. H. Lutterloh, a practicing physician at Sanford, to attend her in her approaching confinment, and he promised to come whenever he might be called for. On 2 May, 1905, about 11 p. m., the *feme* plaintiff felt the pains of labor coming on and caused the following telegram, addressed to Dr. Lutterloh at Sanford, to be delivered to the agent of the defendant at Spout Springs for immediate transmission, and paid the charges: "Come at once to see Mrs. Carter. John Ivey." Soon after the agent at Spout Springs informed Ivey that the message had been received by the defendant's agent at Sanford, and the plaintiffs confidently expected the physician would come. Dr. Lutterloh testified that it was a good road and had he received the telegram promptly, he would have arrived in his buggy in three hours. The telegram was received at Sanford at 11:23 p. m., but the operator there hung it on his hook and made no effort to deliver it till about 7 next morning. Dr. Lutterloh took a freight train, which was then just leaving for Spout Springs, but after suffering great agony in this her first confinement, the *feme* plaintiff was delivered about 8 a. m., before the physician arrived. The arrival of Dr. Lutterloh had been momently and anxiously expected all during the night. On his arrival he gave the *feme* plaintiff remedies which at once alleviated her sufferings.

(376) There is evidence not only of her great mental and physical sufferings, but also of her physical injury by reason of the absence of a physician. It was in evidence that the office hours of the defendant, at both stations, were from 7 a. m. to 7 p. m., and that Mr. Ivey waked up the operator at Spout Springs and went with him to the office, where he sent a dispatch, and he assured Ivey that the message was received at Sanford. The operator at Sanford says that he "was receiving messages for the Western Union Telegraph Company (the defendant); that he received this message over its wire from its agent at Spout Springs" without objection, and that he neither wired back nor attempted to do so; that the message could not be delivered that night. He says he had no messenger and that it would have been dangerous for him to leave the office, because he was receiving dispatches controlling the movement of trains; but he also said that several trains were passing about that hour and that he went out to meet them. It was in evidence that Dr. Lutterloh's office and drug store were 150 to 200 feet from the telegraph office on the opposite side of the street, and Dr. Lutterloh testified that he was there that night till about 12 o'clock, and that his residence was 400 to 500 yards away. The operator says he knew where Dr. Lutterloh's drug store was, but that he did not know where his residence was, and that he made no inquiry. It was competent for Dr. Lutterloh to

testify that had he received the telegram he would have gone at once. *Bright v. Tel. Co.*, 132 N. C., 326.

There were several exceptions, but the correctness of the rulings below turns upon two points: 1. Was the operator at Sanford the agent of the defendant? 2. Was there any evidence of negligence on his part, or rather was the presumption of negligence from the failure to deliver promptly a telegram of this urgency rebutted?

The court charged the jury that "If the agent at Spout Springs received the message and sent it to Sanford, and that it was there received by the agent who occupied the office, and was using the (377) wires and instruments of the defendant company, the agent at Sanford was the agent of the defendant and responsible for reasonable dispatch in the delivery of the message." The distinguished counsel who last addressed the Court properly conceded that this charge was sustained by the ruling of this Court in *Dowdy v. Tel. Co.*, 124 N. C., 522, and rested his argument upon the second ground, that there was no evidence of negligence, or, if there was, that the presumption was rebutted.

The telegraph company has the right to fix hours during which its offices shall be open, provided they are reasonable. We need not discuss that in this case, for, conceding that 7 p. m. was a reasonable hour for closing, the defendant's agent at Spout Springs waived it so far as sending the message was concerned, by actually sending this message and receiving pay therefor. This was, it is true, not a waiver as to the receiving office. But that office waived the closing hour limitation by receiving the message without demur. Had the operator at Sanford immediately replied that he could not undertake to deliver the message till next morning, and would consider it as not received except on that condition, there would have been no contract to deliver. But the operator at Sanford did not make any objection to the receipt of the message at that hour, and says he did not make any effort to let the sending office know that the message would not be delivered. Had he done so, the sender could have sent a messenger to Sanford on horseback in less than three hours, and the physician (according to his own testimony) could have gotten there by 5 a. m., several hours before the child was born, and in time to relieve the *feme* plaintiff's intolerable sufferings and the laceration and other physical injury due to parturition without medical aid; or, it may be, that on learning that the message would not be delivered, another physician could have been obtained elsewhere.

The operator at Sanford, as soon as he received the message, (378) should have promptly notified the sender that it would not be delivered that night. Instead of doing so, he hung it on the file for delivery next morning, and testifies that he made no effort to notify

the sender nor to deliver the message. Its receipt at that hour, from the office at Spout Springs, which had been closed since 7 p. m., as well as the wording of the message, put him on notice of its urgency. "The failure to notify a sender of a telegram of the nondelivery thereof is evidence of negligence. If for any reason it cannot deliver the message, it becomes its duty to so inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency." *Cogdell v. Tel. Co.,* 135 N. C., 431, and cases there cited; *Green v. Tel. Co.,* 136 N. C., 506. This operator knew at the moment he received the message that he would not deliver it that night and, its urgency appearing on its face, he should immediately have so notified the operator at Spout Springs before the latter left his office.

"Where a message appears on its face to be urgent, the fact that it is offered for transmission after office hours will be no defense to the company if the agent accepts it without reserve." 27 A. & E., 1038, note 2, and cases there cited. In the case at bar the defendant's operator at Spout Springs not only took the message for immediate transmission and delivery, but informed the sender that it had been received at Sanford. "Where a telegraph company undertakes to deliver a telegram at other than its office hours it thereby waives the benefit of its office hours." *Bright v. Tel. Co.,* 132 N. C., 317. "A rule merely made without notice to those who are to be affected by it and without exaction or conformity to it, and which is not in fact observed by the company itself, cannot, as a protection against liability, be laid away in the secret consciousness of the agents of the company, unknown and unobserved until the occasion arises to apply it on account of liability incurred by failure to
(379) deliver." *Tel. Co. v. Robinson,* 13 Pickell, 97 Tenn., 638, cited in *Hendricks v. Tel. Co.,* 126 N. C., 311. "The company would be bound, at its peril to ascertain and disclose its inability to deliver a message, where on its face it showed the importance of speedy transmission." *Tel. Co. v. Harding,* 103 Ind., 505.

The receipt of the message without demur or objection was an implied agreement to deliver it with reasonable dispatch. All the authorities concur that this duty arises from the receipt of the dispatch, and that the failure to deliver within a reasonable time raises the presumption of negligence, and the burden is upon the telegraph company to rebut this presumption. *Cogdell v. Tel. Co.,* 135 N. C., and numerous cases cited, p. 434.

The operator at Sanford testified that he was busy receiving messages as to the running of the trains and that it would have been unsafe for him to go out to deliver a message. If so, he should have so notified the sending office when it was received and not have left the sender un-

der the delusion that the message would be promptly delivered. But he also testified that he had to go out to meet passing trains, of which two or three came between 11 and 12 o'clock at night, and the plaintiffs argue that the mail carrier, hotel porters and others meet such trains, and that with any reasonable diligence the operator could have had this message delivered at Dr. Lutterloh's office, 150 to 200 feet away across the street, and the doctor testified that he was there that night until 12 o'clock; and, indeed, the agent, it may be, could have procured a messenger to take the message to the doctor's house if it had been necessary. But he showed no effort to do either; he merely hung the message on the hook "till next morning," he says. In the meantime, the woman was suffering untold agonies, having relied upon the agent using reasonable diligence to deliver her telegram.

The burden being upon the defendant to rebut the presumption of negligence arising from the receipt of the message by the operator, at Sanford, without any objection on account of its being after (380) office hours, and the delayed delivery, the judge could not have directed a verdict in favor of the defendant. *Boutten v. R. R.*, 128 N. C., 340. The court charged the jury: "The company is under no obligation to keep messengers in its offices for the purpose of receiving and delivering messages after office hours were closed. But if after the time the message was received at Sanford the defendant's agent there could reasonably and practicably have delivered that message, it was his duty to do so, whether he could have done so through a messenger boy or whether he could have employed some other person to communicate with the sendee, Dr. Lutterloh, and let him know that the message was there requiring his immediate attendance upon the plaintiff. . . . Now, when you take facts and circumstances into consideration here, was this message delivered with reasonable diligence, and the facts which you find from the evidence to exist at Sanford, do they exculpate or excuse the defendant from making delivery? If you find they do not, and the message was not delivered with reasonable diligence, you should agree to find the first issue 'Yes,' that is, was the defendant negligent in the delivery of the telegram to Dr. Lutterloh? and if you find from the evidence that the office was closed, that it was after office hours, that the force was discharged that attended upon the office, and that there was no one by whom the message could have been delivered at the command of the defendant or its agent, and if you should further find that at the time he received the message that the duties which he was required to perform were such that he could not leave the office without endangering the life of those who might be traveling on the trains over the road, then I charge you it was not negligence for him to wait until he could

get some person by whom he could send the message. It is a question for you to say how you will find the facts to be in regard to that
(381) matter."

This was a matter for the jury, and it was fairly and justly presented to them by the court. The jury found from the surrounding circumstances, "which from the evidence the jury found to exist at Sanford," that "the defendant's agent at Sanford could reasonably and practicably have delivered the message" that night. They possibly based this upon the evidence (which was not all sent up) or a knowledge of common usage, their everyday knowledge, that when the two or three passenger trains were stopped and the agent went out to meet them, as he testified he did, that the mail carrier, the hotel runners and others would be at the train, and that the message or notice that there was a message could have been gotten across the street 150 or 200 feet away to the office of Dr. Lutterloh, where the doctor said he was that night till 12 o'clock. At least, the burden was upon the defendant to show that some effort was made to deliver the telegram after receiving it at Sanford without objection, and that no one was at the trains whom he could get to deliver the message. On the contrary, the defendant's agent testified that he hung it on the hook and made no effort whatever to deliver it till about 7 o'clock next morning. The jury found that upon the circumstances in evidence the presumption of negligence arising from the failure to deliver the telegram, for nearly eight hours after its receipt, was not rebutted. The agent was not compelled to receive the message after office hours, but he did so and without objection, and then made no effort to deliver it for nearly eight hours. Suppose he had given the message to the company's messenger and the messenger had made no effort to deliver it for nearly eight hours, would the presumption of negligence have been rebutted by the bare fact that he received the message after office hours?

(382) No error.

CONNOR, J., concurring: I concur in the conclusion reached in this case, with much hesitation, and only in deference to the controlling authorities cited in the opinion. If an open question, I should hold that when a telegram is received by an operator after office hours, as a matter of accommodation, the sender would be fixed with notice that the undertaking to deliver the message was not in the discharge of a public duty, but was a special contract to be interpreted in the light of the time, the surrounding conditions, etc.; that the measure of duty would be the exercise of ordinary care in delivering the message, carrying no presumption of negligence in failing to make prompt delivery—the burden of proof being upon the plaintiff to show negligence. The courts, however,

seem to have decided that the acceptance of the message, after office hours, is a waiver of such hours, imposing the same measure of duty and raising the same presumption as if received during office hours. The rule, in my opinion, is a very harsh one. The basis upon which the rigid rule and presumption is justified, when messages are sent during office hours, does not obtain. If we could accept the uncontradicted statement of the operator, I could see no negligence in his conduct; but as there is a presumption of negligence, the question whether it was rebutted was for the jury and we are bound by their verdict. I cannot assent to the proposition that he was required to, or would have been justified in, picking up a hotel porter, or some straggler around a depot at midnight to deliver the message. To have done so would have been negligence. I think that he was negligent in that he did not promptly, upon receipt of a message showing the urgent necessity for immediate delivery, notify the sending office that he could not deliver it. He should not have taken the message. This, however, is not the cause of action set forth. The case is a hard one. The defendant may in the future protect itself by an absolute refusal to take a message after office hours. This would seem to be the only way open to it in such cases. Whether those who are often in sore need of its extraordinary service will be (383) compensated for the loss of it by such recoveries as this, it is not my province or duty to discuss. The law has been declared, and I may not change it because of hard cases—which are said to be "the quicksands of the law."

WALKER, J., concurs in the concurring opinion.

BROWN, J., concurs in the concurring opinion, as well as the opinion of the Court.

Cited: Helms v. Tel. Co., 143 N. C., 395; *Edwards v. Tel. Co.,* 147 N. C., 130, 131; *Suttle v. Tel. Co.,* 148 N. C., 482; *Cates v. Tel. Co.,* 151 N. C., 500; *Carswell v. Tel. Co.,* 154 N. C., 114, 115, 116, 117, 120; *Ellison v. Tel. Co.,* 163 N. C., 13, 14; *Griswold v. Tel. Co., ib.,* 175.

COTTRELL v. RAILROAD.

(Filed 16 May, 1906.)

Carriers—Overcharges—Penalty.

Where it was admitted that "the defendant collected freight charges for the entire shipment, as invoiced and originally billed," and the evidence was uncontradicted that the 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge under Revisal, sec. 2641, and failure to refund such overcharge after the 60 days allowed for investigation rendered the defendant liable for the penalty denounced by Revisal; sec. 2644.

ACTION by J. L. Cottrell against Carolina and Northwest Railway Company, heard upon appeal from a justice of the peace by *O. H. Allen, J.*, and a jury, at November Term, 1905, of CALDWELL. From the judgment rendered, the plaintiff appealed.

Lawrence Wakefield and Mark Squires for plaintiff.
J. H. Marion and W. C. Newland for defendant.

(284) CLARK, C. J. On 13 July, 1905, the plaintiff presented the following claim against the defendant for a shortage in the delivery of a shipment of goods and for repayment of freight paid on such undelivered part of the goods, which claim was supported by paid freight bill and bill of lading as required by law, to wit:

5⅔ doz. beer @ 50c.	$2.83
Freight on same	96
Empty bottles @ 30c. per doz.	1.70
	$5.49

This claim not having been paid on 9 October, 1905, the plaintiff began this action before a justice of the peace to recover the above and for the penalty of $100 for failure to refund overcharge of freight within sixty days, as required by chapter 590, Laws 1903—now Revisal, 2642-2644. On the trial of the appeal in the Superior Court the correctness of above items was not denied. It was admitted that "the defendant collected freight charges for the entire shipment, as invoiced and originally billed," and the evidence was uncontradicted that the 96 cents was paid as freight on that part of the shipment which was "short" and not delivered. It was, therefore, an overcharge, being a charge of that amount over and above the amount due upon that part of the shipment which was delivered and on which alone freight could properly be

charged. Revisal, 2641, is explicit to this effect. Failure to refund such overcharge after the sixty days allowed for investigation rendered the defendant liable for the penalty denounced by Revisal, 2644.

As a matter of convenience, the defendant collected the entire freight on the whole shipment. Revisal, 2641, forbids collection of freight on the undelivered portion of the shipment. Certainly, when the claim for shortage and for refund of freight paid on that part of the shipment was made in the mode required by law, it was the duty of (385) the defendant to investigate and, if the claim was found to be just, refund in sixty days. This statute was enacted in pursuance of a well-known public policy and to remedy a well-known evil. It is common knowledge that there are countless cases of shortage in freights and of overcharges, either by freight collected on such shortages or otherwise. Errors will happen and sometimes are well-nigh unavoidable; but none the less, justice and sound policy require the prompt investigation of all claims, and prompt payment of those that are just. These sums aggregate very many thousands of dollars annually, but each amount usually is too small a sum to justify the expense of litigation. Unless the railroad companies will promptly investigate and refund in such cases, the aggregate loss to the public is very great, and the exasperation in the public mind, at the injustice, is greater still. To give the public a remedy by insuring speedy investigation and payment, this statute was passed requiring all common carriers, telegraph and telephone companies to investigate all claims for overcharges and refund in sixty days, prescribing a penalty of $25 for the first day's delay beyond sixty days, and $5 for each day's delay thereafter; the total penalty, however, in no event to exceed $100.

The companies that, either voluntarily or in obedience to the law, investigate promptly and refund all claims for overcharges which are found to be just, within sixty days, suffer no inconvenience from this statute. Those who are so inconsiderate of just claims as not to adjust them within sixty days are proper subjects of the penalty and prove the necessity of this statute, without which those having claims for overcharges could not get payment of them without great delay and annoyance, if at all, when the sum is too small to justify payment of a lawyer's fee and advancement of court costs. There was no contradiction of the evidence as to the above items, and the judge erred in not directing the jury to add to their verdict of $5.49 (which was not ob- (386) jected to) a penalty of $25 for the first day's delay and $5 per day for each day's delay thereafter, beginning after the lapse of sixty days from filing the claim, not to exceed, however, $100 for the total penalty.

The statute is a very important one and a very necessary one for cases in which a common carrier is not voluntarily prompt in refunding overcharges. At any rate, the courts have no discretion, but it is their duty to enforce it.

Error.

Cited: Efland v. R. R., 146 N. C., 133, 138; *Iron Works v. R. R.,* 148 N. C., 470; *Jeans v. R. R.,* 164 N. C., 229; *Thurston v. R. R.,* 165 N. C., 599.

BERRY v. LUMBER COMPANY.

(Filed 16 May, 1906.)

Trespass—Grants—Adverse Possession—Disabilities—Evidence as to Damages.

1. Where there are two or more conflicting titles derived from the State, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right and shall be adjudged to have the better title.

2. Adverse possession of the plaintiffs under a junior grant (which was color of title) from October, 1888, to December, 1897, vested the title in them as against the owners of the legal title under a senior grant, it not appearing that any of the latter were exempt from the operation of the statute of limitation by reason of any disability, and a married woman who acquired no title by another junior grant issued to her cannot use her disability to defeat the right of the plaintiffs.

3. Adverse possession relates only to the true title, and the exemption in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action.

4. A finding that the plaintiffs have been in adverse possession "of the land within the lines" of the Berry grant and in adverse possession "of the Berry grant" means all of the land within the lines and boundaries of the said grant, both that above and below a certain line.

5. In an action for damages for trespass, where the plaintiffs owned only that part of the tract north of a certain line evidence that trees were cut on the tract, but there was nothing to show whether north or south of said line, was too conjectural to form the basis of a verdict.

6. The exceptions taken to the suggestion of the court, in regard to the effect of the introduction of a grant and to its refusal to allow the grant to be withdrawn, were not well taken, as those matters were peculiarly within the judge's discretion.

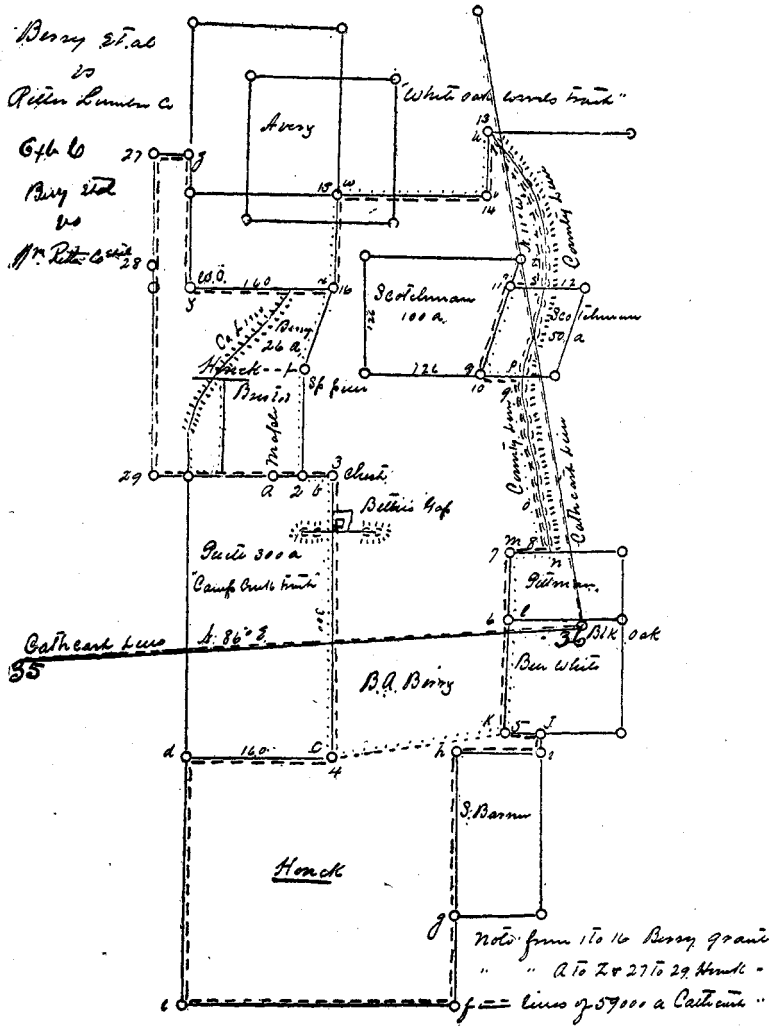
ACTION by Leola Berry and others against W. M. Ritter Lum- (387) ber Company, heard by *W. R. Allen, J.*, and a jury, at December Term, 1905, of BURKE.

Plaintiffs sued for damages in the sum of $1,800, alleged to have been sustained by a trespass of the defendant in entering upon a tract of land containing 605 acres and cutting timber trees standing and growing thereon. The defendant denied the trespass and pleaded specially a grant issued to M. C. Houck hereafter mentioned and also the Cathcart grant and that the lands therein described had been conveyed by Dwight M. Lowry and wife to the Steel and Iron Company, and the title had passed by mesne conveyances to the defendant.

Plaintiffs introduced a grant to B. A. Berry for 605 acres, dated 31 October, 1888, and issued upon an entry to M. L. Pearcy, dated 13 December, 1886, which covered the land in dispute, and plaintiffs by mesne conveyances, which were put in evidence, connected themselves with said grant. They then offered evidence tending to show that they had been in adverse possession of the land from October, 1888, to November or December, 1897, but they had no possession after the latter date. In 1902 or 1903, the defendant entered upon the land and committed the trespass alleged in the complaint.

Defendant introduced a grant to M. C. Houck, dated 29 June, (388) 1888, and registered 8 June, 1889. It was issued on an entry of 7 May, 1887, and also covered the *locus in quo* and all of the land conveyed by the Berry grant. It then connected itself with this grant by showing mesne conveyances. The defendant next introduced a grant to William Cathcart for 59,000 acres dated 20 July, 1796, (389) which covered the *locus in quo,* and all the land described in the Berry and Houck grants which is north of the south boundary of the Cathcart grant, or what is known in the case as the "Cathcart line," and which has been designated by this Court for greater certainty as the line between the figures 35 and 36, shown on the accompanying map. There was no evidence that any one of the persons claiming under the Cathcart grant was under disability. It was admitted that those claiming under that grant had not been in the actual possession of the land covered by the Berry grant or any part of it, though they had been in actual and continuous possession of the other land described in the Cathcart grant and not covered by the Berry grant. There was evidence on the part of the defendant tending to show that the plaintiffs had not held possession adversely of the land described in the Berry grant for seven years. M. C. Houck, wife of John M. Houck, was under the disability of coverture from 1866 to 1900, when she was divorced and afterwards married her present husband, George W. Green. There was evidence

tending to show that the trees which were cut on the Berry tract had been counted, but it did not appear how many were cut on that part of the land south of the Cathcart line and how many north



[THE ABOVE IS THE MAP REFERRED TO IN THE CASE.]

of that line. The evidence on this question was substantially like that of Aaron Pearcy, which was as follows: "The timber was cut off by the W. M. Ritter Lumber Company's hands. It was heavily timbered land. On the south part was heavy white pine timber. Hampton and

William Berry helped me count the timber. We took it abreast and marked the stumps and counted them. I went on the outside because I knew the lines and counted only on the 605-acre tract; we counted none on the Scotchman tract. We counted 4,210 trees; I think there were about 9,000 stumps in all; something over. These were outside of the 26-acre tract. The timber was worth about $1 per tree. (390) It was easy to log, as there were tramroads; no one ever built a tramroad in our country except the defendant. The customary price was $1. The defendant bought at that; no one except defendant was running any mill in that section."

The plaintiffs at first contended, and proposed to show, that the Cathcart grant did not cover the Berry tract of 605 acres or any part of it, and the defendant undertook to prove that it did cover the said tract, and consumed a day in its effort to do so. The court suggested that it was best for the plaintiffs to admit that the "Berry 605-acre tract" was covered by the Cathcart grant. After some colloquy between the court and counsel, it was admitted by both parties that the Cathcart grant covered the 605 acres of land described in the Berry grant, the court at the time stating to counsel that they must act on their own judgment, as its views of the case might be erroneous. It appears by inference that the defendant requested the court to be allowed to withdraw the Cathcart grant, and the request was refused. Defendant excepted to the suggestion of the court to the plaintiff, and to all of the rulings of the court in this connection which related to the Cathcart grant. It was agreed that the judge should find the facts as to the title and as to all other matters outside of those embraced by the issues to be submitted to the jury, and that the court's conclusions of law thereon and its judgment should be entered, subject to exceptions by either party.

The defendant requested the court to charge the jury as follows:

"1. That there is no testimony from which the jury can determine the number or value of the trees cut north and of those cut south of the Cathcart line; the only testimony being that the three witnesses counted the stumps on, but none off, the 605-acre Berry tract, a portion of which lies north and a portion south of the Cathcart line.

"2. That the plaintiffs have not been shown, in any view of the testimony and admissions, to be the owners of any of the lands south of the Cathcart line." These instructions were refused, and de- (391) fendant excepted.

The court charged the jury:

"1. That although the suit was brought to recover only $1,800, they might assess damages to the full amount of $1,800 in response to the second issue, as to the land north of the Cathcart line, and the same

amount as to that south of said line, in response to the fourth issue, provided they found there was that much damage to the land south of the Cathcart line.

"2. That they could find from the evidence what amount of damage was done south and what amount north of this line, in response to the second and fourth issues."

The defendant excepted to these instructions and assigned as a special ground of exception to the second instruction, "that there was no evidence tending to show what amount of the entire damage was done by the cutting of timber south of the Cathcart line or what amount of timber was cut north of the Cathcart line, within the lines and boundaries of the Berry grant, and that one of the witnesses offered by the plaintiff testified that most of the white pine trees, which he said were the most valuable timber trees on the land, were cut on the southern part of the Berry grant."

The following are the issues, with the answers thereto:

1. Did the defendants cut timber on the land within the lines of the Berry grant north of the line of the Cathcart grant? Ans.: Yes.

2. If so, what damage was caused thereby? Ans.: $1,800.

3. Did the defendants cut timber on the land within the lines of the Berry grant south of the line of the Cathcart grant? Ans.: Yes.

4. If so, what damage was caused thereby? Ans.: $600.

5. Have plaintiffs and those under whom they claim been in the continuous, exclusive, adverse possession of the land within the lines of the Berry grant, claiming thereunder for seven years prior to 30 October, 1896? Ans.: Yes.

6. Have the plaintiffs and those under whom they claim been in the continuous, exclusive, adverse possession of the Berry grant,
(392) claiming thereunder prior to November, 1897? Ans.: Yes.

The following judgment was rendered: "This cause coming on to be heard, and it being admitted that the Berry and Houck grants, which were introduced in evidence, covered the land in controversy, and that the Cathcart grant, also introduced in evidence, covered all of the said land north of the line on the plat marked "Cathcart line," and the jury having returned the verdict appearing in the record and the parties agreeing that the jury should not answer the issue as to title, and that the court should answer that issue, after the rendition of the verdict, and should find such additional facts bearing upon the question of title as are deemed material: The court finds as facts: (1) That the entry under which the plaintiff's claim can be located and all of its calls satisfied without embracing any of the land in controversy, and that there was no actual survey of said entry prior to the issuing of the grant

to M. C. Houck. (2) That at the time of the said entry under which the plaintiffs claim, and from that time continuously to 20 August, 1900, the said M. C. Houck was a married woman, and that plaintiffs have not been in possession of said land since 1897. The court thereupon finds that the plaintiffs are the owners of the land described in the Berry grant, which is north of the line of the Cathcart grant, and that they are not the owners of the land described in the Berry grant, which is south of said Cathcart line and which is embraced in the Houck grant. It is thereupon considered and adjudged that the plaintiffs are the owners in fee of the land described in the Berry grant, which is north of the Cathcart line, and that they are not the owners of any land south of said line which is covered by the Houck grant. It is further considered and adjudged that the plaintiffs recover of W. M. Ritter Lumber Company the sum of $1,800 and their costs, to be taxed by the clerk."

The defendants having excepted to the conclusion and judgment of the court, that the plaintiffs are the owners of the land described in the grant to Berry for 605 acres which lies north of the Cath- (393) cart line, appealed to this Court.

John T. Perkins for plaintiffs.

A. C. Avery, S. J. Ervin, T. A. Love, and L. D. Lowe for defendant.

WALKER, J. There was some discussion before us as to the validity of the Pearcy entry upon which the grant was issued to M. C. Houck. We have not set out the contents of that entry, as we do not think it material to the decision of the case that we should pass upon that question. We assume for the sake of argument that but for the Cathcart grant the defendants would have the older and consequently the better title, the Houck grant having been issued before the Berry grant, and the Pearcy entry being, as we will also assume, too vague in its description of the land entered to constitute notice to the subsequent enterer and grantee, M. C. Houck, of the prior entry (*McDiarmid v. McMillan,* 58 N. C., 29), so as to raise an equity in behalf of the plaintiffs claiming under the junior grant and senior entry, to have M. C. Houck declared a trustee of the legal estate for them. *Featherston v. Mills,* 15 N. C., 596; *Harris v. Ewing,* 21 N. C., 369; *Plemmons v. Fore,* 37 N. C., 312; *Gilchrist v. Middleton,* 107 N. C., 663; *S. c.,* 108 N. C., 705; *Kimsey v. Munday,* 112 N. C., 816. A cause of action based upon such an alleged equity existing in favor of the plaintiffs was set up by way of amendment to the complaint, but the view we take of the case excludes it from consideration.

With that question eliminated, the case stands thus: The Houck and Berry grants were both ineffectual to pass title to any land covered by the Cathcart grant, as the latter, being of older date, the estate had no title to that land at the time the junior grants were issued, and the lands were therefore not subject to entry and grant. The State (394) could not grant that which it did not itself have, and, therefore, where there are two or more conflicting titles derived from the State, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right, and shall be adjudged to have the better title. *Hoover v. Thomas,* 61 N. C., 184; *S. v. Bevers,* 86 N. C., 588; *Gilchrist v. Middleton,* 108 N. C., 705; *Jenney v. Blackwell,* 138 N. C., 437; Broom's Legal Maxims (8 Am. Ed.), 352. It being true, therefore, that no title passed by the Houck and Berry grants to the land covered by the Cathcart grant, the persons who can connect themselves with the latter grant are entitled to the land covered by both the Houck and Berry grants and north of the southern boundary described in the Cathcart grant, unless that title has been in some way divested. Those who claim under the Houck grant do not pretend to have had any possession of the land north of the "Cathcart line," but the plaintiffs assert that while their Berry grant did not convey any title, it was color of title, and that they and those under whom they claim had adverse possession of the said land from October, 1888, to December, 1897, through their tenant, Elizabeth Barrier, she having been ousted in the latter year, and the jury under proper instructions from the court have so found. This vested the title in the plaintiffs as against the owners of the legal title under the Cathcart grant, it not appearing that any of them were exempt from the operation of the statute of limitations by reason of any disability. Right here the learned counsel for the defendants strenuously contended that the statute did not run against Mrs. Houck during her coverture, and relied on section 148 of The Code, which is as follows: "If a person entitled to commence an action for the recovery of real property, or to make an entry or defense founded on the title to real property or to rents or services out of the same, be at the time such title shall descend or accrue, a married woman, (395) then such person, notwithstanding the time of limitation prescribed in this title be expired, may commence her action or make her entry within three years after discoverture." And, also, on Laws 1899, ch. 78 (now Revisal, sec. 363), which is as follows: "In an action in which the defense of adverse possession is relied upon, the time constituting such adverse possession shall not include any possession had against a *feme covert* during coverture, prior to 13 February, 1899." The contention is a novel one. A possession cannot well be adverse to

any one who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right to be barred by such a possession. It has sole reference to the owner of the title, as the very language of the various sections of The Code having reference to the subject clearly shows. It will be noted that section 148, on which counsel relied, uses the words at the outset, "If a person *entitled* to commence any action for the recovery of real property, or to make an entry or defense founded on the *title* to real property," etc. One who has no right cannot properly be said to be "entitled to bring an action." And certainly he has no right of entry or action or any defense "founded on the title to real property," because he has no such title. The law does not attempt to do the vain thing of barring by adverse possession something that has no real existence. "Adverse possession," therefore, is predicable only of the title to land or other thing in controversy. It is the possession and enjoyment of real property or any estate lying in grant continued for a length of time and held adversely, and in denial and opposition to the title of another claimant. Black's Dict., 44. It is held in opposition, instead of in subordination to the true title, and is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a right of action. (396) 1 A. & E. (2 Ed.), 789. The term designates a possession in opposition to the true title and real owner, and implies that it commenced in wrong by ouster or disseizin, and is maintained against right. It is openly and notoriously in defiance of the actual title, so as to turn the estate of the true owner into a mere right of entry or of action. *Ibid.*, note 1, citing *Alexander v. Polk,* 39 Miss., 755. Within any of these definitions of the term, adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. If this were not true, a person might acquire ever so good a title, as against the former owner, by adverse possession begun and continued for thirty years, and yet the very day after his perfect title had accrued, a married woman might tortiously enter upon the land and hold it against him on the ground that she had been under the disability of coverture for the thirty years during which he had the possession. But section 146 of The Code (now Revisal, 386) is in itself a conclusive answer to the argument. That section provides: "In every action for the recovery of real property or the possession thereof, or damages for a trespass on such possession, the person establishing a legal title to the premises shall

be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such promises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." M. C. Houck acquired no title by her grant, because the State had already parted with its title, and she cannot, therefore, use her disability to defeat the right of the plaintiffs.

(397) The position of the defendant, that it has not been found as a fact by the jury, or by the court under the agreement of counsel, that the adverse possession of the plaintiffs extended to any part of the land covered by the Berry grant, which is north of the Cathcart line, is clearly untenable. The fifth and sixth issues and the responses thereto are as follows:

Have plaintiffs and those under whom they claim been in the continuous, exclusive, adverse possession of the land within the lines of the Berry grant claiming thereunder for seven years prior to 30 October, 1896? Yes.

Have plaintiffs and those under whom they claim been in the continuous, exclusive, adverse possession of the Berry grant, claiming thereunder prior to November, 1897? Yes.

The case states (record, p. 29) that there was evidence offered by the plaintiff tending to show that Elizabeth Barrier, the tenant of W. A. Berry, under whom the plaintiffs claim, had actual possession of the "land in controversy" for more than seven years, and that she had been ejected from "the said land" under a writ issued from the Federal court. We find other evidence in the case tending to show that there was an adverse possession of the same land by Elizabeth Barrier. It was agreed that the court might find the facts relating to the title and declare the law thereon, judgment to be entered accordingly. The court found the facts in regard to the adverse possession to be as stated in the fifth and sixth issues, and the answers thereto which were made by the court. There is no exception to the effect that the court improperly ruled as to what would constitute an adverse possession. None of the exceptions is sufficient to raise any such question, nor is it now intended to raise any such question, as we understand; but the contention simply is that the fact is not found whether the possession was above or below the Cathcart line. We think the verdict sufficiently ascertains that the possession extended to the land covered by the Berry grant, and this, in the absence of any restrictive words, means, as the verdict states, all of the "land within the lines and boundaries of the Berry grant," both

(398) that above and below the Cathcart line. We conclude that the

fact of possession above the Cathcart line was sufficiently found to enable the court to proceed to judgment, unless there are other errors.

The defendants next contended that the evidence did not show, with sufficient clearness and certainty for the jury to act upon it, how many trees were cut north of the Cathcart line and how many south of it. We think the exception is well taken, and the court should have given the instruction, in regard to this phase of the case, which was requested by the defendants. The evidence tends to show that trees were cut on the Berry tract, but there is nothing to show on what particular part of the land they were cut, whether north or south of the Cathcart line. The jury cannot be allowed to guess as to where the cutting was done. The burden was upon the plaintiffs to show that the trespass was committed on the land belonging to them, and, as a part of the Berry tract did not belong to them, evidence tending to show that trees were cut on the Berry tract is not necessarily proof that they were cut north of the Cathcart line. They may all have been cut below that line. If they were cut on both sides of the line, it does not appear how many were cut on the north side or how many on the south. *S. v. Collins,* 72 N. C., 144. The evidence was not of the kind that should form the basis of a verdict. It is too conjectural. *March v. Verble,* 19 N. C., 19; *Lewis v. Steamship Co.,* 132 N. C., 904; *Byrd v. Express Co.,* 139 N. C., 273.

The exceptions taken to the suggestion of the court, in regard to the effect of the introduction of the Cathcart grant and to its refusal to allow the grant to be withdrawn by the defendant, were not well taken, as those matters were peculiarly within the judge's discretion. The jury were out of the room when the suggestion was made, and the parties afterwards, in the presence of the jury, admitted that the Cathcart grant covered the land described in the Houck and (399) Berry grants. Nor do we see that it had the effect of changing the cause of action. The plaintiffs may have shifted their position a little in submission to the judge's intimation, but at least one of the causes of action, the trespass, was not changed. Both parties seem to have abandoned their original contentions, but the issues between them remained practically the same. No harm has come to the defendants from the suggestion of the judge and his subsequent rulings in connection with the withdrawal of the Cathcart grant. The refusal of the judge to permit the withdrawal of the Cathcart grant worked no prejudice to the defendant and does not raise a practical question, as in the new aspect of the case presented by the suggestion of his Honor and the changed attitude of the parties resulting therefrom, the plaintiff's counsel would undoubtedly have reintroduced the grant at the first opportunity, as that course would have been the only one left to him, if he

expected his client to succeed in the action. His right to reintroduce the grant cannot be questioned. This, perhaps, was the reason which influenced the court to rule as it did. The other exceptions may not be again presented, and require, therefore, no separate discussion at this time.

There must be another trial because of the error as to damages, but it will be restricted to the first and second issues, which will be amended so as to read as follows:

1. Did the defendants cut the timber on that part of the land, described in the Berry grant, which lies north of the southern boundary of the Cathcart grant, known in the case and now designated on the map as the line between figures 35 and 46?

2. If so, what damage has the plaintiffs sustained by reason of the said cutting of timber?

The other issues (except the third and fourth, which will be set aside) and the findings and rulings of the court, not relating to the first and second issues, will stand, and a new trial is awarded only as to the damages.

New trial.

Cited: Dew v. Pyke, 145 N. C., 305, 306; *Currie v. Gilchrist,* 147 N. C., 649.

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(400)

JANNEY v. ROBBINS.

(Filed 16 May, 1906.)

Power of Attorney—Description of Land—Unregistered Deed—Color of Title—Adverse Possession—Trespass—Evidence.

1. A power of attorney to sell and convey "all of our land in the State of North Carolina," is a description sufficiently definite to permit evidence *aliunde,* and would authorize a conveyance of all the land the person owned in the State at the time of the execution of the instrument.

2. The principle that under our present registration law (Connor Act, Rev., 980) an unregistered deed does not constitute color of title, does not extend to a claim by an adverse possession held continuously for the requisite time under deeds foreign to the true title or entirely independent of the title under which plaintiff makes his claim. *Austin v. Staten,* 126 N. C., 783, distinguished.

3. In an action to restrain defendant from cutting timber on certain land, where defendant denied plaintiff's title and claimed title in himself, an erroneous ruling excluding evidence tending to make his assertion good as to "part" of the land, entitles him to a new trial.

ACTION by Joseph W. Janney and others against Thomas C. Robbins, heard by *O. H. Allen, J.*, and a jury, at November Term, 1905, of CALDWELL.

This was an action to restrain defendant from unlawfully cutting timber on the land of plaintiffs. Defendant, admitting the cutting of timber on certain land referred to in the complaint, denied plaintiff's title to the land in controversy, averring that no wrongful cutting or other trespass had been committed by defendant. Issues submitted: (1) As to plaintiffs' ownership and right to immediate possession of the land sued for. (2) As to damage done by wrongfully cutting timber on said land.

Plaintiff first put in evidence a grant from the State to W. D. (401) Sprague, being grant No. 918, dated 1875, for 640 acres, and offered evidence to show that the grant covered the land in controversy, and also a deed from W. D. Sprague to Louisa W. Bond, dated 1876, covering the land in the above grant. To show title from this source in plaintiff it became necessary for plaintiff to avail himself of a power of attorney from L. W. Bond to J. McDowell Tate, dated 6 January, 1887, to sell said land, and a deed by said Tate pursuant to the power. The descriptive words of the power of attorney from L. W. Bond were to "negotiate, to sell, and convey, by proper deeds of conveyance, any and all of our real estate in the State of North Carolina." Defendant objected to the power of attorney because of the "vague and indefinite description of the land authorized to be conveyed." Objection overruled, and defendant excepted. The papers in this line of title seem to have been all registered by 7 January, 1890. Defendant then offered in evidence a grant from the State to J. L. Hawkins, dated 3 December, 1981, a deed from J. L. Hawkins to A. M. Church and wife, dated in 1895, and a deed from Church and wife to defendant in 1903. The grant and deeds in this chain of title were all registered in 1903. Defendant offered evidence to show that these deeds covered the land in dispute, and further offered evidence to show that defendant and those under whom he claimed had been in the adverse continuous possession of the land for more than seven years prior to the institution of this suit under and by virtue of the grant to Hawkins and the deeds to Church and to the defendant—the deeds being necessary to give color of title for the requisite length of time.

Plaintiff objected to any evidence tending to show title by adverse possession by reason of any occupation of the property which antedated the registration of the deeds under which defendant claims. Objection sustained, and defendant excepted. Plaintiff, in reply, then offered a deed from J. L. Hawkins to W. L. Bryan, dated 29 March, 1892, for

(402) 83 acres of land covered by the grant to Hawkins of date 3 December, 1891, and a deed in fee from W. L. Bryan to plaintiff, dated 7 May, 1892, for this same 83 acres of land bought of J. L. Hawkins—these deeds being registered respectively 9 May, 1892, and 12 May, 1892, and it was admitted that the 83 acres of land contained in these deeds was a part of the land trespassed upon. The plaintiff further offered evidence to show that under a correct and proper location of the deeds to and from A. M. Church, under which defendant claims, they would not cover any of the lands in controversy, and so defendant was entirely without color of title to any part of the land.

The court charged the jury that if they believed the testimony, to answer the first issue "Yes," and under further and proper instructions referred to the jury the question of damages. Verdict for plaintiffs, and from the judgment thereon defendant appealed.

Edmund Jones for plaintiffs.
W. H. Bower and M. N. Harshaw for defendant.

HOKE, J. Defendant rests his claim to a new trial on two exceptions: first, that the description in the power of attorney is too vague and indefinite to authorize the conveyance of any land, and, second, that the court ruled out the testimony offered with a view of showing title in defendant by adverse occupation.

On the first point, the authorities in this State are against the defendant's position. Conceding that a power of attorney to sell and convey real estate must contain on its face sufficient data to permit parol testimony to fit the description to the property, or it must refer for description to some deed or written paper which does contain such data, the language of this power of attorney, "all of our land in the (403) State of North Carolina," expresses a description sufficiently definite to permit evidence *aliunde,* and would authorize a conveyance of all the land the person owned in the State at the time of the execution of the instrument. *Carson v. Ray,* 52 N. C., 609; *Farmer v. Batts,* 83 N. C., 387; *Perry v. Scott,* 109 N. C., 374.

On the second point raised by defendant's exceptions, we are of opinion that there was error which entitles the defendant to a new trial. In developing their case before the jury, plaintiffs had put in evidence a grant from the State to W. D. Sprague bearing date in 1875, and connected themselves with this grant by a line of deeds registered on or before 1890. In answer, the defendant had put in evidence a grant to one J. L. Hawkins, bearing date December, 1891, and connected himself

with the grant by a line of deeds, the first in order being a deed from Hawkins to A. M. Church in 1895. This grant and these deeds were not registered till 1903.

Defendant then offered evidence tending to show continuous and adverse occupation of all the land in controversy under these deeds for seven years next before action brought, contending that such occupation under them would mature his title as against the Sprague title, the only one then presented by plaintiff. The evidence was excluded, and defendant excepted. This ruling was predicated upon the idea that under our present registration laws an unregistered deed can never be used as color of title, and was no doubt caused by the headnote in *Austin v. Staten,* 126 N. C., 783, in which it is declared to be the decision of the Court, "that an unregistered deed does not now constitute color of title." An examination of this case, however, will disclose that the headnote is too broadly stated and goes entirely beyond the scope and effect of the decision. The portion of our present registration law (originally chapter 147, Laws 1885), Revisal 1905, sec. 980, was not designed to interfere with the doctrine of maturing title by adverse occupation, and does not do so except to the extent as limited and defined in the decision referred to. There is a decided intimation to this effect (404) in *Collins v. Davis,* 132 N. C., at p. 111. The law was enacted in order to establish and declare the rights of persons who claim under the same title, intended to be the true title, or the one presumably the true title, because both parties claim under a common grantor and undertook to do this by simply applying to deeds, and contracts concerning realty and leases of land of over three years duration, the same provisions that had long prevailed as to mortgages, to wit, that no such instruments should be valid to pass the property as against creditors or purchasers for value, but from the registration thereof.

In *Austin v. Staten, supra,* the plaintiff claimed under a deed to himself from H. W. Staten and two others, dated 31 March, 1896, registered the same day. The defendant claimed under a deed to himself from the same parties dated 31 December, 1887, registered 31 May, 1897. It will be noted that there both parties claimed from the same grantor, and the plaintiff's deed, though dated nine years or more later than the defendant's, had been registered more than a year prior to the defendant's deed. There were questions of fraud involved in the case, in no way material to the point now considered. By the express provisions of the registration act, the plaintiff on the record and face of the papers had the superior right, because his deed had been first registered. Defendant then took the position that though his deed, by

virtue of the registration act, was avoided as against plaintiff, yet the same was good as color of title, and proposed to maintain his title by showing occupation under his unregistered deed for seven years. The court held that to allow this would be "in effect to destroy chapter 147, Laws 1885, and this we cannot do."

Whatever might be the position of the Court if this were an open question, we think it clear that the principle there announced must be confined to the facts of the case to which it was then applied, and (405) does not extend to a claim by adverse possession held continuously for the requisite time under deeds foreign to the true title or entirely independent of the title under which plaintiff makes his claim. As to such deeds and claimants, our present registration law does not, and does not intend to, modify or interfere with the doctrine of maturing title by adverse occupation as heretofore expounded and applied by the decisions of this Court.

At the time the evidence was offered the plaintiff had introduced a line of deeds connecting himself with the Sprague grant covering the land in controversy. Defendant then offered a line of deeds taking their source in a grant to one J. L. Hawkins, also covering the land in controversy, and proposed to offer evidence to show continuous and adverse occupation under these deeds for seven years next before the action brought. The deeds not being registered, the court, acting, no doubt, on this syllabus, excluded the testimony, and in this there was error.

The plaintiff, however, contends that, though this may have been erroneous, it afterwards became harmless, and the same was in fact cured by testimony subsequently offered by him showing that plaintiff had also the better title to the land in controversy under this very Hawkins grant, and if this be true, then the plaintiff and defendant do claim title from the same source, and the ruling would come directly within the correct principle of *Austin v. Staten, supra.* This would be a satisfactory and complete reply to defendant's position, but that the case states that plaintiff's line of deeds, which connect him with the Hawkins grant, cover but 83 acres and only a part of the land in controversy. The defense, then, of title by adverse occupation was open to defendant as to all the land in dispute outside of the 83 acres, and as to such land the deeds of defendant were good as color of title without registration, and the evidence should have been received on that question. This (406) is not an action of ejectment simply, in which, when a defendant fails to disclaim, but enters a general denial, a recovery of any portion of the land was sometimes held to warrant a general verdict in plaintiff's favor. Here the defendant in his answer has set out and described by metes and bounds the land which he claims, and on which he

admits he has entered and cut timber, claiming the right to do so. He offers evidence tending to make his assertion good as to part of the land, and this is denied him by an adverse and erroneous ruling of the court. By reason of the verdict rendered, pursuant to such ruling, the plaintiff has obtained an injunction against the defendant, restraining him from entering or cutting timber on any portion of the land in controversy, and this, we think, is substantial error and entitles the defendant to a new trial.

Apart from this, the technical strictness of the old law as to the effect of a failure to disclaim on the part of the defendant has been very much modified, if not altogether done away with, except, perhaps, on the question of costs as to actions for land under The Code. This change and the effect of certain kinds of pleading, as affecting the rights of parties in controversies of this character, are well set forth by *Chief Justice Smith,* in *Cowles v. Ferguson,* 90 N. C., 308, as follows: "We do not attach the same significance to the form of the answer, however interpreted, as the court has, in its bearing upon the rights of the defendant. Assuming that the defendant claims title and possession as following it to the whole tract, and upon the proof is unable to make good his claim, shall he for this reason be denied the right to retain the part to which he does show title and possession? Conceding, as we must, in reviewing the ruling of the court, that by a long adverse possession the defendant has acquired title to the part so occupied, and it is the same if his evidence would warrant the jury in so finding, the plaintiffs will not fail in their action because they do not show themselves entitled to the whole area claimed in the complaint. They will recover so much (407) as they show title to, though less than the whole; and this, because the claim to all is a claim to all the parts which make the whole, the greater including the less.

"The same principle applies to the defense with equal if not greater force. The defendant cannot be denied the right to retain so much of the land in dispute as he proves himself to be the owner of, because his assertion of title and possession to all could not be sustained. He is not to be deprived of what is his own because he claimed more than belongs to him. Indeed, his case is stronger, for he retains all to which the plaintiffs cannot show title in themselves, because, though the defendant's possession may be wrongful as to the true owners, it is not wrongful as to the plaintiffs, whose recovery is confined to what is proved to belong to them.

"The true and governing rule applicable to conflicting claims set up to the same land by the parties to the action is, and must be, that they recover and retain respectively what each shows himself entitled to upon

the evidence, unaffected by the fact that both set up claims to the whole —with this qualification, that so much as does not belong to either remains undisturbed with the one in possession. This rule, just in itself, seems to have been subordinated to some technical principle of pleading which refused to the defendant his right to hold what was his own because he did not disclaim as to the residue of the tract; in other words, he claimed too much, and, therefore, cannot keep what is his own.

"The court was perhaps misled by what is said by *Pearson, C. J.,* in *McKay v. Glover,* 52 N. C., 41, that 'if a plaintiff succeeds in showing title to any part of the land contained in the demise of which the defendant is in possession, the jury may return a general verdict; although, as to the other part, the plaintiff failed to show title.' But he adds: 'The court may in its discretion direct the jury to find specially so as (408) to run the line between the plaintiff and the defendant; but the usual course is not to complicate the inquiry, and to allow a general verdict if the plaintiff makes out his case as to any part of the land held by the defendant, and the plaintiff then takes out a writ of possession at his peril.' This is said about the old form of the action of ejectment, whose object is to get possession for the lessor of the plaintiff, and the determination affects no right of property in either. Its results are unlike the result of the action under The Code of Civil Procedure, which may, as in other actions, conclude and settle the title when that is put in issue, and such is the effect of the judgment rendered in this case, if allowed to stand."

We have only referred in the opinion to *Austin v. Staten, supra,* because that is the case in which the broad doctrine that an unregistered deed can never be color of title is supposed to have had its origin and support, and we desire to correct the erroneous impression which the decision may have made. We are not inadvertent to the cases of *Lindsay v. Beaman,* 128 N. C., 189, and *Utley v. R. R.,* 119 N. C., 720. So far as it affects the question here considered, *Lindsay v. Beaman* only passed on the record of a partition proceeding as color of title. The effect of an unregistered deed as color was in no way involved in the decision, and the expression of the judge as to this was entirely *obiter.* The decision in *Utley v. R. R., supra,* is in accord with our present ruling, except as modified by *Austin v. Staten,* and in the restricted interpretation we have here given this last case. It might well be suggested that in *Austin v. Staten* the unregistered deed relied on as color could not avail for any such purpose, because, until a second deed was executed and registered, the first passed the title, and a deed never operates as color which conveys the real title. Where a second deed is registered, however, the effect of a prior unregistered instrument as color will al-

ways be presented, and we have considered it proper to approve the decision in *Austin v. Staten* to the extent as indicated and heretofore expressed.

New trial. (409)

WALKER, J., concurs in result.

Cited: Page v. Junior Order, 153 N. C., 404; *Brown v. Hutchinson,* 155 N. C., 209; *Gore v. McPherson* 161 N. C., 644; *Moore v. Johnson,* 162 N. C., 270; *Pate v. Lumber Co.,* 165 N. C., 186; *King v. McRacken,* 168 N. C., 624; *Buchanan v. Hedden,* 169 N. C., 224; *Evans v. Brindle,* 173 N. C., 158.

BRENIZER v. ROYAL ARCANUM.

(Filed 16 May, 1906.)

Garnishment — Practice — Issues — Foreign Insurance Companies — Service of Summons — Attachment — Assessments — Trust Fund — Jurisdiction—Mandamus—Injunction.

1. Under Revisal, 781, the plaintiff in garnishment proceedings, upon the suggestion that he wishes to traverse the return of the garnishee, is entitled, without any formal or verified statement, to have the issue tried by a jury.

2. The court correctly refused to vacate a warrant of attachment which was in all respects regular.

3. In an action against a foreign fraternal insurance society doing business in this State, service of summons on the commissioner of insurance brings the corporation into court.

4. Where in an action against a foreign fraternal insurance society, the funds in the hands of a collector were attached and the society claimed that such funds were held upon an express trust for the benefit of the widows and orphans of deceased members, and were not subject to attachment, the society was entitled to raise such question by motion to vacate the attachment.

5. Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, is not subject to an attachment by a creditor of the society.

6. The courts of this State have no power to control by mandamus or injunction the supreme council of a foreign fraternal insurance society.

(410) ACTION by A. G. Brenizer against Supreme Council of the Royal Arcanum, heard by *Webb, J.*, at November Term, 1905, of MECKLENBURG.

This was a motion to dissolve an attachment levied upon certain moneys in the hands of D. T. Johnson, collector of Raleigh Council of the Royal Arcanum. The facts appearing upon the record are as follows: Plaintiff A. G. Brenizer on 31 October, 1905, instituted an action in the Superior Court of Mecklenburg County for the purpose of recovering the sum of $1,400, alleged to be due him by the Supreme Council of the Royal Arcanum. Summons was duly served on the Insurance Commissioner of North Carolina. The warrant of attachment was issued by the clerk of the Superior Court and was directed to the sheriff of Wake County, commanding him to attach all the property of the defendant in said county. The clerk issued an order to the sheriff of Wake County, commanding him to summon D. T. Johnson to appear and answer on oath concerning such moneys or property as he had in hand belonging to the defendant, etc. Upon service of the notice, said Johnson, upon oath, made return, saying: That he is a collector of Raleigh Council, No. 551, of the Royal Arcanum, which is a subordinate council under the jurisdiction of the Supreme Council. That as such collector under the charter, constitution, and laws of the Royal Arcanum, as shown in the constitution thereof, it is his duty to receive and collect all moneys due by the members of his council for the widow's and orphans' benefit fund and to pay the same over to the treasurer of the subordinate council. It is the duty of the treasurer to keep a separate account of the widows' and orphans' benefit fund and not allow this fund to be used for any other purpose and to transmit the money

(411) to the Supreme Council. As such collector, he had in his possession on 1 November, 1905, the day the notice of attachment was served upon him, the sum of $861.34, which is to his credit, as collector, in bank. That this money was collected and received from the individual members of the said council, as assessment No. 350, for the widows' and orphans' benefit fund, and when collected should have been paid over to the treasurer of the said council, whose duty it is to transmit the same to the proper officer of the Supreme Council. That he had no other money or property of the Supreme Council; that all the money in his possession or on deposit made by him was collected for the purpose of paying assessment No. 350 belonging to the general fund of Raleigh Council, not the property of, or in any way controlled by, the Supreme Council. This money is a part of the fund which, under the charter, constitution and laws of the defendant, the Supreme Council, and under the laws of Massachusetts, of which State defendant is a citi-

zen, was raised for and is held as a trust fund to be paid out solely for death benefits, and neither affiant nor defendant nor any one else can divert the same to any other purposes. That he is advised that such sum is not liable to attachment at the hands of any one who has supposed claim against the Supreme Council, not arising out of the death benefit. He refers to the provisions of the charter, constitution, and rules of the Royal Arcanum; wherefore he asks that the attachment against him be vacated, etc.

Henry J. Young, treasurer of Raleigh Council, filed an affidavit stating that it was his duty to receive from the collector all the money paid to him for the council and to keep an account of the same. That it is his duty to keep a separate account of the widows' and orphans' benefit fund, and not to permit it to be used for any other purpose. That at the time of the notice of attachment was served upon him he had in his possession $333, which belonged to the subordinate council, and that he had no funds belonging to the Supreme Council. (412)

E. A. Skinner, of the State of New York, filed an affidavit stating that he was Supreme Treasurer of the Supreme Council of the Royal Arcanum; that he is the custodian of the funds of said corporation, etc. That according to the articles of incorporation of defendant, the laws of Massachusetts, and the constitution and laws of the defendant, the said defendant has created and established a widows' and orphans' benefit fund out of which shall be paid to the wife, children, and relatives of persons entitled thereto the amounts of certificates issued to them by said council. The said widows' and orphans' benefit fund is collected and remitted to him as custodian thereof and payments therefrom made in accordance with the constitution and laws of said order. That none of the moneys contributed and paid to the widows' and orphans' benefit fund by the members of the various subordinate councils has ever been used for any other purpose than for the payment of death benefits and to establish what is known as the emergency fund, and that said moneys have been held sacred as a trust created by the articles of incorporation, the laws of Massachusetts, and the constitution of the Royal Arcanum; that the funds which have been attached by process in this action were contributed to and paid by certain members to the collectors for the sole purpose of being transmitted before 15 November, 1905, to this deponent as custodian of said fund, and to be used only in the payment of death benefits as hereinbefore stated, and that none of such funds under the article of incorporation, the laws of Massachusetts, etc., is liable for the payment of any other debt or debts of the Supreme Council, but is a trust fund as herein provided. There

is a separate fund of the Supreme Council from which all expenses of whatever kind are paid.

W. O. Robson, of the State of Massachusetts, filed an affidavit stating that he was supreme secretary of the defendant; that he knows
(413) of the constitution and laws thereof and of the laws of Massachusetts, under which the defendant is organized. That said defendant was authorized to and has established a widows' and orphans' benefit fund by requiring all the members of the various councils of the defendant corporation, wherever situated, to pay to the collectors of their respective subordinate councils certain sums of money, prescribed in said laws, which, after a certain period of time, therein prescribed, become the property of the defendant corporation, and that, after the same comes into the possession of the supreme treasurer, it then becomes a part of the widows' and orphans' benefit fund, above referred to, and by the articles of incorporation, the laws of the State of Massachusetts, and the constitution and laws aforesaid, are a trust fund to be used only as provided in said laws, found in exhibit attached. That according to the laws of Massachusetts and the constitution, etc., the said widows' and orphans' benefit fund is a trust fund created and established solely for the purpose of paying therefrom, "on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding $3,000 to the wife, children, relatives, etc., as he may direct." That said trust funds have not been, nor does he believe they could be, used for any other purpose whatsoever. That the funds which were attached to this action were paid by the members of the subordinate councils to the officers of said councils, as assessments due from such members to the widows' and orphans' benefit fund, to be transmitted to the supreme treasurer, etc. A copy of the certificate issued to the plaintiff was attached to the record, by which it appears that the Supreme Council of the Royal Arcanum promises to pay out of its widows' and orphans' benefit fund to the person named therein the sum of $3,000, etc. Certain portions of the constitution and laws of the said Supreme Council were in evidence, in which the objects of the
(414) order are stated, among others, to issue a widows' and orphans' benefit fund, from which the sum not exceeding $3,000 shall be paid to the wife, children, etc., of each member upon the conditions therein set out. It is also provided that upon application made and accepted by any person a certificate shall issue entitling the person named therein upon the death of the applicant to be paid from the widows' and orphans' fund the sum named not exceeding $3,000. A schedule of assessments is attached to the record, also certain portions of the statute in force in Massachusetts regulating the management of benefit societies.

The motion was based upon two grounds the second being that the warrants of attachment and attempted service and levy thereof be adjudged void and vacated on the ground that the funds attempted to be garnisheed and attached are not subject to attachment or garnishment for the claim of the plaintiff.

The motion being denied the defendant excepted and appealed.

E. T. Cansler and Chase Brenizer for plaintiff.
Tillett & Guthrie and F. H. Busbee & Son for defendant.

CONNOR, J., after stating the case: Plaintiff's counsel in their well-prepared brief and able argument in this Court raise a question of practice, insisting that under the provisions of the statute, Rev., sec. 781, "When any garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, then the court shall order an issue to be made up, which shall be tried by a jury, and, on their verdict, judgment shall be rendered." It is clear that plaintiff, upon the suggestion that he wished to traverse the return was entitled without any formal or verified statement to have the issue tried as directed by the statute. It seems, however, that defendant made its motion upon the return and plaintiff thereupon made an issue of law, as upon a de- (415) murrer, admitting, for the purpose of the motion, the truth thereof. The appeal comes to us in that form and has been argued upon the merits. We concur with the plaintiff that his Honor correctly refused to vacate the warrant of attachment. It is in all respects regular, and if so advised, the plaintiff may, upon his affidavit, have other warrants against any property which the defendant may have in this State. The service of summons on the Commissioner of Insurance brings the defendant corporation into court, and all such further proceedings may be had in the cause in ascertaining and declaring plaintiff's rights as may be in accordance with the law upon the facts as found by the court or jury.

Plaintiff suggests that the defendant corporation cannot raise the question whether, upon the return to the notice, the money in the hands of Mr. Johnson is liable to garnishment or attachment. That only the garnishee or collector can raise the question at this time, or until, after judgment, it is sought to have the funds applied to its discharge.

We think that in view of the contention of the defendant corporation that it is entitled and that it is its duty to receive and hold this money upon an express trust, that it may, at this stage of the litigation, make such motions and pursue such course as may be proper to protect the fund. It is always the duty of a trustee to protect the trust property, and for that purpose institute actions, intervene in actions pending, and

in any other way, in accordance with orderly procedure, protect such property.

Having disposed of these preliminary questions of practice, we are confronted with the real question in debate. Taking the return to be true, together with the affidavits filed in support thereof, is the money in the hands of Mr. Johnson, collector, subject to attachment for the claim of the plaintiff? The solution of this question depends upon the answer to the further question, whether the money collected by
(416) him is impressed with an express trust. The process with which we are dealing is rather an attachment than a garnishment. The money held by Johnson is the property of defendant, and not a debt due by Johnson, which is usually the subject of garnishment. It is not material to discuss or attempt to distinguish the two kinds of process. Johnson says that he is the collector of Raleigh Council, the members of which are assessed by the Supreme Council, monthly, for the amount fixed, and that he collects such assessments for the widows' and orphans' benefit fund created by the council and held by it in special trust to pay to the wife, children, relatives of, or persons dependent upon, members holding certificates at their death. That the amount in his hands, at the time of notice of attachment, was collected and received from the individual members of the said local council as assessment No. 350 for the widow's and orphans' benefit fund, and should have been turned over to the treasurer of said council, whose duty it is to send the same to the treasurer of the Supreme Council for the purpose of holding same. He says that he had no other money which is or can be called the property of the Supreme Council. That this fund is, under the charter, constitution, and laws of the Supreme Council and the laws of Massachusetts, raised for and is held as trust fund to be paid out solely for death benefits. The other affidavits and exhibits all tend to sustain the truth of the return. The portions of the constitution, etc., in evidence declaring the objects of the order are consistent with the return. In paragraph 5 it is expressly stated that one of the objects of the order is "To establish a widows' and orphans' benefit fund from which, on satisfactory evidence of the death of a member of the order . . . a sum not exceeding $3,000 shall be paid to the wife," etc. The funds from which the payments of such benefits shall be made shall be derived only from assessments collected from the members, except as provided in sections 8, 9, and 10. The fund from which the expenses shall
(417) be defrayed may be derived from a per capita tax, dues, and expense assessments. Provision is made for creating from the assessments, in excess of the current death losses, an emergency fund, from which, if assessments are insufficient to meet death losses, they may

be paid. The emergency fund shall be used only for the death or disability benefits. We think it apparent from the portions of the charter, laws, and statutes quoted, and others in the record, that the assessments received by Mr. Johnson, collector, are made and paid for the purpose set out in his return. It is his duty to pay them over to the treasurer of Raleigh Council, to be sent to the supreme treasurer. Mr. Robeson says that he is the supreme secretary and knows the method by which the assessments are made, collected, and remitted. That after receipt by the grand treasurer, the assessments become a part of the widows' and orphans' benefit fund, all of which, he says, is regulated by the charter, laws, etc., of the corporation and the laws of Massachusetts.

The question is of first impression in this State, but we find that in other courts the status of funds held by orders or societies of the class to which defendant belongs has been considered. "Whether a fund formed by the contributions of members of a society has been impressed with a trust and so accepted, is a question of fact always open to judicial inquiry, and whether the alleged trustee be an individual, incorporated or otherwise, no act, declaration, or decision of such trustee will prevent such inquiry. If the terms of the alleged trust are contained in an instrument of gift, that instrument will be examined and the intentions of the donor carried into execution. If expressed in the article of a voluntary society, these articles will be carried into specific execution for the purpose of enforcing the trust, and if in the fundamental law, or in the ordinances and by-laws of a society, on the faith of which contributions have been made, the court will adopt the construction of the members and apply relief according to their own views (418) of the law. An ordinance of a society which provides for the creation of a fund for the benefit of the widows, orphans, heirs, or designated beneficiaries of the members, and commits the administration of such fund to the officers of the society, impresses any money paid into such fund with the qualities of a trust for the special purposes expressed therein; and the fund thus formed can properly be applied only in that particular manner pointed out in such ordinance, which is in this regard to be treated as an express declaration of trust." Niblack Benefit Soc., 247.

Our statute, Rev., secs. 4790-98, recognizes the distinction between "assessment companies," "fraternal orders," and insurance companies. By section 4792 assessment companies are prohibited from issuing policies or transacting business not authorized by its charter. By section 4795 fraternal orders are defined, bringing the defendant corporation within such definition, and providing "That such order, society, or association paying death benefits may also create, maintain, apply, or dis-

burse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain shall be added to the payments made by a member." Section 4796 provides that funds for such orders must be derived from assessments and dues. "Such societies or associations shall be governed by the laws of the State governing fraternal orders, and shall be exempt from the provisions of all general insurance laws of this State and no law hereafter passed shall apply to such societies, unless fraternal orders be designated therein."

This general statement of the law is sustained by a number of decided cases—we find none to the contrary. In *Bank v. Clark,* 77 N. Y. Supp., 1089, the relative rights of the members and creditors of an order of this character were involved and passed upon. An order or associa-
(419) tion, in some respects similar to the defendant, chartered in Indiana, became insolvent, and a receiver was appointed by the court in that State. The order had subordinate councils in New York, and they, in turn, established a grand council in that State. The Supreme Council maintained a general fund for the purpose of defraying its ordinary expenses, etc., and a relief fund for the benefit of members disabled, etc. The funds were derived from assessments of an amount fixed according to age, etc., paid by members of the subordinate councils and transmitted by them to the Supreme Council, 90 per cent of which went into the relief fund and 10 per cent into the general fund. Certificates were issued to the members very similar in form and substance to that issued to plaintiff. No assessments were made for any particular claim. For the convenience of claimants, depositories of the relief fund were appointed, one of them being the National Park Bank. Several creditors attached the funds deposited therein. A receiver was appointed by the New York courts to protect the funds in that State for the benefit of claimants residing there. The question as to the rights of attaching creditors and the receiver came up before the Supreme Court. *Wright, J.,* said: "So we have a fund devoted by the law providing for its existence, and also by the subsequent agreement of every member of the order, to a certain definite purpose. It was paid by the members to the Supreme Council for that purpose, and it was hedged about by rigid provisions for its protection against diversion from that object by the Supreme Council or any other authority. The body of beneficiaries, entitled to this fund, was determined by the claims that were, from time to time, passed upon and allowed. . . . From the foregoing it clearly appears that said fund was impressed with a trust for the purpose aforesaid." After discussing the rights of all claimants to an equitable distribution of the fund, it is said: "The counsel for the attaching creditors cite several cases for the purpose of endeavoring

to substantiate their claims to a preference by virtue of their (420) liens of attachment; but those cases do not apply to a case like this, when the fund attached is a trust fund." The Court directed the receiver appointed by the New York court, after paying the expenses of the receivership, to pay over the fund to the Indiana receiver to be administered in accordance with the terms of the trust.

In *Knights Templars v. Vail,* 206 Ill., 1103, in discussing the status of the funds derived from assessments and set apart for a specific purpose, a distinction is drawn between such funds and those of the ordinary life insurance company, *Ricks, J.,* saying: "It may be observed that appellant is not an ordinary insurance company, which pays tribute to the State upon the theory that it reaps, from the business, pecuniary profit, but, on the contrary, its existence is only authorized upon the theory, as the title of the act authorizing it provides, that it was organized 'for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, etc., of the members thereof.' In the eye of the law, the members and those bearing certain relations to them are the beneficiaries of all the funds realized by such corporation, and not the corporation itself. The corporation stands but as a trustee handling the funds paid by the members and to be issued to them, and the beneficiaries authorized by the act, according to the plain restrictions provided by the act." The same view is taken in *Com. v. Eq. Ben. Assn.,* 18 Atl. Rep. (Pa.), 1112, wherein, after discussing the theory upon which insurance companies is based, it is said: "What is known as a 'beneficial association,' however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or secure against loss. Its design is to accumulate a fund from the contribution of its members for beneficial or protective purposes to be used in their own aid or relief in the misfortunes of sickness, injury, or death."

In *Allen v. Thompson,* 108 Ky., 478, the question under consideration is sharply presented. Plaintiff borrowed from the Grangers' Mutual Benefit Society a sum of money, and secured its payment (421) by a mortgage. The society, of which he was a member, becoming insolvent, he sought to use, as a counterclaim, the amount paid by way of assessments or the cash value of his certificate. The assessments were made for and paid into the mortuary fund held by the society to pay death claims of the members. The Court said: "These monthly dues were a sum certain payable every month, and not contingent in any way upon the death of the members, as under the old policy. Still the company has no assessments, and no means of meeting this obligation, except from the mortuary fund above referred to. Every member who took a policy was compelled to know that his only reliance for the payment

of his policy in case of his death was the collection of the dues of the members. It was, therefore, strictly a mutual company, and for this reason the funds of the two classes were required to be kept separate, so that no part of the funds of one class should be required to pay the losses of the other. Besides, the mortuary fund, by the express terms of the charter, could be used only in the payment of death claims or in resisting claims on the fund. It was thus a guaranty fund for the payment of death losses, and cannot be appropriated to any other obligation so as to leave them unpaid." He was not permitted to set up his counterclaim. In *Sherman v. Harbin,* 125 Iowa, 174, the Court, in this connection, used the following language: "Such an association acts as trustee in the collection of funds and their distribution to the beneficiaries entitled to receive them." The question, as it arose in that case, is discussed at length, and the conclusion reached in harmony with what we have quoted from other courts. *Ins. Co. v. Provident Aid Soc.,* 89 Me., 413.

In *Wilber v. Torgerson,* 24 Ill. App., 119, it appeared that the directors, for the purpose of paying a death loss, advanced the money from their personal funds. Thereafter they repaid themselves, out of (422) the reserve fund set apart to pay death losses, the amount so advanced. The association became insolvent. Plaintiff was entitled to be paid the amount due on a certificate issued to his wife. He insisted that the directors had no right to repay themselves out of the reserve fund the amount so advanced. Upon appeal from a judgment against the directors, *Moran, P. J., said:* "We think this action of the court was correct. It was the duty of the directors to make an assessment upon the members to pay the death claim, and if, instead of doing so, they saw fit to advance their own money to discharge said claim, they did not thereby gain a right to appropriate the reserve fund in payment to themselves of such advance as long as there was any certificate holder who had the right to have such reserve fund paid out to him as a mortuary benefit . . . under the terms of the certificates which the association issued; such reserve fund was a trust fund to be used only for mortuary benefits, without assessments, or applied otherwise for the promotion of the objects for which, by the by-laws, it was set apart. The advance of the directors made them only ordinary creditors, and the trust fund could not be used to pay such debt if there were trust purposes to which it could be applied." The relation which the members or holders of certificates issued by the Royal Arcanum hold to the order came under discussion in *Saunders v. Robinson,* 144 Mass., 306, in which it was held that the sum due the beneficiary named in the certificate was not subject to attachment or garnishment. *Devens, J.,*

said: "An example of the whole system shows that the association was established, among other things, for the purpose of affording mutual aid to its members, and also for the purpose of establishing what is termed a widows' and orphans' benefit fund, for the payment of specified sums to the widows, orphans, and other dependents of deceased members. It transacts its business mainly through the agency of grand councils composed from the subordinate councils in each State, and through the agency of these subordinate councils, both of which councils operate under charters granted by the supreme councils, and in (423) obedience to the rules prescribed in such charters."

While not strictly analogous, we find in *Duke v. Fuller*, 9 N. H., 536 (32 Am. Dec., 392), an interesting discussion of the principle as involved in the charter, etc., of a lodge of Freemasons. This Court held in *Lord v. Hardie*, 82 N. C., 241, that the communion service owned by the trustees of a church could not be sold under execution. *Smith, C. J.*, said: "It is thus apparent that the trustees hold the property vested in them by law, in their corporate capacity, for the exclusive use of the congregation, and under its direction and control." They are depositories of the naked legal title. "An attaching creditor can acquire no greater interest in attached property than the defendant had at the time of the attachment." *Ward v. Waterman*, 85 Cal., 488. Whether we treat the funds collected by Mr. Johnson, collector, as the property of the corporation immediately upon its receipt by him or as the property of the members of Raleigh Council until transmitted is immaterial. If the first, it is impressed with an express trust; if the second, it cannot be attached for a debt of the Supreme Council of the Royal Arcanum. The results which would follow if a creditor of the supreme council could attach the assessments paid by members for the widows' and orphans' benefit fund would be disastrous to thousands of innocent people. To what extent the failure of the subordinate councils to forward the assessments, by reason of attachments served on them, would operate to cancel the certificates of its members, we need not inquire. If, however, we permitted the assessments to be diverted from the purposes for which they are paid, we would be powerless to protect the sufferers. We have no power to control by mandamus or injunction the supreme council. If the plaintiff shall establish his claim against the corporation, he will have final process against any property it may have within this State. For such other property he will be compelled to resort to (424) the court of Massachusetts. *Blackwell v. Life Assn., ante*, 117.

After a careful examination of the authorities, we are of the opinion that the levy of the attachment on the funds in the hands of the officers of Raleigh Council should have been vacated and set aside.

Error.

CLARK, C. J., dissenting: The assessments are not for any particular loss, but to raise a fund to pay operating expenses and losses as they may occur. If a policyholder should die and payment be refused, surely his personal representatives could attach this or any other property of the defendant which he might find in this State. He should not be driven to a distant forum to battle with the company in the courts of the State of its origin. This fund has not been segregated and applied to any one loss. The assessments are held in trust, it is true, to pay losses which may accrue, just as premiums are so held by "old line" companies. But in both cases the money is the property of the company (*Bragaw v. Supreme Lodge,* 128 N. C., 354), its general assets, and may be attached here and held to abide the judgment of our courts in payment of a death loss, whose payment out of the fund has been refused, or to pay a claim like the plaintiff's, which is in lieu of a death loss, being to recover back assessments paid into the fund by him by reason of the wrongful cancellation of his policy, or breach of contract under which he paid in said premiums. It is a trust fund for the payment of losses; it is necessarily a trust fund for the repayment of anything which has been paid into the fund by the plaintiff under an agreement which has been wrongfully repudiated by the defendant.

Cited: Reid v. R. R., 162 N. C., 358; *Hollingsworth v. Supreme Council,* 175 N. C., 624.

Dismissed on writ of error, 215 U. S., 612.

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(425)

RAYBURN v. CASUALTY COMPANY.

(Filed 16 May, 1906.)

Accident Insurance—Effect of Delivery—Conditions—Burden of Proof —Total Disability—Partial Disability—Election—Amount Recoverable.

1. 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, and in such case the policy takes effect from its date.

2. If there be conditions in an insurance policy restricting the effect of the delivery, proof of their nonobservance devolves on the defendant.

3. In an action for indemnity under an accident policy, where there was no evidence upon which the jury could base any conclusion in regard to the medical or surgical treatment received by plaintiff and its effect upon the length of time which his disability continued, the jury could not be permitted to guess that if the plaintiff had consulted other physicians or received other treatment, he may have had earlier relief.

4. Where, under an accident policy, plaintiff, whose occupation was a section foreman, was insured for $5 per week for a period not exceeding 104 weeks, during which, by reason of injuries caused by accident, he should be "wholly, immediately, and continuously disabled from transacting any and every kind of business pertaining to his occupation," and he testified that he performed from and after 24 March the same service in the same occupation and at the same salary as before the injuries complained of, he was not entitled to recover any indemnity after said date.

5. Where an accident policy provided for indemnity for partial disability, but the plaintiff elected to sue for total disability, the measure of his right must be determined by the language of his contract.

6. In an action on an accident policy providing for the payment of a certain indemnity weekly, a recovery cannot be had for any time subsequent to the date of the summons.

ACTION by S. C. Rayburn against the Pennsylvania Casualty (426) Company, heard by *Councill, J.*, and a jury, at October Term, 1905, of RUTHERFORD.

This was an action upon a policy issued by defendant to the plaintiff, the material parts of which are as follows: "In consideration of the agreements herein . . . and the payment of an annual premium of $10, the Pennsylvania Casualty Company . . . does now agree to pay to Stephen C. Rayburn, . . . by occupation a section foreman on track work, for bodily injuries caused by external, violent, and accidental means, which wholly, immediately, and continuously disable the assured from transacting any and every kind of business pertaining to his occupation, $5 per week for a period not to exceed one hundred and four weeks." The application is dated 21 October, 1901; the policy 23 October, 1901. Plaintiff alleged that on 27 October, 1901, while driving in a buggy, he sustained an injury, dislocating his right shoulder; that he received assistance from several physicians, none of them giving him relief until 22 February, 1902, when his shoulder was replaced. That he could not at the time of the trial use his shoulder and arm "to any advantage"; that he could not do the work he was performing at the time he was hurt. He further testified: "Have been engaged in my work for six years. I was section foreman at the time policy was applied for, and I am now occupying the same position. I worked from one to six men. Was allowed three men at the time I applied for policy, and I was being paid $38 a month salary for that work; I am now getting the same salary of $38 per month as section foreman. I went back to my work and occupation as section foreman on 24 March, 1902, at the same salary I was getting at the time I was hurt, and at the same salary that I am now receiving, and with the same force of hands, three in number, that I had before I was injured; my crew con- (427)

sisted of three hands on 26 October, 1901, and it consisted of three hands on 24 March, 1902. I was hurt on Sunday, 27 October, 1901." He described the manner in which he sustained the injury, as follows: "Was driving along in a buggy, was going to church, wheel ran off, horse was frightened," etc. The defendant admitted that application was made on 21 October for the policy, and alleged that on 23 October it forwarded to its agent the policy set out in the complaint, with instructions to collect the premium due thereon and deliver the policy to plaintiff. That on 30 October, 1901, said agent collected the premium and delivered the policy. That said policy provided that it could not take effect unless the premium was actually paid previous to any accident under which the claim was made. Plaintiff put in evidence the policy with the application and testified as herein set forth. Defendant introduced no testimony, but demurred to the plaintiff's evidence, and moved for judgment of nonsuit, which was denied, and defendant excepted. Defendant tendered the following issues:

1. Was the policy delivered prior to the accident alleged in the complaint?

2. Was the premium on the policy paid prior to the accident alleged in the complaint?

His Honor declined to submit these issues, and defendant excepted. His Honor thereupon submitted the following issues:

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

2. Was plaintiff's policy of insurance in force at the time of such injury: Ans.: Yes.

3. Did the injury sustained by plaintiff wholly, immediately, and continuously disable him from transacting any and every kind of business pertaining to his occupation? Ans.: Yes.

4. How long did such disability continue? Ans.: One hundred and four weeks.

5. What amount, if anything, is plaintiff entitled to recover of defendant? Ans.: $520.

Defendant requested the court to charge the jury as follows:

1. That the payment of the premium being a condition precedent to the validity of the policy, it was incumbent upon the plaintiff to
(428) prove payment of the premium prior to the accident or injury alleged in the complaint, and the plaintiff having failed to prove the payment of the premium prior to the accidental injury alleged in the complaint, is not entitled to recover.

2. That the policy introduced in evidence failed to recite a receipt of the premium, and further containing a clause stipulating that the policy

shall not be enforced as to any accident occurring prior to the payment of the premium, it was necessary for plantiff to prove a payment of the premium prior to the accident alleged, before he can recover; and if the jury should find from the evidence that there is no evidence of the payment of the premium prior to the date of the accidental injury complained of, the jury shall find in favor of the defendant and answer the issue as to whether the defendant is liable to the plaintiff "No."

3. That if the jury should find from the evidence that the accidental injury alleged in the complaint occurred on 27 October, 1901, then the plaintiff cannot recover in this action, and the jury should answer the issues as to the liability of the defendant to plaintiff, in behalf of the defendant.

4. That if the jury should find from the evidence that the plaintiff was injured by accidental means on 27 October, 1901, and that as a result of said accidental injury plaintiff was wholly, immediately, and continuously disabled from transacting any and every kind of business pertaining to his occupation only until 25 March, 1902, then the jury should find that the disability continued for a period of twenty-one weeks, and should answer the issue submitted in accordance with said finding. . . .

10. That if the jury should find from the evidence that the plaintiff was wholly, immediately, and continuously disabled for a longer period of time than twenty-one weeks; and if the jury should find further from the evidence that this suit was instituted on 23 October, 1902, then the jury is instructed that plaintiff, having elected to bring (429) his suit at that time, any contract plaintiff had with defendant terminated on said date, and plaintiff could not recover for longer time than 23 October, 1902.

11. That the payment of the premium prior to the accident being a condition precedent to the validity of the policy, the burden was upon the plaintiff to prove or show to the satisfaction of the jury that he had complied with this condition precedent and paid the premium prior to the accident; and if the jury should find from the evidence that the plaintiff has not proved payment of the premium prior to the accident, then plaintiff is not entitled to recover and the jury should answer the issues in favor of defendant.

Defendant submitted other requests not necessary to set out. His Honor gave the fourth instruction without alteration—declined the others. Defendant excepted.

His Honor instructed the jury that if they believed the evidence they should answer the first issue "Yes," otherwise "No," to which defendant excepted.

Upon the second issue his Honor instructed the jury that if they believed the defendant's evidence that the policy offered in evidence was delivered by it to plaintiff, that such delivery was conclusive proof that the contract was complete and was an acknowledgment by the defendant that the premium was properly paid during good health of plaintiff, and they should answer the issue "Yes," otherwise "No." To this the defendant excepted. The third issue was answered by consent.

Upon the fourth issue his Honor charged the jury as follows: "That the plaintiff is only entitled to recover for such period of time as he was wholly, immediately, and continuously disabled from performing the substantial part of his duty pertaining to this occupation, not exceeding the period, however, of 104 weeks," and further charged: "If you find that the plaintiff has been prevented from performing such duty pertaining to his occupation from 27 October until the present time, then you will answer this issue 104 weeks, which is the time stipulated in (430) policy; if, however, you find that plaintiff has been able to perform the substantial part of the duties pertaining to his occupation since 24 March, 1902, then you will answer the issue twenty-one weeks, which is the period of time from 27 October, 1901, to 24 March, 1902. In order for plaintiff to recover under this policy for being wholly, immediately, and continuously disabled from performing every kind of business pertaining to his occupation, he must satisfy you that he has been wholly, immediately, and continuously disabled from performing the substantial part of the duties pertaining to his occupation." Defendant excepted. From a judgment upon the verdict, defendant appealed, assigning as error the rulings of the court upon the several matters to which it had noted exceptions.

McBrayer & McBrayer for plaintiff.
Gallert & Carson for defendant.

CONNOR, J. This cause was before us at February Term, 1905 (138 N. C., 379), at which time several of the questions presented by defendant's exceptions were considered and decided. *Mr. Justice Brown,* writing for the unanimous Court, there said: "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." This proposition, with the further one, that in such case the policy takes effect from its date, is sustained by the authorities cited in that opinion. As stated by *Judge Brown,* if there be conditions in the policy restricting the effect of the delivery, proof of their nonobservance devolves on the defendant. The learned counsel for

the defendant insists that the conditions contained in the policy must be complied with before it is effectual—that they are conditions precedent. Let this be conceded, and the result follows that the delivery of the policy is an acknowledgment by the company that they have (431) been met—that the premium has been paid. It is not that the condition has been waived, but that, in the absence of evidence to the contrary, the delivery of the policy is an acknowledgment that they have been complied with. It cannot be that after the delivery of an instrument, reciting the payment of the consideration upon which the promise of defendant is based, the plaintiff must "go forward" and prove what is solemnly admitted. Such is the proper construction of the policy. The defendant concedes that a number of courts have decided the question in accordance with our view, but insists that the contrary is held by others and is the correct view. On the last trial defendant offered no evidence nor does it appear, in any way, that the premium had not been paid. We presume that this course was pursued in deference to our decision on the former appeal. We have examined the authorities cited and see no reason for changing the conclusion to which we then arrived. This disposes of the defendant's exceptions in regard to his Honor's refusal to submit the issues tendered. The questions sought to be presented were met and disposed of by the instruction to the jury upon the second issue, which is sustained by the decision upon the former appeal. In the view which we take of the ruling of his Honor upon the fourth issue, several of defendant's exceptions become immaterial. We have examined the several prayers declined by his Honor, and see no error in his rulings.

Without discussing the interesting question presented by defendant's counsel in regard to the medical or surgical treatment received by plaintiff and its effect upon the length of time which his disability continued, we find no evidence upon which the jury could base any conclusion in regard thereto. To guess that if the plaintiff had consulted other physicians or received other treatment he may have had earlier relief, cannot be permitted. This brings us to a consideration of the ruling upon the fourth issue. An accident policy does not undertake to (432) indemnify the insured for permanent injuries, otherwise than is expressly provided by its terms. Considered only with reference to such of the terms of this policy as are involved in this appeal, the contract is that the company undertakes to pay the insured, whose occupation is "a section foreman on track work," the sum of $5 per week for a period not exceeding 104 weeks, during which, by reason of injuries caused by accident, etc., he is "wholly, immediately, and continuously disabled from transacting any and every kind of business pertaining to his occupation."

The standard, therefore, by which the amount of his recovery is fixed is the number of weeks during which, by the causes named in the policy, he is so disabled from transacting, not his occupation, but every kind of business pertaining to such occupation. His Honor gave the fourth prayer of defendant, which we think correctly instructed the jury in that respect. The only testimony which the jury had for its guidance was that of the plaintiff. He says that he went back to his work and occupation as section foreman on 24 March, 1902, with same number of hands at the same salary which he had received before the accident, and has continued in such occupation under the same conditions to the time of the trial. In view this testimony defendant insists that his Honor was in error in submitting to the jury any theory upon which they could find that plaintiff was disabled in the manner and to the full time provided for by the policy; that he should, upon plaintiff's evidence, have instructed the jury to answer the fourth issue, 21 weeks. In his carefully prepared brief defendant's counsel cites a number of cases which sustain his contention in this respect. In *Bylow v. Casualty Co.,* 72 Vt., 325, it appeared that plaintiff was insured by a policy containing the identical language found in the one before us. His occupation was a (433) lumper in a granite-cutting yard, the duties of which occupation were "overseeing, carrying, and boxing granite, loading and unloading cars." His thumb was injured; he continued thereafter in the employ of the granite firm in superintending the work that he had been doing before the accident. *Taft, C. J.,* said: "It thus appears that he was not wholly and continuously disabled and prevented from performing any and every kind of duty pertaining to his occupation, for he continued in the employ of the same firm in connection with his duties, performing them in part and receiving 90 per cent of his full pay, working nine hours daily instead of ten, at the same rate per hour that had been paid him." In this appeal plaintiff performed from and after 24 March, 1902, the same service in the same occupation at the same salary.

In *Accident Assn. v. Millard,* 43 Ill. App., 148, the Court said: "The undertaking of defendant was not to indemnify against pain or inconvenience, but for the loss of time when wholly disabled from attending to his professional business." In *James v. Casualty Co.,* 113 Mo. Appeals, 622, *Ellison, J.,* says: "We hold the contract to mean, not that the insured was rendered absolutely and literally unable to perform any part of his occupation, but that he was disabled from performing substantially the occupation stated in the policy." This is in accordance with the standard laid down by his Honor. The definition of the terms used and construction of a policy very similar to that under consideration is given in *Wall v. Casualty Co.,* 111 Mo. Appeals, 504. The dis-

cussion and review of the authorities is exhaustive. *Goode, J.*, says: "The purpose was to provide indemnity for the plaintiff if he should sustain loss of time in consequence of an accidental injury—that is, be prevented by such an injury from using his time so as to derive income from it. In other words, the agreement contemplated an indemnity to the plaintiff by an accidental injury by which his ability (434) to earn money should be suspended." *Knapp v. Ins. Co.*, 53 Hun. (6 N. Y. Supp., 57), 84; *Ford v. Ins. Co.*, 148 Mass., 153; *Lobdill v. Mut. Assn.*, 69 Minn., 14; 1 Cyc., 269-270.

After instructing the jury as requested by defendant, his Honor further said: "If you find from the evidence that the plaintiff was prevented from performing the substantial part of his duty pertaining to his occupation according to the contentions of the plaintiff, then you will answer this issue 'One hundred and four weeks.'" We find nothing in the evidence to sustain this instruction. It is true that the plaintiff testified that a part of his duty in his occupation was, at times, to do actual manual labor, putting in cross-ties, driving spikes, tamping ties, etc.; that he was not able to do this work since the injury sustained by him. Assuming this to be true, he says that he is now working the same force of hands, following the same occupation, and receiving the same salary as before the injury. In the light of this testimony, we do not think that it can be said, or the inference reasonably drawn, that he was substantially "wholly, immediately, and continuously disabled from transacting any and every kind of business pertaining to his occupation" for 104 weeks. This is the plain language of the policy and measure of defendant's liability. It is true that his Honor in this connection states plaintiff's contention to be that the railroad company was rewarding a worthy employee who had the misfortune to be injured, etc. We find no suggestion of any such condition in the evidence upon which to base such a contention. In the absence of such explanation of the actual conditions existing since 24 March, 1902, we must conclude that plaintiff earned his salary in his occupation. How far the generosity of the railroad company, if shown to exist, would affect the defendant's liability, it is not necessary for us to say. We are not disposed to depart from the well settled and frequently recognized rule that the language of insurance policies, when of doubtful meaning, is to be construed strictly against the insurer, and liberally in favor of the (435) insured; but we may not do violence to clear and explicit language to find or to increase liability by construction when it does not exist by a fair interpretation of the contract. It will be noted that the policy provides for indemnity for partial disability, by which the company agrees to pay not exceeding 80 per cent of the amount payable for a total

loss of time. The plaintiff elected to sue for total disability, and the measure of his right must be determined by the language of his contract. In the light of his own testimony he cannot recover for more than 21 weeks, and his Honor should so have instructed the jury. He did so by giving the fourth prayer, and the error consists in adding thereto the language excepted to.

While this disposes of the appeal, an interesting and, in view of the large number of such policies in existence, an important question is presented by defendant's request to his Honor to instruct the jury that only 52 weeks having elapsed between the injury and the date of the summons, plaintiff could not, in any point of view, in this action recover for more than that time. At the time of the trial the entire period had elapsed. It will be noted that the contract is to pay "$5 per week." We presume that after the proofs are in, the insured is entitled to demand the weekly indemnity at the end of each week, and upon failure to pay may sue therefor. However this may be, we do not think that a recovery may be had for any time subsequent to the date of the writ. In certain well defined cases sounding in damages the plaintiff may have his damages assessed up to the time of the trial, and in some, as for personal injuries, damages may be assessed for future suffering and incapacity. We find no authority for permitting a recovery upon an express contract for any other amount than that due at the date of the writ.

(436) *Jarrett v. Self,* 90 N. C., 478; *Smith v. Lumber Co.,* 140 N. C., 375.

There must be a new trial upon the fourth issue.

Partial new trial.

Cited: S. c., 142 N. C., 376; *Hardy v. Ins. Co.,* 154 N. C., 438; *Murphy v. Ins. Co.,* 167 N. C., 336.

KERNODLE v. TELEGRAPH COMPANY.

(Filed 22 May, 1906.)

Telegraphs—Joint Agent with Railroad—Delivery—Reasonable Time—Question for Jury—Evidence—Proximate Cause—Mental Anguish.

1. It is the duty of a telegraph company to provide proper means for the delivery of messages and the transaction of its business, and if it employs an agent on joint account with a railroad, it must abide the consequences of a conflict of duty upon the part of the agent.

2. The law exacts a greater degree of diligence in the transmission and delivery of a telegram relating to sickness than it does to an ordinary message, and what would be reasonable time under some circumstances would not be under others.

3. In an action against a telegraph company for alleged negligence in the delivery of a telegram, the question whether it was delivered in a reasonable time should be determined by the jury under proper instructions, and the court erred in deciding, as a matter of law, that a delay in the delivery of the telegram of seventeen minutes after its receipt was unreasonable under the facts of this case.

4. Where the gravamen of plaintiff's complaint against a telegraph company is that if the telegram had been delivered earlier he would and could have reached home earlier and spent more hours with his wife before she died, it is incumbent on the plaintiff not only to show that there was negligence in the delivery, but that this negligence caused the mental suffering, and where the defendant's evidence was to the effect that plaintiff could not have reached home earlier than he did, even if the telegram had been delivered promptly, the court erred in charging the jury, "If you believe the testimony of the defendant, it is your duty to answer the first issue 'Yes.'"

5. In an action against a telegraph company for negligent delivery of a telegram announcing the sickness of plaintiff's wife at home, what the plaintiff *would* have done had he received the telegram in time to continue his journey, is a matter which should have been submitted to the jury to determine.

CLARK, C. J., dissenting.

ACTION by C. R. Kernodle against the Western Union Tele- (437) graph Company, heard by *Peebles, J.*, and a jury, at May Term, 1905, of ALAMANCE.

Action to recover damages for negligence in failing to deliver the following telegram: "D. W. Kernodle, Bethel, N. C. Ida is sick. Please let Charlie know at once," signed G. R. Danniely. There was evidence tending to prove that the plaintiff arrived at Bethel on the train from the east at 9:20 a. m., and that the telegram was delivered to his brother two minutes after the train left. There is no allegation or charge of negligence in the transmission of the message. It was received at Bethel at 9:05 a. m. From the judgment rendered, the defendant appealed.

W. H. Carroll and Brooks & Thomson for plaintiff.
King & Kimball and F. H. Busbee & Son for defendant.

BROWN, J. 1. We think his Honor erred in practically directing the jury that in any view of the evidence they should render a verdict against the defendant upon the issue of negligence. While there may

be evidence tending to prove negligence and sufficient for that purpose to be submitted to the jury, it is not such a case as warranted the learned judge below in taking the question from the jury and deciding it himself. It is admitted there was no delay in the transmission of the telegram. The negligence alleged is in the delay in its delivery to D. W. Kernodle, the sendee, after its receipt by the operator at Bethel. We concur
(438) in what is said by counsel in reference to the duty of the defendant to provide proper means for the delivery of messages and the transaction of its business, and that if the defendant employs an agent on joint account with the railroad company, it must abide the consequences of a conflict of duty upon the part of the agent. Notwithstanding the law gives the defendant a reasonable time within which to deliver a message (*Tel. Co. v. McConnico,* 27 Tex. Civ. App., 63; *Tel. Co. v. Steinberger,* 107 Ky., 469), the law exacts a greater degree of diligence in the transmission and delivery of a telegram like the one in this case than it does an ordinary message, and what would be reasonable time under some circumstances would not be under others. So that the question is, What was a reasonable time for the delivery of this particular telegram? This telegram was in the sendee's hands in 17 minutes after its receipt. It was received at 9:05 a. m., 15 minutes before the train arrived, and was delivered 2 minutes after it left. In order to have benefited Charles R. Kernodle, it must have been delivered in 15 minutes after its receipt. It required at least 3 minutes to copy the message in the office, number and enter it on the delivery book, which left only 12 minutes for its delivery before the arrival of the train. In *Tel. Co. v. McConnico, supra,* it is held that the failure of the agent to deliver a message within 20 minutes after the opening time on Sunday was not negligence, although had the message been immediately delivered the addressee could have caught a train, enabling him to reach his destination in time for the funeral.

Under the circumstances, we cannot hold as a matter of law that 12 minutes delay was unreasonable. It should have been submitted to the sound discretion of the jury under appropriate instructions. The judge rested his ruling solely upon the evidence of Harper, the defendant's operator and witness. He testified that he did not see D. W. Kernodle or Charles R. Kernodle until after the train left; that he did not
(439) know that D. W. Kernodle, the sendee, was in town, and that the hotel was 100 yards from the depot. What assurance is there that Harper might not have missed the sendee had he started from the office to the hotel at once? The sendee was at the waiting-room at the station just before the train arrived. Harper did not know it. Had he started out to look for Kernodle, how do we know he would have

looked for him in the very place where he was? These are considerations that confirm us in the conviction that the question of reasonable time should have been submitted to the jury under the issue of negligence.

We have recently considered this matter of "reasonable time" in a case at this term, *Claus v. Lee,* 140 N. C., 552. The controverted fact in that case was whether the plaintiff had delivered a bill of merchandise in "reasonable time." The court below submitted the question of reasonable time to the jury with appropriate instructions, and refused to decide it as a matter of law. It was practically the only point in the case. All the justices concurred in affirming the judgment and a majority concurred in the opinion. We take it the same rule should apply to the delivery of the telegram, and as to whether, under all the circumstances, it was delivered in a reasonable time or not, the jury should be permitted to determine. The learned *Chief Justice,* in the case of *Kearns v. R. R.,* 139 N. C., 470, where the judge below, as this Court held, properly nonsuited the plaintiff, said in his dissenting opinion: "If a judge can dispense with a jury trial because he thinks that upon the evidence the verdict ought not to be in favor of the plaintiff, then the judge, not the jury, tries the case and weighs the evidence, whether it is reasonably sufficient to justify a recovery. Why carefully forbid the judge to express an opinion whether a fact is sufficiently proved, if the judge can decide that the evidence is not sufficient to justify a verdict for the plaintiff and refuse to submit the case to the jury?"

2. There is another objection to affirming the judgment. The (440) plaintiff was neither the sender nor the sendee of the telegram. The only way he can recover, if at all, is upon the theory that it was sent for his benefit. He must not only show a negligent act on the part of the defendant, but he must further prove that such act caused his injury. To constitute actionable negligence, not only a negligent act must be proved, but that it caused injury to the plaintiff. If the plaintiff had not arrived at Bethel that Sunday morning, no one will contend that he could have recovered anything because of the delay in not delivering the telegram until two minutes after the train left. Why? Because he would have shown no *actionable* negligence, no injury caused to himself by the delay. The gravamen of his complaint is that if the telegram had been delivered a few minutes earlier, he would and could have continued on the same train and reached Burlington at 6 p. m. the same day, very much earlier than he did reach there, and thus spent that many more hours with his wife before she died. That is the injury he complains of, and which he says caused him mental anguish. It follows, therefore, if he could not have reached Burlington at the time he claims he could, had he continued on the train, he has suffered no injury by

reason of the failure to receive the telegram until two minutes after the train left. The court rested the case on Harper's evidence, which must therefore be taken to be true, and charged the jury, "If you believe the testimony of the defendant's own witness, Harper, it is your duty to answer the first issue 'Yes.'"

Harper testified that he was familiar with the railroad schedules, and that if the plaintiff had continued his journey home from Bethel on the 9:20 train Sunday, he could not have reached home until Monday. "The Selma connection," he says, "was not made then, and the train does not get to Goldsboro until 3:40 p. m., and the Southern leaves at 1:35 p. m." "The Selma train has been put on since that time." Perhaps we cannot take notice of it in this case, but it is a part of our judicial
(441) history that at the time of this occurrence there were no afternoon connections at Goldsboro or Selma between the Coast Line and Southern Railway train, and that the Selma train referred to was put on in consequence of a judgment of this Court filed 13 December, 1904, and that there was no connection at Selma until after that date. *R. R. Connection case,* 137 N. C., 1.

3. We think the court erred in the charge upon the second issue as to damage. The eighth assignment of error set out in the record is as follows: "The action of the court in charging the jury as follows: 'Then it is your duty to consider what damage is a reasonable compensation for the increased anxiety and mental suffering that Charles Kernodle endured in consequence of that telegram not being delivered in time. If he has satisfied you by the testimony of D. W. Kernodle that he *could* have come on and gotten here that evening at 6 o'clock, then as a matter of course he will be entitled to compensation for the anxiety and suffering that he endured by not being able to communicate with his wife, and not being able to hear from her from that time up to the time he got here the next day.'" The plaintiff alleged and offered evidence that he *would* and could have come on the 9:20 train from Bethel and reached Burlington at 6 p. m. same day. His Honor assumed as an established fact that plaintiff would have continued on and made the journey to Burlington the same day, and left it to the jury to say only whether he *could* have done so. Under the charge, he took from the jury the right to pass on the credibility of the plaintiff's evidence as to whether he *would* have done so. That fact being one of intention, might well have been contested before the jury. The plaintiff remained in Bethel all day Sunday, instead of driving on to Rocky Mount in the daytime, and drove there at night. He possibly was in doubt whether to go on or to wait and hear again from his wife before doing so. The telegram was
(442) not so very alarming. It only stated that "Ida is sick. Let

Charlie know at once." It does not say she was dangerously sick and did not ask the plaintiff to come at once. Had the telegram been handed him as he stepped off the train, as it was not so very alarming, he might have done just as he did—wait all day in Bethel to get further news before leaving his business and returning home. What the plaintiff would have done had he received the telegram in time to continue his journey is not admitted—it is contested, and is essentially a matter for the jury to determine from the evidence.

The Supreme Court of Texas says in an action against a telegraph company for unreasonable delay in delivering a death message, where the addressee testified she *would* have gone if she had received the telegram in time: "Still, whether she *would* have gone is a question for the jury to determine from all the circumstances." *Tel. Co. v. May,* 8 Tex. Civil Appeals, 176. The identical point is decided in *Bright v. Tel. Co.,* 132 N. C., 326. There, the court permitted Cooper to testify that he *would* have gone to Wilkesboro had he received the message in time. *Mr. Justice Walker* says: "It was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for the mental anguish which resulted from his failure to go to Wilkesboro."

If *Bright's case* is to be considered as authority, his Honor plainly erred in not submitting to the jury the question as to what plaintiff *would* have done had he received the telegram in time to have taken the train; for that opinion holds it was necessary to prove this fact. This is held to be the law in all jurisdictions that recognize the doctrine of mental anguish. "If the prompt delivery of the message would not have prevented the suffering, the failure to deliver cannot be regarded as a proximate cause of the damages complained of, and there can be no recovery. It is therefore incumbent upon a plaintiff, who claims damages because of being kept from his father's deathbed, to show (443) that he *could* and *would* (both) have reached his father before death had the message been delivered promptly." 27 A. & E. (2 Ed.), 1075, 1076. The author cites some fifteen adjudications from several different States in support of the text.

This question is plainly raised by the eighth assignment of error, and there is nothing in the record or brief which shows that it has been abandoned; nor is there a word or syllable in the entire case which shows that it was admitted by the defendant as an "accepted fact" that the plaintiff would have continued his journey on the train he arrived on had he received the telegram.

It is stated in the case that there was evidence tending to prove that he would, but we are unable to find where the plaintiff personally so testi-

fied. We assume there was evidence to prove that fact, but it was not submitted, as it should have been, to the jury.

As this case is to go back for a new trial, we suggest that the two issues submitted on the first trial do not fully present the question of proximate cause for the jury's determination. The following issues will better present every feature of the case:

1. Was the defendant guilty of negligence in respect to the delivery of the telegram to D. W. Kernodle?

2. If so, was the plaintiff, Charles R. Kernodle, injured thereby?

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

New trial.

CLARK, C. J., dissenting: There is no evidence that the agent "required at least 3 minutes to copy the message in the office, number and enter it on the delivery book," and no evidence that he was required to do (444) any of these things by the company. "What does not appear, does not exist."

The uncontradicted evidence is that the defendant's agent received this urgent message 15 minutes before the train came; that it was received at Burlington with instruction to "rush it" (and the answer admits this); that the train stopped at Bethel two minutes; that the operator knew the sendee, who was stopping at a hotel 75 yards away in full view, and that in fact for several minutes before the train came the sendee was sitting in a few feet of the door of the operator's office, and that during these 17 minutes the operator made no effort whatever to deliver this message, either himself or through a messenger, and his only excuse is that as express agent (not as telegraph agent) he had a crate of fowls to put on when the train should arrive, and as railroad agent he had some tickets to sell and he thinks one trunk to check.

Whatever time his duties as agent for the express company or the railroad company required is no defense for the defendant. The operator does not claim that he had any other message to deliver or that his duties as representative of the telegraph company took a single second out of the 17 minutes which the defendant had for the delivery of this telegram. If the defendant chose to employ an agent who had other and more remunerative duties, it cannot use that fact as a valid excuse for failure to discharge its duty in the delivery of this telegram. It should at least have furnished him a messenger for its work, if it employed so busy a man.

The judge did not err in holding upon these facts that the failure to deliver in 17 minutes was negligence. What else could it be? It was not

diligence. When the facts are found, whether this is negligence is a question of law. In *Meadows v. Tel. Co.*, 132 N. C., 40, the plaintiff contended that a message could have been delivered a half mile away in 15 minutes, and the defendant did not controvert and could not controvert a fact of such common knowledge. Here, the hotel was 75 or 100 yards away. The defendant's answer admits that it received this message with instructions to "rush" it. It was not complying with (445) this agreement when its agent at Bethel, having only this one message, for 17 minutes made no effort to deliver it to the sendee. The plaintiff as beneficiary has the same cause of action as if he had been sendee. *Sherrill v. Tel. Co.*, 109 N. C., 527; *Gorrell v. Water Co.*, 124 N. C., 328.

The judge in the statement of the case sets out the plaintiff's evidence, "that if the message had been delivered to him on his arrival at Bethel the plaintiff would have remained on that train and continued his journey to Goldsboro, arriving there between 2 and 3 o'clock, where he *could have and would have* connected with a train over the Southern Railway that would have brought him to Burlington about 6 p. m. Sunday, the 20th." The defendant's agent testified that the connection by Selma could not have been made.

The defendant asked the following prayer: "If you find from the evidence that the plaintiff would have proceeded on the train on which he arrived at Bethel, if the message had been delivered to him before the departure of said train, and that he *could not* have reached Burlington till 6 o'clock a. m. on Monday, the 21st, and that he arrived there on the same day at 11 o'clock, he would not be entitled to recover any damages for suffering prior to the arrival of the 6 o'clock train, but only for such suffering as he endured between 6 o'clock a. m. and 11 o'clock a. m. of the same day." This the court gave, but, singularly enough, the defendant's eighth assignment of error is to the following extract from the charge, which is almost *in totidem verbis* with the defendant's prayer given as above set out, to wit: "Then it is your duty to consider what damages is a reasonable compensation for the increased anxiety and mental suffering that Charley Kernodle endured in consequence of that telegram not being delivered in time. If he has satisfied you by the testimony of D. W. Kernodle that he *could have* come on and gotten there that evening at 6 o'clock, then as a matter of course he will be entitled to compensation for the anxiety and suffering that he (446) endured by not being able to communicate with his wife, and not being able to hear from her from that time up to the time that he got here the next day."

The court charged at the request of the defendant, "If he (the plaintiff) *could not* have reached Burlington till 6 a. m.," and in his charge he says, "If he *could have* come on and gotten there that evening at 6 o'clock." This shows that the case was tried upon the theory that the plaintiff would have gone if he could (which he testified to and was not contradicted), for the defendant's prayer for instructions uses the same words "could," without adding "would." The defendant surely cannot complain that the charge uses the same form of words which it asked the court to tell the jury contained the law applicable to the facts.

It has been strenuously insisted that the plaintiff, leaving Bethel at 9:20 a. m., could not have made connection at Goldsboro so as to reach Burlington at 6 p. m., as he testified, but that the defendant's agent was right when he testified that the plaintiff could not have made the connection at Selma. But the court could not assume that the plaintiff's evidence was incorrect and refuse to submit it to the jury. Aside from the fact that such controversy is one of fact for the jury, this leaves entirely out of sight the patent fact to which the defendant's witness testified, that if the agent were right and connection could not have been made that afternoon, still the plaintiff (had he remained on the train at Bethel) would have gotten to Burlington at 6 a. m. Monday, instead of 11 a. m., and the judge charged in the very words of the defendant's prayer as to the measure of damages, if the jury should find that state of facts. The verdict is entirely consistent with that finding, which, doubtless, is the verdict returned by the jury. The answer admits that when the plaintiff did not remain on the train at Bethel, he could not have gotten home any quicker than by going to Rocky Mount that (447) night, which it admits he did. Its evidence went to show that had he remained on the train he would not have gotten to Burlington till 6 a. m. Monday, and its prayer on that aspect was given.

There is absolutely nothing in the verdict to indicate that the jury found that the plaintiff could have made connection at Selma or Goldsboro Sunday afternoon. His evidence is uncontradicted that if he had received the message at Bethel he would have remained on the train and have gone home. It is admitted by the defendant's prayer (and shown by defendant's evidence) that had he done so he would have reached Burlington at 6 a. m. Monday, instead of 11 a. m., and the court charged in the words of the defendant's prayer as to the damages on that state of facts (which the jury doubtless found, and there is nothing to the contrary). The jury found as properly charged by the judge that upon the defendant's own showing there was negligence in not delivering such a telegram, so short a distance, in 17 minutes, and assessed the damages. In this there is no error surely.

Cited: Mott v. Tel. Co., 142 N. C., 535; *Helms v. Tel. Co.*, 143 N. C., 395; *Suttle v. Tel. Co.*, 148 N. C., 482; *Beal v. Tel. Co.*, 153 N. C., 333; *Ellison v. Tel. Co.*, 163 N. C., 214; *Morton v. Water Co.*, 168 N. C., 585, 591; *Weeks v. Tel. Co.*, 169 N. C., 705.

(448)

COMMISSIONERS v. STEDMAN.

(Filed 22 May, 1906.)

Taxation—Commissions to Sheriff—Reduction During Term—Legislature—Construction of Act.

1. Where section 91, chapter 590, Laws 1905, fixes the commissions to be paid to the sheriff at 5 per cent on all taxes, etc., up to the sum of $50,000, and upon all sums in excess thereof at 2½ per cent, the direction to the auditor, contained in section 92 to deduct 5 per cent, cannot, by implication, repeal the clearly expressed limitation upon the commissions given the sheriff, and this is clearly an inadvertence.

2. Where one provision expresses the principal purpose and object of the Legislature, the language used will control and guide in construing a section or clause providing the details by which the primary purpose is to be effectuated.

3. While the office of the sheriff is a constitutional one, yet the regulation of his fees is within the control of the Legislature, and the same may be reduced during the term of the incumbent.

CONTROVERSY without action under section 803 of the Revisal by the Board of Commissioners of New Hanover County and State of North Carolina, against F. H. Stedman, sheriff, heard by *Webb, J.*, at Spring Term, 1906, of NEW HANOVER. From a judgment for the plaintiffs, the defendant appealed.

This was a controversy without action submitted to the court upon an agreed state of facts. The defendant, F. H. Stedman, sheriff of New Hanover County, was duly elected sheriff of said county for a term of two years at the general election held in November, 1904, and on the first Monday in December, 1904, duly qualified as such officer as required by law, and has filed with the Board of Commissioners of New Hanover County his bond in the sum of $100,000, as he was required to do, and that his term expires on the first Monday in December, 1906.

That since said qualification and filing of said bond the defendant (449) has acted, and is still acting, as sheriff in and for the said county of New Hanover, and is performing all of the duties of the said office, as

provided for by law, and is entitled to all the emoluments thereof, whatever the sum may be. That as such sheriff he is authorized, and it is his duty, to collect taxes for said county, and for the year 1905 he has collected State and county, school and special taxes amounting to $135,200. That the said plaintiffs have demanded of him a settlement of the taxes hereinbefore referred to as collected, and the said defendant agrees and offers to make a settlement thereof, and offers to pay at any time the full amount of said collections, less 5 per cent commissions on each and every sum which is collected, as commissions for his service in making said collection, and no more. The plaintiffs offer to make settlement, but insist that a deduction of 5 per cent as commissions for sheriff's services in collecting said taxes be made on the total sum up to $50,000, and 2½ per cent made on all amounts in excess of $50,000, and no more.

His Honor rendered judgment that defendant was entitled to 5 per cent commissions on $50,000 and 2½ per cent on the amount collected by him in excess thereof. Defendant appealed.

Robert D. Gilmer, Attorney-General, for plaintiff.
Rountree & Carr for defendant.

CONNOR, J., after stating the facts: Chapter 590, Laws 1905, provides: Section 91. "That the sheriff and tax collector shall receive 5 per cent on all taxes, licenses, and privileges, collected by them for State, county, township, school district, or other purposes whatsoever up to the sum of $50,000, and upon all sums so collected by him in excess thereof he (450) shall receive 2½ per cent commissions."

Section 92. "The Auditor, in making the settlement of the amount due from the sheriff or tax collector aforesaid, *shall deduct from the list returned* . . . 5 per cent commissions on the amount collected."

Defendant contends that section 92 is in conflict with section 91, in that while the first section fixes the commissions at 5 per cent on $50,000, and 2½ per cent on the excess thereof, the next succeeding section directs the Auditor, in settling with the sheriff, to deduct the 5 per cent on the whole amount. The point is also made, in the brief, that the rate of commission for collecting taxes cannot be reduced during the term of the incumbent, the office being of constitutional and not statutory creation.

Counsel call to our attention the principle of construction that, where two statutes or two provisions in the same statute upon the same subject conflict, the last in point of time will control, because it is the last expression of the legislative will. Conceding this to be true, the question

remains whether there is a conflict, of which defendant can avail himself. Section 91 clearly fixes the commissions to be paid to the sheriff —he cannot receive any amount in excess thereof. The direction to the Auditor to deduct 5 per cent cannot, by implication, repeal the clearly expressed limitation upon the commissions given the sheriff. It simply directs the duty of the Auditor and prescribes what deductions he may make, the commissions being the third item in the enumeration. If it be conceded that there is a conflict, and that both sections are to stand as written, the amount left in the hands of the sheriff in excess of his commissions as provided in section 91 could not be applied to his own use, but would be held as public money to be accounted for. The defendant contends that as the statute fixing the sheriff's commissions prior to 1905 gave him 5 per cent on the total amount collected, and the act of 1905 was a revision of the Machinery Act, the same construction will prevail as before the revision, unless the language plainly (451) requires a change of construction. Conceding this to be true, the language of section 91 manifests a clear and well-considered change in the law fixing the commissions. But for the language of section 92 there would be no reason for construction of section 91. If the language of section 91 was of doubtful meaning, we would apply the principle correctly stated by defendant. The difficulty does not arise from that quarter. Hence, the principle does not apply. The principle upon which we think the solution of the question depends is that where one provision expresses the principal purpose and object of the Legislature, the language used will control and guide in construing a section or clause providing the details by which the primary purpose is to be effectuated. The primary purpose here is to fix the sheriff's commissions for collecting taxes. The settlement with the Auditor is a matter of detail containing directions to that officer, and must be construed with reference to the primary provision. The third subsection of section 92 is clearly an inadvertence. We cannot attribute to the Legislature the intention to repeal a clearly expressed purpose in regard to an important matter by a provision immediately following, providing the manner of making the settlement. Section 92 must, therefore, be construed in the light of section 91, directing the reduction of the commissions prescribed by that section. *Fortune v. Comrs.,* 140 N. C., 322.

In regard to the second point, it is true that the case of *Mial v. Ellington,* 134 N. C., 131, does not affect the status, or rights, of the sheriffs—his being a constitutional office. The regulation of his fees, however, is within the control of the General Assembly. He takes his office, not by contract, but by commission, subject to this power in the Legislature. The Constitution fixes no fees whatever. *Bunting v. Gales,* 77 N. C., 283.

(452) "The office is constitutional, it is true, but the duties are statutory. . . . The Legislature may, within reasonable limits, change the duties and diminish the emoluments of the office if the public welfare requires it to be done, and to this the incumbent must submit." *Fortune v. Comrs., supra,* in which the law is discussed and the authorities cited by *Mr. Justice Walker.*

The judgment must be

Affirmed

Cited: Murphy v. Webb, 156 N. C., 408; *Mills v. Deaton,* 170 N. C., 388; *Toomey v. Lumber Co.,* 171 N. C., 182.

WATSON v. FARMER.

(Filed 22 May, 1906.)

Justices of the Peace—Jurisdiction—Torts—Remitting Excess—Contributory Negligence—Pleadings—Issues.

1. Courts of justices of the peace have jurisdiction to hear and determine actions for injury to personal property and to render judgments thereon, not exceeding $50, and the jurisdiction is not determined by the value of the property injured, but by the amount demanded in the warrant or complaint.

2. Where in an action for a tort brought before a justice of the peace, the plaintiff demanded $50 damages and the justice rendered judgment for that sum and on appeal the jury assessed the damages at more than $50, the plaintiff could remit the excess and take judgment for the sum demanded.

3. Where the answer failed to set out the acts and defaults of the plaintiff constituting contributory negligence, the judge did not err in not submitting an issue as to contributory negligence.

ACTION by S. J. Watson aganst J. O. Farmer, heard on appeal from a justice of the peace by *Cooke, J.,* and a jury, at October Term, 1905, of WILSON.

The issues submitted were:

1. Was the plaintiff's mule injured by the negligence of the defendant's driver? Yes.

(453) 2. What damage did the plaintiff sustain? $55.

Thereupon the plaintiff remitted the excess and the court rendered judgment for $50. Defendant appealed.

Pou & Finch for plaintiff.
Aycock & Daniels and J. A. Farmer for defendant.

BROWN, J. It is contended by the defendant that the justice of the peace had no jurisdiction of the cause of action set out in the complaint, and that the judge erred in not submitting an issue as to contributory negligence.

1. The jurisdiction of the courts of justices of the peace to hear and determine actions for injury to personal property and to render judgments therein, not exceeding $50, is upheld by this Court in *Malloy v. Fayetteville,* 122 N. C., 480, in an opinion by the present *Chief Justice,* in which all the authorities are collected. We are not disposed to question that decision, but, on the contrary, regard the question as settled by it. The jurisdiction of the justices is not to be measured by the value of the personal property injured. It is to be determined by the amount demanded in the warrant or complaint. It is true, there are cases like this where the actual damage sustained exceeds $50, but we see no reason why the plaintiff should not lay his damage at $50. He cannot recover in tort any more than he demands, and having recovered that in one action, he is debarred from any further recovery on the same cause of action. *Eller v. R. R.,* 140 N. C., 140. His Honor should have directed the jury to limit their assessment of the damages to $50, the sum demanded. As his Honor did not do so, and the jury rendered a verdict for $55, we see no good reason why the plaintiff should not be permitted to remit the excess and take his judgment for the sum within the justice's jurisdiction, and which was all the plaintiff sued for. The justice himself fixed the damage at $50 and rendered judgment for that sum, it being within his jurisdiction. Because a jury inadvertently assessed the damage at $5 more than the plaintiff demanded is no (454) reason for ousting the justice's jurisdiction when the plaintiff is willing to remit the excess. The question is decided in *Noville v. Dew,* 94 N. C., 43, in accord with the plaintiff's contention.

2. In this case the pleadings are in writing. The answer fails to set out the acts and defaults of the plaintiff or his servant constituting contributory negligence, and is therefore insufficient to raise the issue. 5 Enc. Pl. and Pr., 12. Also, there seems to be an absence in the record of any evidence of contributory negligence.

Affirmed.

CONNOR, J., concurring: I think that the decisions of the Court, upon the authority of which the conclusion in this case is based, are not in accord with the correct construction of the language of the Constitution.

They fail to give due force to the words, "wherein the value of the property in controversy does not exceed $50." If that limitation be abondoned, I cannot see why any action in tort, wherein the "amount demanded," which is said to be the standard, does not exceed $50, may not be brought within the jurisdiction of a justice of the peace. The framers of the Constitution evidently intended to make a distinction between the limitation placed upon jurisdiction in actions founded upon contract wherein the "sum demanded" is made the test, and those arising out of tort by making the "value of the property in controversy" the test. If the power given the Legislature to confer jurisdiction "in other civil actions wherein the value of the property in controversy does not exceed $50," which was exercised in strict accordance with, and the exact language of, the Constitution, had been adhered to, the justice would have had jurisdiction to try actions in the nature of
(455) *detinue* and *replevin,* involving title to personal property within the value fixed. It has always been the theory of the law that a jury was peculiarly fitted to assess damages; hence the limitation put upon the jurisdiction of justices. I do not care to discuss the question further than to say that my concurrence is based entirely upon the doctrine of *stare decisis.* I think it probable that the logical result of the decided cases will some day compel the court to reëxamine the question and return to the standard fixed by the organic law. In the light of the decisions of this Court, his Honor ruled correctly.

WALKER, J., concurs in concurring opinion.

Cited: Duckworth v. Mull, 143 N. C., 464; *Houser v. Bonsal,* 149 N. C., 54; *Wilson v. Ins. Co.,* 155 N. C., 177.

HARTON v. TELEPHONE COMPANY.

(Filed 22 May, 1906.)

Telephones—Negligence—Proximate Cause — Intervening Act — Question for Jury—Contributory Negligence of Beneficiary of Recovery.

1. In order to answer an issue as to defendant's negligence "Yes," there must have been a negligent act and this negligent act must have been the proximate cause of the intestate's death.

2. In an action against a telephone company for death from the falling of one of its poles, if the jury find that the defendant negligently allowed the pole to remain in a dangerous condition when it was likely to fall and

injure persons passing along the highway, and it did fall, blocking the road, and a traveler, in order to clear a passway, replaced the pole so that it later fell and killed the intestate, and this act of the traveler and the resultant injury were events which the defendant might reasonably have expected to occur as a result of its original negligence—in such case the first issue as to defendant's negligence should be answered "Yes."

3. There may be more than one proximate cause of an injury, and when a claimant is himself free from blame and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained, though there may be other proximate causes concurring and contributing to the injury.

4. The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition.

5. The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.

6. Except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could have reasonably expected them to occur as a result of his own negligent act.

7. In an action brought by the father, as administrator of his child, for damages for the negligent killing of his child, if the father at the time of the occurrence was guilty of a negligent act which concurred in causing the injury, and his negligent act was of such character that a man of ordinary prudence could have reasonably expected that the injury was likely to result in consequence of his act, this would be such contributory negligence as would bar a recovery, the father being the beneficiary of the recovery.

CONNOR and WALKER, JJ., dissenting.

ACTION by H. H. Harton, administrator of Mary Willie Har- (456) ton, against Forest City Telephone Company, heard by *W. R. Allen, J.*, and a jury, at August Term, 1905, of RUTHERFORD.

There was evidence tending to show that defendant had erected its poles along a highway in Rutherford County. The road hands had worked this particular part of the highway six or eight days prior to the injury, ditching close up to a pole which was rendered (457) insecure and liable to fall. A road hand notified a lineman of the defendant of its unsafe condition some days before the injury, but the

matter was not attended to and the pole fell across the road with the lines attached, blocking the road. One Carpenter, going along the road with a wagon, in order to clear the way and enable himself to pass, with the assistance of two others, set the pole back in the hole from which it had fallen, propped it, and left it, as he thought, secure. He testified that with the pole down, vehicles could not pass; that he could not have done otherwise than put the pole back in order to clear the way; could not have pulled it to either side without breaking the wires; that he propped the pole and, when he left it, thought it was more secure than before; that soon after, the plaintiff's intestate was passing along the highway, and the pole fell and killed her.

Among other instructions, the plaintiff asked the following:

3. If you should find that the defendant was negligent in leaving the pole standing in an unsafe and dangerous condition, it cannot excuse itself by showing that the pole had already fallen and was replaced by a third person a short time before the fall which injured the plaintiff's intestate, unless you should find that the falling of the pole and its replacement was an unnatural occurrence of an event which would not ordinarily be expected and anticipated by a person of ordinary prudence in the natural and ordinary course of events.

4. If you should find from the evidence that the pole was rendered insecure and dangerous to the public by the work of the road hands six or eight days previous to the time of the alleged injury; that the pole was upon a public highway; that the defendant's lineman had notice of its insecure condition, and defendant failed to make the pole
(458) secure, which insecurity was dangerous to the public traveling said road, and the injury to the intestate occurred as alleged, then the defendant cannot excuse itself by showing that the pole fell across said road and was placed back in its former position by a traveler in such way as to render it liable to fall again, unless you find that the injury came about in a manner or from causes which defendant might not have reasonably foreseen.

7. If you find that the pole fell as alleged and did the injury, then the fact that it had previously fallen and had been erected by Mr. Carpenter, as he testified, cannot avail the defendant as an excuse for its negligence, unless you find that the action of Mr. Carpenter in reërecting the pole was not connected with and was not the result of the first fall of said pole.

The court declined to give either of the instructions, and intimated that he would charge the jury as follows:

"If you find from the evidence that the road hands left the pole insecure and in such condition that it could be reasonably foreseen that it

would fall in the road, and that it was left in this condition such a length of time that the defendant, by the exercise of ordinary care, could have discovered its condition, or was notified of it a sufficient length of time to enable it to repair, this would constitute negligence on the part of the defendant; but negligence alone does not entitle the plaintiff to recover. There must be negligence, and this negligence must be the real or proximate cause of the injury; if after the negligence of the defendant, there is another cause over which it had no control, which intervenes and is the real cause of the injury, then the negligence of the defendant would not be proximate. If you find from the evidence that the defendant was negligent, and that as a result of this negligence the pole fell in the road, and if you further find from the evidence that one Carpenter, admitted not to be an agent of the company, raised the pole from the (459) ground and placed it in the hole where it had formerly been, and that thereafter the pole fell and injured plaintiff's intestate, and that the act of Carpenter was the real cause of the injury to intestate, then the negligence of the defendant would not be the proximate cause of the injury, and you would answer the first issue 'No.' This is predicated upon the admission of plaintiff that after Carpenter replaced the pole, sufficient time did not elapse for the defendant to discover that it had been replaced."

Upon the refusal of his Honor to give the instruction as requested, and upon the intimation as to his intended charge, the plaintiff submitted to a nonsuit and appealed.

Justice & Pless for plaintiff.
McBrayer & McBrayer and Justice & McRorie for defendant.

HOKE, J. In the charge as proposed, the judge below correctly defined the negligent act alleged against defendant and properly stated that in order to answer an issue as to defendant's negligence "Yes," there must have been a negligent act, and this negligent act must have been the proximate cause of the intestate's death. In the last part of the charge, however, we think there was error to the prejudice of plaintiff which entitles him to a new trial. The portion of the charge referred to is as follows: "If you find from the evidence that the defendant was negligent, and that as a result of this negligence the pole fell in the road, and if you further find from the evidence that one Carpenter, admitted not to be an agent of the company, raised the pole from the ground and placed it in the hole where it had formerly been, and that thereafter the pole fell and injured plaintiff's intestate, and that the act of Carpenter was the real cause of the injury to intestate, then the negligence

(460) of the defendant would not be the proximate cause of the injury, and you would answer the first 'No.' This is predicated upon the admission of plaintiff that after Carpenter replaced the pole, sufficient time did not elapse for the defendant to discover that it had been replaced."

The prayers for instruction on part of the plaintiff, while not entirely free from criticism, in that they may be construed as improperly putting the burden of proving the element of proximate cause involved in the first issue, on the defendant, yet they substantially embody the proposition that if defendant negligently left the pole in a dangerous and threatening position, so that it was likely to fall and injure persons passing along the highway, and the pole did fall across the highway, and Carpenter, traveling along said highway, in order to clear the same and make a passway, put the pole back in the position from which it had fallen and from which it later fell again and killed the intestate; and the act of Carpenter, with the resultant injury, was one which defendant might have reasonably foreseen as a consequence of his original negligence, in such case, the intervening act of Carpenter would not prevent the primary negligence from being the proximate cause of the resultant injury, and the jury should answer the first issue "Yes." In rejecting this principle and proposing the last portion of the charge above quoted, his Honor could by fair interpretation only have intended, and we have no doubt he did intend, to decide that, notwithstanding the fact that defendant may have been negligent, if Carpenter put the pole back in an insecure position from which it was likely to fall and injure one on the highway, and it did so fall and cause the injury, this would so break the sequence of events from the original negligence as to prevent same from being the proximate cause of the injury, and would shield defendant from responsibility; and in this, as stated, we think there was (461) error. Though Carpenter was guilty of negligence in replacing the pole so that it threatened injury and was likely to fall and did fall and kill the intestate, this would not necessarily avail to protect defendant. There may be more than one proximate cause of an injury, and it is well established that when a claimant is himself free from blame and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained, though there may be other proximate causes concurring and contributing to the injury. In 21 A. & E. (2 Ed.), 495, it is said: "To show that other causes concurred in producing or contributing to the result complained of is no defense to an action of negligence. There is, indeed, no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of plaintiff's injuries."

Again, on p. 496, it is said: "When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable."

In *Phillips v. R. R.*, 127 N. Y., 657, it is said: "When, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that there were two proximate causes of the injury, one the negligence of the defendant, and the other an occurrence happening without fault on the part of the plaintiff, the latter is entitled to recover." See, also, *Cartersville v. Cook*, 129 Ill., 152.

The question then recurs for consideration, whether, notwithstanding that the act of Carpenter, negligent or otherwise, was the proximate cause of the injury, may not the original or primary negligence have also been the proximate cause?

There are many definitions of proximate cause given in the books, all involving the same principle, differing in form, however, in order the better to elucidate and apply the principle to the variant facts of particular cases. That given in Shearman and Redfield on Negligence, sec. 26, may be adopted as the one best suited to explain (462) the ruling on the fact of the case before us. "The proximate cause of the event," says the author, "must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition." And Barrows on Negligence, p. 17, in further statement of the doctrine, says: "When an independent, efficient, and wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former, and not the latter, is deemed the proximate cause of the injury." There is no doubt here that the act of Carpenter intervened and, whether wrongful or otherwise, that it was an efficient cause of the injury; but was it a new, and more especially, was it an independent cause? For this is required before the sequence of events is broken, and the original or primary negligence becomes "insulated" and ceases to be the proximate cause. Speaking of this feature of the definition, Barrows on Negligence further says: "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. Thus, where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs

away: but for the intervening act, he would not have run away and the injury would not have occurred; yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded nor obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening responsible
(463) cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening cause may be culpable, intentional, or merely negligent." To the same effect Shearman and Redfield, secs. 31 and 34, speaking further of the intervening cause in section 31: "In the first place, the causal connection must be actually broken, the sequence interrupted, in order to release the defendant from responsibility. The mere fact that another person concurs or coöperates in producing the injury or contributes thereto in any degree, whether large or small, is of no importance. . . . It is immaterial how many others had been at fault if the defendant's act was the efficient cause of the injury." And in section 34: "If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not concur in point of time, and the negligence of one only exposes the injured person to risk of injury, in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. If it could not have been thus anticipated, then the intervening negligent person is alone responsible." A like doctrine is laid down in 1 Thompson Commentaries on the Law of Negligence, secs. 47 to 85 inclusive, giving various instances of its application.

It will be seen that the test laid down by all of these writers, by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a
(464) new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. If the intervening act was of that character, then the sequence of events put in motion by the primary wrong is not broken, and this may still be held the proximate cause of the injury. Numerous and well considered deci-

sions by courts of the highest authority show that this is a correct statement of the doctrine. *Ins. Co. v. Boon,* 95 U. S., 117; *R. R. v. Kellogg,* 94 U. S., 469; *Gas Co. v. Ins. Co.,* 158 Mass., 574; *Lane v. Atlantic Works,* 111 Mass., 136; *Wright v. R. R.,* 27 Ill. App., 200.

In *Ins. Co. v. Boon, supra,* the Court says: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule." In *Lane v. Atlantic Works, Colt, J.,* delivering the opinion, says: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged, but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." And at page 144, this (465) opinion further declares that, "It was immaterial whether the act of Horace Lane (the intervening agent) was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against."

In *Clark v. Chambers,* 19 Eng. Ruling Cases, 28, on facts not dissimilar to those of the case before us, it was held that the primary negligence of the defendant was the proximate cause of the resultant injury, as a matter of law. In that case, a defendant had partially and wrongfully obstructed a private carriage-way by placing a barrier thereon armed with spikes—commonly called a *chevaux de frise;* some one, without authority from the defendant, removed the obstruction from the driveway and placed the same in a footpath near by, and one going along the footpath on a dark night was injured by the removed barrier. Held, as stated, that as a matter of law the original wrong was the proximate cause of the injury.

While this decision is deserving of the greatest consideration, the opinion itself suggests that there are cases which declare the law as we now hold it, and we think it the more correct rule that, except in cases

so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act, and we hold that the question on the phase of the case presented by these prayers for instructions should be submitted under a charge substantially embodying this position: that if the jury find the defendant, in breach of its duty, negligently allowed the pole to remain in a dangerous condition where it was likely to fall and injure one on the highway, and it did fall, blocking the road, and Carpenter, in order to clear a passway, replaced the pole so that it later fell and killed the intestate, and this act of Carpenter and the resultant injury (466) were events which the defendant might reasonably have expected to occur as a result of its original negligence, in such case, the first issue should be answered "Yes," with such other positions as the testimony may require.

In regard to the issue of contributory negligence, there seems to have been no testimony in the former trial of any contributory negligence on the part of the intestate. In this connection, however, attention is called to the decision in *Davis v. R. R.*, 136 N. C., 115, in which it is held that if there was contributory negligence on the part of the plaintiff, who is father and next of kin of the intestate, the same would be available as a defense to the extent of his interest. If the father at the time of the occurrence was guilty of a negligent act which concurred in causing the injury, and his negligent act was of such character that a man of ordinary prudence could have reasonably expected that the injury was likely to result in consequence of his act, this would be such contributory negligence as would bar a recovery.

No opinion is expressed on the testimony, as it may not on this point have been set out with a view to present the question. There is error and a new trial is awarded.

New trial.

BROWN, J., concurring in result: I am not now prepared to hold against the rulings of *Judge Allen* in this case, but before determining whether the intervention of Carpenter "insulated" the alleged negligence of the defendant, I prefer that the jury should pass on all the issues, and therefore consent to a new trial. I agree that it would have been better had the trial proceeded and a voluntary nonsuit not been taken. If that had been done, the entire case would have been before us, and all rulings excepted to duly considered. If it should be found that Carpenter propped the pole up with a rotten or insufficient prop, so that it broke and fell, or that he placed the prop so far out that it was knocked

out of place by the wheel of the buggy, or that he otherwise did (467) the work in so negligent a manner that the pole fell on the intestate in consequence of his negligence, I should have no difficulty in holding Carpenter's act the immediate cause of the injury and that the defendant would not be liable.

Again, I think there is evidence of contributory negligence upon the part of the intestate. The plaintiff may be the beneficiary of a recovery and come within the ruling in *Davis v. R. R.*, 136 N. C., 115. Upon the whole I think it best to order a new trial, to the end that the jury may pass on all the issues.

CONNOR, J., dissenting: As this case goes back for a new trial, I do not care to discuss several of the interesting and difficult questions presented upon the record. I simply wish to say that I do not think plaintiff's prayers for instructions could have been properly given, and that the instruction proposed to be given by his Honor was correct. The plaintiff should have proceeded with the trial and not have taken a voluntary nonsuit. In the light of the evidence, the sole question was whether the negligence of defendant was the proximate cause of the injury—and this his Honor proposed to submit to the jury. After correctly defining the measure of defendant's duty in regard to securing the pole, after being notified of the dangerous condition in which it was left by working the road, followed by the rains, his Honor said: "If you further find from the evidence that one Carpenter, admitted not to be an agent of the company, raised the pole from the ground and placed it in the hole where it had formerly been, and that thereafter the pole fell and injured plaintiff's intestate, then the negligence of the defendant would not be the proximate cause of the injury." This, I think, a correct instruction. It must be conceded, I respectfully submit, that if Carpenter's act was the real, which is synonymous with proximate cause of the injury, then the preceding and exhausted negligence (468) of defendant could not be also and at the same time the real (proximate) cause thereof. It must be conceded that expressions may be found as cited by *Mr. Justice Hoke,* in which the existence of two proximate causes are recognized as causing an injury. I must confess my inability to understand how two independent causes, acting and operating entirely independent of each other, can both be said to be the proximate cause of one injury. In a certain sense every event is the result, culmination of every precedent event; but for practical purposes, in the affairs of human life, there must be a limit found somewhere when the causal connection between events cease to be recognized for the purpose of fixing liability; otherwise, we run into abstractions of the schoolmen and convert the courts into academies for speculation. I fully

comprehend how two or more concurrent causes may coexist and co-operate, but in the domain of practical jurisprudence, before a legal liability can be fixed, a point must be reached at which, either as a legal conclusion or by the verdict of the jury, the ultimate *causa causans* is reached. In the case put by Mr. Barrows, cited in the opinion, as in all of the cases which I have examined, the negligent act, as leaving the horse unhitched in the street, was a continuing act of negligence, the dangerous consequences of which could be clearly foreseen. This is well illustrated by the decisions of this Court in *Greenlee v. R. R.,* 122 N. C., 977, and *Troxler v. R. R.,* 124 N. C., 189, in which it was held that the failure of the railroad company to provide safety appliances was negligence *per se,* and because continuing up to the moment of the injury and from long and uniform experience known to be imminently dangerous to human life, it was treated, in the language of the Court, as the "*causa causans* of the injury," excluding the defense of contributory negligence. It is nowhere suggested that the negligence of the defendant in not furnishing the appliances and that of plaintiff in undertaking to (469) do the work without them, were both proximate causes. This, it was evident to the Court, would be to destroy the landmarks defining the doctrine of contributory negligence. Whatever may be thought of the scientific accuracy of the doctrine of continuing negligence, it is well settled, with its limited application, in our jurisprudence. It simply excludes the defense of contributory negligence by treating the defendant's continuing negligence as the proximate cause of the injury. In the same way many cases may be found in the books wherein it is held that if one leave a dangerous object in the highway, under such circumstances that a reasonably prudent man would foresee that persons passing would interfere with it, causing injury, the original negligent act is treated as the proximate cause of the injury. In all of these cases the negligent act was continuing at the time of the interference. In *R. R. v. Kellogg,* 94 U. S., 469, a well considered and uniformly approved opinion, it is said: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is of difficult application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. . . . We do not say

that even the natural and probable consequences of a wrongful act or omission are, in all cases, to be chargeable to the misfeasance or nonfeasance. They are not where there is a sufficient and independent cause operating between the wrong and the injury. In the nature of things, there is in every transaction a succession of events, more (470) or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are natural or probably connected with each other by a continuous sequence or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

In this case, the pole was down and across the road; the negligence of defendant had spent its force, was exhausted. For any injury sustained by a traveler by reason of its being across the road, defendant was liable. Carpenter came along and undertook to replace it. In such condition Mr. Bishop says: "The inadequate, remote cause, which is not sufficient to charge the party, we may define to be one which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. If after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible." Noncon. Law, 43. This, I think, is the law applicable to this case, the question of fact being for the jury. I am unable to foresee where the doctrine of double or, possibly, triple proximate cause will lead us. It will become necessary for either the court or the jury to find which of the several proximate causes is most or nearest proximate to the injury—ultimately leading to the generally rejected doctrine, save in admirality, of comparative negligence. In recognizing several proximate causes when inquiring into defendant's negligence, it must follow that the same principle must be carried into the inquiry in regard to plaintiff's negligence, producing, I respectfully submit, additional confusion and uncertainty into a domain sufficiently beclouded with contradictory theories, abstract (471) speculations, and confusing terminology. I think it much safer to keep in view, and be governed by, the wise maxim *via antiqua via est tuta.*

WALKER, J., concurs in the dissenting opinion.

Cited: Britt v. R. R., 144 N. C., 255; *S. c.,* 146 N. C., 433; *Penny v. R. R.,* 153 N. C., 308; *Harvell v. Lumber Co.,* 154 N. C., 262; *Ward v. R. R.,* 161 N. C., 183; *Paul v. R. R.,* 170 N. C., 233; *Wood v. Public Corp.,* 174 N. C., 700; *Balcum v. Johnson,* 177 N. C., 216; *Stone v. Texas Co.,* 180 N. C., 556.

WOODY v. TIMBER COMPANY.

(Filed 22 May, 1906.)

Deeds—Standing Timber—Injunctions.

Where a deed makes an absolute conveyance of so many trees marked and branded, with a right of way for their removal, and contains no clause limiting the time within which they may be removed, the court properly dissolved a temporary injunction restraining the purchaser from cutting and removing the trees.

ACTION by A. A. Woody against Intermont Iron and Timber Company, pending in the Superior Court of YANCEY, and heard by *Justice, J.*, at chambers at Rutherfordton, N. C., on 21 April, 1906, upon a motion to continue a temporary injunction to the hearing.

Action to declare void a certain deed and to restrain the defendant from cutting timber on the land described in it. The following is a copy of the deed:

For and in consideration of the sum of one hundred and thirty-two dollars and seventy-five cents ($132.75), in hand paid by the grantee to the grantors, the receipt of which is hereby acknowledged, A. A. Woody and wife, Lydia, have bargained and sold and by these presents transfer and convey to Tate L. Ernest, agent, the following described timber standing in the tree, as follows, to wit: 36 poplar and 7 ash of the diameter of 24 to 30 inches in diameter, and 45 poplars 30 inches and
(472) over, and 2 ash 30 inches and over, and the following other trees 24 inches and over in diameter: 9 cucumbers, 13 lynn, 111 chestnut oaks, 11 white oaks and 25 other oaks, making a grand total of 153 trees, all of which said trees are standing at this date on the following described land of the grantors, to wit: Situated on Bush Creek of Toe River and adjoining the lands of Moses Fox and others, W. H. Deyton and others, containing 100 acres, more or less, situated in the county of Yancey and State of North Carolina, which trees are branded thus:

To have and to hold to said grantee, and successors and assigns, with usual covenants of seizin, right to convey, unencumbrances and general warranty, together with the right of way over, through, and upon any lands belonging to said grantors, for the removal of any timber belonging to said grantee or successor or assigns, provided adequate and reasonable damages are paid for any injuries done to any growing crops which may then be upon said lands. Should the grantors clear any of the lands on which said timber stands, they shall be at liberty to deaden such trees as stand within such cleared land after the lapse of five years from this date, provided they shall first give the owner of the timber six months

written notice of their intention to deaden; and in consideration of the foregoing premises the grantors agree to protect said timber as long as it may remain upon said lands.

Witness our signatures and seals, this ..... day of March, 1900.

A. A. WOODY. (L. S.)
LYDIA WOODY. (L. S.)

From an order dissolving the temporary injunction, the plaintiff appealed.

J. W. Pless and J. T. Perkins for plaintiff.
McBrayer & McBrayer for defendant.

BROWN, J. It is contended that the deed is void under the authority of *Mfg. Co. v. Hobbs,* 128 N. C., 46. The instrument construed in that case is unlike this in every respect. This is an absolute (473) conveyance of so many trees marked and branded, and contains no clause limiting the time within which they may be removed. It is possible the courts may so construe the meaning of the deed as to require the grantee or those claiming under him to remove the trees within some reasonable time. *Bunch v. Lumber Co.,* 134 N. C., 116. But as it is plain that the time within which the defendant may enter and remove the trees has not yet expired, the injunction was properly dissolved.

If the plaintiff desires to clear the land he may give the six months notice required in the instrument and compel the removal of the trees, or he may deaden them with impunity.

Affirmed.

Cited: Lumber Co. v. Smith, 146 N. C., 161.

MOORE v. MCCLAIN.

(Filed 22 May, 1906.)

Ejectment—Trespass—Prima Facie Title—Burden of Proof—Boundaries—Natural Objects—Courses and Distances—Conflicting Calls.

1. In an action of ejectment and trespass, where the plaintiff alleged title and the defendant denied it, the burden of the *issue* was upon the plaintiff, and showing a *prima facie* title did not shift the burden of proof upon the issue, but imposed upon the defendant the duty of "going forward" with his evidence.

2. When, in addition to course and distance, natural objects, marked trees or lines of other tracts are called for in a grant or deed, these, when shown, will control course and distance; but the duty is not imposed upon those claiming under such a grant or deed to locate, or make reasonable search for, the natural objects before they can rely upon the calls for course and distance.

3. A finding that the defendant was not in possession of the *locus in quo* when suit was brought would put an end to the plaintiff's action, if in ejectment only.

(474) ACTION by Ellen O. Moore against Thomas McClain and others, heard by *Peebles, J.*, and a jury, at January Special Term, 1906, of POLK.

Plaintiff sued in ejectment, alleging title to a tract of land described in the complaint by metes and bounds; that defendants were in the wrongful possession thereof. She also alleged that the land was heavily timbered and that the defendants were cutting and removing valuable timber therefrom, praying for an injunction restraining defendants, etc. A restraining order was issued, and upon the return day continued to the hearing. Defendants denied each allegation of the complaint. Issues were submitted to the jury directed to the inquiry of title, possession and damages. Plaintiff introduced a grant from the State bearing date 28 November, 1809, followed by a chain of title. She then introduced testimony tending to locate the boundaries of the grant; one Edwards testifying that, beginning at A and running to B, he found marks along the line appearing to be 10 or 15 years old; passed a stone and pointers at B; found pointers at C and traced the line to the beginning. Plaintiff introduced one Joe Moore, who testified that he was 64 years old; was present when line was run; was about 17 years old. When they reached the stack corner, about 200 yards from the house, they sent witness to Daniel McClain's house after an axe and they cut into a tree and found marks in it. Witness saw the tree last year; some rocks there now; did not remember whether they put any down there or not. McClain's house was northwest from corner. John Matthews testified that McClain wanted him to cut some boards when going east, and he told me not to cut anything on the right; that was Moore's land; twenty-five years ago.

Plaintiff rested. Defendants introduced a grant to John Hughes,
(475) bearing date 26 February, 1793, calling for "beginning at a Spanish oak on a hill on the north side of Green River"; showed by the surveyor that he began at the Spanish oak at the point on the map marked 1, and run by course and distance to 2, thence to 3, thence to 4, and if the Spanish oak was at the beginning corner, the course and distance would include the land in dispute. He testified in regard to the

marks on the Spanish oak and that the second corner called for in defendant's grant was for a pine; that he found no pine at the end of the distance, which gave out in a field, but that three or four yards beyond he found a stump. The second call in the grant by course and distance carried him to 3; that the call was by course and distance "to a stake in his (Hughes') own line"; that he, the surveyor, knew of no line at 3; that he made no inquiries as to where the Hughes line was; did not attempt to find it, was not asked to look for it or locate it by either the plaintiff or defendant. George Lynch testified that he was 56 years old; was raised at Dan McClain's, on land inside of defendant's grant, as located by the surveyor; that he had known the Spanish-oak corner, which he pointed out to the surveyor, since he was a boy, and that it had at all times been known and recognized by McClain and the adjoining owner of land as the McClain beginning corner of the Hughes grant. At the conclusion of the evidence the defendant's counsel asked the court in writing to charge the jury "That there is no evidence as to the location of the Hughes line or tract of land at the time of the date of the John Hughes grant introduced by the defendant dated in 1793, and therefore the call in said grant cannot control course and distance." This prayer was refused by the court and defendant excepted. The court then charged the jury that if they were satisfied that the plaintiff had located the calls of her grant and had been in possession of said boundary, as testified to by the witnesses, it would be their duty to answer the first issue "Yes," unless they found from the evidence that the defendants (476) had located the John Hughes grant as claimed by them, and as indicated on the map, and that in passing upon the location of the Hughes grant they should take into consideration and be governed by the natural boundaries called for. That if they found the beginning to be at the Spanish oak, the next corner would be a pine, and if they could find a pine from the evidence they would go to it regardless of course and distance. The next call in the grant was course and distance, which would carry them to 3, if not controlled by natural boundaries; but, as the call from 2 to 3 was south to a stake in his, the grantee's own line, his line when located would control course and distance, and that the surveyor had testified that he had made no effort to find the Hughes line called for in the grant, and that no effort so far as he knew had been made to locate it. His Honor charged the jury that as the defendant's paper called for the Hughes line it was the defendant's duty to make reasonable efforts to find it, and charged the jury that the burden was upon the defendant to locate the Hughes line before he could establish the boundary by course and distance. The defendant excepted. After the jury had retired, his Honor informed counsel that he was of the

opinion that there was no evidence to support the allegation that the defendant was in possession when the suit was brought, and that he would charge the jury to answer the second issue "No." Counsel for both parties consented thereto. The jury found the first issue for the plaintiff, second issue by consent "No." That the defendant had trespassed upon the land and assessed the plaintiff's damages at $40. Thereupon his Honor rendered judgment that the plaintiff was the owner and entitled to the possession of the land, a full description whereof is set out in the judgment, and that she recover of the defendants and their surety upon their defense bond the sum of $40 and costs, to all of which the defendant duly excepted and appealed, assigning as errors: The refusal of the court to give the first instruction asked. The in-
(477) struction that the burden was upon the defendant to show where the Hughes line was and to make reasonable effort to find same, before he could rely upon the course and distance to fix the boundary of his grant. In permitting the plaintiff to recover the land described in the complaint after it had been found by the jury that the defendant was not in possession of the land in dispute when the action was brought.

The defendant appealed from the judgment rendered.

Gallert & Carson for plaintiff.
Smith & Schenck for defendant.

CONNOR, J., after stating the case: The plaintiff introduced testimony tending to show the location of the Alexander grant of 29 November, 1809, within the boundaries set out in the complaint. She does not connect herself with this grant, but shows a chain of title beginning 10 February, 1834, with which she does connect herself, showing possession, etc. The defendants, for the purpose of showing title out of the State, at the date of the Alexander grant, introduced a grant to John Hughes, dated 26 February, 1793, which they undertook to locate. This grant called for a Spanish oak as the beginning corner. There was evidence tending to show the location of this oak. The surveyor testified that it was marked as a corner. The first call from this oak was by course and distance to a pine; the second call was by course and distance to "a stake in his (Hughes) line." The surveyor testified that the course and distance called for carried him to a point marked "2" on the plat; he found no pine there; found a stump three or four yards away. The second call by course and distance carried him to "3"; he made no inquiries as to the Hughes line, made no attempt to find it, nor was he asked to do so by either party. He testified that following the call he reached "4," thence to the beginning. If this testimony is true, the Hughes grant

covers a portion of the Alexander grant and shows title out of the (478) State at the date thereof.

So far as the controversy is presented upon this appeal and the exceptions to his Honor's ruling, the sole question is as to the manner in which the defendants may locate the Hughes grant. The plaintiff having shown a *prima facie* title, it behooved the defendants to show a superior title. The burden of proof upon the *issue* was upon the plaintiff. She alleged title and the defendants denied it. Showing a *prima facie* title did not shift the burden of proof upon the issue, but imposed upon the defendants the duty of "going forward" with their evidence. The distinction is clear and well illustrated in *Meredith v. R. R.*, 137 N. C., 478, and *Board of Education v. Makely,* 139 N. C., 31. When the defendants introduced the Hughes grant they undertook to show that it covered a portion of the *locus in quo.* It became necessary for them to show the beginning, this being a natural object. After doing so, and it appearing that the calls were for course and distance and natural objects, it is too well settled to admit of controversy that if there was a discrepancy in the calls that which was most certain, which is the natural object, would control. The judge so instructed the jury, and he further imposed upon the defendants the duty of making reasonable search for the natural objects before they could rely upon the calls for course and distance. To this ruling the defendants excepted, and this is the point for determination.

Ruffin, C. J., in *Harry v. Graham,* 18 N. C., 76, discussing this question, says: "There is but one principle applicable to questions of this sort. If there be but one description in the deed, that is to be strictly adhered to. If there be more than one and they turn out upon evidence not to agree, that is to be adopted which is the most certain. Course and distance from a given point is a certain description in itself, and, therefore, is never departed from unless there be something else (479) which proves that the course and distance stated in the deed was thus stated by mistake. It has been held that a tree called for and found not corresponding to the course and distance, establishes the mistake, and is itself the terminus. So of the line of another tract. But if the tree be not found, nor its former situation identified, it is the same as if the call for it had been omitted, for there is no sign but the course and distance. Such is the case here, no tree being found, nor its locality proved otherwise than it is shown by the deed to have stood at the end of a line of a certain length. The description is, therefore, the same as if the call had been for a stake or an imaginary point at the end of a distance." The rule is laid down by *McRae, J.,* and approved in *Redmond v. Stepp,* 100 N. C., 212: "If only course and distance are given and the beginning

is found, the land will be run by course and distance. But when, in addition to course and distance, natural objects, marked trees or lines of other tracts are called for, these, when shown, will control course and distance and must be reached by a further extension or shortening of the line so as to reach such objects, trees or adjoining tracts. If none such can be found, then the course and distance must be the guide in fixing the boundary." This is the correct view and has, in actions of ejectment and trespass, been so recognized. It would impose upon those claiming, as in this case, under old grants, a heavy burden to require them to find or make search for natural objects or very old lines before they could make at least a *prima facie* location of such grants.

The plaintiff contends that there was evidence tending to show that, in truth, the Hughes grant did not cover any part of the Alexander grant. If this is correct, such evidence should have been considered by the jury. The record does not profess to set out the language used by the judge,

(480) but says that in effect he charged the jury that "the burden was upon the defendants to locate the Hughes line before they could establish the boundary by course and distance." This may not correctly express his Honor's views or instruction, but we must take it as we find it in the record. We think that the instruction was erroneous. It not appearing from the survey that there was any discrepancy in the calls of the grant, the call for course and distance would control. If there was evidence, as contended by the plaintiff, the question should have gone to the jury under proper instructions. The plaintiff's counsel cites in support of the instruction *Hill v. Dalton,* 140 N. C., 9. That case gave us much anxious concern. The question was presented, in regard to the burden of proof, in a proceeding under the processioning act for the first time. As we then said, the plaintiff was the actor; he set forth his line and insisted that it should be so declared and established; he therefore carried the burden of proof on the issue. The grant contained three calls—course and distance, a white oak in James McKaughan's line. The survey by course and distance did not show any white oak or other line. Evidence was introduced by the defendant locating the McKaughan line. The sole question was where, in this condition of the evidence, the burden of proof lay. Apprehending the difficulty which might arise, if the principle then announced was not restricted to the single case of a processioning proceeding, which is anomalous and always perplexing, we said: "We confine our ruling to a proceeding for procession for establishing a disputed line." We certainly did not intend to introduce a new rule of practice into the trial of other cases. We are impressed with the wisdom of adhering to well-settled rules affecting the title to real estate. It is to be regretted that the evidence and lan-

guage of his Honor's instructions were not sent up. We could more clearly see the bearing of the instructions upon the real merits.

We are of the opinion that his Honor fell into error in holding that the defendants must locate the Hughes line before they could establish the boundary of the grant by course and distance. We (481) can see no reason why, upon the introduction of the grant and the survey, they may not have gone to the jury. Of course, the plaintiff was in no sense bound by the defendant's evidence. She may have insisted and asked the jury to find that the survey did not correctly locate the grant. It was their province to decide the question of fact, where the two lines were. His Honor instructed the jury to find that the defendants were not in possession of the *locus in quo* when the suit was brought. This put an end to the plaintiff's action, if in ejectment only. His Honor was of the opinion that the complaint set forth facts sufficient to constitute a cause of action for trespass, and proceeded to judgment accordingly. While complications may grow out of this course of procedure, and the effect of such judgments, as estoppels, be doubtful, we cannot see that any harm came to the defendants in this case. The exception is not pressed in the brief.

As the cause goes back for a new trial, the pleadings may be so amended as to present the issue as for a trespass, if they do not in their present form do so.

The plaintiff says that no harm came to the defendants by reason of his Honor's rulings, because they did not connect themselves with the Hughes grant. The evidence in that respect is not set out, if there was any. The record indicates that the parties desired to present the single question raised by the exception. It may be that the merits of the controversy depended upon proof of possession ousting the owner of the paper title. However all of this may be, for the error pointed out there must be a

New trial.

Cited: McNeely v. Laxton, 149 N. C., 335; *Mitchell v. Wellborn, ib.,* 352; *Singleton v. Roebuck,* 178 N. C., 204.

(482)

GILLILAND v. BOARD OF EDUCATION.

(Filed 22 May, 1906.)

Evidence—Race Ancestry—General Reputation—Opinion Evidence—Instructions.

1. In an action by plaintiffs for a mandamus to admit them to the white schools, where it was alleged that one of their ancestors, who lived in Buncombe County forty years ago, was of negro blood, it was competent for plaintiffs' witness who lived at that time as a neighbor to their ancestor four years, to testify in answer to a question if he remembered whether their ancestor voted, and if so, when and where, that "there was nothing said against his voting, and I think he always voted," as tending to show that their ancestor was of pure white blood, colored people not being allowed to vote at that time.

2. Where a witness has had opportunity to note relevant facts himself and did observe and note them, and simply qualifies his testimony by the use of the term "I think" because his impression or memory is more or less indistinct, this, while in the form of opinion, is really the statement of a fact, and will be so received.

3. In questions of race ancestry, general or common reputation is received under certain conditions, and it is not alone by oral expression that this reputation is evidenced and established. The manner in which a man is received and treated by his neighbors and the community generally may give as convincing evidence of their opinion and attitude concerning him as if it was declared in speech.

4. 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 considered, it presents the law fairly and clearly 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.

ACTION by Sylvia Gilliland and others, by their next friend, against Board of Education of Buncombe County and School Committee
(483) of Avery's Creek Township, heard by *McNeill, J.*, and a jury, at November Term, 1905, of BUNCOMBE.

The plaintiffs, children within the school age, resident in Avery's Creek Township, Buncombe County, on 1 August, 1905, entered, as pupils, the school established in said township, in pursuance of law, for children of the white race. They attended the school for one week, when they were excluded therefrom by the defendants, who have since continued to refuse them admittance to the school, after demand duly made by the plaintiffs. The defendants admit that the plaintiffs are within the school age and resident within said township and assignable to the schools established

therein, and admit further that they have excluded them from the schools of said township established for the white race, and claim the right so to exclude them on the ground that the plaintiffs are not children of the white race, but are of mixed blood, having a certain amount of negro blood. The cause was made to depend and did depend on that single question whether the plaintiffs were children of the white race pure and unmixed with any negro blood. The form of the issue is as follows: "Are the plaintiffs entitled to admission in the white schools of Buncombe County?" Under the charge of the court the jury rendered a verdict in favor of the plaintiffs; judgment on the verdict, and the defendants excepted and appealed.

J. B. Anderson and Locke Craig for plaintiffs.
Tucker & Murphy and J. Frazier Glenn for defendants.

HOKE, J., after stating the case: While the principle involved in this issue is one of supreme importance, not only to the parties litigant, but to the entire Commonwealth, the questions as presented to us in the case on appeal are very much restricted in their scope and (484) import, and are without serious difficulty.

The Constitution and statutes of North Carolina require that the children of the white race and the children of the colored race must be taught in separate public schools. In obedience to this requirement the defendants have established separate public schools for the two races in Avery's Creek Township. It is conceded that the plaintiffs are children within the school age, resident in that township, assignable to the public schools therein, and that if they are children of the white race, a substantial right has been unlawfully denied them by defendants, properly enforcible by *mandamus*.

The issue is, in form, determinative of the controversy and such as enabled the parties to present every phase of the evidence relevant to the question involved. After a very full investigation the jury have answered the issue in plaintiff's favor, and if this answer has been given after a trial free from error, the verdict must and should be an end of the matter.

The claim and allegations of defendants placed the mixture of negro blood in Jeffrey Graham (now dead), a great-grandfather of plaintiffs, who lived in Buncombe County about forty or forty-four years ago. In the deposition of William Whitesides, offered by plaintiffs as evidence to show that their ancestor, Jeffrey Graham, was of pure white blood, the witness stated that he lived as a neighbor to Jeffrey Graham four years about forty or forty-four years ago, and the following question and answer were assigned for error:

"Q. Do you remember whether Jeffrey Graham voted, and if so, state

when and where? A. There was nothing said against his voting, and I think he always voted."

It is well established that in questions of race ancestry, general or common reputation is received under certain conditions, and the principle applies here. Wigmore on Evidence, sec. 1605, p. 1594;
(485) *Bryan v. Walton,* 20 Ga., 480; *Vaughan v. Phebe,* 7 Tenn., 384; *Nave v. Williams,* 22 Ind., 368. And it is not alone by oral expression that this reputation is evidenced and established. The manner in which a man is received and treated by his neighbors and the community generally may give as convincing evidence of their opinion and attitude concerning him as if it was declared in speech. At the time spoken of by the witness, colored people were not allowed to vote under the Constitution and laws of this State, and the fact that the ancestor was permitted to vote openly and without any objection is most pertinent in establishing the general reputation and opinion that said ancestor was qualified under the laws to do so.

Defendants do not insist on this position, but rest the objection on the fact that this is simply an opinion of the witness. We do not think, however, that this is a correct interpretation of the question and answer.

A witness who undertakes to testify to objective facts and qualifies his testimony by using the terms, "I think," or "I have an impression," etc., if the witness has had no physical observation or has made no note of the facts, but is merely stating to the court and jury his mental inference or deduction, this, as a rule, is incompetent. But if the witness has had opportunity to note relevant facts himself and did observe and note them, and simply qualifies his testimony in this way because his impression or memory is more or less indistinct, this, while in the form of opinion, is really the statement of a fact, and will be so received. Greenleaf Ev. (16 Ed.), sec. 430 (i). And so it is here. The witness was a neighbor of Jeffrey Graham for four years or more and speaks from his own observation. He is giving to the jury impressions of things he saw and noted, and not an inference or deduction from things he had not seen, and the evidence was properly received.

Again, it is urged for the defendants that there was error in the judge's charge, duly pointed out by exception, as follows: "If you find
(486) that the plaintiffs and their ancestors have not heretofore associated with negroes, but have associated with white people on terms of social equality, and that their ancestors went to white schools, claiming to be of Portuguese descent, this evidence must be considered in arriving at a conclusion as to what race they belonged, and you should consider in this connection the declaration of Jeffrey Graham that he

was of Portuguese descent." The error insisted upon here being that the judge in effect declared as a fact that Jeffrey Graham had made said declarations, and this, the defendants contend, is in violation of the statute which prohibits a judge from expressing an opinion as to whether a relevant fact is or is not sufficiently proved. Revisal, sec. 535. But we do not think that the charge is open to this criticism. We have held in *S. v. Exum,* 138 N. C., 599, that the charge to the 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 considered, it presents the law fairly and clearly 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, citing Thompson on Trials, sec. 2407. There was testimony in behalf of both plaintiffs and defendants as to declarations of Jeffrey Graham and others in regard to the status, race, etc., of the plaintiffs' ancestors, and his Honor, in a previous portion of his charge in referring to this testimony, had said: "You will also take into consideration and estimate the evidence tending to show declarations of persons on both sides as to the status, color and association of the plaintiffs' ancestors." Taking the charge as a whole, we think that this correct instruction should, by fair interpretation, be annexed to and qualify the second reference to these declarations, and the jury could only have understood that the existence or nonexistence of such declarations was left for them to determine. We find no error in the trial, and the judgment is affirmed. (487)

While the defendants have no doubt acted throughout from a conscientious purpose to do their full duty in the premises, and while the exigencies of the case may have made it desirable and perhaps necessary to bring the matter before a jury for decision, we deem it not improper to say that we have examined the record in which the entire testimony is set out, and are of opinion that the jury have rendered a righteous verdict and that the truth of the matter has been established.

No error.

Cited: Horne v. Power Co., 144 N. C., 378; *Taylor v. Security Co.,* 145 N. C., 389, 396; *Goins v. Indian School,* 169 N. C., 739; *Morgan v. Fraternal Assn.,* 170 N. C., 81; *Hall v. Fleming,* 174 N. C., 170; *S. v. Horner, ib.,* 793; *Turner v. Battle,* 175 N. C., 223.

HEMPHILL v. LUMBER COMPANY.

(Filed 22 May, 1906.)

Railroads—Negligence—Contributory Negligence—Derailments—Burden of Proof—Defective Appliances—Lumber Roads—Street Railways Fellow-servant Act.

1. In an action against a lumber road for injuries from a derailment, the court properly refused defendant's prayer to instruct the jury that if they believed the evidence to answer the first issue (negligence) "No," as a presumption of negligence arose from the derailment. And there was, besides, in this case evidence that both the car and the track were defective.

2. In an action against a lumber road for injuries from a derailment, the court properly refused to charge the jury that if they believed the evidence to answer the second issue (contributory negligence) "Yes," as the burden of this issue was upon the defendant, and, besides, the evidence was conflicting.

3. Lumber roads and street railways are "railroads" within the meaning of the Fellow-servant Act, Revisal, sec. 2646.

(488) ACTION by A. W. Hemphill against Buck Creek Lumber Company, heard by *W. R. Allen, J.*, and a jury, at March Term, 1906, of BUNCOMBE. From a judgment for the plaintiff, the defendant appealed.

Locke Craig and P. H. Winston for plaintiff.
Busbee & Busbee and Justice & Pless for defendant.

CLARK, C. J. The plaintiff was injured in the derailment and wreck of a train of cars loaded with logs and tanbark, which was running backward at a speed of eight to fifteen miles an hour. He was a brakeman, and in the discharge of his duty on the front end of the car farthest from the engine. This railroad was a lumber road, with iron rails, four feet gauge, and using steam locomotives. The plaintiff testified that the rims of the wheels of the car on which he was riding were not as wide as the rims of the wheels of the other cars, and hence that car was more liable to get off the track; that this happened often on the new part of the road, but not on the older part; that this car was not the same height as the car to which it was coupled, which necessitated the use of a bent link; that the only bent link he could get was crooked, and this made it necessary for the brakeman to be on this front car of the backing train to watch it, as it might break and turn the car loose. It was not controverted that, at the place the derailment occurred, the track was in

bad condition, the crossties too rotten to hold the spikes and rails, that the defendant's foreman had inspected and found this to be true before the wreck, but the plaintiff testified that he knew nothing of the condition of the track at that point; that the derailment occurred at a curve where the track had spread on account of the rotten crossties.

The court properly refused the defendant's prayer to instruct the jury that if they believed the evidence to answer the first issue (negligence) "No." "Where there is a collision or derailment, and in like cases, the presumption of negligence arises." *Wright v. R. R.*, 127 N. C., 229; *Marcom v. R. R.*, 126 N. C., 200; *Kinney v. R. R.*, 122 (489) N. C., 961; *Grant v. R. R.*, 108 N. C., 470; 2 S. and R. Neg., sec. 516, and numerous cases there cited. The above was cited and approved in *Stewart v. R. R.*, 137 N. C., 689. There was, besides, evidence that both the car and the track were defective.

The court also properly refused to charge the jury that if they believed the evidence to answer the second issue (contributory negligence) "Yes." The burden of this issue was upon the defendant, and, besides, the evidence was conflicting.

The defendant further insisted that the Fellow-servant Act, Rev., sec. 2646, which deprives "any railroad operating in this State" of the defense of assumption of risk as to "any defect in the machinery, ways, or appliances of the company," does not apply to lumber roads, and therefore its first prayer should have been given. In *Schus v. Powers-Simpson Co.*, 69 L. R. A., 887, 85 Minn., 447, this point was raised under the Minnesota Fellow-servant Act, which is very similar to that in this State, and the Court held that the words "Every railroad corporation owning or operating a railroad in this State" embraced a "logging road"; that though it is not a common carrier of freight and passengers, its employees engaged in the operation of its trains are exposed to the same dangers and risks as are employees of railroads operating as common carriers, and come within the spirit and intent of the act, and that the wider signification of the word "railroad," meaning any road operated by steam or electricity on rails, was intended by the Legislature.

Both street railways and logging roads are railroads, *i. e.*, roads whose operations are conducted by the use of rails, and come within the general term "railroads"—certainly within the meaning of the Fellow-servant Act, which sought to protect all employees engaged in this dangerous avocation, by requiring safe ways, machinery, and appliances, and taking away from such companies the defense that an em-
ployee had been injured or killed by the negligence of a fellow- (490) servant.

In *Hancock v. R. R.*, 124 N. C., 222, the point was made that street cars and lumber roads were not within the fellow-servant law. It was not necessary to pass upon the point in that case, but in *Witsell v. R. R.*, 120 N. C., 557, which was an action against a street car company, the rule as to the nature of appliances required on all "railroads" was laid down, and street cars have in all cases been treated ever since in this Court as liable to the same duties as any other railroad.

In *Fleming v. Lumber Co.*, 128 N. C., 532, where the negligence alleged was such that the judge below nonsuited the plaintiff, evidently on the ground that the Fellow-servant Act did not apply to a lumber road, this Court by a *per curiam* order set aside the nonsuit and directed that the issues should be submitted to a jury. In *Craft v. Timber Co.*, 132 N. C., 156, it was held that the rules applicable to other railroads, as to negligence causing fires originating on the right of way, "applied to private railroads constructed for logging purposes," and this was reaffirmed in *Simpson v. Lumber Co.*, 133 N. C., 96. The same rule as to defective spark-arresters was held applicable to lumber roads as to other railroads. *Cheek v. Lumber Co.*, 134 N. C., 230.

No error.

Cited: Liles v. Lumber Co., 142 N. C., 42, 44; *Hairston v. Leather Co.*, 143 N. C., 518; *Bird v. Leather Co., ib.*, 286; *Sawyer v. R. R.*, 145 N. C., 27; *Stewart v. Lumber Co.*, 146 N. C., 49; *Winslow v. Hardwood Co.*, 147 N. C., 279; *Wright v. R. R.*, 151 N. C., 531; *Snipes v. Mfg. Co.*, 152 N. C., 45; *Bissell v. Lumber Co., ib.*, 125; *Blackburn v. Lumber Co., ib.*, 363; *Brookshire v. Electric Co., ib.*, 670; *Thomas v. Lumber Co.*, 153 N. C., 354; *Twiddy v. Lumber Co.*, 154 N. C., 240; *Worley v. Logging Co.*, 157 N. C., 495; *Carter v. Lumber Co.*, 160 N. C., 10; *Buckner v. R. R.*, 164 N. C., 204; *McDonald v. R. R.*, 165 N. C., 625; *Buchanan v. Lumber Co.*, 168 N. C., 43; *Bloxham v. Timber Corp.*, 172 N. C., 46; *Goodman v. Power Co.*, 174 N. C., 663; *Mumpower v. R. R., ib.*, 745; *Williams v. Mfg. Co.*, 175 N. C., 227; *Wallace v. Power Co.*, 176 N. C., 562.

(491)

McPETERS v. ENGLISH.

(Filed 22 May, 1906.)

Justices of the Peace—Jurisdiction—Judgment for Purchase Money of Land—Execution—Vendor and Vendee—Notes—Parol Evidence—Consideration.

1. A justice of the peace has jurisdiction to render judgment for the balance due on a note given for the purchase money of land.
2. The interest of a vendee, who holds a bond for title to land, cannot be subjected to sale under execution upon a judgment rendered for the purchase money.
3. In an action to recover upon a note given for the purchase money of land, parol evidence is competent to show the consideration of the note.

ACTION by W. W. McPeters and others against O. H. English and others, heard by *McNeill, J.*, and a jury, at October Term, 1905, of MADISON.

This was an action for the recovery of a tract of land described in the complaint, defendants denying plaintiffs' title. The cause went to trial upon the usual issues. It appeared that the *locus in quo* was originally the property of one Abner Holcombe, Sr., and that he, on 22 January, 1872, executed a bond to Charles McPeters, the ancestor of the plaintiffs, whereby he obligated himself upon the payment of $200, for which he held the notes of said McPeters, to execute to him a good and sufficient deed conveying the said land. That McPeters went into the possession thereof and failed to pay the full amount of the purchase money. That on 23 May, 1882, the said Holcombe recovered against said McPeters before a justice of the peace for the sum of $97.50, with interest and costs. That in said judgment it was recited that it was for "debt on land." That a transcript of said judgment was duly docketed (492) in the Superior Court of Madison County, and execution issued thereon, which was lost. It further appeared that on 4 May, 1885, C. W. Tweed, Sheriff of Madison County, by virtue of said execution, sold the said land at public auction and executed a deed therefor to J. B. Sams. It appeared that the said Charles McPeters undertook to assign by parol his interest in said land to his son, T. M. McPeters, with the understanding that he would pay the balance of said purchase money. That the defendants, W. M. Edmonds and others, took possession of said land in behalf of J. B. Sams, ousting the said T. M. McPeters. Thereafter the said T. M. McPeters conveyed his interest in said land to the defendants and said Sams; the defendants claimed title under the deed from the sheriff to Sams. Charles McPeters died in 1885, leaving the plaintiffs

and said T. M. McPeters his heirs at law. The court instructed the jury that "Charles McPeters having only a bond for title to the land in controversy at the time of the alleged sale by the sheriff under execution, said sale was void and vested no title in the purchaser; and this is so though you should find that the execution did issue upon a purchase-money judgment, and you will disregard the said alleged sale in coming to your conclusion. To this instruction the defendants excepted. Plaintiffs conceded that defendants owned the one-eighth interest of T. M. McPeters, and his Honor so instructed the jury. The jury found that the plaintiffs were the owners of seven-eighths undivided interest, whereupon it was adjudged that they be let into possession of the said land of the defendants in respect to their interests. Defendants excepted and appealed.

Zachary & Roberts for plaintiff.
Gudger & McElroy for defendants.

CONNOR, J., after stating the facts: In the well-prepared briefs of counsel for both parties, while it is conceded that there is but one (493) exception, quite a number of points are discussed. We notice them only because we think there is some misapprehension of the real question involved. There can be no controversy that the justice had jurisdiction to render judgment for the balance due on the note for the purchase money of the land. This is clearly held in *Patterson v. Freeman,* 132 N. C., 357, and upon this judgment execution could issue against any property of the defendant other than the land for the purchase price of which it was given. For reasons hereinafter pointed out, no sale could be had, under execution issued upon this judgment, of the land for the purchase price of which the note was given. This is so, not because it is a justice's judgment; the same result would follow if the judgment had been rendered in the Superior Court. The fact that the note was given for the purchase money does not entitle the plaintiff to sell the equitable interest of the vendee. If the contract had been executed and a title made to the grantee, a judgment upon the note given for the purchase money thereof would have been collected by a sale of the land, and under the constitutional provision no homestead would have availed against such sale. We concur with the plaintiffs that testimony was competent to show the consideration of the note, although, as pointed out, the statute prescribed the manner in which the judgment should be rendered, showing the consideration to have been the purchase money. These questions, however, do not in any manner affect the merits of this controversy. The difficulty with the defendants' title lies in the

fact that McPeters had no such interest in the land as could be subjected to sale under an execution upon a judgment rendered for the purchase money. As between the parties, the relation of vendor and vendee has always been held to be substantially that of mortgagor and mortgagee, and it has always been held with unbroken uniformity that the mortgagee could not subject the equity of redemption of the mortgagor to sale for the mortgaged debt. This was first held *Camp v. Coxe,* (494) 18 N. C., 52, in which *Ruffin, C. J.,* points out with great clearness the reasons upon which the exception to the act of 1812, Rev., sec. 629, is based. He says: "It would not only open the door for oppression, and invite to it, but such a sale is in every case against the contract of the parties, as understood in a court of Equity. That court relieves even against agreements between persons in a fiduciary relation, upon a principle of policy, to prevent fraud; much more ought it to protect one person, in the power of another, from loss by the use of a legal advantage, contrary to the agreement. The contract here was that the mortgagor might redeem. Will the court allow the mortgagee to cut him off from that equity at short hand? Such a position cannot be tolerated, nor could the Legislature have intended it. The act did not mean to interfere with the stipulations of the parties, as they might affect them, either at law or in equity. . . . If he is not satisfied with his security, the mortgagor's person and other property are open to him. Let him resort to them; but against the estate on which he has taken a security he ought not to act, but upon the footing of that security, and according to its terms in their established sense." *Simpson v. Simpson,* 93 N. C., 373; *Myrover v. French,* 73 N. C., 609. This doctrine is too well settled to require further citation of authority. See, also, *Tally v. Reid,* 72 N. C., 336, and *Mayo v. Staton,* 137 N. C., 670.

We are of the opinion that his Honor's instruction was clearly correct, and the judgment must be

Affirmed.

Cited: Parker v. Horton, 176 N. C., 145.

(495)

RUMBOUGH v. SACKETT.

(Filed 22 May, 1906.)

Ejectment—Title—Location of Land—Instructions—Exceptions and Objections to Charge.

1. A plaintiff in ejectment must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's. He must, in other words, show a title good against the world or good against the defendant by estoppel.

2. A request to charge the jury that "The beginning corner of said grant was a white oak, directly opposite what was known as the Upper Warm Springs at the date of the grant, and if you shall find that the spring, as now located and described by the witnesses, is at the same place it was in 1803, and that there is no white oak now standing answering the description in said grant, then you will locate said beginning corner at a point on the east side of the river directly opposite the spring as now located," was properly refused, upon the ground that the facts stated were too indefinite for a satisfactory location of the corner, especially under the circumstances of this case, and, further, because the prayer does not conform to the evidence, but omits a material part of it.

3. Where a judge fails to charge as to any particular phase of the case, his attention must be directed to the omission by a prayer for special instructions upon the matter thus overlooked, or his failure to charge cannot afterwards be assigned as error, but when he so charges as to eliminate from the case a substantial part of it, which would necessarily prejudice one of the parties, it will be reversible error.

ACTION by J. C. Rumbough against J. H. Sackett and wife, heard by *W. R. Allen, J.*, and a jury, at January Term, 1906, of MADISON.

The plaintiff brought his action to recover a tract of land described as follows: "Beginning at a white oak below the mouth of a branch opposite William Nelson, Jr., at the Upper Warm Springs on the east side of French Broad River, and running up the river so as to include a small bottom, and with the meanders of said river 145 poles to a beech (496) and large rock on the northeast side of said river, then north 55 degrees east 60 poles to a stake, then north 32 degrees west 145 poles to a stake, then to the beginning, containing 50 acres." He claimed under a grant issued to William Brittain in December, 1803, with which he connected himself by *mesne* conveyances. The defendant denied the plaintiff's title and right of possession, and specially denied that the Brittain grant covered the *locus in quo*. He also claimed under a grant issued to Thomas Gable, 13 December, 1798. It was admitted by the plaintiff that if the beginning corner of the Brittain grant was not at A, but at 1, as shown by the map filed in the case, it does not embrace

the land in dispute and he is not entitled to recover. The court submitted issues to the jury which, with the answers thereto, are as follows:

1. Where is the beginning corner of the plaintiff's grant on the plat? A. "At 1 on small plat."

2. Is the plaintiff the owner of the land in controversy? A. "No."

3. If so, is the defendant in the wrongful possession thereof? A. "No."

Testimony was introduced by both parties to show the location of the grants. We deem it necessary, in order to present the material point in the case, to refer briefly to the testimony of two of the defendants' witnesses, R. B. Justice and C. T. Garrett, who testified as to the location at 1 of the stump and white oak tree pointed out to them by deceased persons as the corner of the Brittain patent. The witness Justice stated that "the Upper Spring was directly across the river from the point at 1," as shown on the map. He further said that "There is a pin oak at A; it is different from a white oak and has leaves like a chinquapin. It is different from the white oak that stood at 1. Two sycamores stood near the stump in 1887, one of them having the mark of a pointer; I do not know the age of the marks." There was other evidence tending to show the location of the beginning corner of the Brittain grant at 1, and also evidence tending to show the contrary. It is not necessary to set forth any more of the evidence, which was somewhat voluminous, as that had already stated will suffice for our purpose, in the view (497) taken here of the case.

The plaintiff requested the court to charge the jury as follows: "4. The court charges you that the beginning corner of said grant was a white oak directly opposite what was known as the Upper Warm Springs at the date of the grant, and if you shall find from the evidence that the spring, as now located and described by the witnesses, is at the same place it was in 1803, and that there is no white oak now standing answering the description in said grant, then you will locate said beginning corner at a point on the east side of the river directly opposite the spring as now located." This instruction was refused, and the plaintiff excepted. There was judgment for the defendant on the verdict, and the plaintiff appealed.

P. A. McElroy for plaintiff.
Zachary & Roberts for defendant.

WALKER, J., after stating the case: The rule is well settled that a plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's. He must, in other words, show a title good against the world or good against the defendant,

by estoppel. *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhart,* 139 N. C., 503. Under this rule, it becomes unnecessary to consider the instructions to the jury requested by the plaintiff other than the fourth, or the charge of the court, as the jury found that the beginning corner of the Brittain grant, from which the plaintiff deduced his title, was not at "A," but at the figure "1" as shown on the plat, and this finding, coupled with the plaintiff's admission that he could not succeed unless the location of that corner was at "A," defeats his recovery, and therefore renders it useless to consider any question relating to the
(498) location of the Gable grant under which the defendant claimed, or any other purely defensive matter. As the plaintiff himself states in his second prayer for instructions, the whole controversy hinges on whether the plaintiff's chain of title or that of the defendant covers the *locus in quo.* If the court committed no error in refusing to give the instruction embraced in the plaintiff's fourth prayer, the verdict cannot be disturbed. The proposed instruction, as incorporated in the prayer, did not take in, as will readily be seen by a comparison of the two, all of the description contained in the Brittain grant; but if it had, his Honor should have refused to give the instruction as, if the oak had disappeared or "was not standing," there was ample evidence to show that a stump, which was identified as the stump of that particular oak, was there within the recollection of witnesses who testified to its location, and, besides, if no oak corresponding with the call could be found, and no stump, the jury would be left to conjecture as to where the oak had stood, and, in the absence of definite information on this point, they were required by the prayer to ascertain at what particular place "below the mouth of the branch," opposite the Upper Warm Spring, the corner was at the time the grant was issued. But the grant did not call for a corner "directly opposite the spring," but for the corner (where the white oak stood) "below the mouth of the branch and opposite William Nelson, Jr., at the Upper Warm Spring on the east side of the French Broad River." One of the essential ingredients of the call, namely, "below the mouth of the branch and opposite to William Nelson, Jr.," is omitted from the prayer. His Honor did right in refusing to give the instruction upon the ground assigned by him, that the facts stated therein were too indefinite for a satisfactory location of the corner. *Mizell v. Simmons,* 79 N. C., 182; *Harry v. Graham,* 18 N. C., 76. As suggested by the example put in the case last cited, the nearest approach to the true corner,
(499) in the absence of the tree to locate it, would not perhaps be, as stated in the plaintiff's prayer for instructions, at a point on the east side of the river directly opposite the spring, but at the mouth of the branch, as the nearest locative call or physical object mentioned in the

grant. We do not say that the line should go there, but have merely cited those cases to show that the call, as set out in the instruction, falls under the class of those said to be too vague. It may be further said that it is not only uncertain as to how far below the mouth of the branch the tree was, but there is no distance stated by which to determine how far the line must extend in an opposite direction from William Nelson's or from the Upper Warm Spring, if the tree is not there. There is one further and serious objection to the prayer, for it assumes that if the tree is gone, there is no way of proving where it stood, and in this view it would exclude entirely from the case the evidence introduced by the plaintiff as to the finding of the stump of the oak tree and the location of the exact place where the tree once stood. There was also evidence that the tree itself was pointed out to one of the witnesses as the corner. A judge cannot so affirmatively charge the jury as to exclude from their consideration important evidence of either side bearing upon the material issue between the parties. When he fails to charge as to any particular phase of the case, his attention must be directed to the omission by a prayer for special instructions upon the matter thus overlooked, or his failure to charge cannot afterwards be assigned as error, but when he so charges as to eliminate from the case a substantial part of it, which would necessarily prejudice one of the parties, it will be reversible error. His Honor, therefore, for other good and sufficient reasons than the one first given, properly refused to instruct the jury as he was requested by the plaintiff in the fourth prayer to do.

We have carefully examined the case and find that it is one which is governed by ordinary and familiar principles in the law of ejectment and boundary, which were clearly and succinctly stated by the presiding judge and correctly applied to the facts. (500)

No error.

Cited: Miller v. R. R., 143 N. C., 123; *Brock v. Wells,* 165 N. C., 173; *Matthews v. Myatt,* 172 N. C., 234; *Pope v. Pope,* 176 N. C., 288.

BURNETT v. LYMAN.

(Filed 22 May, 1906.)

Ejectment—Transfer of Interest Pendente Lite—Parties—Real Party in Interest—Substitution of Plaintiffs.

1. In an action of ejectment, where the plaintiffs after the institution of the action conveyed the land by deed in fee simple, and their grantee was not made a party, the court erred in refusing defendant's motion for a judgment of nonsuit, and in instructing the jury that "if they believed the evidence, to find that the plaintiffs were the owners and entitled to the possession."

2. In an action of ejectment, the rule that the plaintiff must have the right to the possession, not only at the institution of the suit, but at the time of trial also, is not changed by Revisal, sec. 415, which provides that the action shall not abate by death or transfer of interest, as this section must be construed in connection with section 400, that "Every action must be prosecuted in the name of the real party in interest," and with the following provision in section 414: "When a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in."

3. The bargainee of the land, *pendente lite*, may not only be substituted as party plaintiff, but if the original plaintiffs remain in the case, such bargainee, having become the "party in interest" (section 400), is necessary to a complete determination of the action, and it is the duty of the judge, certainly if objection is made, to have him "brought in."

ACTION by W. B. Burnett and another against A. H. Lyman and another, heard by *Neal, J.*, and a jury, at May Term, 1905, of BUNCOMBE. From a judgment for the plaintiffs, the defendants appealed.

(501) *Frank Carter for plaintiffs.*
Tucker & Murphy for defendants.

CLARK, C. J. This is an action of ejectment begun by W. B. Burnett and W. E. Burnett. After it had been pending for some time the plaintiffs conveyed the land by deed in fee simple to one Rawls, who before the trial conveyed to Mattie C. Moore, a married woman. Neither Rawls nor Mrs. Moore were made parties. Upon the above facts appearing in evidence, the defendants moved for judgment of nonsuit. The court refused the motion and directed the jury, if they believed the evidence, to find the issues in favor of the plaintiffs.

In *Arrington v. Arrington*, 114 N. C., 120, *Burwell, J.*, says: "In an action to recover land, the rule is that the plaintiff must have the right to the possession not only at the institution of the suit, but at the time

of trial also," quoting 7 Lawson R. and R., sec. 3708, which lays this down as the universal rule, save, he says, one case in Vermont, which *Judge Burwell* further shows was not in truth any exception. *Arrington v. Arrington* is cited to sustain this proposition. *Morehead v. Hall,* 132 N. C., 123. To same effect is 15 Cyc., 29, and cases there cited.

The defendants admit that this proposition was unquestionably true under the former practice, but contend that this is changed by Rev., sec. 415, which provides that "No action shall abate by the death, marriage, or other disability of a party, or by a transfer of any interest therein, if the cause of action survive or continue. . . . In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." Aside from the fact that this section, enacted in 1868, was in force when the above cited cases were decided, it must be noted that the general principle of the (502) reformed procedure is that "Every action must be prosecuted in the name of the real party in interest," Rev., 400, and that the above quoted section 415 does not refer to the parties who may maintain an action, but to "abatement of actions," and must be construed in connection with section 400, and with the following provision in section 414: "When a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." Certainly, a complete determination cannot be had when the true owner of the land is not a party to the action.

Construing sections 400, 414, and 415 of the Revisal together, and recalling that the last relates to the "abatement of actions" only, it would seem that the provision therein that the action may be continued in the name of the original plaintiff means simply that the abatement does not act automatically upon the transfer of the interest, and that if the action is continued without objection, the judgment shall not be void, but none the less, the judge should cause those in interest (section 400) to be "brought in" (section 414), and upon objection made, as in *Arrington v. Arrington, supra,* and in this case, it was error not to require them to be made parties, else sections 400 and 414 would be useless. The bargainee of the land *pendente lite* may not only be substituted as party plaintiff (*Talbert v. Becton,* 111 N. C., 543), but if the original plaintiffs remain in the case, such bargainee, having become the "party in interest" (section 400), is necessary to a complete determination of the action, and it is the duty of the judge, certainly if objection is made, to have him "brought in." Section 414. In *Davis v. Higgins,* 91 N. C., 388, relied on by the defendants, there was no objection for failure to make the bargainee a party, but the court held that if the assignment had

(503) been brought to the attention of the court, it should *ex mero motu* have dismissed the action, unless a prosecution bond had been filed by the bargainee.

That section 415 does not have the effect of permitting the original plaintiff in ejectment to recover, after conveying his interest, without either joining his grantee as a party or substituting him as a party, is clear from the language of section 415, that "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein." Certainly, upon the death of a party, though the action does not abate, judgment cannot be had without making his personal representative a party. So, when there is a conveyance by the plaintiff, his bargainee must either be "brought in" (section 414) as an additional party or "substituted"—being necessary to the determination of the action—because he is now the party in interest. Section 400.

If this were not so, the judgment would solemnly record an untruth, "that the plaintiff is the owner and entitled to the possession" of the property. There might be cases where the defendant could urge an equity against the grantee, and from this he should not be cut off. Also, the defendant has the right to have the bargainee "brought in," that he may be liable for the costs, if unsuccessful. The action "does not abate" by death or transfer, but in both cases other parties must be made, and in case of a transfer, though the action may be continued in the name of the original party, the true party in interest, the bargainee, must be "brought in" if objection is made.

It was error in the court to instruct the jury that "if they believed the evidence to find that the plaintiffs were the owners and entitled to the possession." If they believed the evidence, the jury were compelled to find just the opposite, and that the plaintiffs were not the owners and were not entitled to possession, because it was shown that they had parted with all the rights they had possessed.

Error.

Cited: Rogerson v. Leggett, 145 N. C., 10; *Moore v. Moore,* 151 N. C., 557; *Brown v. Hutchinson,* 155 N. C., 207.

(504)

MERRICK v. BEDFORD.

(Filed 22 May, 1906.)

Voluntary and Premature Nonsuit—Appeal.

Where the court had denied defendant's motion of nonsuit, made at the close of plaintiff's evidence, and held that the plaintiff was entitled to have his case submitted to the jury, but disagreed with plaintiff's counsel as to the measure of damages, a nonsuit taken by plaintiff, while the defendant was introducing evidence, was voluntary and premature, and an appeal therefrom will not lie.

ACTION by W. K. Merrick against Harrison Bedford and another, heard by *W. R. Allen, J.*, and a jury at March Term, 1906, of BUNCOMBE. From a judgment of nonsuit, plaintiff appealed.

Locke Craig and Jones & Jones for plaintiff.
Merrimon & Merrimon for defendant.

BROWN, J. The following is taken from the official record in this case: "After the conclusion of the plaintiff's evidence and before the evidence closed, the plaintiff's counsel announced that the plaintiff would take a nonsuit. Judgment of nonsuit is entered and the plaintiff is taxed with the costs. No adverse ruling to the plaintiff was made after the motion of the defendant to nonsuit was overruled, and the court held that the plaintiff was entitled to have his case submitted to the jury, but disagreed with the plaintiff's counsel as to the measure of damages. On the next day, after the jury was discharged in the case, the plaintiff gave notice of appeal in open court."

It appears also in the record that at the close of the plaintiff's evidence the defendant had moved to nonsuit the plaintiff, which motion was denied. The defendant was engaged in introducing evidence, and had not concluded, when the plaintiff took the nonsuit. At (505) the time the nonsuit was taken, no reasons were given, and the plaintiff did not state that it was taken in consequence of any adverse ruling.

We think, furthermore, that according to the plaintiff's brief and argument, the adverse ruling complained of related solely to the issue of damages and not to the cause of action, upon the establishment of which the right to recover damages depends. Under the ruling; the plaintiff would have recovered some damages, much more than nominal. Under the decisions of this Court the plaintiff should have continued the trial, and by noting exceptions properly, he would have been able to

have this Court review every ruling made in the court below. We think the nonsuit was voluntary, premature, improvidently taken, and that under our decisions an appeal from a nonsuit under such circumstances will not lie. *Hayes v. R. R.,* 140 N. C., 131; *Tiddy v. Harris,* 101 N. C., 591.

In the latter case, *Chief Justice Smith,* a lawyer and judge of long experience under both systems of practice, states the ruling governing the right to appeal when a nonsuit is taken, as follows: "The practice has long prevailed that, when the proofs are all in and the judge intimates an opinion that under the old practice the plaintiff cannot recover, or under the new fails to establish the issues necessary to his having judgment, he may suffer a nonsuit, and by appeal have the correctness of the ruling reviewed." This rule, which has long prevailed, has been approved recently by this Court in *Hayes v. R. R., supra,* and *Midgett v. Mfg. Co.,* 140 N. C., 361. To the same effect are *Gregory v. Forbes,* 94 N. C., 221, and *Crawley v. Woodfin,* 78 N. C., 4.

In *Hayes' case, supra,* which is cited and approved in *Midgett's case, Mr. Justice Walker,* speaking for the Court, says: "In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed, viz., to take a nonsuit and appeal, has been said to apply (506) ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff. The plaintiff's right to take the course he did was challenged in this Court because the ruling did not cover the whole case, but left him ground upon which recovery could be had. But we do not find it necessary to resort to the said rule of practice to dispose of this appeal." "It is a well-settled rule of practice in this State that when on the trial the court intimates an opinion that the plaintiff cannot maintain the action, he may, in deference to the opinion of the court, submit to a judgment of nonsuit, assign ground of error, and appeal to this Court. In such cases the judgment is not regarded as one entered simply at the instance of the plaintiff; he submits to it with the understanding on the part of the court that he shall have the right to except and appeal." *Merrimon, J.,* in *Hedrick v. Pratt,* 94 N. C., 103. For this, the learned judge cites *Pescud v. Hawkins,* 71 N. C., 299; *Graham v. Tate,* 77 N. C., 120; *Wharton v. Comrs.,* 82 N. C., 11.

This well-settled rule of practice is also recognized in *Bank v. Comrs.,* 116 N. C., 380; *Wool v. Edenton,* 117 N. C., 1. The rule is recognized in *Midgett's case, supra,* in the following language authorized by a unanimous Court: "An intimation of an opinion by the judge adverse to the plaintiff, upon some proposition of law which does not take the case from the jury, and which leaves open essential matters of fact still

to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing. Such nonsuits are premature, and the appeals will be dismissed. . . . If the plaintiff is permitted to take a nonsuit and appeal whenever an adverse ruling is made during the trial, not necessarily fatal to the case, it is possible the same case may be brought to this Court for review repeatedly, and numerous and unnecessary trials had in the court below. It is best that the case be 'tried out,' and then, if an appeal is taken, all the alleged errors (507) excepted to during the trial may be reviewed here."

According to this well-settled rule of practice, the plaintiff prematurely took a nonsuit, and his appeal must be dismissed.

Appeal dismissed.

Cited: Morton v. Lumber Co., 144 N. C., 35; *Hoss v. Palmer,* 150 N. C., 18; *Teeter v. Mfg. Co.,* 151 N. C., 603; *Gilbert v. Shingle Co.,* 167 N. C., 290; *Robinson v. Daughtry,* 171 N. C., 203; *Chandler v. Mills,* 172 N. C., 368; *Chambers v. R. R., ib.,* 559; *McKinney v. Patterson,* 174 N. C., 489; *Headman v. Comrs.,* 177 N. C., 268.

GUDGER v. WHITE.

(Filed 22 May, 1906.)

Deeds—Description—Construction—Definiteness—Parol Evidence.

1. Courts are required to interpret a deed so as to ascertain and effectuate the intention of the parties as gathered from the entire instrument, but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense.

2. Where one deed refers to another for a description, the latter is to be taken as if embodied in the deed referring to it, and the premises as therein described will pass under the former.

3. Where only one deed is shown to have been made by R., and that in 1875, a deed from plaintiff to defendant's grantor, made in 1898, referring to "a deed having been made to this tract by R., the then owner," is a sufficient reference to R.'s deed, and the description in the first deed must be considered as if it had been inserted in the second, and the description in the two deeds being in substance the same, the deed of 1898 conveyed the land according to natural conditions existing at the time the deed of 1875 was executed, having for one of its boundaries a branch as it then was, and not as the bed of it was changed by a freshet in 1892, the deed of 1898 being read simply as of the date of the deed of 1875.

4. Where the description in a deed closes with a clause which clearly and unequivocally sums up the intention of the parties as to the property conveyed, such clause should have its proper effect upon all the antecedent phrases in the description, and is surely entitled to much weight in determining the true construction of the deed.

5. It is a question for the court to decide as one of law, what was the boundary, and for the jury to determine where it is actually located.

6. A description in a deed, "Beginning on a point where the two roads intersect, and runs so as to embrace a front of 44 feet on the Buncombe turnpike road, west of the branch and running back to the mountain, the branch being the southeastern line. Also, all the land opposite said lot to the river; giving a frontage of 44 feet; a deed having been made to this last-named tract No. 2 by Pinckney Rollins, the then owner; this deed is made to this tract to better perfect the title and is to be a quitclaim deed thereto," is sufficiently definite for the land to be identified under Revisal, sec. 1605.

(508) ACTION by J. M. Gudger, Jr., against H. A. White, heard by *McNeill, J.*, and a jury, at October Term, 1905, of MADISON.

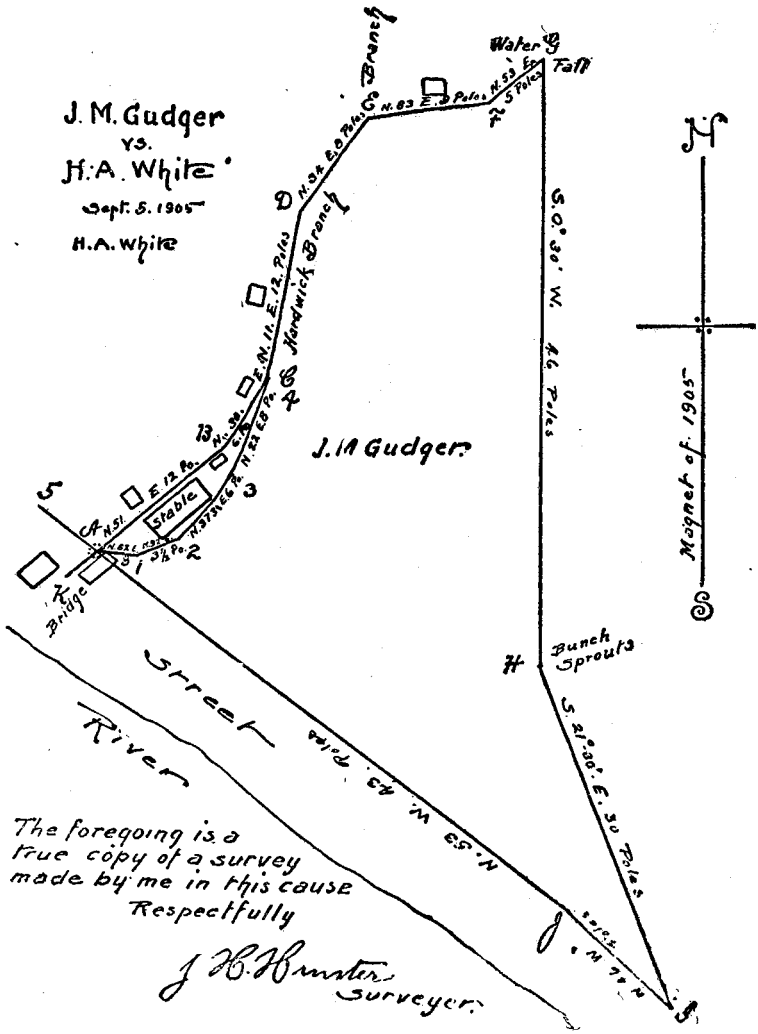
The plaintiff sued for a parcel of land now in the possession of the defendant and designated on the map as A 1, 2, 3, 4, C, B, and back to A, the beginning. He showed title out of the State by a grant issued to John Gray Blount in 1796 for a large body of land, and then introduced a deed from Z. B. Vance to Samuel Shelton and from Shelton to Pinkney Rollins, and then a succession of deeds from Rollins and those claiming under him, connecting the plaintiff with the title of Z. B. Vance. All these conveyances covered the *locus in quo*. There was evidence tending to show that the plaintiff and those under whom he claims had held adverse possession of the land in controversy for 30 years. The plaintiff testified that he had been in possession of the land in dispute, which is covered by the said deeds, continuously since 1895,

(509) and built tenements and a blacksmith shop thereon. The defendant took possession of the land lying between the old and the new channel of the Hardwicke branch in January, 1905. The defendant introduced a deed from the plaintiff to J. K. Hardwicke, dated 9 June, 1898, and duly registered. The plaintiff objected to this deed, so far as it was attempted thereby to convey the second tract

(510) described therein, as the description was too vague and uncertain to convey any land. Objection overruled, and plaintiff excepted.

The second tract is described in that deed as follows: "Beginning on a point where the two roads intersect and runs so as to embrace a front of 44 feet on the Buncombe turnpike road, west of the branch, and running back to the mountain, the branch being the southeastern

line. Also all the land opposite said lot to the river; giving a frontage of 44 feet; a deed having been made to this last named tract No. 2 by Pinkney Rollins, the then owner; this deed is made to this tract to better



perfect the title and is to be a quitclaim deed thereto, and only to warrant title against those claiming under me and no further." The defendant also introduced deeds and the records of judicial proceedings

from which it appeared that the title of Hardwicke had vested in him. He introduced evidence tending to show that the run or channel of Hardwicke Branch, called for in the deed of the plaintiff to Hardwicke, had changed in 1892 in consequence of a large freshet in the streams of that section, and that at the time the said deed was made, in 1898, the course of the channel was along the line designated on the map at A 1, 2, 3, and 4; while there was evidence for the other side that in 1892 or 1893 the freshet caused the branch to break through its banks and form three prongs, one of which ran along and near the line 3, 2, 1, and that there was running water in the old channel at the time the deed to Hardwicke was made by the plaintiff in 1898, and until about two years before the trial; that Hardwicke never had any possession east of the old channel (A, B, C). The defendant built a stable and put up a rock wall on the disputed line after being notified by the plaintiff not to do so until the true divisional line was located. The plaintiff introduced in evidence the record of an action brought by J. K. Hardwicke on 17 December, 1897, against the widow and heirs of Pinkney Rollins for the purpose of having reëxecuted the deed of Pinkney Rollins

(511) to J. K. Hardwicke, which had been lost. At August Term, 1898, a judgment was rendered in that suit granting the relief and directing the judgment to be certified and registered according to the statute in such cases made and provided, the judgment to have the same effect as if the deed had been properly reëxecuted. The description in the complaint and judgment, in that case, of the land which was alleged and found to have been conveyed by the Rollins deed of 15 May, 1875, is as follows: "Lying and being in the town of Marshall, county of Madison, and State of North Carolina, and being the same tract of land on which the said plaintiff now resides, above the old Baird place, next to the branch, exclusive of the road running up said branch from the Buncombe turnpike road, and beginning on a point where the two said roads intersect, and running so as to embrace a front of 44 feet on the Buncombe turnpike road, and running back to the mountain up the branch, embracing the width of 44 feet, including all the land next the branch not occupied by the aforesaid road, and the same width below said Buncombe turnpike road, namely, 44 feet, fronting on the lower side of said road next to French Broad River and running the same width, namely, 44 feet, down the road, the whole boundary here mentioned to include one-half acre; and it further appearing to the court that a deed in fee simple was duly made and acknowledged by Pinkney Rollins and wife, Hester Rollins, to James K. Hardwicke, dated on or about 15 May, 1875, conveying the above-described tract of land," etc.

The plaintiff requested the court to charge the jury:

1. That the description of the second tract in his deed to Hardwicke is too vague and uncertain to pass any land or to be aided by extrinsic evidence.

2. That as to the land in dispute, the deed from the plaintiff and wife to Hardwicke, referred to in the last preceding special instruction, constitutes neither title nor color of title beyond the boundaries defined in said Pinkney Rollins deed therein referred to. (512)

3. That the expressed design and intention of the deed from J. M. Gudger, Jr., and wife to Hardwicke, in so far as it relates to the land in controversy, being to perfect said Hardwicke's title to the land embraced in the Pinkney Rollins deed therein mentioned, the said Gudger deed had no effect to create a new boundary line between the lands of said Gudger and Hardwicke, and the said deed cannot be held to embrace any land not included within the boundaries of said Pinkney Rollins deed.

4. That when a stream, which is a boundary, from any cause suddenly leaves its old bed and seeks a new one, such change of the channel does not affect the boundary, which remains, as before the change, in the middle thread of the original channel, although there may be no running water therein, and it is the duty of the jury to ascertain where the old channel was and to find its middle thread to be the true boundary. The court refused to instruct the jury as requested in the first three prayers, but gave the instruction contained in the fourth prayer.

At the request of the defendant, the court among other instructions charged the jury as follows: "If the jury shall find as a fact from the evidence that on 9 June, 1898, the date of the deed from J. M. Gudger, Jr., to J. K. Hardwicke, the main channel or thread of the Hardwicke branch was situated as designated on the map by the figures 1, 2, 3, and 4, you will then answer the first issue in favor of the defendant, and that the plaintiff is not the owner of the lands in dispute." It is not necessary to set out more of the charge, as the remaining portion is not material to the question decided.

The issue submitted to the jury and the answer thereto were: "Is the plaintiff the owner and entitled to the possession of the land described in the complaint as amended? 'No.'" Judgment was entered upon the verdict for the defendant. The plaintiff, having excepted to the charge and rulings of the court adverse to him, appealed. (513)

P. A. McElroy and Frank Carter for plaintiff.

Zachary & Roberts for defendant.

WALKER, J. It was conceded that if the true dividing line between the plaintiff's and the defendant's land is the one designated on the map by the letters A, B, C, representing the old channel of the Hardwicke Branch, then the plaintiff is entitled to recover; but if the line is the one shown by the figures A 1, 2, 3, and 4, then the defendant owns the land in dispute. So that the only question in the case is to be solved by the location of the dividing line, and this turns upon the construction of the deed from the plaintiff to Hardwicke. It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument "after looking," as the phrase is, "at the four corners of it."

The description of the second tract contains, first, a general description of the land, which corresponds with that in the deed of Pinkney Rollins to J. K. Hardwicke, dated in 1875, as set forth in the (514) complaint of Hardwicke and in the decree which was rendered in the suit between him and the heirs of Pinkney Rollins; and, second, a reference to the deed of Rollins, dated in 1875, and a statement that the deed of 1898 was intended to supply a missing link, namely, the Rollins deed, which had been lost, and to take its place as to the second tract conveyed. "Courts are always desirous of giving effect to instruments according to the intention of the parties, so far as the law will allow. It is so just and reasonable that it should be so, that it has long grown into a maxim that favorable constructions are put on deeds." *Kea v. Robeson,* 40 N. C., 373; *Rowland v. Rowland,* 93 N. C., 214. "Words shall always operate according to the intention of the parties, if by law they may, and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor." *Campbell v. McArthur,* 9 N. C., 38. *Chief Justice Taylor* also says in the same case, p. 38: "The grantor has referred to that

patent as the means of correcting any mistake in the description of the land, and of ascertaining what his intent was in making the deed."

In *Ritter v. Barrett,* 20 N. C., 266, Judge Gaston, for the Court, after referring to the rule that one deed may by proper reference to another show what was really intended to be conveyed, applies it to the facts of that case and says: "The very purpose of the reference would seem to be to ascertain with more particularity what it was apprehended might not have been otherwise sufficiently described. They, therefore, declare their intent to convey unto John Sowell the same land which Jacob McLindon sold to Isaac Sowell. If, therefore, in the description of the land thus conveyed, there be found any inaccuracy or deficiency, that inaccuracy is corrected and that deficiency supplied the moment we ascertain the true boundaries of Isaac Sowell's purchase, and these appear upon the face of McLindon's deed." This case was (515) followed by *Everitt v. Thomas,* 23 N. C., 252, in which *Chief Justice Ruffin* says: "We do not doubt that, by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of identifying the thing intended to be conveyed." He further says that this is especially so when the calls of the two deeds, it turns out, are not inconsistent with each other, and there is a manifest intention by the later deed to convey the whole or a part of the land described in the earlier one. In such a case the reference will be allowed to help an imperfect description, so as to make it conform to the principal intention. *Cooper v. White,* 46 N. C., 389. Only one deed is shown to have been made by Pinkney Rollins to J. K. Hardwicke, and that is the deed of 1875. The plaintiff's deed to Hardwicke is, therefore, a sufficient reference to that deed. *Ritter v. Barrett, supra.* The description in the first deed must be considered as if it had been inserted in the second, and the latter deed then construed with that description in it. *Hemphill v. Annis,* 119 N. C., 514. "Where one deed refers to another for a description, it is to be taken as if embodied in the deed referring to it, and the premises as therein described will pass under it." 4 A. & E. (2 Ed.), 803. The descriptions in the two deeds being in substance the same, it is very clear by a fair construction of the deed of 1898 that, as to the second tract therein described, the plaintiff only intended, and Hardwicke shared this intention with him, to convey the parcel of land as it was at the time the Rollins deed was executed. In other words, that the eastern boundary should be the Hardwicke Branch, as then located, the call under the law extending to the middle thread of that stream. This fact is to be necessarily inferred from the face of the deed so far as the second tract described is concerned, as it was

(516) conveyed to supply a missing or lost link in Hardwicke's chain of title, and the deed expressly states that it is the same tract which was conveyed by deed to Pinkney Rollins, and that it is "this tract," meaning the Rollins tract as conveyed by the deed of 1875, which the parties then conveyed by the deed of 1898. If there were any repugnance between the particular description (if we may so call it) which precedes and that which we have just mentioned, there might be more difficulty in the construction; but that particular description is not at variance with the one in the Rollins deed, and the only question is whether the land should have the branch, as it then was, for one of its boundaries, or as it was afterwards changed to another bed by the freshet. The deed of 1898 furnishes the strongest proof that neither of the parties supposed, or could have supposed, that Hardwicke was acquiring title to land by that deed which was not covered by the Rollins deed. The reference most certainly is to the same land which was conveyed by the Rollins deed, and no more or less than that was intended to pass to Hardwicke by the deed of 1898. It is chiefly a question of intention to be deduced from the terms of the deed, and each case must in a measure be decided by itself. Where the description in a deed closes with a clause which clearly and unequivocally sums up the intention of the parties as to the particular property conveyed, such clause should have its proper effect upon all the antecedent phrases in the description, and is surely entitled to much weight in determining the true construction of the deed. *Ousby v. Jones,* 73 N. Y., 621. That case decides that it should have controlling effect in determining what was intended to be conveyed by the deed, but we need not go so far in order to justify the conclusion we have reached.

(517) An illustration of the principle that only the interest will pass which the deed clearly shows was intended to be conveyed, is to be found in *McAlister v. Holton,* 51 N. C., 331. This Court decided in *Davidson v. Arledge,* 88 N. C., 326, that a dispute as to the true location of a line separating two parcels of land must be determined by an interpretation of the descriptive words in the deeds, in order to ascertain intention of the parties. "The court looks into the instrument itself to ascertain what is meant to be conveyed, and uses parol evidence to fit the description to the thing." Page 332. After all, the simple question is, What does the whole description show was actually intended to be conveyed? When reading the deed and looking at the facts and circumstances as they appear, what impression is left on the mind as to the purpose of the parties? *Wuesthoff v. Seymour,* 22 N. J. Eq., 66. Cases from other States are much in line with our own. *Rutherford v. Tracy,* 48 Mo., 325; *B. S. Inst. v. Crossman,* 76 Me., 577; *Hudson v.*

Irwin, 50 Cal., 450; *Masterson v. Munroe,* 105 Cal., 431; *Getchell v. Whittemore,* 72 Me., 393. In the last cited case it was held that where a deed describes the land as the premises conveyed to the grantor by another deed, to which reference is made for a particular description, it will not give the grantee title to a lot which was excepted from the deed to which reference was made, although the title to the excepted lot was in the grantor of the last deed at the time of executing it. If the intention is clearly manifested to describe the same and the identical property as conveyed by the former deed, the later deed will be held to operate according to the intention. And is this not a just and reasonable rule? Why should we disappoint the intention of the parties? In *Rutherford v. Tracy, supra,* a very learned discussion of the rule of construction will be found showing the trend of modern judicial thought upon the subject. The ancient maxim, it is said, was that "the first deed and the last will shall operate," but even this well-settled principle does not impair the other one, that the law attempts always to reconcile apparently repugnant provisions, and it will consider and give effect to the whole and every part of a will, deed, or contract when consistent with the rules of law, in order to effectuate the obvious (518) intention of the parties.

It is not necessary in this case to decide that the deed of 1898 did not take effect at the time of its delivery as to the second tract conveyed, but did take effect as of the date of the Rollins deed in 1875. A deed may be said to take effect generally when delivered, and it was so held in *King v. Little,* 61 N. C., 484, and in the same case in equity with names reversed—*Little v. King,* 64 N. C., 361. But those two cases and *Henley v. Wilson,* 77 N. C., 216, were decided upon their peculiar facts and in order to carry out the true intention of the parties, as will be observed. In the *Little case* Mrs. King had bought the land from Williams in 1854 and taken a deed and afterwards sold it, so that eventually Williams again acquired the title by purchase. He then conveyed to Mrs. King, with a memorandum at the foot of his deed to the effect that the deed was executed to supply the place of Mrs. King's first deed, which had been lost. It will be seen, at a glance, that it was necessary to hold that the memorandum was only explanatory and not controlling, as Williams would have been doing a vain thing if his second deed should be considered as merely supplying the place of the first deed, and not as conveying any present estate he owned, for it would not then even operate as a quitclaim. The court construed the instrument according to the intention of the parties. And the same may be said of *Henley v. Wilson,* with this added observation, that, there, the Court said the intention of the parties would be effectuated.

But in our case, it being only a matter of construction for the purpose of ascertaining the intention of the parties and giving it effect, as that intention is manifest, the deed of 1898 will be read as if it had been executed in 1875, and interpreted according to natural conditions as then existing, though in a technical sense it may be said to take
(519) effect as of date of its delivery. Such was the ruling in *Hodges v. Spicer,* 79 N. C., 225, and *Phifer v. Barnhart,* 88 N. C., 333. While there may seem, at first thought, to be a conflict between the last two cited cases, on the one side, and *Little v. King* and *Henley v. Wilson,* on the other, it will be found, we think, upon a close examination to be more apparent than real. In all these cases the object was to discover the real intention and, when ascertained, to execute it. If there is any conflict, though, it is not necessary that we should further attempt to decide which is right or to reconcile any seeming repugnancy, as our case must turn upon a very different principle from the one therein discussed. We have merely construed the deed according to the intention, and it can make no difference whether it has *ex post facto* operation, as of the date of the Rollins deed in 1875, by the fiction of relation, or takes effect as of the date of the plaintiff's deed to Hardwicke in 1898. No intervening rights have accrued to create any practical difference as to the time of its operation. The Hardwicke deed of 1898 should be read simply as of the date of the Rollins deed of 1875.

It was, of course, a question for his Honor to decide as one of law, what was the boundary, and for the jury to determine where it is actually located. *Davidson v. Arledge,* 88 N. C., 331; *Jones v. Bunker,* 83 N. C., 324; *Redmond v. Stepp,* 100 N. C., 212; *Davidson v. Shuler,* 119 N. C., 586. The case of *Redmond v. Stepp, supra,* is a strong authority sustaining the principle which we have said should guide us in this case, namely, the intention of the parties with reference to the boundary, which must be determined by the deed itself and the location of the "natural object, marked tree, or adjoining tract" as it existed at the time, to which the parties evidently referred.

It follows from all that has been said that his Honor should have given the instructions requested by the plaintiff in his second
(520) and third prayers as numbered in the statement of the case. For convenience, we have condensed the prayers of the plaintiff into four only, which contain the substance of those necessary to be noticed. His Honor seems to have taken the same view of the law that we have, if we look at his charge as a whole; but he inadvertently overlooked the fact, when he charged the jury to consider the Rollins deed if the tracts described in that and the Hardwicke deed were the same, that there are two tracts described in the latter deed and only one in the former, and

the jury may have been misled by this instruction; but at any rate, the plaintiff was entitled to have given the instruction he requested, and the court erred when it afterwards charged the jury, at the request of the defendant, contrary to the principle therein stated.

As to the other point presented, that the Hardwicke deed is too vague and uncertain in its description of the second tract of land to convey any title thereto, we are with the defendant. There is no patent ambiguity, and we think the description is sufficiently definite for the land to be identified under the act of 1891, ch. 465, sec. 1 (Revisal, sec. 1605), and certainly when it is read in connection with the deed of Rollins to Hardwicke. *Perry v. Scott,* 109 N. C., 374; *Warren v. Makely,* 85 N. C., 12.

We have not referred to the competency of any of the evidence introduced and considered by us, as no objection was made thereto, and if there had been any, this is not the defendant's appeal. If any had been admitted over his objection, the ruling would not necessarily be the subject of review in this Court when the plaintiff alone appealed. *King v. Cooper,* 128 N. C., 347.

The error committed by the court in regard to the effect of the description of the second tract in the deed of the plaintiff to Hardwicke requires a

New trial.

Cited: Modlin v. R. R., 145 N. C., 230; *Featherston v. Merrimon,* 148 N. C., 205; *Price v. Griffin,* 150 N. C., 527; *Sherrod v. Battle,* 154 N. C., 349; *Thomas v. Bunch,* 158 N. C., 178; *Acker v. Pridgen, ib.,* 339; *Williamson v. Bitting,* 159 N. C., 324; *Eason v. Eason, ib.,* 540; *Jones v. Sandlin,* 160 N. C., 155; *Beacom v. Amos,* 161 N. C., 365, 366; *Lumber Co. v. Swain, ib.,* 568; *Ipock v. Gaskins, ib.,* 680; *R. R. v. Carpenter,* 165 N. C., 468; *Brown v. Brown,* 168 N. C., 10; *Spencer v. Jones, ib.,* 292; *Weil v. Davis, ib.,* 303; *Morton v. Water Co., ib.,* 588; *Lumber Co. v. Lumber Co.,* 169 N. C., 90, 100; *Mining Co. v. Lumber Co.,* 170 N. C., 276; *McMahon v. R. R., ib.,* 459; *Smathers v. Jennings, ib.,* 603; *Coble v. Barringer,* 171 N. C., 449; *Revis v. Murphy,* 172 N. C., 581; *Hutton v. Cook,* 173 N. C., 498; *Jones v. McCormick,* 174 N. C., 84; *Williams v. Williams,* 175 N. C., 163; *Milliard v. Smathers, ib.,* 60; *Elizabeth City v. Commander,* 176 N. C., 30, 31; *Patrick v. Ins. Co., ib.,* 670; *Williams v. Bailey,* 178 N. C., 632; *Hinton v. Vinson,* 180 N. C., 398.

(521)

DUNN v. RAILWAY COMPANY.

(Filed 22 May, 1906.)

Street Railways—Liability of Assignor of Lease.

Where the defendant had leased from a street railway the privilege of operating his cars over its track, but had assigned the lease and the cars, and was not engaged at the time in the operation of the road, he cannot be held liable for injuries to the plaintiff from the negligent operation of the cars by the employees of the assignee.

ACTION by W. L. Dunn against Asheville and Craggy Mountain Railway Company, heard by *McNeill, J.*, and a jury at September Term, 1905, of BUNCOMBE.

This was an action for damages to the plaintiff's buggy caused by the alleged negligence of the defendant in the operation of certain cars on the Asheville Street Railway.

There was evidence tending to show that on or about 21 September, 1903, on Patton Avenue, in the city of Asheville, the plaintiff's buggy was badly damaged by collision with certain cars being then used on the Asheville Street Railway, and that the collision occurred by reason of negligence on the part of persons who had control of and were then operating the cars. The cars were the property of the defendant company, and at the time were controlled and operated by the agents and employees of the Howland Improvement Company. The defendant, The Asheville and Craggy Mountain Railway Company, under a charter from the State, owned and operated a railway from the clubhouse, near the boundary line of the city of Asheville and running several miles to a point on the Craggy Mountain range lying east of the city, and had also leased from the Asheville Street Railway the privilege of operating its cars, for certain purposes and under certain conditions, over the city railway to and from certain points along certain streets in the
(522) city, for the term of thirty years. On 6 June, 1903, the defendant company leased its road to the Howland Improvement Company, a corporation organized under an act of the Legislature, having the right to condemn land, build and operate roads, etc., for the term of eighty-five years, and assigned to this corporation its cars and other property used in the operation of its road, and also assigned and turned over to the Howland Improvement Company its lease and incidental rights and privileges held in the Asheville Street Railway Company, and the Howland Improvement Company took possession of the defendant company's property and was operating defendant's road under and by virtue of this contract; and at the time and place of the

injury the Howland Improvement Company was using defendant company's cars on the road of the Asheville Street Railway Company under the lease assigned to it by the defendant.

At the close of the plaintiff's evidence, and again at the close of the entire evidence, the defendant moved to nonsuit. Motion was overruled, and defendant excepted. Verdict and judgment for plaintiff, and defendant appealed.

Merrick & Barnard for plaintiff.
Merrimon & Merrimon for defendant.

HOKE, J., after stating the case: There is no allegations or evidence tending to show that the cars which caused the injury were in any way defective. The negligence charged against the defendant company is in the way the cars were managed and operated, and it will be noted that the injury did not occur on the line of the defendant's road, nor was the defendant, nor were any employees of the defendant, in charge of the cars at the time of the injury. The plaintiff recognizes that these conditions would ordinarily protect the defendant from responsibility for the occurrence, and seeks to hold the defendant liable (523) on the principle established in *Logan v. R. R.*, 116 N. C., 940. But we do not think the principle can be applied to the facts of the case before us. In that important and well-considered opinion *Mr. Justice Avery* declares the doctrine that a railroad company, owning its road under and by virtue of a State charter, cannot escape responsibility for negligence in the operation of its road by leasing it to another company, unless its charter or some subsequent act of the Legislature expressly exempts the lessor road from such responsibility; and in this and in other decisions in which the doctrine is affirmed, it is held that both the lessor and the lessee in possession and operating the road are liable for the lessee's actionable negligence.

But in no case, so far as we are aware, has it been declared or intimated that a lessee, who has assigned all his interest and who is not in any way engaged at the time in the management or operation of the road, can be held for his assignee's misconduct.

Applying the doctrine of *Logan v. R. R., supra,* and more correctly, perhaps, the doctrine in *Aycock v. R. R.*, 89 N. C., 321, and assuming negligence to be established, and that the plaintiff and his agent were free from blame, the facts would seem to disclose that the Asheville Street Railway Company could be held responsible, because the cars were at the time upon their road way by their consent, and the Howland Improvement Company, because its employees were in charge of

and operating the cars. But there is no fact or principle of law which could attach responsibility for the occurrence to the defendant company. One element always involved in a question of negligence is the breach of some duty.

In *Logan v. R. R.,* and others of like import, it is declared that a railroad company which owns or holds its road under and by virtue of a State franchise is under a duty to the general public to see that its road is properly operated, and on this principle its lessee operating (524) its road becomes its agent, for whose conduct it is responsible in the performance of this public duty, and which it is not allowed to put aside except by express legislative sanction.

But no such duty arises to the defendant company on the facts of the present case. The injury, as stated, did not occur on the defendant's road, but on that of the Asheville Street Railway. The employees of the defendant were not engaged in operating the cars. The defendant had gone out of business, and the Howland Improvement Company, acting under a separate and independent charter which conferred upon it most ample powers and whose employees were in control of the cars at the time, was neither upon the defendant's road nor in the exercise of the defendant's franchise. It simply had in possession and was using some of the personal property which the defendant company had formerly owned and had assigned, to wit, the cars and the lease.

There was error in overruling the motion to nonsuit, and upon the testimony the action should have been dismissed. This will be certified to the court below, that judgment may be entered dismissing the action.

Reversed.

Cited: Hollingsworth v. Skelding, 142 N. C., 252, 255.

(525)

POE v. RAILROAD.

(Filed 25 May, 1906.)

Damages for Death—How Estimated—Annuity Act.

In an action to recover damages for injuries causing death, the court erred in permitting the jury to consider the provisions of chapter 347, Laws 1905 (the Annuity Act), for the purpose of ascertaining the present value of the intestate's life.

ACTION by C. C. Poe, administrator of Willie E. Brown, against Raleigh and Augusta Air Line Railroad Company, heard by *Ferguson, J.,* and a jury, at November Term, 1905, of CHATHAM.

Plaintiff sued to recover damages of the defendant for negligently causing the death of his intestate. The negligence was admitted, and the only question presented in the record relates to the question of damages. There was no objection to the general rule for the assessment of damages laid down by the court, but the defendant excepted because the court instructed the jury that the Legislature at its last session had provided a table to be used in ascertaining the present value of an annuity. The court read chapter 347, Laws 1905, to the jury, and added: "These methods are submitted to you as a means by which you may calculate the present value of the net income which the intestate would have derived from the labors of his life, if he had not been killed." The court instructed the jury as to the rule of damages laid down in *Watson v. R. R.,* 133 N. C., 188, and also as to the method of ascertaining the present value of the life of the deceased as stated in that case. There was a verdict and judgment for the plaintiff, and the defendant appealed.

H. A. London & Son for plaintiff.

Day & Bell, Womack, Hayes & Bynum, and Murray Allen for defendant.

WALKER, J., after stating the case: After giving full consideration to the able and ingenious argument of the plaintiff's counsel, we think the court erred in permitting the jury to consider the pro- (526) visions of chapter 347, Laws 1905, for the purpose or ascertaining the present value of the intestate's life. The rule for estimating the damages to be allowed, in such cases as this one, has been long settled, and we have no idea that the Legislature intended by the chapter above mentioned to change the rule so firmly established. That act was intended to apply strictly to an annuity, which has a well-defined meaning in the law. "An annuity is a stated sum payable annually, unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable; and hence, when a testator gave a beneficiary the interest upon a certain sum, payable annually, it is not an annuity, but merely an ordinary legacy, for it is not a stated sum, but may be more or less according to the earnings of the capital, and is merely interest or income." 1 Words and Phrases Judicially Defined, p. 405. "There is a distinction between income and annuity. The former embraces only the net profits after deducting all necessary expenses and charges. The latter is a fixed amount directed to be paid absolutely and without contingency." *Ibid.* "The income

or interest of a certain fund (bequeathed) is not an annuity, but simply profits to be earned, and although directed to be paid annually, that relates only to the mode of payment, and does not change the character of the bequest." *Ibid.; Bartlett v. Slater,* 53 Conn., 102; *Booth v. Ammerman,* 4 Bradford, 129. The act of 1905 provides a method by which, in connection with the mortuary table, the present cash value of an annuity may be ascertained. It recognizes the very distinction (527) we have drawn between annuity and income, for in section 3 it provides that when a person is entitled to the use of a sum of money for life or for a given time, the interest thereon for *one year* may be considered *as an annuity* and the present cash value be ascertained as in the case of a strict annuity. But it will be observed that the amount, even in that case, is fixed, as it is the interest for one year. In the first section the act refers to a strict annuity, an invariable sum due by the year and payable annually, and in the third section it refers to a sum now in hand, and not one to be hereafter earned, as in our case. The first section would seem to have provided for those cases where a certain and definite sum, unchangeable in amount, is given by one person to another to be paid annually, without regard to the fund out of which it is to be paid or to any interest of the annuitant in the capital, and the third section permits reference to the fund itself (at present in hand), so far as it is necessary to ascertain, by the interest upon it for one year, what the annual sum to be paid shall be. But the entire act shows that it was not intended to apply to an income or to any other variable quantity. The rule which the act prescribes is almost the exact opposite of that which this Court has hitherto laid down as applicable to such cases as this one, and its consideration by the jury in connection with the latter rule would tend to confuse them, rather than enable them to determine more approximately or with greater accuracy than under the existing and long-standing rule, the true value of the life in question.

In ascertaining by the net income what is a fair and just compensation for the pecuniary injury resulting from the death, under Lord Campbell's Act, as it is called (Revisal, secs. 59 and 60), we are dealing with something not now in possession, but which is to be earned in the future, and therefore it is that this Court has always kept said fact in view when formulating a rule for the assessment of damages in such cases. The terms in which that rule has been framed imply (528) necessarily that the net income will, or at least may, be a changeable quantity, a certain amount in one year and another and quite different amount in the next, as the jury are required by it to consider the capacity of the intestate to earn money, which may increase

or decrease owing to his age and other circumstances, and the other elements which enter into the calculation under that rule are also of such a nature as to render the annual income of a series of years variable in amount. The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when, according to his expectancy, the intestate would have died in due course of nature; but this total may be composed of many annual incomes of different amounts. The present value of that sum, whatever it may be, is what the jury should allow in the way of damages.

This Court has not prescribed any "hard and fast rule" by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment of damages in any particular way. A general rule for the guidance of the jury was suggested in *Pickett v. R. R.*, 117 N. C., 616, stating more definitely a proper method of calculation than was done in the previous cases of *Kesler v. Smith*, 66 N. C., 154, and *Burton v. R. R.*, 82 N. C., 504, the age, health, strength, skill, industry, habits, and character of the deceased being, as then said, elements of importance to be considered in fixing the amount of compensation. That case was followed by *Coley v. Statesville*, 121 N. C., 301; *Benton v. R. R.*, 122 N. C., 1007; *Mendenhall v. R. R.*, 123 N. C., 275, and perhaps others, in all of which the general rule stated in *Pickett v. R. R.* was recognized and applied; the end of it all being to enable the jury to ascertain the net accumulated income which the deceased might reasonably be expected to have earned during the period of his expectancy, if death had not ensued. The charge of *Judge O. H. Allen* in *Mendenhall v. R. R., supra,* which was adopted by this Court as containing a correct statement of the principle govern- (529) ing such cases, is commended as a safe one for guidance, coupled with the usual reference to the mortuary table. The rule was again considered in *Watson v. R. R.*, 133 N. C., 188, and approved. It was there suggested by the Court that while the judge was not required to do so, and his refusal so to do in that case was held not to be error, yet that he might with propriety have submitted to the jury the arithmetical rule contained in the defendant's prayer for instructions, as illustrative of the general method of measuring the damages. A review of all that has been said upon this subject leads us to the conclusion that no special formula has yet been prescribed as alike applicable to all cases and as one that should invariably be used in trials. The presiding judge may select, from the several forms which have been used, the one he may think will inform the jury of their duty in the premises, or he may use his own form of expression for that purpose, the object at last being to assist the jury to arrive as near as may be at a correct estimate, and much, there-

fore, will depend upon the nature of the case, and a great deal will be left to the intelligence and sound sense of the trial judge; but to introduce a new and foreign element into the computation, such as the annuity act, passed evidently for a different purpose, would tend to great confusion and render uncertain the rule which has been for many years, and is now, reasonably well understood. The present value of the net accumulated income to be ascertained upon the principles heretofore stated by this Court in the cases cited is the safest and best rule to be followed. *Pickett v. R. R., supra.* We do not think this rule, long since adopted, has been, or was intended to be, modified in the least by any subsequent legislation.

There was error in the charge of the court, for which a new trial is awarded on the issue as to damages. The verdict as to the first (530) issue will stand. It is not necessary to consider the other assignments of error, as they become immaterial by our ruling and may not again be presented.

New trial.

Cited: Gerringer v. R. R., 146 N. C., 35; *Roberson v. Lumber Co.,* 154 N. C., 330; *Ward v. R. R.,* 161 N. C., 186; *Embler v. Lumber Co.,* 167 N. C., 464; *Comer v. Winston-Salem,* 178 N. C., 388.

FITZGERALD v. RAILROAD.

(Filed 25 May, 1906.)

Railroads—Fellow-servant Act—Master and Servant—Negligence—Res Ipsa Loquitur—When Doctrine Applies.

1. Under the Fellow-servant Act, which operates on all employees of railroad companies, whether in superior, equal, or subordinate positions, if the plaintiff, a hostler of the defendant, was injured as the proximate cause of the negligence of his helpers in shoveling coal from a car into a tender, the defendant is responsible.

2. Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence.

3. In an action for injuries to a hostler of a railroad from the falling of a piece of coal which his helpers were transferring from a coal car to a tender, it would be a negligent act for one of the helpers to undertake

to throw a lump of coal weighing 100 pounds across the space, when he must have known the chances were much against his success, and where a failure might cause death or serious injury to his coemployee, who he knew was working near.

4. The doctrine of *res ipsa loquitur* is not confined to cases of the failure of some mechanical appliance, or contrivance, or machine, which fails in some unusual and unexpected manner to do its work properly.

5. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

6. Where a hostler of a railroad company was occupied with his duties between a coal car and a tender, and his helpers were shoveling coal from the car to the tender and knew he was working around the tender, and he was injured by a 100-pound lump of coal falling on him, the doctrine of *res ipsa loquitur* applies.

BROWN, J., dissenting.

ACTION by Obediah J. Fitzgerald against the Southern Railway (531) Company, heard by *Ward, J.*, and a jury, at October Term, 1905, of GUILFORD.

This was an action to recover damages for an injury caused by alleged negligence on the part of defendant. No contributory negligence was alleged in the answer, and the cause was submitted to the jury on two issues: 1. As to the defendant's negligence causing the injury. 2. As to damages.

There was evidence tending to show that plaintiff on 11 July, 1904, at the time of the injury, was in the employment of the defendant as a hostler on the yard of the defendant at Winston, N. C., and it was his duty with his helpers, who were employed by the defendant, when any engine came in, to take charge of and coal it, clean out the fire, and put it away in its proper place. On the morning of the injury the engine had been moved up over the pit in which the fire was to be dumped alongside of the coal car from which the coal was to be thrown into the tender. That this coal car was standing on a track parallel with the one on which the engine was standing, and between the parallel tracks there was an open space, across which the coal was to be thrown. The engine had been standing with fire in it all night, and the fire had to be cleared from the engine and the water turned on the fire in the (532) pit while the coaling was in progress. After the fire had been cleared from the engine and thrown in the pit, on the occasion of the injury, the water was turned through the hose which was attached to a hydrant, when the hose blew out, so that the hose had to be fastened on

again, and there was nobody to do this but the plaintiff; he was the only man to do this work around that point. The hydrant was in the open space between the coal car and the rear of the tender, and when the hose blew off, which had been insecurely fastened by the tank-man to the hydrant, the plaintiff squatted down by the tank with the back of his head towards the tender and was attempting to fasten the hose on the hydrant; he was 2½ feet from the tender and about 8 feet from where the negroes were at work throwing coal straight across into the place in the front part of the tender for receiving and holding it.

The plaintiff, in his own behalf, testified that the lump of coal weighed about 100 pounds, and evidently described the size and shape of the coal by indicating the same with his hands. He was asked (p. 11, record), "How large was the coal?" and replied, "Of course, I could not tell the weight then, but the lump seemed to be about that long and about that large around. Kind of an odd shape; seemed to be about a 100-pound lump, something like that." The court, on stating this part of the testimony to the jury, said, "As I got his testimony down, it was a large piece of coal, about 20 by 20 inches and a 100-pound lump." There was no objection to this part of the statement of the court, and we take it that without question the witness, when he said, "About that long and that large around," indicated to the court and jury the size of the lump by the position of his hands or some other objective measurement.

On his examination in chief this is stated: That one of the negroes threw the lump of coal that struck the witness. On cross-examination he stated that he did not know which one of the negroes threw the
(533) coal, because he could not see it leave their hands up on the car while he was down there discharging his duty, and for the same reason he did not know whether it went up on the tender and rolled off or struck the tender and fell off. In answer to a question by the defendant, the witness stated:

Q. Do you know who threw it? A. No, I do not know which one threw it, because I could not see it leave their hands up on the car, while I was there discharging my duty.

Q. You don't know whether it came directly from the shovel onto your head or whether it went up on the tender and rolled off? A. No.

Q. Nor whether it struck the tender and fell off? A. That is the information I had.

The witness further testified that the coal should have been thrown into its bed or basin in the forward part of the tender. The negroes were engaged in throwing coal in front end of the tender and did not have to throw the coal on the back end at all; that he did not know whether the boys saw him at the time; that they could have done so; he was at the

rear end of the tender and on their side, but they knew he had to work all around them while they were coaling. The plaintiff was permanently injured and disabled. There was a motion for nonsuit, which was overruled, and the defendant excepted.

The court, after defining at length negligence and proximate cause, charged the jury in substance that if defendant through its agents failed to exercise proper care, that care which a prudent man should use under the circumstances, in throwing the coal from the car to the tender, and such negligence was the proximate cause of the plaintiff's injuries, they should answer the first issue "Yes." The charge also put the burden of the issue on the plaintiff. Defendant excepted. Verdict for plaintiff, and from judgment thereon defendant appealed.

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

HOKE, J., after stating the facts: The statute known as the Fellow-servant Act, published as chapter 56, Private Laws 1897, where the same applies, has the effect of making all coemployees of rail- (534) road companies agents and vice-principals of the company so far as fixing the company with responsibility for their negligence is concerned. While commonly spoken of as the "Fellow-servant Act," it is entitled "An Act to Prescribe the Liability of Railroads in Certain Cases," and it operates on all employees of the company, whether in superior, equal, or subordinate positions. The two hands, therefore, who were shoveling coal, while they were there as "helpers" to the plaintiff, were the agents of the defendant, and, contributory negligence on the part of the plaintiff not being proved or even alleged, if the plaintiff was injured as the proximate cause of their negligence the company is responsible.

We do not understand that the defendant controverts or desires to controvert this position, but rests its defense on the ground that there is no evidence offered which requires or permits that the plaintiff's cause be considered by the jury, and this on the idea, chiefly, that so far as the testimony discloses, it is just as probable that the injury was the result of an accident for which the defendant is in no way responsible, or for negligence which may be imputed to the defendant as an actionable wrong. While this may be the law under given circumstances, we think that the principle has no place in application to the facts of the case before us.

It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circum-

stances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus, in Shearman and Redfield on Negligence, sec. 58, it is said: "The plaintiff (535) is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstanial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence; a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind."

In accordance with this general doctrine, in the well-considered case of *Howser v. R. R.*, 80 Md., 146, *Roberts, J.*, says: "These and many English and American cases clearly establish the fact that it is not requisite that the plaintiff's proof in actions of this kind should negative all possible circumstances that would excuse the defendant. It is sufficient if it negatives all probable circumstances that would have this effect." In *Whitney v. Clifford*, 57 Wis., 156, *Cassady, J.*, said: "The plaintiff is not required to prove his case so clearly as to exclude the possibility of any other theory." In *Stepp v. R. R.*, 5 Mo., 229, it is held: "Direct evidence of the want of the exercise of due care is not to be required to be produced. Surrounding circumstances may afford as (536) conclusive proof as direct evidence." Applying these rules to the case before us, we think the plaintiff was clearly entitled to have his cause submitted to a jury, and the motion to nonsuit the plaintiff was properly overruled.

This was not an ordinary case of loading coal into a wagon or car where a lump of coal might roll at any time with no reasonable prospect

of hurting anybody; on the contrary, these hands—and for their conduct, as we have seen, the defendant is responsible—knew that the plaintiff was working somewhere around and near the engine, and where, if a piece of coal rolled off, it was likely to strike him, and if a heavy piece should roll and strike, it would do him serious injury. They were therefore charged with a high degree of care in this respect. This statement imports no infringement on the doctrine which obtains with us, that there are no degrees of care so far as fixing responsibility for negligence is concerned. This is true on a given state of facts and in the same case. The standard is always that care which a prudent man should use under like circumstances. What such reasonable care is, however, does vary in different cases and in the presence of different conditions, and the degree of care required of one, whose breach of duty is very likely to result in serious harm, is greater than when the effect of such breach is not near so threatening.

Throwing this coal, some of it, at least, consisting of heavy lumps, into a tender, with a man walking around in a position where a miscalculation or wild throw was not unlikely to cause great damage, presents a very different proposition and demands a much higher degree of care than the ordinary loading of coal from one vehicle to another. These hands, then, charged with this knowledge and this degree of care, were given the task of throwing the coal from the car across the intervening space into the forward part of the tender; they were not to throw it into the rear of the tender, where the water tank of the engine (537) was placed, which was as high or nearly on a level with the railing of the tender. This was not the place for the coal, and any thrown there was very likely to fall off. The weight of the coal, a 100-pound lump, makes it very probable that one of the hands undertok to throw a lump of coal too large for him; most likely he undertook it without a shovel, as the size, 20 by 20 inches, would hardly permit that a shovel could be used for the purpose; and, staggering under the weight, he failed to clear the space or control its direction; the piece struck the railing of the tender, or outside and below the rails, and, falling to the side, struck the plaintiff and did the injury. This is not only very probable from the circumstances, but there is direct evidence to this effect. In answer to a question by the defendant, the plaintiff testified: "Q.: Do you know whether it struck the tender and fell off?" "A.: That is my information." If this is the way it occurred, and we think it much the most probable inference, it would, in our opinion, be a negligent act for one of those hands to undertake to throw a lump of coal of that weight across that space, when he must have known the chances were much against his success, and where a failure might cause death or serious

injury to a coemployee working near. Indeed, there could hardly be a reasonable suggestion made on the evidence, with the duty incumbent on these men to observe a high degree of care, which would negative the existence of negligence. If they undertook to throw a lump of coal too heavy for them across the space, so heavy that they could not get it over or control its direction—and they must have known or should have known this when they lifted the coal—they would be negligent. If they threw the coal in the first instance, back on the water tank where it was likely to roll off, this would be a negligent act. If they continued to pile coal on the forward part of the tender, where it belonged, till it was (538) even with or above the top of the tender, so that the coal was likely to roll off, either directly to the ground or over the tank in the rear, it would be negligence to do this without warning to the plaintiff and giving him an opportunity to be on the lookout. They were in a position to note the condition of the coal, and the plaintiff was not. He was on the ground engaged in the necessary discharge of his duties and bending over in the effort to connect the hose with the hydrant.

While we have thus far made no reference to the doctrine of *res ipsa loquitur* for the reason that this doctrine is more usually invoked when nothing but the objective facts attendant upon an injury can be produced, while here, we have the additional evidence, frequently not obtainable, that the agents of the defendant, and for whose conduct the defendant is responsible, by their act caused the injury complained of, we are of opinion that the doctrine applies with full force to the facts of this case.

It was suggested for the defendant that *res ipsa loquitur* is only applicable in case of the failure of some mechanical appliance, or contrivance, or machine, which fails in some unusual and unexpected manner to do its work properly, and the default is imputed for negligence to its owner or the employee who is charged with the duty of keeping it in order. But the doctrine is not so confined. Courts of the highest authority have applied it in cases not at all dissimilar to the one before us, and approved text-writers state the principle to like effect. In Shearman and Redfield on Neg., sec. 59, it is said: "In many cases the maxim *res ipsa loquitur* applies. The affair speaks for itself. It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury, but in these cases, the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the (539) injured person is able to offer or that it is necessary to offer." In

Hale on Torts, 482, it is said to apply "where the thing is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." And in Labatt on Master and Servant, sec. 843, it is said: "The *rationale* of this doctrine is that in some cases the very nature of the occurrence may of itself and through the presumption it carries, supply the requisite proof. It is applicable when, under circumstances shown, the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case without direct proof of negligence"—citing a large number of instances where the maxim was upheld, as when a piece of coal falls from the tender of a passing train and hits a section-hand who is standing a reasonable distance from the track (*R. R. v. Wood* [Tex. Civ. App.], 63 S. W., 164), and where a large piece of coal falls from a tub where it is being hoisted from the hold of a steamer. *Joist v. Webster,* Quebec, 15 C. S., 220.

In *Scott v. Dock Co.,* 3 Hurl. and Colt, the plaintiff proved that while conducting his duties as customs officer he was passing in front of a warehouse in the dockyard and was felled to the ground by six bags of sugar falling upon him, and the principle is declared as follows: "There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In *Jensen v. The Joseph B. Thomas,* 81 Fed., 578, the principle is announced in almost identical words: "The occurrence of an injury may itself, in connection with other circumstances, sufficiently show negligence as to justify a judgment (540) for damages, where the thing causing the injury is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if ordinary care is used." "And the principle was applied in a case where one of the vessels had set an empty water keg on the loose hatch-covers at the side of the hatch in such a position that an accidental shock or jarring of the covers might let the covers into the hatch while stevedores were working in the hold." See, also, *McCray v. R. R.,* 89 Texas, 168. In this case it was held as follows:

"1. When a servant sues his employer for damages arising from injuries caused by the negligence of the latter, the plaintiff must prove the negligence of the defendant, and proof of the accident and injury alone

will not be sufficient to authorize a recovery. But the circumstances attending the injury may, without any direct evidence, be sufficient to establish the fact of negligence.

"2. A brakeman, sitting on the side of a car in a train running between stations, was killed by a steel rail, part of the load of a car in front of him falling therefrom, one end striking the ground and the other sweeping alongside of the train and striking him. Without other proof of negligence in the loading on the car of rails, the circumstances were sufficient to take the case to the jury, and it was error to direct a verdict for the defendant."

In *Howser v. R. R.,* 80 Md., 146, the maxim is held to apply where a plaintiff was walking along a footpath outside of the right of way and was injured by a half-dozen cross-ties which fell upon him from a gondola car attached to a train passing along the defendant's road. In *Sheridan v. Foley,* 58 N. J. Law, 230, it is said: "It is urged, however, on behalf of the defendant, that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury (541) which he received was caused by the negligent act of the defendant or his servants; that the mere proof that the plaintiff was injured by a brick falling from the hod of one of the defendant's hod-carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to warrant the jury in inferring that the injury complained of was the result of the carelessness of the defendant or of his employees. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care."

In *Armour v. Golkowska,* 95 Ill. App., 492, it is held:

"1. Where an employee in a packing house, while at work at a table trimming meat, was injured by the fall of an empty barrel from the platform above her, and there is no evidence by way of explanation as to how the barrel came to fall, the doctrine of *res ipsa loquitur* applies.

"2. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management

use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

See, also, *Electric Co. v. Sweet,* 57 N. J., 224; *Seybolt v. R. R.,* 95 N. Y., 562; *Lyons v. Rosenthal,* 11 Hun. (N. Y.), 46; *Hart's case,* 157 Ill., 9; *Byrne v. Brodie,* 2 Hurl. and Colt, 721.

These authorities, we think, clearly establish that the maxim of (542) *res ipsa loquitur* applies in a case like the one before us. In the ordinary course of things, if these hands had been reasonably attentive to their duty and reasonably observant of proper care, the event would not have occurred. From the fact that it did occur and from the attendant circumstances and in the absence of any explanation, the inference of negligence was reasonable, and much the most probable, and in such case the order for a nonsuit would have been erroneous.

In the well-considered opinion of *Mr. Justice Connor* in *Womble v. Grocery Co.,* 135 N. C., 474, it is established and declared that "this principle of *res ipsa loquitur,* where it applies, carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether upon all the evidence the plaintiff has sustained his allegation." This was the course pursued by the judge below, who charged the jury that the burden was on the plaintiff to show by the greater weight of the evidence that the defendant was negligent and that the negligence was the proximate cause of the injury, explaining the meaning of the terms and further applying the facts as presented, but the burden was placed on the plaintiff throughout. There was no error, therefore, either in refusing the motion for nonsuit or in the charge as given.

Our attention is called to the case of *Raiford v. R. R.,* 130 N. C., 597, as authority for holding that the facts of the present case present no evidence of actionable negligence. The case, we think, does not sustain the position. In that case a piece of iron fell from an engine, and, taking an eccentric course, struck and seriously injured the plaintiff, who was working near the engine. The iron had fallen by reason of a coworker having previously loosened or removed a nut that held the same in place. The only negligence alleged was the act of (543) the coemployee in unscrewing the nut. There was no testimony showing or tending to show that the nut had been improperly or negligently removed or that any injury was likely to follow, and the occurrence was held to be an excusable accident. In our case the very question is whether the act of the defendant was negligent in throwing

the coal, and, as we have endeavored to show, there was ample evidence from the facts and circumstances that those employees must have been or very probably were negligent, or the event would not have followed. There are cases in other jurisdictions which appear to conflict with the decision here made, but a careful examination will disclose that most of them can be distinguished and upheld on grounds entirely consistent with the principles declared in the present opinion. And where this cannot be done, we think those decisions are not in accord with the great weight of authority in cases of this character.

There is no error, and the judgment below is

Affirmed.

WALKER, J., concurs in result.

BROWN, J., dissenting: As I have utterly failed, after earnest effort, to evolve from the evidence in this case any rational theory of negligence upon the part of the defendant or its servants, I am unable to concur in the judgment of the Court.

As I understand the law, the party who affirms actionable negligence must establish it by proof sufficient to satisfy reasonable minds. The evidence must show more than the mere probability of a negligent act. Moreover, if the injury complained of may have resulted in one of two different ways, or from one of two different causes, for one of (544) which the defendant is liable, but not for the other, the plaintiff cannot recover. Neither can he recover if it is just as probable that the injury was caused by the one as by the other. This principle is formulated from the text-writers and numerous adjudications and is an accepted doctrine in the law of negligence. It has also been repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon the plaintiff to furnish evidence to show how and why the accident occurred, some fact or facts by which it can be determined by the jury, and not left entirely to conjecture, guess, or random judgment, upon mere supposition. *R. R. v. Heath,* 103 Va., 66; *R. R. v. Sparrow,* 98 Va., 630; *R. R. v. Cromer,* 99 Va., 763, and cases there cited.

If it is just as probable from the evidence that the injury was the result of one cause as another, the plaintiff cannot recover. *Grant v. R. R.,* 133 N. Y., 657; *Searles v. Mfg. Co.,* 101 N. Y., 661.

The Court of Appeals of Kentucky formulates the rule in these words: "When the question is one of negligence or no negligence, it is well-settled law that where the evidence is equally consistent with either view, the existence or nonexistence of negligence, the court should not

submit the case to the jury, for the party affirming the negligence has failed to prove it." *Gas Co. v. Kaufman,* 48 S. W., 439. To the same effect are Thompson on Negligence, p. 364, and Labatt on Master and Servant, vol. 2, sec. 836.

The latter writer says there must be a juridical connection between the master's negligence and the injury, the burden of proving which is on the servant; also, that "the plaintiff must introduce testimony to show that the injury is more naturally to be attributed to the negligence of the defendant than to any other cause."

The English courts uniformly hold that where plaintiff's evidence is equally consistent with the absence as with the existence of negligence, there can be no recovery. *Cotton v. Wood,* 98 E. C. (545) L., 566.

An employer of labor is not an insurer against injury. The servant assumes such risks as are naturally incident to the work he engages to do. The master is required to provide only against dangers that can reasonably be expected and not against the consequences of accident that may or may not happen. *Williams v. R. R.,* 119 N. C., 746.

The evidence of the plaintiff himself is all that throws any light upon this occurrence, and his version discloses an accident, pure and simple, either "an event from an unknown cause" or "an unusual and unexpected event from a known cause," a "chance casualty." The plaintiff had entire charge of the work of coaling and watering defendant's engine. He had three laborers under his control. Two of them, by plaintiff's direction, were engaged in throwing coal from a coal car into the coal bin of the tender of an engine, which is in the forward part of the tender. The coal car was alongside the tender and only a few feet from the coal bin in it. At the time of the occurrence plaintiff was on the ground at the rear of the tender, stooping down fixing a water hydrant, and while so engaged a piece of coal struck plaintiff and injured him. At the time this happened the coalers were knee-deep in the coal car throwing coal into the forward part of a tender, probably 25 feet long, while plaintiff was at its extreme rear end. Plaintiff did not notify the coalers where he was or what he was doing. As much stress is laid on the fact that the coalers knew that plaintiff was "around there somewhere" at the time of the injury, I quote plaintiff's evidence: "And they knew that you were around about there somewhere; did not know where you were?" Answer: "No, sir, I don't think they knew right then where I was." "You knew where they were?" "Yes, sir." It being admitted that the coalers did not know where the boss was when the chunk of coal was thrown, which it is claimed hit him, it was not their duty to keep a lookout for him. It was his duty (546)

to keep a lookout for them, or to apprise them of his whereabouts. He was "foot loose" and knew exactly what his men were doing. On the contrary, they were standing knee-deep in a coal car, all their attention necessarily riveted on their work and straining every muscle to load the heavy coal into the tender. They could not do their work and look out for the boss. He could easily look out for them and keep out of danger. If such coaler had to stop and ascertain the whereabouts of the boss before throwing each shovelful of coal, they would have made such slow time on the loading up that the boss would have soon discharged them to save his own head. If, then, it was not the duty of the coalers to keep up with the whereabouts of the boss, but was his duty to keep a lookout himself, then the coalers have been guilty of no negligence in that respect. If it had been shown that at the very time the lump of coal was thrown, which it is claimed hit the plaintiff, the man throwing it had actual knowledge of plaintiff's position and situation, there might be something in plaintiff's contention that the lump was recklessly thrown. But plaintiff himself distinctly acquits the men of any knowledge of his then whereabouts.

The evidence is fatally defective because it fails to show how or why the piece of coal fell on plaintiff's head. Plaintiff distinctly states that he did not see either man throw it, and further testified as follows: "You don't know whether it came directly from the shovel onto your head, or whether it went up on the tender and *rolled off?*" Answer: "No, sir." "Nor whether it struck the tender and fell off?" Answer: "That is the information I had." "I am talking about what you know." "No, I don't know." "You just simply know that a piece of coal fell down and hit you on the head?" "Yes, sir." It is contended that this quotation from the record contains evidence that a lump of coal
(547) hit the side of the tender and ricochetted and struck plaintiff.

It ought not to require an argument to show that such evidence is not "direct evidence" that the lump of coal hit the tender and glanced off. The plaintiff states positively that he does not know it, but that *his information* was it struck the tender and fell off. Although this came out before objection could be made and was not stricken from the record, it surely cannot be called "evidence of a fact." It does not even amount to the dignity of hearsay evidence, for plaintiff does not state who told him so. Had he named his informer, a definite statement of an ascertained person would have been before the jury, although not made under oath, and would have been competent unless objected to. As it is, the statement has no probative force, and is of no sort of value as evidence. Suppose, however, that during the process of loading the tender a piece of coal did strike its side and glanced off, or landed on

top and, failing to stick, rolled off; that does not prove negligence. Loading coal is rough and heavy work, and there is no suggestion that the men doing it were not fully competent for the purpose. They could not be expected to handle coal and load a tender with that care and delicacy usually employed in placing eggs in a basket. A piece of coal may have fallen short of the mark and still the coaler may have used reasonable care in throwing it. It is no evidence that he did not. Common observation teaches that it is something usually incident to loading from one car to another, and no one was in position to know this better than the plaintiff, whose business it was to load tenders. Any one who has noticed the loading of a wagon from a brick kiln or the unloading of corn into a barn doubtless saw some bricks and ears of corn fall short of their destination. Short throws are frequently "accidents that will happen in the best regulated families." But I cannot see how it is possible that the lump could have hit the side of the tender and, glancing off sideways, struck the plaintiff more than 8 feet distant. I can see how it may have landed on top of the pile in the tender (548) and rolled off; but that surely would be no evidence of negligence.

It is suggested that it was negligence to have undertaken to throw a 100-pound lump the distance between the coal car and the tender. Why? Obviously, from the lack of strength in the thrower. If it struck the tender with sufficient force to ricochet it as far as the rear end of the tender where the plaintiff then was, there was no lack of strength in the brawny arms that threw it. Had the throw been a weak one, the lump would have struck the tender and sunk straight to the ground. Spent balls do not ricochet. If the coaler threw the lump with sufficient force to land it in the tender and accidentally missed the mark, he did what many a marksman has done before. None of us can always hit the mark we aim at. From the very character of the operation it is no evidence of negligence that one lump of coal should happen to land on the ground out of a whole car-load. It is hardly possible for the coaler to have thrown the lump directly on the plaintiff, as the coaler was throwing into the front of the long tender and the plaintiff was at the extreme rear end, and at an angle of nearly 45 degrees from the coaler. It is hardly possible for a man of average strength to throw a 100-pound lump the distance with sufficient force to make it richochet from the front of the tender to its rear. Therefore, those theories are worth but little. They are highly improbable, much less probable. From all the circumstances in evidence, considering especially the plaintiff's position at the very rear end of the tender, there are two rational theories by which the accident can be accounted for, and both are inconsistent with any charge of culpable negligence. One theory is that

the coaler threw a lump on top of the coal pile in the tender and that it failed to find lodgment and rolled off the rear end. This is consistent with the plaintiff's "information," namely, that the lump struck the tender and "fell off." I am unable to find in the record a scintilla of evidence that the lump struck "outside and below the rail." From
(549) the use of the words "fell off" one would naturally infer the coal landed on the tender's coal pile and rolled off. If so, that is no evidence of negligence. The other theory is that the coaler threw a lump which accidentally struck another lump, which, being dislodged, rolled off the rear end of the tender on the plaintiff. If so, this would be no evidence of negligence. It is contended "that if the coalers threw the coal in the first instance back on the water tank where it was likely to roll off, it would be an act of negligence." There is no evidence of this, and the probability is entirely against the theory, because the coalers were opposite the front end of the tender, nearest the coal bin, and at a considerable angle from the water tank. The distance was so short between the car and the tender that they could hardly have thrown the coal so far sideways. It is further said: "If the coalers continued to pile coal on the farward part of the tender, where it belonged, until it was even with or above the top of the tender so that the coal was likely to roll off, etc., it would be negligence to do this without warning plaintiff." In the first place, one may search the record with closest scrutiny and not find a suggestion of evidence to support such hypothesis. If it had been true, the plaintiff doubtless would have made it known. In the second place, the coalers, according to the plaintiff's own statement, did not know where the plaintiff was, and, as I have undertaken to show, it was not their duty to know, engaged as they were under his control in most engrossing work. In the third place, it was the coaler's duty to continue to throw coal and load the tender until plaintiff ordered them to stop. It was for the boss, not the men, to say when the job was completed, as he was responsible for its proper performance.

Of course, all these theories are purely speculative conjectures, and that is all there is in the plaintiff's case. I have discussed them with a view to showing that in the domain of probabilities the pre-
(550) ponderance is largely with, instead of against, defendant's contention, that there is no sufficient evidence of negligence.

As a last resort, the rule which an eminent lawyer recently called "the overworked doctrine of *res ipsa loquitur*" is invoked to help out, if possible, the plaintiff's feeble case. Mr. Wigmore, in his valuable work, says that the rule has spread rapidly in the United States, "although with much looseness of phrase and indefiniteness of scope." "What its

final accepted shape will be can hardly be predicted. But the following considerations ought to limit it." One who reads those considerations will conclude that the learned author would be amazed to know the rule could be applied in a case like this, where the origin of the injury is involved in so much doubt. Wigmore on Evidence, vol. 4, sec. 2509. If there is nothing in the way of substantive evidence to take this case to the jury, and it is to go there solely upon the principle of *res ipsa loquitur,* then the Court is giving to the rule the force and effect of a presumption of a *prima facie* case. This is contrary to *Womble's case* and *Stewart's case* in our own Reports. The mere fact of an accident has never yet been held sufficient to impose a liability for negligence. There must be something in the circumstances surrounding the case to take the case out of this rule before "the facts can speak for themselves." As is said in *Toomey v. Steel Works,* "This is founded in reason and common sense." 89 Mich., 249. It is held in many cases that as between master and servant the mere fact that the servant is injured while in his employ is not *prima facie* negligence and is no evidence of negligence. *R. R. v. Houck,* 77 Ill., 287; *Kuhns v. R. R.,* 70 Iowa, 561; *Elevator v. Neal,* 65 Md., 438, and cases cited in these opinions. In *Steel Co. v. Shields,* 146 Ill., 607, the plaintiff was injured by the falling of a mould on him. The Court says: "In an action of this character it is necessary to aver and prove negligence on the part of the defendant, and if the record disclosed the fact that the plaintiff merely proved the falling of the mould and the injury, the judgment (551) could not be sustained." In the case at bar nothing has been proved except that a lump of coal fell on the plaintiff at a place 8 feet distant, and to the side of where the coalers were at work. What caused it to fall is pure conjecture. I say with deference, it is a dangerous and unwarranted extension of the rule, *res ipsa loquitur,* to apply it under such circumstances. This Court did not apply it in *Carter v. R. R.,* 129 N. C., 203, or in *Raiford v. R. R.,* 130 N. C., 597, both much stronger cases than this for its application. There seems to be sometimes a difference in the application of the rule in favor of a passenger or stranger and where the relation of employer and employee exists. The Supreme Court of Massachusetts says in this connection: "No general rule can be laid down that the mere occurrence of an accident is or is not sufficient proof of an actionable negligence; for each case must depend upon its own circumstances; and what would be sufficient proof of such negligence in an action brought against a railway company by a passenger, or by a stranger, might not be so in an action brought by one of its servants." The authorities cited in behalf of the application of the rule in a case like this do not sustain the contention.

Shearman and Redfield, sec. 59, apply the rule only to cases where "the surrounding circumstances contain *without further proof* sufficient evidence of defendant's duty and of his neglect to perform it." Mr. Labatt, sec. 843, says: "Its essential import is that on the facts proved the plaintiff has made out a *prima facie* case without direct proof of negligence." In all the cases cited on behalf of the plaintiff the evidence established a direct juridical connection between the injury and the originating cause which set in motion that which caused the injury, as in the case of the coal dropping from a cranky bucket, or from the tender of a flying train, or the falling of the cross-tie from a passing car. But in this case there is no evidence as to what started the
(552) movement of the lump of coal which fell on the plaintiff, as there is not one shred of evidence to show that it was thrown on the plaintiff by the coalers. There is no suggestion that the coalers threw the lump on the plaintiff purposely, and I think I have shown from the position of the plaintiff it could not well have been done accidentally. *Howser v. R. R.,* 80 Md., 154, is cited as an authority for the plaintiff. An examination of the facts in that case show that they are not at all similar to this case, and that the case is worth but little in support of the plaintiff's contentions. But if it were an analogous case as to facts, it is greatly weakened as an authority by the very forcible dissenting opinion of *Judge McSherry,* concurred in by another member of the Court.

In conclusion, it can be justly said that, taking all the facts in this case of which there is any substantive evidence, and putting them together, they do not tend to prove a single definite act of negligence or neglect of duty upon the part of the defendant's servants, the two coalers. The language of *Adams, J.,* in *Allen v. Banks,* 39 N. Y. Sup., 1017, is to my mind peculiarly applicable: "This case was tried upon the theory that it was only necessary to prove the occurrence of the accident and its physical consequences to the plaintiff in order to establish a cause of action against the defendant. It is singularly destitute of any evidence which will furnish a satisfactory explanation of the particular cause which produced the injury complained of."

Cited: Wallace v. R. R., post, 665; *Bird v. Leather Co.,* 143 N. C., 287; *Horton v. R. R.,* 145 N. C., 138; *Dermid v. R. R.,* 148 N. C., 190, 192, 197; *Dail v. Taylor,* 151 N. C., 288; *Turner v. Power Co.,* 154 N. C., 136, 137, 138; *Cabe v. R. R.,* 155 N. C., 421; *Boss v. R. R.,* 156 N. C., 75; *Henderson v. R. R.,* 159 N. C., 583; *Kelly v. Power Co.,* 160 N. C., 285; *Wells v. R. R.,* 161 N. C., 370; *Mincey v. R. R., ib.,* 469; *Moore v. R. R.,* 165 N. C., 441; *Ward v. R. R.,* 167 N. C., 160, 162; *Barnett v. Mills, ib.,* 580; *Ridge v. R. R., ib.,* 518; *McRainey v. R. R.,*

168 N. C., 571; *Shaw v. Public Service Corp., ib.*, 616; *Cates v. Hall*, 171 N. C., 363; *Bloxham v. Timber Co.*, 172 N. C., 45; *Meares v. Lumber Co., ib.*, 295; *Orr v. Rumbough, ib.*, 759; *Moore v. R. R.*, 173 N. C., 319; *Cashwell v. Bottling Works*, 174 N. C., 326; *Nixon v. Oil Mill*, 174 N. C., 732; *Moore v. Lumber Co.*, 175 N. C., 210; *Lamb v. R. R.*, 179 N. C., 622; *Whittington v. Iron Co., ib.*, 652; *Matthis v. Johnson*, 180 N. C., 133; *Stone v. Texas Co., ib.*, 559; *Newton v. Texas Co., ib.*, 567, 568.

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SETTLE v. SETTLE.

(Filed 25 May, 1906.)

Sale of Real Estate to Make Assets—Petition—Parties—Infants—Appearance by Next Friend—Judgments—Collateral Attack—Equitable Jurisdiction—Retention of Cause—Executors and Administrators—Final Settlement—Breach of Administrator's Bond.

1. Where, pursuant to agreement, the children of a decedent joined in an *ex parte* petition to the Superior Court asking for the sale of realty to pay debts, for the purpose of preserving the personalty, and where the infant children were represented by their next friend, regularly appointed, who was their brother-in-law, the parties were properly before the court, and the Superior Court, in the exercise of its equitable jurisdiction, could grant the relief.

2. Infants without general guardians may appear by their next friend, appointed in the manner prescribed by the statute, and judgments rendered such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons *sui juris*.

3. The Superior Court possesses the same equitable powers and jurisdiction when not limited by statute, formerly exercised by the courts of equity.

4. Where the Superior Court assumes jurisdiction of a proceeding to sell the land of a decedent for the purpose of preserving the personalty and subjecting the land to the payment of the debts, it may retain jurisdiction and make a final settlement of the estate, provided such final relief comes within the scope of the petition, or is not so foreign thereto as to make the decree "outside the issue."

5. Where a petition of the children of a decedent asked that the land be sold so as to preserve the personalty, and that the proceeds be applied to the payment of debts and that the personal estate be distributed among the children of the deceased according to their respective rights, so that each one would have a fund at interest, and prayed that the court decree a conversion of the real estate into money, and direct that the payment of debts be put thereon, and that the personal estate be distributed to those

entitled thereto, and for general relief: *Held*, that the petition authorized the court to make a full settlement and distribution of the estate of the decedent.

6. In courts of general jurisdiction, such as the Superior Court, all presumptions are made in favor of the regularity of judgments and the jurisdiction of the court to render them, and recitals of jurisdictional facts are conclusive when attacked collaterally.

7. A recital in a decree of the Superior Court that the "cause had been retained for other and further orders" constitutes a part of the record, and can be contradicted only by a direct attack, either by an independent action or by a motion in the cause.

8. Where in a proceeding to sell land to make assets and thereby preserve the personalty, a decree was entered confirming the sale and directing the administrator, who was the purchaser, to charge himself with the proceeds, etc.; and at a subsequent term a petition was filed praying for the distribution of the personalty, and a decree was entered reciting that the cause had been retained for further decrees, and ordering a reference to ascertain the value of the personalty, etc.; and at a subsequent term the referee filed his report, and at the same term the administrator filed a report to which was attached an itemized account of his administration, a final decree approving the report of the administrator was within the jurisdiction of the court, and as conclusive as if upon a petition for account and settlement in the probate court.

9. Where the amount due by an administrator to an infant distributee was fixed and judgment rendered therefor, the breach of the bond was in not paying that amount into court, or, upon the arrival at full age, to the distributee.

(554) ACTION by the State on relation of Floreda Settle against Thomas Settle, administrator of Mrs. Mary A. Settle, deceased, and others, heard by *Ferguson, J.*, at February Term, 1906, of GUILFORD. From a judgment for the plaintiff, the defendant appealed.

E. J. Justice and Z. V. Taylor for plaintiff.
King & Kimball for defendant.

CONNOR, J. This cause is before us upon appeal from a judgment rendered upon the pleadings and exhibits attached thereto. The plaintiff, upon the complaint and answer, treating the facts set forth
(555) in the answer as insufficient to establish a plea in bar, moved his Honor for judgment that defendant administrator render an account of his administration, and from a judgment accordingly, defendant appealed.

In considering the appeal we must, therefore, treat the allegations in the answer as being true. The uncontradicted facts as set forth in the

complaint and admitted in the answer are: Mrs. Mary A. Settle died intestate, domiciled in Greensboro, N. C., March, 1895, leaving surviving her children, heirs at law and distributees, the defendants, Thomas Settle, Mrs. Nettie Beall, Mrs. Mary O. Sharpe, Mrs. Lizzie Boyd, Douglas Settle, Mrs. Carolina Wilkes, Mrs. Julia Holt, David Settle, and the relator, Miss Floreda Settle, the last four being infants. The defendant Thomas Settle, on 11 March, 1895, was appointed administrator of the deceased and qualified by executing a bond in the sum of $20,000, with the other defendants as sureties thereto. Mrs. Settle, at the time of her death, was possessed of certain personal estate consisting of bank and other stock, choses in action and household furniture, aggregating about $5,000; a policy of insurance on her life for $5,000, and was seized and possessed of a dwelling-house in the city of Greensboro of the value of $7,000, aggregating about $17,000. The personalty went into the hands of the defendant administrator. On 8 July, 1895, the said children and their husbands entered into an agreement as follows: "We, the undersigned heirs at law of Mary A. Settle, deceased, hereby agree that it is best for the interest of all, and particularly for the minor children of said Mary A. Settle, to sell the home place, which is not capable of division in kind, and put the payment of the debts on that fund, and thus leave the personal estate for division amongst the children, which may be an interest-bearing fund for said minors, and to this end we agree that our names may be joined in any petition or suit which may be necessary to carry out our said views, as witness (556) our hands, this 8 July, 1895." Signed by each of the said children and distributees and their husbands. Pursuant to the said agreement, Messrs. Dillard & King, attorneys, practicing in the courts of said county, at August Term, 1895, in behalf of all of said children, distributees and heirs at law, the said infants being represented by B. C. Sharpe, Esq., theretofore appointed their next friend, filed a petition as follows:

To the Honorable, the Judge of the Superior Court of the County and State aforesaid:

Your petitioners above named respectfully show unto the court:

1. That Mary A. Settle, the widow and relic of the late Judge Settle, departed this life in Greensboro, N. C., intestate in the year 1895, and leaving her surviving the following children and heirs at law, to wit (naming them), the last four infants without guardians, who are represented in this petition by B. C. Sharpe, specially assigned by the clerk as next friend to protect their interests in this suit, leaving at her death a considerable personal estate, consisting of household and kitchen furni-

ture, money on hand, bank stock and choses in action, in all amounting to about $....., and leaving her house and lot in the city of Greensboro (describing same), and being the house and lot on which Mary A. Settle had her domicile at the time of her death, and at the time of her death said intestate owed but four debts and they of small amounts, except that which she was owing to her two sons, Thomas Settle and Douglas Settle, for moneys advanced by them for her during her widowhood.

2. That your petitioners believe the personal estate is sufficient to pay the debts of the intestate and all the costs and charges of administration, and so likewise they feel sure the said house and lot, if sold prudently, will produce enough to pay the same, and leave the personalty for
(557) distribution to and amongst the next of kin and heirs according to their respective rights therein.

3. Your petitioners show that they have given much reflection as to what is best to be done, having regard to the interests of all concerned, and particularly to the interests of those of your petitioners who are under full age, and their deliberate conclusion is that the best thing to be done is to sell the land and devote the proceeds to the payment of the debts and take the personal estate and distribute the same among the children according to their respective rights, some of them having been advanced to their full share therein and others partially, and still others not at all; and so believing, your petitioners have executed a written agreement to be joined in this *ex parte* petition, indicating their views on the subject, and hereunto annex the same, to be taken as a part of their petition.

4. That if the personal estate be applied to pay the debts, the land will have to be divided, which cannot be done in kind, so as to make the shares valuable, and the consequences then will be that, the personal estate being all gone, the infant children aforesaid will have no distributive interest (share) to bear interest for them and no homestead to live at, when if the debts be put on the land, each one of said infants will have a fund at interest to be used in their support.

5. Your petitioners are advised that your Honor has the jurisdiction to decree a conversion of the said house and lot into money and the application of the proceeds to the payment of the debts, so as then to provide for the children, and especially the infants, so that their interests in the personal estate may be productive and helpful in their support as aforesaid.

Wherefore, your petitioners pray your Honor to decree a change and conversion of the real estate of the late Mary A. Settle into money
(558) and direct that the payment of the debts be put upon the same,

and that the personal estate be distributed in money to and amongst those entitled thereto, and such other and further relief in the premises as may be just and right.

We have set forth in full the foregoing petition to the end that its scope and purpose may appear.

At the same term of the court a decree was entered in said petition by his Honor, *Henry R. Bryan,* judge presiding, directing a sale of the said house and lot for the purpose set forth in the petition and appointing Dr. W. P. Beall commissioner to make the sale, he being the husband of one of the petitioners. Specific directions were given in regard to the manner of conducting such sale, directing a report at the next term of the court. It is also provided in said decree that Thomas Settle and Douglas Settle, either or both, be allowed to bid for the said property, if they so desire.

At December Term, 1895, the commissioner made report that he had sold the said land in accordance with the terms of the decree, and that Thomas Settle was the last and highest bidder therefor at the price of $7,000, and that said sum was a full and fair price therefor. He further reported that the amount had not been paid, but that as it was the purpose of the suit to appropriate the sum to the payment of debts, he recommends that the said amount be charged to the said Thomas Settle, as administrator, and be by him accounted for in the final settlement of said estate. At the same term, his Honor, *Judge Starbuck,* presiding, a decree was made confirming the said sale and directing the defendant administrator to charge himself with the proceeds and apply and account for the same in due course of administration in paying the debts. "That he account for and distribute the excess, if any, of said purchase money, together with the personal estate, among all of the next of kin, making equality among the said next of kin by a due accounting for advancements among them, if any such there be." There was in this decree no direction that the cause be retained for other and fur- (559) ther orders.

At May Term, 1896, of said court a petition was filed in the said cause reciting as follows: "This cause having been retained for further proceedings and decrees, the above-named parties, your petitioners, would respectfully show unto the court, that Thomas Settle, as administrator of Mary A. Settle, deceased, has so far administered the estate of said decedent as to ascertain that there would be a surplus consisting of some cash, stock in Bank of Guilford of the par value of $600, in the Piedmont Bank of $500, the Wakefield Hardware Company of $1,000 at par value, and the household furniture, estimated at say $1,000, for distribu-

tion among those entitled after an account shall have been taken of advancements to and among certain of the heirs and distributees of the said Mary A. Settle." Said petition further stated that the value of said personal property was unknown to the petitioners, and that if the same would be allotted to and among them it would be necessary to ascertain such values in order that an equitable distribution thereof may be made, and the value of the household property also ascertained, which, after being ascertained, may be distributed in kind among those entitled. That petitioners, Nettie S. Beall and Mary S. Sharpe, and it may be others, have been advanced in amounts to a sum in excess of their respective distributive shares. The petitioners asked that a reference be ordered and that, after notice duly given, testimony be taken as to the value of such stocks and other property and also the amount advanced, with direction that the referee find the facts in regard thereto and report the same to this court, and that the cause be retained. Upon said petition, his Honor, *Judge Coble,* presiding, made an order in the following language: "This cause having been retained for further orders and decrees, and now coming on for such, it is ordered and decreed by the court that the same be referred to Col. J. T. Morehead to take testimony as to the value of said property and the amount advanced to said
(560) distributees and to find the facts relative thereto and report the same to the court."

That at May Term, 1897, Colonel Morehead filed his report, together with the testimony taken by him, finding that the stock in the Piedmont Bank was worth $512.50; Bank of Guilford, $600; Wakefield Hardware Company, $850, and the furniture, $450; that the advances to Mrs. Beall and Mrs. Sharpe are equal to their interest in the estate. To this report are the words, "No allowance asked for." At the same term the defendant, Thomas Settle, administrator, made the following report: "The undersigned would respectfully report unto the court that the total assets which have come into his hands, or should have come into his hands, as administrator of Mary Settle, deceased, are shown in the statement hereto attached, and he has paid out in accordance with the credits shown by said statement; that the balance in his hands for distribution is $8,015, as per said statement hereto attached." Filed and verified 16 June, 1897. To said report is attached an itemized statement showing receipts of $17,900. In this statement the administrator charges himself with the face value of the stocks and $1,000 for the furniture. He afterwards deducts $150 and $550, being the excess of said valuation as found by Colonel Morehead, charging himself with $12.50, being the excess in value of the Piedmont Bank stock. In this account, every item mentioned in the complaint, except $179, which is only referred to

generally, is accounted for. The complaint alleges upon information and belief that there is about $5,000 which she is entitled to have defendant account for but does not further specify the basis for said allegation. The account contains an itemized statement, with dates, etc., of each item. No commissions are charged by the administrator.

At the same term a decree was made by his Honor, *Judge Allen,* presiding, reciting that the report of Colonel Morehead and of Thomas Settle, administrator, had been duly filed, and that no (561) exceptions had been made thereto, and that the same is in all respects confirmed, and, further, "From this report and that of the said administrator, it is found and adjudged by the court that the net sum in the hands of the administrator for distribution on all accounts, after charging himself with all proper sums which he is chargeable with, and allowing himself all proper credits, is $8,015; that this sum is divisible among the seven children in equal shares, to wit: ..... It is further found by the court that Nettie Beall, wife of W. P. Beall, and Mamie Sharpe, wife of B. C. Sharpe, have been advanced sums more than their respective distributive shares, and are not entitled to any part of the assets of said deceased. It is found by the court that the share due each of the seven first above-named children is $1,145."

Upon the foregoing facts, his Honor, *Judge Ferguson,* upon said motion, adjudged: "That there has been no final settlement of the estate of Mrs. Mary A. Settle, deceased, by Thomas Settle, administrator, and that the proceedings entitled 'Thomas Settle *et al., ex parte,*' referred to in the answer, were at an end when the land referred to in the petition was sold by the commissioner, the sale reported and confirmed, and an order was made directing the commissioner to execute title to the purchaser; and that the other and further proceedings therein the court had no jurisdiction or power under the pleadings filed in that case to make; and that the decree of his Honor, *O. H. Allen, Judge,* made in 1897, which said decree is set out as a part of the answer of the defendants, is void, and is no estoppel upon the plaintiff in this action." He thereupon directed that the cause be referred to Colonel Morehead to take and state an account, etc.

The questions which lie at the threshold of this appeal are: (562) (1) Did the court have jurisdiction of the persons and of the subject-matter which passed into the judgment of May Term, 1897? (2) Is the said judgment outside the issue or foreign to the matter set forth in the petition? If the plaintiff's contention, in respect to either question, be correct, it is manifest that his Honor's judgment should be affirmed. In regard to the first question, the parties voluntarily, and in the orderly way prescribed by law, came into and sub-

mitted such matters and things, rights, etc., as are set forth in the petition, to the jurisdiction of the court. It cannot be doubted that they set forth a statement of facts sufficient to "challenge the attention of the court and set the judicial mind in motion." As they agreed upon the pertinent and material facts in regard to which the prayer for relief was based, there was no reason why they should not have invoked the equitable powers of the court by petition. The infants were represented by their next friend, appointed upon application to the clerk as the statute directs. The husbands of the *femes covert* were joined as petitioners. That infants, without general guardians, may appear by their next friend, appointed in the manner prescribed by the statute, is not controverted, nor is it denied that judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants, in the same manner and to the same extent as persons *sui juris*. *Tate v. Mott,* 96 N. C., 19; *Tyson v. Belcher,* 102 N. C., 112. The person appointed to represent the infants was their brother-in-law, whose wife had exactly the same interest in the property and estate as did the infants. There is no suggestion that he was not, in all respects, a proper person to be appointed. The parties were therefore properly before the court.

Prior to the adoption of the Constitution of 1868 equitable rights and remedies, in accordance with the general rules of procedure existing in the Court of Chancery in England, except as modified by statute, were (563) administered in this State by the judge of the Superior Courts of Law and Equity, sitting as chancellor. While jurisdiction was given the Courts of Pleas and Quarter Sessions to take probates of wills, grant letters testamentary and of the administration of estates of deceased persons, entertain petitions for sale of lands to pay debts, audit accounts of executors, administrators, and guardians, and do many other acts in the administration and settlement of estates, it was always held, by this Court, that the jurisdiction of courts of equity to entertain bills for the settlement of estates, etc., was not withdrawn.

Ruffin, C. J., in *Barnawell v. Threadgill,* 40 N. C., 86, in disposing of an objection to the jurisdiction of the court of equity because a remedy at law had been given by statute, said: "But that is a cumulative legal remedy, not so effectual, in many cases, as that in equity, when accounts may be taken, all parties in interest brought before the court, and the decree enforced, not only by execution, but by process for contempt. Besides, the rule of construction is settled that statutes, which merely give affirmative jurisdiction to one court, do not oust that previously existing in another court. There is nothing incongruous in concurrent jurisdictions." That a court of equity had jurisdiction to entertain and

dispose of a bill brought either by creditors, legatees, or distributees, known as administration suits, prior to 1868, is shown by numerous cases in our Reports and was uniformly recognized in all of the States of the Union, unless expressly deprived of it by statute. By the Constitution of 1868 a radical change was made in the distribution of judicial power. The distinction between courts of law and of equity was abolished and one form of action prescribed. The jurisdiction formerly vested in the county courts in regard to the settlement of estates was conferred upon courts of probate and the procedure prescribed styled a special proceeding. The change in the jurisdiction and introduction of the new method of procedure gave to the bar and the courts much concern.

It was found that suits brought to the term should have been (564) brought before the clerk or *vice versa.* The court made several, not altogether successful attempts to "mark the line" dividing the jurisdiction of the courts. *Tate v. Powe,* 64 N. C., 644, and other cases. The General Assembly passed several curative statutes which were sustained by the Court. *Bell v. King,* 70 N. C., 330. The convention of 1875 conferred upon the General Assembly the power to distribute the jurisdiction conferred upon the several courts established by the Constitution and those which should by the power conferred be established by the Legislature, etc. Article IV, section 12. Pursuant to this grant of power the General Assembly at the session of 1876-77 enacted that, in addition to the remedy by special proceeding, actions against executors, etc., may be brought originally in the Superior Court in term-time, and in all such cases it should be competent for the court in which said action shall be pending to order an account to be taken by such person as the court may designate and to adjudge the application or distribution of the fund ascertained or to grant other relief as the nature of the case may require. The Court in *Haywood v. Haywood,* 79 N. C., 42, construed this statute and held that it conferred upon the probate and Superior Courts concurrent jurisdiction in suits for the settlement of estates. *Pegram v. Armstrong,* 82 N. C., 326; *Fisher v. Trust Co.,* 138 N. C., 90. That the Superior Court, under our judicial system, possesses the same equitable powers and jurisdiction, when not limited by statute, formerly exercised by the courts of equity, is not controverted. In this case the clerk would have had no power to order the sale of the land under the statutory proceeding provided for by section 68, Revisal. The purpose of the petition was to sell the realty, not because the personalty was insufficient to pay the debts, but for the purpose of preserving the personalty which produced an income and subjecting the realty to the payment of the debts. This relief could have been afforded only by a court having jurisdiction hence it was necessary to (565)

apply to such court for relief. Counsel concede that the cause was properly constituted in the Superior Court of Guilford County for the purpose of having the land sold to create a fund for the payment of the debts, and that the sale was in all respects regular. They attack the decrees of May Term, 1896, and May Term, 1897, for that, first, the purpose of the petition, to wit, the sale of the land, having been accomplished, the court had no further power or jurisdiction in the premises, but that if it had such jurisdiction it was lost by the decree of *Judge Starbuck,* of December Term, 1895, which decree it is contended was final. It is elementary learning that when a court of equity once takes jurisdiction, although invoked by reason of some ancillary equity, it will proceed to dispose of the entire matter in controversy. "It is a distinctive characteristic of a court of equity that it may adapt its decrees to all varieties of circumstances which may arise and may vary, qualify, restrain and model the remedy so as to suit it to mutual and adverse claims, controlling equities and the real and substantial rights of all the parties." 5 Enc. Pl. and Pr., 958. "It is to be recollected that it is a fundamental principle of courts of equity to make as complete a decision upon all points embraced in a cause as the nature of the case will admit, so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harassed by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties, "who are not before the court, in the present proceedings." Daniel Ch. Pr., 635. "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the (566) decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented." Story Eq. Pl., 72. It was the uniform practice of courts of equity, their jurisdiction being invoked by reason of some equitable right or some relief which the law courts had no power or machinery for administering, to dispose of the entire case developed in the pleadings. *Pearson, J.,* in *Simmons v. Hendricks,* 43 N. C., 84, says: "A court of equity will not take jurisdiction simply to put a construction on a deed or devise, because that is a pure legal question. But when a case is properly in a court of equity, under some of its known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the court will determine it, being necessary to do so in order to decide the cause."

Discussing the origin and extent of the jurisdiction of courts of equity, or, more accurately speaking, courts having equity jurisdiction, to enter-

tain administration suits, Mr. Pomeroy says: "The rule has already been stated, as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be afforded by a court of law." Pomeroy Eq., sec. 231. The principle as applied to administration suits is thus stated: "Although the legislation of most of the States has either expressly or practically taken the general jurisdiction of administration from the courts of equity and has conferred it upon courts of probate under minute statutory regulation, still, whenever a court of equity takes cognizance of a decedent's estate, for any special purpose or to grant any special relief, not within the power of the probate court, . . . it has been held in many States that the court of equity, having thus acquired a jurisdiction of the estate for this particular purpose, may and should, notwithstanding the statutory system, go on and decree a (567) complete administration, settlement and distribution of the entire estate in the same manner in which it would have proceeded under the original jurisdiction of chancery prior to the legislation." *Ibid.*, 235. "While the original jurisdiction of equity over the subject of administration in general is thus abolished in so many States, the power to interfere for some special and partial purpose or to grant some special and partial relief in the course of the administration and settlement of decedents' estates, exists in all the Commonwealths as a part of the general functions belonging to equity courts." After classifying the States, he says: "In some of the States belonging to the second devision, as described above, where the general equity jurisdiction over administration is not absolutely abolished, but is rather suspended or dormant, when such suit is brought to obtain a particular relief which necessarily operates to aid some pending administration, or to remove some obstacle from its completion, the rule is settled, in accordance with a familiar principle, that the court having thus acquired a partial jurisdiction over the subject-matter, or for a partial purpose, will go on and decree full and final relief. The court will, therefore, in addition to the particular remedy demanded, take control of the entire administration; will even withdraw it from the probate court, if already begun therein, and to that end will enjoin all further proceedings before such tribunal, and will order a final accounting and decree a final settlement and distribution, whether the deceased died testate or intestate." Pomeroy Eq., sec. 351, citing a large number of cases, including *Simmons v. Hendricks, supra.* In *Sanders v. Soutter,* 136 N. Y., 193, the jurisdiction being apportioned very much

as with us, it is said: "A court of equity possesses jurisdiction, concurrent with the surrogate's court to entertain an action or proceeding for an accounting of executors. It seems to be the rule that the Supreme Court, in the exercise of its discretion, will decline to take juris-
(568) diction of an action for an accounting by the representatives of the estate of a deceased person, unless special facts and circumstances are alleged showing that the case is one requiring relief of such a nature that the surrogate's court is not competent to grant it, or some reason assigned, or facts stated, to show that complete justice cannot be done in that court. But when a court of equity obtains jurisdiction of the matter for some special purposes . . . or to grant some other special relief, not within the power of the probate court, it may and very frequently does, retain the case for all purposes and decree a complete administration, settlement and distribution of the entire estate." *Judge Story,* in *Pratt v. Northan,* 5 Mason (C. C. R.), 95, says: That when for any adequate reason the court of equity takes jurisdiction in the settlement of estates, the parties and the cause being once in the court, they should not be turned over to a suit at law for "final redress." And for the purpose of complete justice it became necessary to conduct the whole administration and distribution of assets under the superintendence of the court of chancery when it once interfered to grant relief in such cases. *Chancellor Kent,* in *Thompson v. Brown,* 4 Johns., ch. 619 (637), announces this same doctrine. This Court, in *Pollard v. Slaughter,* 92 N. C., 72, in an action for the recovery of land involving the construction of a will, held that the defendant was entitled to dower, although it had not been allotted. *Ashe, J.,* said that although jurisdiction to allot dower was given the clerk in a special proceeding, the Superior Court would direct the allotment. "This can be done under the equitable jurisdiction of the Superior Court over the subject of dower, which we do not think has been taken away by giving cognizance of such matter to the clerk of the court. . . . But inasmuch as in this case the parties are before the court and a determination of the whole matter will prevent a circuity of actions, which it is the
(569) policy of The Code to discourage, we have, therefore, deemed it proper to take cognizance, in this case, of the defendant's equitable right to dower and decide the case upon its merits." The judgment directed the Superior Court to proceed in that cause to have dower allotted. In special proceedings it was found after long experience necessary to pass the act of 1887, Revisal, sec. 614, which makes it the duty of the Superior Court and confers jurisdiction when a special proceeding for any ground whatever shall be sent to the judge upon the request of either party to proceed to hear and determine all matters in

controversy, unless it shall appear to him that justice would be more cheaply and speedily administered by sending it back to the clerk. This statute has been construed in a number of cases. *Elliott v. Tyson,* 117 N. C., 116; *Springs v. Scott,* 132 N. C., 548. We, therefore, conclude that the court had jurisdiction of the persons and of the subject-matter involving the final settlement of Mrs. Settle's estate, provided that such final relief came within the scope of the petition or was not so foreign thereto as to make the decrees of May Terms, 1896 and 1897, "outside the issue." It is conceded "that a decree or judgment in a matter outside of the issue raised by the pleadings is a nullity and is nowhere entitled to the least respect as a judicial sentence." *Jones v. Davenport,* 45 N. J. Eq., 77. The principle is stated in *O'Reilly v. Nicholson,* 45 Mo., 160, and approved by the author in Van Fleet on Collateral Attack, sec. 750. It was sought to attack the decree collaterally because it was outside the issue. The Court said: "But the decree is not a nullity. It is true, the petition hardly lays the foundation for the relief given; but the court had jurisdiction both of the subject-matter of the petition and the decree. The object of the petition was for authority to raise money out of the land to pay the legacies, and the court added to the order sought, substantially, an election by the legatee to take the legacy and release the land, with an order for carrying out that election. (570) The court had a right to do both, and if the petition did not lay a foundation for both, the decree is simply erroneous and cannot be impeached collaterally. A judgment, though informal, even to the extent of granting a relief not contemplated in the petition, when parties are before the court and the relief is within its jurisdiction, is not void." The test appears to be whether the questions which passed into the decree were presented to the attention of and within the jurisdiction of the court—the parties being before the court. The question was discussed in *Reynolds v. Stockton,* 34 N. J. Eq., 211, and in the same case on a writ of error in 140 U. S., 255. In passing upon the constitutional provisions requiring full faith and credit to be given records of other States, *Brewer, J.,* says: "The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject-matter and of the person is substantially responsive to the issues presented by the pleadings or is rendered under such circumstances that it is apparent that the defeated party was in fact heard upon the matter determined." *Bunker v. Bunker,* 140 N. C., 18. This renders necessary an examination of the language of the petition. It is the work of one who, as shown by the records of this Court and a long career at the bar, won a reputation second to none as an equity lawyer and draftsman. The petition informs the court of the condition of

Mrs. Settle's estate, the kind and character of the property, the number, status and condition of her children with respect to the estate. The petition is filed after the execution and by authority of an agreement made some months after Mrs. Settle's death. The court is informed in respect to her indebtedness and the reason why the interests of the petitioners would be promoted by a sale of the real estate for the payment of the debts and the distribution of the personalty among the chil-
(571) dren. They say that "they have given much reflection to what is best to be done, having regard to the interests of all concerned, and particularly to the interests of those of the petitioners who are under full age. The petition states that their father is dead; that some of the children had been advanced to their full share, others partially, and others not at all; that the real estate described was the home of their mother and cannot be divided otherwise than by sale; that the personalty consisted of money on hand, bank stock, choses in action," etc. In view of these and other facts set forth, they wish to have the realty sold, and the court direct the proceeds to be applied to the payment of the debts, "and take the personal estate and distribute it among the children according to their respective rights, so that each one of said infants will have a fund at interest to be used in their support." We think that these facts clearly suggest to the court a desire and purpose to have the proper proceedings, orders, etc., necessary to have a full statement and distribution of Mrs. Settle's estate made in that proceeding. This construction is sustained by the prayer for relief, that the court decree a change and conversion of the real estate into money and direct that the payment of the debts be put upon the same, and that the personal estate be distributed in money to those entitled thereto, and for general relief.

It will be observed that the stocks and household furniture had not been sold—their purpose evidently being to divide this property in kind. The reasons which moved them to this course are manifest. The entire course of conduct, both of the parties and counsel, who, we are informed on the argument, were charging no fee for services, shows a purpose to make a family settlement of their mother's estate in a way which required the aid and function of a court of equity. The realty being sold by the husband of one of the petitioners as commissioner, it appeared that one of the sons had, as the decree permitted him to do, purchased at a price satisfactory to the others. Thereupon a motion in the
(572) cause is made for a reference to ascertain the value of the stocks, household furniture and the advancements. The reference was made to James T. Morehead, a member of the bar, who took evidence which he reported to the court with his conclusions, all of which is confirmed without exception. If the court was not to make the distribution,

why take these steps? In the regular statutory order of administration, the administrator would have sold the stocks and furniture and accounted for the proceeds. It is evident that the parties wish to preserve this personalty. It will be noted that Mr. Morehead bases his conclusions, in respect to the value of the furniture, upon the testimony of Mr. Sharpe, the next friend of the infants, and Dr. Beall. He also reports that their wives have been fully advanced. This report coming in, the administrator files a report to which is attached an itemized account of his administration, and at the same term, May, 1897, the final decree is made by *Judge Allen*. In the light of the authorities, the language and general scope of the petition, we are of the opinion that the final judgment is within the jurisdiction of the court and the averments and prayers of the petitioner. It was so treated by the parties, the counsel, and the court. The plaintiff says that, conceding this to be true, the court lost jurisdiction by the decree of December Term, 1895, which she insists is final. It is true that there is no direction at the conclusion of the decree retaining the cause. While this is usual, it is not necessary, if in truth the cause was retained by the court. The record shows that at May Term, 1896, which was the second term, following December, the motion in writing recites that the cause had been retained for other and further orders, and the decree directing the reference contains the same recital. The decree of May Term, 1897, recites: "This cause coming on to be heard and for further orders and directions," etc. It will be noted that the judgment of December Term, 1895, makes no direction in respect to cost. It is some- (573) times difficult to adopt from the authorities a satisfactory definition of a final decree. Mr. Freeman, after noting the difficulty in fixing upon a satisfactory definition, says: "But no order or decree which does not preclude further proceedings in the court below should be considered final. A decree is interlocutory which makes no provision for cost and in which the right is reserved to parties to set the cause down for further directions not inconsistent with the decree already made, and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee." Freeman on Judgments, sec. 29. For the purpose of passing upon this phase of the case it is important to note the well settled rule that in courts of general jurisdiction, such as the Superior Court, all presumptions are made in favor of the regularity of judgments and the jurisdiction of the court to render, and that recitals of jurisdictional facts are conclusive when attacked collaterally. Therefore the recital in the decree of May Term, 1896, that the cause had been retained for other and further orders constitutes a part of the record and

can be contradicted only by a direct attack, either by an independent action or a motion in the cause. This principle is illustrated in *Harrison v. Hargrove,* 109 N. C., 346. There the decree recited that the summons had been served on the defendants. *Shepherd, J.,* said: "The decree recited that personal service of the summons had been made on the plaintiffs (defendants in the original proceeding) devisees, and being unable to attack it collaterally, they moved in the original cause," etc. It was held that "the record reciting the necessary jurisdictional facts, such a decree is voidable only." *Doyle v. Brown,* 72 N. C., 393; *Millsaps v. Estes,* 137 N. C., 535; Black on Judgments, sec. 273. In this proceeding, therefore, we must, upon the recitals in the record, hold that
(574) the cause was retained for further orders and that the decree of December Term, 1895, was not final. If the plaintiff wishes to attack the record she may do so by a direct proceeding for that purpose. We find no suggestion in the complaint that in filing the original petition, or any motion or order made in the progress of the cause, there was any fraud. The plaintiff's motion for a reference is based upon the contention, and his Honor so decided, that the judgment of May Term, 1897, was void for that the court had no jurisdiction or power under the pleadings to render the judgment. For the reasons set forth herein, we are of the opinion that there was error in this ruling. There is no allegation in the complaint to surcharge and falsify the final account. The judgment was rendered June, 1897. The relator of the plaintiff reached her majority 15 November, 1899. This action was brought 1 February, 1905. It was the duty of the defendant administrator to pay the amount found to be due the relator into court on 16 June, 1897. He says that he has paid her in full, setting out an itemized statement of the amounts and dates of payment. This, of course, is pleaded as a payment and is not included in the judgment of May Term, 1897. The parties are entitled to have the question of payment passed upon by reference or otherwise. It would seem that as the amount due plaintiff was fixed by the judgment, the breach of the bond, if the amount due has not been paid, was at that time, but as the plaintiff was an infant the statute did not begin to run against her until she was of full age, after which time she had three years within which to sue the sureties on the bond. Rev., sec. 395, subsec. 6. In *Edwards v. Lemmond,* 136 N. C., 329, where the authorities are reviewed, the suit was against the administrator for an account and settlement. If his Honor was correct in holding that the judgment of May Term, 1897, was void, the conclusion followed that plaintiff was not barred. As we hold that the filing and approval of
the account was, in this action, as conclusive as if upon a peti-
(575) tion for account and settlement in the probate court, the statute

runs from that date. The amount due was fixed and judgment rendered therefor, the breach of the bond therefore was in not paying the amount into court or, upon the arrival at full age, to the plaintiff. The judgment of his Honor must be reversed to the end that the parties may proceed in such manner as they may be advised. If the plaintiff so desires, we see no reason why she may not amend her complaint, or move in the original cause upon proper averments. What effect the lapse of time will have upon her rights in that respect is not before us for decision.

Error.

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

Cited: *In re Propst,* 144 N. C., 567; *Hassell v. Steamboat Co.,* 168 N. C., 298; *Chatham v. Realty Co.,* 180 N. C., 503.

WINKLER v. KILLIAN.

(Filed 25 May, 1906.)

Executors and Administrators — Services Rendered Deceased — Parent and Child—Presumption of Promise—Compensation—Use of Property.

1. Where an adult child, who had removed from the home of the parent and had married, rendered services to the parent which were voluntarily accepted, the law implies a promise on the part of the parent to pay what the services are reasonably worth.

2. In the absence of fraud or gross neglect, the plaintiff's claim for personal services rendered defendant's intestate should be reduced by the amount actually received by him in the use and management of the intestate's property, and not by what he could have received by more diligent management.

ACTION by Pink Winkler against S. E. Killian, administrator (576) of Susan Winkler, heard by *Justice, J.,* and a jury, at March Term, 1905, of BURKE.

There was allegation and also evidence on the part of plaintiff tending to show that Susan Winkler, late a resident of the county of Burke, died intestate in said county about 26 March, 1903, and that on 6 August, 1903, defendant was duly qualified as her administrator.

2. That the defendant's intestate was the widow of Abram Winkler, who died in the county of Burke about twelve or thirteen years ago,

leaving at his death said widow, then living at the home place, and three sons and four daughters living at the time, all of whom had married and moved away many years before the death of either parent.

3. That after the death of said Abram Winkler, it became necessary for the defendant's intestate to have a constant attendant both day and night, as she was an exceedingly large and fleshy woman of advanced age, afflicted with dropsy and other diseases, and it was necessary for some one to provide her sufficient supply of food each day, and to see that it was suitably prepared.

4. That from about 20 June, 1892, to 26 March, 1903, the plaintiff had the sole responsibility and entire expense of taking care of her and giving her food, fuel, etc., and provided her all proper attention and service by his own labor, that of his wife, his three minor sons and help employed by him, both day and night, and with properly prepared food furnished three times a day and upward from his own house; that this labor and the amount of food so consumed was at all times much greater than would be required for an ordinary person, but especially during the last five or six years of the life of the defendant's intestate, while she was childish and greatly afflicted with dropsy, she was a constant
(577) care to the plaintiff, requiring persons to attend to and work with her almost constantly day and night, and he was compelled to keep large fires going constantly, both day and night, both winter and summer, consuming an immense quantity of wood; said service, care and attention, and amounts paid physicians, burial expenses, etc., being of the value of $4,515.15.

5. That in order to be better able to render the services hereinbefore mentioned, the plaintiff moved from the place he was living at the time of his father's death to a point nearer his mother, but did not at any time reside in the house with her nor she with him; that he at one time started a new house for her, with her approval, close to his own for greater convenience, and got up the frame, but she changed her mind, not wishing to leave the old home, and he tore down the frame and erected another house nearer to her for the occupancy of Mrs. Wood and her children, who for about six years was the constant attendant of the defendant's intestate under employment by the plaintiff.

6. That during all the years aforesaid none of the other sons or daughters of the defendant's intestate ever contributed anything to her support, nor did any of them ever come to see her, except one daughter on a few occasions.

Plaintiff in his own behalf testified as follows: "I am plaintiff in this action. Have been married about thirty years. I built a house on my father's land and moved to myself three or four months after I was

married. I have lived by myself ever since. I afterwards bought the land on which I built. I moved to the place I now live a few months after my father's death."

Plaintiff then proposed to prove by his own testimony that "soon after the death of his father, in 1891, the children met together, and that the plaintiff told the others that if they or any of them would take the old lady and take care of her he would give them all his inter- (578) est in her estate; but that if he took care of her he should expect to be well paid. That the others declined to take care of her." At the close of the evidence the court said to counsel that he would charge the jury that upon the testimony, if believed, the plaintiff could not recover at all, and in deference to this intimation of the court, plaintiff excepted, submitted to a nonsuit and appealed.

E. B. Cline and S. J. Ervin for plaintiff.
Avery & Avery and M. H. Yount for defendant.

HOKE, J., after stating the case: It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as well as any other gift, if the work is done and accepted without expectation of pay. It is equally well established that when a child resides with a parent as a member of the family or with one who stands to the child *in loco parentis,* services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay is to be reasonably inferred. This last position is usually considered as an exception to the general rule, and in this and most other jurisdictions obtains both as to adult and minor children. Wherever the same has been applied, however, to claims by adult children, so far as we can discover, it has been made to depend not alone on the fact of kinship in blood, but also on the fact that the adult child has continued to reside with the parent as a member (579) of the family. This additional fact of membership in the same family has been present in all the cases on this subject that we have noted in this State, from the case of *Williams v. Barnes,* 14 N. C., 348, down to that of *Stallings v. Ellis,* 136 N. C., 69, and frequently finds expression in these decisions as the controlling fact on which they rest.

Thus, in *Williams v. Barnes, supra, Ruffin, J.,* delivering the opinion of the Court, said: "It cannot be possible that the head of a harmonious household must drive each member off as he shall arrive at age or be bound to pay him wages or for occasional services unless he shows that it was agreed that he should not pay." In *Dodson v. McAdams,* 96 N. C., 149-154, *Merrimon, J.,* for the Court, said: "It seems to be settled law, certainly in this State, that if a grandfather receives a grandchild or grandchildren into his family, and treats them as members thereof—as his own children—he and they are *in loco parentis et liberorum,* and hence, if the grandchild in such case shall do labor for his grandfather, as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises; the presumption is to the contrary. The grandchild, as to his labor or services rendered in such case, is on the same footing as a son or daughter. And this is so after the grandchild attains his majority, if the same family relation continues. This rule is founded in large measure upon the supposition that the father clothes, feeds, educates and supports the child, and that the latter labors and does appropriate service for the father and his family in return for such fatherly care and domestic comfort and advantage. The family relation and the nature of the service rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it."

(580) In *Young v. Herman,* 97 N. C., 280, it is held: 1. "When a child after arrival at full age continues to reside with and serve the parent, the presumption is that the service is gratuitous. 2. But this presumption may be rebutted by proof of facts and circumstances which show that such was not the intention of the parties, and raise a promise by the parent to pay as much as the labor of the child is reasonably worth." Again, in *Callahan v. Wood,* 118 N. C., 752, *Faircloth, C. J.,* for the Court, said: "We do not put our decision entirely on the kinship relation, but also on the one family relation established and maintained by the parties." In *Hicks v. Barnes,* 132 N. C., 146, the fact that the parties lived as members of the same family was brought out and dwelt upon as the controlling feature of the case. The one family relationship is so clearly made the *ratio decidendi* in claims of this character that the principle extends to many other cases of kinship besides that of parent and child, including persons who are no blood kin, but stand in this relation to each other, and applies also where the parent resides with his child as a member of the child's family and household. This was held in *Stallings v. Ellis,* 136 N. C., 69, and the facts stated

and the entire opinion show that the decision was made to depend on the relationship between the parties as members of one and the same household and family.

Counsel have not cited, nor have we been able to find, any case in this State where an adult child making a claim for services had removed from the home and family of the parent, had married and assumed the care and responsibility of a family of his own for and during the time the services were rendered. Courts of the highest authority in other jurisdictions, however, have dealt with the matter and have held that in such cases the general rule obtains that where such services are rendered and voluntarily accepted, a promise to pay therefor will be implied. Thus, in *Parker v. Parker,* 33 Ala., 459, it is held that "whatever may be the claims of filial duty and affection as between an aged and (581) infirm father and his grown son, there is no principle of law which requires the son, living separate and apart from the father, to perform services for the latter without compensation, where the father is in comfortable circumstances; consequently, to support the son's claim for compensation for such services, proof of an express contract is not necessary." And in *Steel v. Steel,* 12 Pa., 64, 66, *Rodgers, J.,* for the Court, said: "Had this been a claim for services rendered without request by a son while residing in the same house with the father and as a member of his family, this action could not be maintained. But, if we believe the evidence, the services were performed at the request of the father by a son who lived at a distance from him on a different property, and with a family of his own to support." See, also, *Bell v. Moon,* 79 Va., 341; *Smith v. Birdsall,* 106 Ill. App., 264; *Markey v. Brewster,* 10 Hun., 16; same case approved 70 N. Y., 607. There are other decisions of like import and they fully sustain the doctrine as stated generally in 21 A. & E. (2 Ed.), 1061: "The general rule deduced from the authorities is that where a child, after arriving at majority, continues to reside as a member of the family with the parent or with one who stands in the relation of a parent, or where a parent resides in the family of a child, the presumption is that no payment is expected for services rendered or support furnished by one to the other. This presumption is not conclusive, but may be overcome by proof." And further, on page 1063: "Where a child lives separate and apart from a parent, has left the father, married and set up life for himself, the presumption that the services or support is gratuitous does not obtain." The text-writers are to same effect. Abbott's Trial Evidence (2 Ed.), 443; Page on Contracts, secs. 778-782, inclusive. On the evidence admitted by the court the plaintiff was entitled to the charge that if the same was believed the law would imply a promise on the

(582) part of the intestate to pay what the services were reasonably worth, the amount to be determined by a jury or referee, as the court in its legal discretion may determine. In taking the account or determining the amount by a jury, the plaintiff's claim for personal service should be reduced by the amount received by him in the use and management of the intestate's property. In the absence of fraud or gross neglect the plaintiff would be only chargeable for what he actually received from this source, and not what he could have received by more diligent and careful management. There is error, and a new trial is awarded.

New trial.

Cited: *Henderson v. McLain,* 146 N. C., 335; *Bryan v. Cowles,* 152 N. C., 770; *Patterson v. Franklin,* 168 N. C., 17; *Guano Co. v. Bennett,* 170 N. C., 345; *Sanders v. Ragan,* 172 N. C., 614; *Debruhl v. Trust Co., ib.,* 840; *Ellis v. Cox,* 176 N. C., 619.

MATTHEWS v. FRY.

(Filed 25 May, 1906.)

Taxation—Sales for Taxes—Sheriff's Deed—Validity—Presumptions—Notice by Sheriff—Notice by Purchaser—Affidavit.

1. Under Laws 1897, chapter 169, the sheriff's deed is only presumptive evidence that the notice to the owner or delinquent taxpayer has been given, and the publication made as required by section 51, but the notices required to be given by the purchaser under sections 64 and 65 must be proved by him.

2. Where the evidence shows that the sheriff failed to serve notice on the delinquent taxpayer as required by section 51 of chapter 169, Laws 1897, the presumption arising from the sheriff's deed is rebutted and the purchaser at the tax sale acquired no title.

3. Under Laws 1897, chapter 169, sections 64 and 65, requiring a purchaser at a tax sale before receiving the sheriff's deed to make affidavit showing certain facts as to notice, the making of a proper affidavit is a condition precedent to the right to call for the deed, and where the purchaser did not comply with the statute, he acquired no title by the deed.

(583) ACTION by John G. Matthews against A. M. Fry and another, heard by *Neal, J.,* and a jury, at Fall Term, 1905, of SWAIN.

Plaintiff sued to recover a tract of land in the possession of defendant. He introduced a grant from the State and connected himself with it by

mesne conveyances. The defendant, admitting that plaintiff was once seized of the land, claims that his title was divested by a tax sale and deed, under which he has acquired the title formerly belonging to the plaintiff. The land was not listed for taxes in 1898, and in 1899 the county commissioners ordered it to be placed on the tax books and double taxed. It was entered for taxation on the sheriff's book, but not on the book in the office of the register of deeds. It was ordered to be entered and assessed for taxation in the name of John G. Eve, a former owner, and not in the name of plaintiff, and an order to show cause was directed to be issued to Eve, who it appears was dead at the time. The order was, of course, never issued and served. The entry of the land on the sheriff's book was made on 4 April, 1899, and the land was sold on 1 May, 1899, just 26 or 27 days after the entry was made on the tax book. It does not appear that the sheriff gave any notice of the sale by publication or otherwise, either to the plaintiff, who was the owner at the time, or to the public. The entire tract of 640 acres was sold for $8.68, but the sheriff conveyed only 639 acres to the defendant, who was the purchaser. Defendant filed with the sheriff an affidavit which, he alleges, complied with the requirements of sections 64 and 65, chapter 169, Laws 1897, under the provisions of which the land was listed and sold for taxes. In that affidavit defendant states that more than three months before the expiration of the time of redemption allowed by law he caused a notice to be published for four successive weeks in a newspaper in Bryson City, setting forth therein the facts as to his purchase and the other facts required to be stated, and that "the first insertion of said (584) notice was made not more than five months and the last insertion not more than three months before the time of redemption expired." Plaintiff testified, and the judge so found, that he did not know the land had been assessed in Swain County, as he thought it was located in Macon County, and did not know of the sale. He offered to pay the defendant all the taxes and interest and also $100 rather than have a lawsuit, and told defendant that he did not think he should try to hold the land, as he had an equity in it and had not tried to avoid payment of the taxes. The parties waived a jury trial and agreed in writing that the judge should find the facts and enter judgment thereon as, upon the facts, he might decide the law to be. We have made the above statement from his Honor's finding. Judgment was given for the defendant, and the plaintiff appealed.

Dillard & Bell for plaintiff.
Jones & Johnston and Shepherd & Shepherd for defendant.

WALKER, J., after stating the case: The case turns upon the construction of sections 51, 64, and 65, chapter 169, Laws 1897, the sale having been made and the deed of the sheriff to the defendant having been executed under the provisions of that act. It is required by section 51 that before any real estate shall be sold for taxes, the sheriff shall personally serve notice of such sale on the delinquent taxpayer or his agent at least thirty days before such sale, if the defendant resides in the State. If he is a nonresident the sheriff is required to notify him by mail and also by publication in a newspaper in his county once a week for four consecutive weeks preceding the sale, and if there is no newspaper in the county, then by a like notice for four successive weeks by posting the same on the door of the courthouse of the county. Provision is made for the form of notice. According to the construction placed by this Court on
(585) section 65, subsection 7, of chapter 169 of the aforesaid act, the sheriff's deed is only presumptive evidence that the notice to the owner or delinquent taxpayer has been given and the publication made as required by section 51. In *King v. Cooper,* 128 N. C., 347, the present Chief Justice assigns the reasons for this interpretation of the act and says: "For which reasons and from the context, we think the notices and publication presumed under section 69 (7) to have been given, are those required of the sheriff by section 51 of said act, but the notices required with so much particularity to be given by the purchaser, under the new sections, 64 and 65, must be proved by him."

That case correctly interprets the statute and is now approved and followed by us. It settles the meaning of the law as thoroughly as if it had been expressed in the statute with the same clearness and conclusiveness as it is stated by the Court in the language quoted. It is not liable to misconstruction nor is it a matter of doubt. Its true meaning can no longer be questioned, if we are to respect at all the salutary doctrine of *stare decisis.* Tested by this rule, that the sheriff's deed is only presumptive evidence of his compliance with the provisions of section 51, which requires the sheriff to serve notice on the delinquent taxpayer, the defendant has acquired no title to the property by his purchase, as the sheriff failed to serve the notice. The judge finds as a fact that the land was listed for taxation, that is, entered on the book, on 4 April, 1899, and was sold on 1 May, 1899, less than 28 days after it was listed, the length of notice being four weeks or twenty-eight days. *Early v. Doe,* 16 How. (U. S.), 610. So that it was impossible for the sheriff to give the required notice, and in this connection the judge further finds as follows: "It does not appear that the sheriff gave any notice by publication or otherwise of the sale, either to the owner or to the public." The presumption arising from the deed is therefore rebutted. The rea-

sons and the necessity for such a notice are fully stated and sus- (586) tained by cogent argument and the citation of many authorities in 1 Blackwell on Tax Titles (5 Ed.), sec. 398, and note 1: "The publication of notice to taxpayers, required by tax laws, is an indispensable preliminary to the legality of a tax sale, and it must be made in strict accordance with the statutory requirement." *S. v. Neward,* 36 N. J. Law, 288; *Farnum v. Buffum,* 4 Cush., 260; *Early v. Doe, supra.* In this respect a distinction is made between a sheriff's sale under an ordinary execution and one under a tax assessment. 1 Blackwell, *supra,* sec. 397; *Early v. Doe, supra.* Section 51 seems to have been drawn with reference to this distinction, for the language used is appropriate to create a condition precedent. That such notice to the delinquent is essential was expressly decided in *Hill v. Nicholson,* 92 N. C., 24. There, it is true, a mortgagee claimed the right to be notified, and it has been held since that when the sale is sufficient to pass the title as to the mortgagor it will also conclude the mortgagee. *Exum v. Baker,* 115 N. C., 242; *Powell v. Sikes,* 119 N. C., 231; *King v. Cooper, supra.* But we cite *Hill v. Nicholson* only for the principle that the notice is essential and must be given to the owner or delinquent who, in the case of a mortgage, would be the mortgagor, and in this case the plaintiff. It would seem that the statute, as construed in *King v. Cooper, supra,* by making the sheriff's deed only presumptive evidence that the notice was given, itself recognizes that the service of the notice is an "essential prerequisite to the validity of the sale." Subdivisions 8 and 10 of section 69, which were relied on by the defendant, are to be read in connection with the other subdivisions and construed with reference to those subdivisions. Any other construction would produce a conflict between the first seven subdivisions and subdivisions 8 and 10. Indeed, subdivision 10 is expressly made subject to the first seven subdivisions.

But we think that the affidavit of the defendant is not in compliance with sections 64 and 65. It is there required that the notice shall be inserted in the newspaper three times, the first publication to (587) be not more than five months and the last not less than three months before the time of redemption will expire, that is, the delinquent must have at least three months notice and time to redeem after the publication is completed. It is stated in the affidavit that more than three months before the expiration of the time of redemption the defendant caused the notice to be published in a weekly paper for four successive weeks. "The first insertion of said notice in said paper was made not more than five months and the last insertion not more than three months before the time of redemption expired." If by the first part of the affidavit it was intended to say that the notice was published for four

successive weeks and that the last publication was more than three months before the time for redemption expired, then it cannot be reconciled with the other statement that the last insertion was "not more than three months" before the expiration of the said time. But if it was intended to state that the publication was commenced more than three months before the expiration of the period of redemption and continued for four successive weeks, which is likely, it would certainly not be a sufficient allegation under the statute. It is probable that the affidavit does not set forth what was really intended, but it is impossible for us to say that it is a compliance with sections 64 and 65, as it does not clearly state the facts. Where it is said that "the last insertion was not more than three months before the time of redemption expired," the affidavit does not by any means negative the idea that the last publication was made less than three months before the expiration of the time, and yet the statute requires it to appear affirmatively from the affidavit that the last publication was not made within the three months. Perhaps the affiant intended to say "not less than three months" instead of "not more than three months"; but we must decide the case upon the record
(588) as it is. Our conclusion is that the affidavit, being radically defective, was not *prima facie* evidence that the requisite notice had been given, and, besides, as the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land. There are other irregularities, but they need not be specially considered.

Reversed.

Cited: S. c., 143 N. C., 384; *Eames v. Armstrong,* 146 N. C., 6; *Warren v. Williford,* 148 N. C., 479; *Jones v. Schull,* 153 N. C., 521; *Rexford v. Phillips,* 159 N. C., 220; *Board of Education v. Remick,* 160 N. C., 570; *McNair v. Boyd,* 163 N. C., 480; *Sanders v. Covington,* 176 N. C., 450; *Headman v. Comrs.,* 177 N. C., 268; *Cherokee v. McClelland,* 179 N. C., 131, 132.

IN RE MURRAY'S WILL.

(Filed 25 May, 1906.)

Wills—Probate—Evidence—Res Gestæ—Declarations Against Interest —Beneficiaries—Executors—Exceptions — Briefs — Probate Courts' Jurisdiction—Charities—Trusts.

1. On an issue of *devisavit vel non*, where testator made his will while *in extremis*, by which he gave to his wife an estate for life, a question, "Did not the wife of deceased, while the alleged will was being executed, run into the kitchen where witness was and get some water for the deceased and say she was afraid her husband would die before they could get the business fixed?" was properly excluded, as the proposed evidence was not competent as a declaration against interest, the wife having died prior to the trial, nor was it competent as a part of the *res gestæ*, as it was not made in the presence of testator or any person connected with the will or the execution thereof.

2. The fact that an executor is appointed is sufficient to entitle the will to be admitted to probate, if properly executed, and an exception that the propounder had offered no evidence that there was a beneficiary under the will capable of taking, cannot be sustained, as the courts of probate have no other jurisdiction than to inquire into the execution of the will.

3. Where the appellant's brief does not point out the portion of the charge to which an exception is directed, and upon a reading of it this Court finds no ground of complaint, the exception cannot be sustained.

4. Where property is devised to trustees with specific instructions to establish and maintain from its income a school "for the education in the common-school branches of an English education of the poor white children of Buncombe County, living anywhere in said county," to be conducted in the city of Asheville, and with specific instructions in regard to the terms upon which children may be admitted, their age, etc., and with provision for the election of new trustees, etc., the trusts are sufficiently definite to be sustained as a charity.

ISSUE of *devisavit vel non*, heard before *Neal, J.*, and a jury, at (589) May Term, 1905, of BUNCOMBE.

The record shows that the paper-writing, purporting to be the last will and testament of J. L. Murray, deceased, a copy of which is set out, is propounded for probate in open court by Alonzo Rankin and H. S. Harkins, the persons named therein as executors. Whereupon John C. Murray, one of the heirs at law and next of kin to the said J. L. Murray, deceased, comes into court and enters a *caveat* to the probate thereof, and says that the same is not the last will and testament of the said J. L. Murray or any part thereof. Thereupon the issue is framed, to wit: "Is the said paper-writing, or any part thereof, and if so, what part, the last will and testament of the said J. L. Murray, deceased, or not?" And

the said issue is duly certified to the Superior Court of Buncombe County for trial in accordance with the statute. Thereupon process was issued to all the heirs at law and distributees of the said J. L. Murray, deceased, which being duly served, or service accepted by some of them, the issue was brought to trial before a jury and answered in the affirmative. To a judgment in accordance with the verdict, caveators excepted and appealed.

Shepherd & Shepherd, W. J. Cocke, J. M. Gudger, Jr., and H. B. Carter for caveators.
Moore & Rollins for propounders.

(590) CONNOR, J. The record contains nine exceptions to the rulings of his Honor upon the trial, only six of which are noted in the brief. We will dispose of them in the order presented in the brief. The first exception which arises is directed to the ruling of his Honor excluding the following question propounded to Miss Octie Murray by the caveators, she having testified that the testator was very sick at the time of the execution of the will and acted strangely; expressed the opinion that he was not capable of transacting any business. That five or six men came into the room of testator when witness went out. Thereupon caveators proposed to ask her the following question: "Did not the wife of the deceased, while the alleged will was being executed, run into the kitchen where witness was and get some water for the deceased and say she was afraid her husband would die before they could get the business fixed?" Upon objection of propounders, the question was excluded. Exception. It appears from the will that the wife whose declarations were sought to be proved was given an estate for life in the property, but had died prior to the trial. It is insisted that the testimony is competent as a declaration against interest. We do not think that principle applies to the proposed testimony. At the time the alleged declaration was made it does not appear that the will had been executed, nor does it appear that any person in interest was claiming under Mrs. Murray. It is further insisted that it is competent as a part of the *res gestæ*. We do not think that it comes within the principle upon which testimony of that character is admitted. It was not made in the presence of testator or any person connected with the will or execution thereof. It was simply the expression of an apprehension on the part of Mrs. Murray
(591) that her husband would die before the will was executed. Treated as the opinion of Mrs. Murray that her husband was *in extremis* as the basis for the conclusion that he was not capable of executing a will, we do not see how it could be competent. Wills are frequently exe-

cuted by persons in their last moments, and the mere fact that a person expresses an apprehension that the testator will die before signing the will does not, in our opinion, tend to disprove mental capacity. We can see no error in his Honor's ruling in that respect.

The third exception is based upon his Honor's refusal to hold that the propounders had offered no evidence that there was a beneficiary under the will or any one who could take under it, and in refusing to hold that such proof was necessary to the validity of the will. We cannot perceive how the construction of the will was presented or could have been passed upon in this proceeding. The courts of probate have no other jurisdiction than to inquire into the execution of the will. The fact that an executor is appointed is sufficient to entitle the will to be admitted to probate, if properly executed. We are not favored with any authorities tending to sustain this exception. The supplementary brief filed by the caveators cites a number of authorities which it is insisted tend to show that the trust undertaken to be set up and the charity established by the will is void. These are interesting questions, but in no proper sense now before the Court. The exception cannot be sustained.

The fourth exception is directed to the same question in the form of a prayer for special instruction. "That the paper-writing propounded and purporting to be the last will and testament of J. L. Murray, deceased, is not the last will and testament of the said J. L. Murray, deceased, on account of the vagueness and uncertainty of the trust therein attempted to be created and because there is no beneficiary of said will." What we have just said disposes of this exception, together with the fifth, which is based upon the refusal of his Honor to render judgment for the caveators, notwithstanding the verdict. (592)

The sixth exception is in the following words: "That the court erred in calling to the jury's attention the interest of the caveators and their witnesses in the result of this proceeding, without explaining to the jury the rules by which they should be governed in considering and deciding upon the testimony of interested witnesses." The brief does not point out the portion of the charge to which this exception is directed, and upon a reading of it we find no ground of complaint.

The eighth exception is in the following words: "That the court erred in not calling attention to the fact that Judge Fred Moore, who wrote the said alleged will and superintended its alleged execution, felt an interest in having the will sustained, nor the fact that H. S. Harkins and Alonzo Rankin, the executors and trustees of said alleged will, and J. C. Martin and Clarence Sawyer, the other trustees named, had a pecuniary interest in maintaining said alleged will, all of whom testified for propounders that J. L. Murray, deceased, possessed testamentary

capacity at the time of the alleged execution of the will. Specially did the court err as it saw fit to call attention to the interest of some of the caveators and their witnesses."

We have examined the charge of his Honor and find no ground for the alleged complaint. The case on appeal states, after setting out the charge: "The court in its charge endeavored to state in substance the evidence of every witness introduced—of each witness for the caveators and the propounders. The court also gave such comment as each counsel made on the evidence and in almost the exact words of the one addressing the jury. There was much of the testimony to which neither side addressed itself, notably the evidence of Hon. Frederick Moore and the subscribing witnesses to the will."

(593) The charge appears to us to be full and fair, directing the attention of the jury to the questions at issue, testimony, the burden of proof, etc. We find no merit in either of the exceptions to the charge. As we have said, the validity of the trust declared is not presented upon this appeal. We are strongly urged in the brief to declare that the said trusts are invalid. The property, after the death of testator's wife, is given to certain trustees named, with explicit directions to establish and maintain from the income of said property a school "for the education in the common-school branches of an English education of the poor white children of Buncombe County, N. C., living anywhere in said county. Said school shall be conducted in a building in the city of Asheville herein devised, or any other building in said city which may be selected by said trustees or their successors in office." Specific directions are given in regard to the terms upon which children may be admitted, their age, etc. Provision is also made for the election of new trustees in the event that either of those appointed should fail to accept, etc.

Without entering into any discussion of the authorities, we cannot perceive why the trusts are not sufficiently definite to be sustained as a charity. The beneficiaries are to be the poor white children of Buncombe County over the age of 8 years whose parents are not able to pay tuition, this fact to be ascertained by the said trustees. The school is conducted in the city of Asheville under the direction of the trustees. The purpose of the trust is not only in accordance with law, but in conformity to the highest and best interest of the beneficiaries. It is sufficiently explicit, we think, and comes clearly within a long line of decisions maintaining such charities. The judgment must be

Affirmed.

Cited: Phifer v. Mullis, 167 N. C., 410.

(594)

BRYSON v. RAILROAD.

(Filed 25 May, 1906.)

Removal of Causes to Federal Courts—Petition—Filing—Order as to Pleadings.

Where, at the appearance term, the court made an order, to which there was no exception, giving plaintiff 90 days to file complaint and defendant 90 days thereafter to answer, and after the complaint was filed, demanding $25,000 damages, at the next term the defendant again appeared by counsel and asked for time to answer, and was granted 60 days, it was not then entitled to remove the cause to the Federal courts.

ACTION by E. L. Bryson against Southern Railway Company, pending in the Superior Court of JACKSON, and heard by *Neal, J.*, upon defendant's motion to remove the cause to the Circuit Court of the United States.

The petition to remove was filed on 4 December, 1905, before *Judge Neal,* then presiding in the courts of the Sixteenth Judicial District. His Honor denied the motion, and defendant appealed.

Coleman C. Cowan for plaintiff.
Moore & Rollins for defendant.

BROWN, J. The summons was duly returned to Jackson Superior Court, convening on 22 May, 1905. At that term the court made an order giving plaintiff 90 days to file complaint and the defendant 90 days thereafter to answer. There was no exception taken to this order. On 27 September, 1905, the plaintiff filed his complaint, demanding $25,000 damages. It is contended that until the filing of a complaint defendant had no notice that a sum over $2,000 would be demanded, thus bringing the case within the jurisdiction of the Circuit Court of the United States, and therefore could not file his petition until the fact was made known upon which such jurisdiction depends. (595) There might be force in the contention but that it appears that the defendant did not except to the order granting such time, and therefore is taken to have consented to it. It further appears that after the complaint was filed, at the October Term, 1905, the defendant again appeared by counsel and again acknowledged the jurisdiction of the court, and asked for time to answer, and was granted 60 days. Of course, the defendant could not be required to answer until after complaint was filed, but when it agreed to the extension of the time for pleading, the defendant submitted voluntarily to the jurisdiction of the State Court.

If the defendant desired to reserve the right of removal, its counsel should have excepted at the time to the order extending the time within which the pleadings should be filed. *Wilcox v. Ins. Co.*, 60 Fed., 929; *Schipper v. Cordage Co.*, 72 Fed., 803. It seems to be well settled "that a petition for removal filed after the statutory period has expired comes too late, even though filed within the time allowed for answering by the order of the court, where such order is based on the stipulation of the parties. *Bank v. Keator*, 52 Fed., 897.

Had the defendant duly excepted to the order extending the time to plead, he should then have filed his petition to remove not later than the October Term, 1905, of the Superior Court, according to the latest decision of the Supreme Court of the United States upon the subject. *Remington v. R. R.*, 198 U. S., 95. It may be as contended by defendant, that such case is authority for the contention that the petition may be filed before the judge at chambers in the district. It has been held otherwise in this State, and as we hold against the defendant on the other point, it is unnecessary to decide this. It is possible, however, that the decision would not apply to our system of practice, which is dif-
(596) ferent from New York, where the case originated.

The questions presented on this appeal have heretofore been considered by this Court, and are fully discussed by the present Chief Justice in *Howard v. R. R.*, 122 N. C., 945, and decided adversely to the contentions of the defendant.

Judgment affirmed.

Cited: Ford v. Lumber Co., 155 N. C., 352; *Dills v. Fiber Co.*, 175 N. C., 51; *Patterson v. Lumber Co., ib.*, 92.

LEDFORD v. EMERSON.

(Filed 25 May, 1906.)

Evidence—Failure of Party to Testify—Comment of Counsel.

1. In an action to recover plaintiff's share of the profits arising from the sale of certain options, where the plaintiff testified to the amount received by the defendant, gave the amount of expenses and amounts previously paid himself, and stated the balance due him from the defendant by reason of the transaction, and gave data upon which the jury could come to their own conclusion as to the amount, an exception that there was no evidence offered from which any profits could be declared cannot be sustained.

2. Where, in a civil suit, the principal facts were peculiarly within the knowledge of the parties, and the plaintiff having testified, the failure of the defendant to testify was a legitimate subject of comment before the jury, subject to the legal control of the presiding judge, and the fact that the defendant was voluntarily absent in violation of his bail bond does not alter the case to his advantage.

ACTION by J. P. Ledford against A. S. Emerson, heard by *Neal, J.*, at November Term, 1905, of CHEROKEE. From a judgment for the plaintiff, the defendant appealed.

Busbee & Busbee for plaintiff. (597)
Dillard & Bell and Ben Posey for defendant.

PER CURIAM. This case has been twice before the Court recently on preliminary questions (138 N. C., 502, and 140 N. C., 288), and is now before us on appeal from a final judgment obtained by the plaintiff against the defendant.

The plaintiff alleged and offered evidence tending to show that in 1900 the plaintiff had procured an option on 4,000 acres of land in Union and Towns counties, Georgia, at the price of $100 per acre, afterwards increased to 6,500 acres at said price; that the defendant, having obtained information of this fact, in October, 1900, informed the plaintiff that he could find a purchaser for the option if the plaintiff would give him an interest in the margin or profits of any sale he could make, and the plaintiff and defendant then contracted and agreed that if the defendant could find a purchaser they would divide the profits equally, the defendant paying expenses; that the defendant afterwards sold the option for $10,000, receiving the money therefor, and the plaintiff's share of the proceeds, less expenses and amounts already paid the plaintiff, amounted to $4,400, with interest from 1 April, 1903. The issue submitted and responded to by the jury was as follows: "In what amount, if any, is the defendant indebted to the plaintiff by reason of the matters alleged in the complaint? '$4,225, and interest thereon from 1 May, 1903.'"

There were two exceptions urged upon our attention on the argument: (1) That there was no evidence offered from which any profits could be declared. (2) That counsel was allowed to comment on the fact that the defendant did not testify at the trial. Neither, we think, can be sustained.

The plaintiff testified to the amount received by the defendant, gave the amount of expenses and amounts previously paid himself, and stated that the balance now due him from the defendant by reason of the transaction was $4,400, with interest from 1 April, 1903. The (598)

witness not only made this definite statement, but gave the data upon which the jury could come to their own conclusion as to the amount, which they did, as shown by the verdict.

The second objection, we think, is equally untenable. The principal facts attending the transaction were peculiarly within the knowledge of the plaintiff and defendant, and this being a civil suit and the plaintiff having given his version favoring his claim, the failure of the defendant to testify was a legitimate subject of comment before the jury, subject to the legal discretion and control of the presiding judge. *Goodman v. Sapp,* 102 N. C., 477; *Hudson v. Jordan,* 108 N. C., 10. Nor do we think the fact that the defendant was absent in Europe alters the case to his advantage. So far as appears, he was voluntarily absent.

The testimony of the plaintiff tended to fix the defendant with fraud in the matter. The defendant had been arrested on these allegations, and was then absenting himself in violation of his bail bond made by order in the cause. These allegations of fraud and evidence concerning them had therefore been in existence and pleaded long enough to inform the defendant that these charges were made against him and would likely be testified to at the trial, and his voluntary absence and failure to testify or have his deposition taken were, therefore, a fair subject of comment.

There is no error, and the judgment below is

Affirmed.

Cited: S. c., 143 N. C., 528.

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(599)

HAYES v. FRANKLIN.

(Filed 25 May, 1906.)

Religious Societies—Trusts—Construction—Lease of Property—Injunctions.

1. Where land was conveyed to the officers and members of a church for the purpose of keeping and maintaining a church for worship and all privileges and appurtenances thereto belonging, the court will not restrain the officers of the church from leasing a small portion of the lot for a term of years for erecting a store, the rent payable to said officers, on the ground that the officers are committing a breach of trust and acting contrary to the terms of the deed.

2. A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control their management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative.

HAYES *v.* FRANKLIN.

ACTION by J. Taylor Hayes against James Franklin and others, heard by *O. H. Allen, J.*, and a jury, at Fall Term, 1905, of CALDWELL.

The plaintiff alleged and offered evidence tending to show that on 29 December, 1904, plaintiff conveyed to the officers and members of Wilson Creek Baptist Church, in Caldwell County, N. C., and their successors, one-half acre of land, more or less, with definite description, the deed containing the following: "To have and to hold the aforesaid tract for the purpose of keeping and maintaining a church for worship and all privileges and appurtenances thereto belonging, to the said officers and members of Wilson Creek Baptist Church, their successors and assigns, and their only use and behoof." On 17 June the grantees in this deed, the officers and trustees of said church, pursuant to a determination of the congregation in a business meeting, had drawn up and are about to deliver to L. H. and S. E. Weld, two of the defendants, a (600) lease of a small portion of this lot for the term of five years for the purpose of erecting a store, the rent payable in advance by monthly payments to the officers of said church.

In said lease appears the following covenant: "The said parties of the second part (the Welds) doth agree to conduct and carry on their mercantile business in such a manner as not to bring reproach upon said church; and further agree to close their store during church services on Saturday, and never open it on Sunday except in case of sickness, and then only long enough to deliver medicine to the parties," etc.

Plaintiff, being a member in good standing in Wilson Creek Church, instituted this action, seeking to restrain the defendants from carrying out the terms of said lease, contending that same was in violation of the terms of the deed under and by virtue of which defendants held the property.

At the trial, plaintiff tendered the following issues and asked that same be submitted to the jury:

1. Would the erection of the building on the church lot, as described in the complaint, tend to render said church and lot less convenient and desirable as a place of public worship?

2. Was the said lease of the premises, or a part thereof, contrary to the purpose and intent of the donor at the time of the execution of the deed?

The court declined to submit these issues, and plaintiff excepted. On an intimation from the court that plaintiff was not entitled to the relief demanded, plaintiff excepted, submitted to a nonsuit, and appealed.

Edmund Jones for plaintiff.

Lawrence Wakefield, W. C. Newland, and Bower & Hufham for defendants.

HOKE, J., after stating the case: Plaintiff does not claim in this suit the right to re-enter on the land as grantor in the deed, by reason of condition broken; the authorities cited by defendant on that point, (601) therefore, while seemingly conclusive, are not apposite to any question presented in this appeal. Nor is there any issue asked or evidence offered tending to show that the defendants, officers and trustees, have acted or proposed to act contrary to the rules and usages of the church. Nor is it alleged or suggested that the funds will not be applied to church purposes or expended for the church's benefit. The plaintiff rests his right to relief on the position that the officers of the church, in making the lease, are committing a breach of trust and acting contrary to the terms of the deed which, according to the plaintiff's construction, require that the property should be used only for purposes of religious worship.

The Court is referred to numerous authorities to the effect that according to the provisions of the deed the land conveyed is trust property. There is no doubt about this being a correct position in the sense that the same is held for the use and benefit of the congregation named in the deed. The real question here is not whether the property conveyed is held in trust for the church—that is admitted by both parties—but whether the trust is so defined and determined by the terms of the deed that the making of the lease complained of contravenes its controlling purpose, and to the extent that a court of equity will interfere to right the wrong and put the trustees in the proper way. On this question the Court is of opinion that the judge below gave a correct intimation and that the plaintiff is not entitled to the relief sought.

It is the general rule that courts will not interfere in cases of this character unless there is substantial abuse or misuse of the funds which amounts to a perversion of the charity. Perry on Trusts, sec. 733. And in *St. James Parish v. Bagley,* 138 N. C., 384, we have recently declared the general principle to be that a specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control their management and disposition of the (602) property, unless this is the clear intent of the grantor, expressed in language which should be construed as imperative. And further, that such a trust is not to be lightly imposed upon mere words of recommendation and confidence or which simply declare the motive for making the deed, citing with approval Pomeroy's Eq., secs. 1015 and 1016, which supports the doctrine as stated.

While the facts of that case do not permit that it should be considered as an authority necessarily controlling in the one before us, the general principles announced and maintained in the opinion are against the

position of the plaintiff on the facts as now presented. We hold that the language of the deed does not permit or justify the court in restraining action under the proposed lease, or otherwise interfering with the defendants' management and control of the property. There is

No error.

Cited: Carter v. Strickland, 165 N. C., 72.

RHEA v. CRAIG.

(Filed 25 May, 1906.)

Tenancy in Common—Parol Partition—Statute of Frauds—Adverse Possession—Instructions.

1. In consequence of the statute of frauds, Revisal, sec. 976, no legal partition can be made between tenants in common without deed or writing, and the doctrine of part performance is not recognized as sufficient to prevent the operation of the statute.

2. Where, after a parol partition between tenants in common, they severally took possession, each of his part, and have continued in the sole and exclusive possession for twenty years without the making of any claim or demand for rents, issues, or profits by any of them upon the others, but recognizing each other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession, as much so as where the possession was of the whole, instead of a part only.

3. The mere circumstance that the defense of adverse possession originated in a parol agreement did not exclude evidence of the possession under it, nor even evidence of the agreement itself and its attendant circumstances.

4. In a proceeding for partition, a request to charge that if all the tenants in common have been in the continuous, open, and notorious possession of some part of the land, then the statute of limitations has not run in favor of either, against the others, but the possession of each is presumed to have been in the interest of all in support of the common title, was properly refused, as it omitted the important element as to the length of the possession.

5. A prayer for instruction as to what would constitute a break in the continuity of possession of a tenant in common, which did not state whether the possession alleged to constitute the break was adverse or by permission, or its nature, or how long it lasted, was properly refused.

PROCEEDING for partition by H. E. Rhea against J. C. Craig (603) and others, heard by *Moore, J.,* and a jury, upon issues raised before the clerk, at March Term, 1905, of BUNCOMBE.

The proceeding was for the partition of a large body of land which descended to the parties from their ancestor, James Craig. The defendants admit that they and the plaintiff had formerly been tenants in common of the land, but pleaded that on 6 April, 1868, they had entered into a written agreement which was signed by all of them, and thereby appointed three arbitrators or referees, Patton, Hemphill, and Davidson, to meet upon the premises and divide the land among the tenants in common, allotting to each of the parties his or her portion of the same; that the referees did meet upon the land and caused it to be surveyed and platted by T. C. Westhall, a surveyor, and the lines to be marked, and allotted by parol to each of the parties one of the lots or parcels as indicated on the map; that immediately thereafter the several (604) parties went into possession of the land, each of the part so allotted to him or her, which has been held ever since, that is, for thirty years, openly and adversely to the others and to all the world, up to known and visible lines and boundaries, and that by reason thereof the plaintiff and defendants are not tenants in common of the land, but are each sole seized of the portion so allotted to him or her, and so held by adverse possession since the allotment.

The court ruled that as the defendants had admitted that a tenancy in common once existed, the burden was upon them to show that it did not now exist, but had been severed, as alleged in their answer. The defendants were thereupon required to open the case.

There was much evidence concerning the alleged parol partition of the land—that of the defendants' witness, D. C. Stephenson, which bears upon the transactions and dealings of the parties with reference to a partition of the land being sufficient to indicate the general nature of the evidence introduced by the plaintiff as to that matter. He testified, in part, as follows: "The surveyor marked all the lines and corners and located all the shares. The arbitrators set apart to each one his share. We did immediately enter into possession, each of his share, and have remained in the exclusive possession, each of his share, ever since. The land as divided has been ever since assessed against each individual according to his share, and each has ever since paid taxes upon his share. These lines were marked and well known to all the parties, and have been recognized ever since by all the parties as lines between the parties. Mrs. Rhea entered into possession of her part at once, has occupied it ever since, cultivating or having it cultivated every year, built upon it and improved it and cleared up a great deal of it, until shortly before she began this suit. She never made any claim to my share or to that of the Craigs, that I ever heard of, until the beginning of this suit. She has never made any claim whatever to my part, and if she ever has to

the Craigs,' I never heard of it. I know that she never tres- (605) passed upon any of it. I have lived upon my part and cultivated and improved it by building upon it ever since the division, planted an orchard upon it which is still on it, and I would not have moved for $300. I have made as high as $300 on it in one year, that is, on the orchard alone. Neither the plaintiff nor any one else has ever made any claim to my share until the beginning of this suit, although I have lived upon it and made it my home constantly ever since the division. The Craigs have lived upon their shares continuously ever since the division, have improved it somewhat, have cultivated it every year since, and, so far as I know, no claim has ever been made upon it by the plaintiff or any one else until after this suit was brought. They have, since the division and shortly after the division, moved their fences upon the division lines and have maintained them there ever since." There was other testimony tending to corroborate Stephenson and to establish the agreement between the parties to divide the land by arbitration, and to show adverse possession under known and visible boundaries of the several lots since 1869.

The referees made no written report of their acts and proceedings. There was only the written submission, signed by the parties, the survey and plat of the surveyor showing the location and lines of the different lots, and the evidence as to the continuous and adverse possession of each party of his or her lot, as already stated.

The plaintiff introduced evidence tending to show that there had been no such partition of the land as would bind her, and no adverse possession of each of the tenants with respect to the portion of the land alleged to have been allotted to him or her, but that they had occupied the premises indiscriminately as tenants in common and without reference to any division of the same. There was evidence on the part of the defendants that at the time of the survey, Westhall, the surveyor, prepared deeds for the parties to execute, so that they could convey to each other the several lots according to the allotment, and that the plaintiff refused to sign the deed prepared for her, and that the (606) defendants were always able, ready, and willing to execute the deeds prepared for them. There was also evidence that the plaintiff had used and cultivated the land allotted to her and cut timber thereon. Some of the original defendants have died since the proceeding was brought, and other parties brought in. When reference is made to the defendants in connection with the transaction in 1868, the original defendants are meant.

The court charged the jury fully upon the facts as the jury might find them from the evidence, and especially as to the effect of the agreement

of the parties, the survey and allotment and the subsequent adverse possession of the lots by the parties, and among other instructions the court gave the following:

1. If the jury shall find from the evidence that there was a division of the land in controversy among the tenants in common, as alleged in their answer, and that the lines and boundaries fixed by the division were run and marked by the surveyor, and further, that each of the tenants in common entered into his or her share or part allotted to him or her, as alleged in the answer, claiming the same up to the lines and boundaries fixed by the division and claiming the same adversely to each other and all other persons, and that they remained continuously for twenty years or more in such adverse possession, so claiming up to the lines and boundaries, then the law would vest the title to such shares or parts in such tenants in common so having entered upon and remained in possession of the same. Therefore, if the jury shall find from the evidence that there was such entry and such possession by the tenants in common, and that the same continued uninterruptedly for twenty years or more, then the jury should answer the first issue in favor of the defendants and against the plaintiff, that is, they should answer the first issue "No."

2. If the jury shall find from the evidence that the original defendants entered into the adverse possession of such shares of the land in
(607) controversy as had been allotted to them, after a division of the same among the tenants in common, if they find there was such a division, and that while in such possession the plaintiff did by permission of the defendants so in such adverse possession, at any time; enter upon or cultivate any part of the land, cut and remove timber therefrom or do any other act thereon by permission and consent of such defendant being so in possession, then such act or entry, cultivation or cutting timber or other act would not interrupt or disturb the adverse possession of such tenant in common so holding his share adversely to the other tenants in common.

The plaintiff had requested the court to charge the jury as follows:

1. If the jury should find from the evidence that all the tenants in common of the land, as alleged in the petition and admitted in the answer, have been in the continuous, open, and notorious possession of some part of the land, the petitioner having been in possession of one part thereof, the heirs of William Craig of another part thereof, and Daniel Stephenson and his heirs of another part thereof, then the statute of limitations has not run in favor of either of the tenants in common against the others, but the possession of each is presumed to have been in the interest of all the tenants in common and in support of the common title.

2. If the jury shall find from the evidence that the heirs of William Craig have been in possession, within less than twenty years, of a part of the land which was surveyed by Westhall as the part to be allotted to the petitioner, then such possession by said defendants has destroyed the continuity of the possession of the petitioner, and no presumption of petition will arise by reason of their possession of that part of the land claimed by them, and their title to the land claimed by them will not be ripened thereby; and, on the other hand, if the jury shall find from the evidence that the petitioner has been in possession of a (608) part of the land surveyed by Westhall as the part to be allotted to Daniel Stephenson, such possession by the petitioner of said part will break the continuity of the possession of Daniel Stephenson and his heirs, and will prevent their possession from ripening the title of Daniel Stephenson and his heirs to that part of the land claimed by them.

These instructions were refused, and the plaintiff excepted. The plaintiff also excepted to the charge of the court upon the ground that there was no competent evidence before the court of any division or allotment of the land among the tenants in common or that the lines and boundaries were run and marked by the surveyor. Issues were submitted to the jury which, with the answers thereto, are as follows:

1. Are the plaintiff and defendants tenants in common and in possession of the land described in the petition or complaint, as alleged in the said complaint or petition? No.

2. Are the defendants Julius C. Craig and William H. Craig the owners of the tract of land referred to in the answer and designated as No. 2 on the plat attached to the answer, as alleged in the answer? Yes.

3. Are the defendants A. L. Stephenson and others, who claim under D. C. Stephenson, the owners of the tract of land referred to in the answer and designated as No. 3 on the plat attached to the answer, as alleged in the answer? Yes.

4. Is the plaintiff, Harriet E. Rhea, the owner in severalty of the two tracts of land described in the fifth paragraph of the answer and designated as No. 1 and No. 1 A on the plat attached to the answer, as alleged in the answer? Yes.

Judgment was entered on the verdict for the defendants, and the plaintiff appealed.

George A. Shuford, Peele & Maynard, and Locke Craig for plaintiff.
Charles A. Moore and Shepherd & Shepherd for defendants.

WALKER, J. We do not think this case presents any unusual, (609) and certainly not any extraordinary features. It can be decided upon correct principles if we will but bear in mind the nature of an

estate in common and its ordinary incidents. Tenants in common hold by unity of possession and are deemed to be seized *per my* and not *per tout.* They may hold by several and distinct titles, or by title derived at one and the same time by the same deed or descent. But however the estate is created, whether by act of the party, or by descent, or act of the law, they properly take by distinct moities and are seized of separate and distinct freehold, which is a leading characteristic of this relation. 4 Kent (13 Ed.), 367. One of the incidents of the estate is the right of each of the tenants to compel partition, which was given by the statutes of Henry VIII and William III, though it did not exist at common law, according to Blackstone. 2 Blk., 194. Partition at common law might be made by tenants in common by parol, with a feoffment or any written instrument evidencing the partition. But if by parol, it must have been with livery of seizin, and this is because the tenants have several freeholds. *Anders v. Anders,* 13 N. C., 529. "If two tenants in common be, and they make partition by parol and execute the same in severalty by livery, this is good and sufficient in law." Coke, 139a; 1 Gr. Cruise, Title 20, sec. 30. But in consequence of the Statute of Frauds in England, 29 Charles II, and in this State, Act of 1715, Revisal, sec. 976, no legal partition can now be made between tenants in common without deed or writing (*McPherson v. Seguine,* 14 N. C., 153; *Medlin v. Steele,* 75 N. C., 154), though it is said that an agreement in writing to make partition will have the same effect, in equity, as an actual partition at law. 1 Gr. Cruise, *supra;* Eaton Equity, 606. It has also been decided in some of the States, following the English rule, that where the partition has been made by
(610) parol agreement of the tenants and each has taken possession of his part or share and occupied it in severalty for a less period than is required to ripen title by adverse possession under the statute of limitations, a court of equity will recognize and enforce the agreement and decree to it to be valid and effectual for the purpose of concluding the right of the parties, as between each other, to hold their respective parts in severalty. *Goodhue v. Barnwell,* Rice Eq., 198; *Ebert v. Wood,* 1 Binney, 218; *Wood v. Fleet,* 36 N. Y., 499. But those decisions and many others to be found in the books, are based upon the doctrine of part performance, which is not recognized by us as sufficient to prevent the operation of the statute of frauds. *Ellis v. Ellis,* 16 N. C., 341; *Allen v. Chambers,* 39 N. C., 125; *Barnes v. Teague,* 54 N. C., 277. So that the judgment of the court below, if correct, must be sustained upon some other principle.

It has been generally held, we believe, that where land has been divided among tenants in common by parol and the tenants have gone

into possession of their several and respective shares in accordance with the agreement and have held possession of the same under known and visible boundaries, consisting of lines plainly marked on the ground at the time of the partition, and such possession has continued openly, notoriously and adversely for a sufficient time, under the statute of limitations, to bar a right of entry or of action, each of the tenants recognizing the right of the others so to hold and claiming the right to hold and possess the share allotted to him in his own right and in severalty and to exclude his cotenants from any right or participation therein, the possession thus acquired and held will vest a good and perfect title to such share in him. *Hazen v. Barnett,* 50 Mo., 506; *Slice v. Derrick,* 2 Rich., 627; *Gregg v. Blackmore,* 10 Watts, 192; *Haughabaugh v. Donald,* 53 S. C. (3 Brev.), 98; *Tomlin v. Hilyard,* 43 Ill., 300. There does not seem to be any case in our Reports presenting the identical question we have here. In *Anders v. Anders, supra,* (611) the question was not decided and could not have been, as the title descended to the tenants in common from their father in 1814 and the case was heard in this Court in 1830, so that there had not, at the latter date, been a sufficient length of possession by the tenants of their several portions to bar each other's rights. There were other circumstances in the case which prevent it from being an authority either way. We do not see why our case is not governed by the general principle long established in this Court, that where there has been an exclusive possession by one tenant of the common property for twenty years without any demand or claim for an account of rents, issues or profits from his cotenant, and without any acknowledgment on his part of title in said cotenant, the law in such a case raises a presumption that the sole possession was rightful and will protect it, and where the tenant out of possession brings ejectment, his entry will be considered as tolled and his right of action will be barred. *Cloud v. Webb,* 15 N. C., 290; *Black v. Lindsay,* 44 N. C., 467; *Thomas v. Garvan,* 15 N. C., 223; *Covington v. Stewart,* 77 N. C., 148; *Neely v. Neely,* 79 N. C., 478; *Whitaker v. Jenkins,* 138 N. C., 476; *Bullin v. Hancock,* 138 N. C., 198, and *Dobbins v. Dobbins, ante,* 210, where the cases are collected and reviewed. If the parol partition left the tenants in common with undivided interests in the shares allotted to each of them, still it must be conceded that if they severally took possession, each of his or her part, and have continued in the sole and exclusive possession ever since the allotment was made without the making of any claim or demand for rents, issues, or profits by any of them upon the others, but recognizing each other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession as much so as in the other cases where the possession was of the whole instead, as here,

(612) of a part only. When there is the same reason there must be the same law. Indeed, in this case, the principle of the authorities cited should more strongly apply, for when there is possession of the whole it is more consistent with the rule that the possessor is presumed to hold for the benefit of his cotenant, as well as for his own, than when the possession is only of a part allotted under a division of the land, by consent and agreement of all, for, though in the latter case the tenants in the eye of the law still own by moities in that part, the intent of the possessor to hold for himself to the exclusion of his fellow is, in fact, the more manifest. The technical relation is not altered, it is true, in the one case any more than in the other, until the bar takes place by sufficient length of possession, but the circumstances of the possession and the attitude of the parties, where there has been an allotment followed by possession in conformity therewith, impart greater force and conclusiveness to the presumption by which the entry of the cotenant is tolled. It is more in the nature of an actual assertion of right to the sole possession, in denial of all right in the other tenant, and is therefore really adverse, though not theoretically so, as the law, until a certain time elapses, regards the estate in the part so held as still undivided and the possession as promiscuous and not several, just as it does in the other case where the presumption arises from the sole receipt of the rents and profits and the inaction or supineness of the tenant out of possession.

This brings us to consider the charge of the court and the refusal to give the instructions requested. We think the court instructed the jury fully as to what facts were necessary to be found by them in order to bar the plaintiff's recovery. A charge could not be more explicit in that respect. The exception that there was no legal or competent evidence upon which to base the separate instructions is clearly not tenable, as the court did not declare that the parol partition, even when followed by possession of the several parts of the land for a less period (613) than twenty years, was sufficient, and therefore the objection that the agreement was forbidden by the statute of frauds and the oral evidence of it was incompetent falls to the ground. It was necessary to show the facts constituting the possession, the manner of acquiring it and the length of it, in order to raise the presumption of an ouster or of a deed and thus to defeat the plaintiff's claim to partition. The mere circumstance that the defense originated in a parol agreement did not exclude evidence of the possession under it, nor even evidence of the agreement itself and its attendant circumstances. The right to prove these facts rests upon a principle of law, as we have shown, quite distinct from any arising out of the statute of frauds. Nor do we think the jury were misled as to what their verdict should be if they should

find that the defendants had not, by the greater weight of the evidence, made out their case. The court had properly placed the burden of the issues upon them, and the jury must have understood from a consideration of the whole charge that, in the event supposed, they should answer the issue in favor of the plaintiff. There was ample evidence as to the marking of the lines.

The plaintiff's first prayer for instructions should not have been given, as it was misleading. It did not direct the minds of the jury to the true issues involved and was too narrow to be given without explanation. The instruction incorporated in the prayer omitted the important element as to the length of the possession and was therefore incomplete. It was not the contention of the defendants that the possession of a part of the land by one tenant in common was not presumed to be in the interest of all, but whether the possession had been so long continued as to bar the right to a partition. The instruction requested in the second prayer is equally erroneous as that contained in the first, for it does not state whether the alleged possession within less than twenty years of the part allotted to one of the cotenants by another of them was adverse or merely by permission of the former, nor (614) does it state what was the nature of the possession or how long it lasted, so as to show that it was of a kind which would break the continuity of the possession relied on to bar the plaintiff's right to partition. The gist of the whole defense is that the right and title of the tenants in common to their shares in severalty have accrued by reason of the exclusive occupation by each of the tenants of his own part, each claiming, as his alone, the part agreed to be his, and the others not disputing that claim, and each taking, as his alone, the product of his own part, except where by his permission others may have been allowed to enjoy it, but on the faith of the agreement. Unless we could see that the fact upon which the proposed instruction is based would, if found by the jury, prevent the estate in common from being turned into one in severalty by an otherwise exclusive and continuous possession for twenty years, we cannot say that the judge below erred in refusing to give the instruction. It is not clear that the possession, as stated in the instruction, was not taken under claim of right or was not temporary and permissive. Without a more definite statement of the nature of the facts relied on, the instruction requested would have tended more to confuse than to enlighten the jury.

We find no error in the rulings and judgment of the court.

No error.

Cited: Tuttle v. Warren, 153 N. C., 461; *Ballard v. Boyette,* 171 N. C., 26; *Collier v. Paper Corp.,* 172 N. C., 76.

(615)

DURHAM v. COTTON MILLS.

(Filed 28 May, 1906.)

Water and Watercourses—Rights of Riparian Owners—Reasonable Use—Pollution—Nuisance—Injuction—Protection of Public Drinking Supply—Statutes—Constitutional Law—Due Process—Police Power—Public Health.

1. A riparian owner has the right to have the stream flow by or through the land in its ordinary purity and quantity without any unnecessary or unreasonable diminution or pollution by the owners above.

2. The several proprietors along the course of a stream have no property in the flowing water itself, which is indivisible and not the subject of riparian ownership, but each one may use it as it comes to his land for any purpose to which it can be applied beneficially without material injury to the just rights of others.

3. Whether the upper riparian proprietor is engaged in a reasonable exercise of his right to use the stream is a question for the jury, under the proper guidance of the court.

4. Injunction is a proper remedy to prevent the fouling of the water of a running stream by its improper and unreasonable use when prejudicial to the rights of others interested in having the water descend to them in its ordinary natural state of purity.

5. When the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate.

6. In an action by a city to enjoin defendant from emptying sewage and waste material into a river 17 miles above the city's intake, the opinion of several physicians and laymen that the pollution at the outlet of defendant's sewer will injuriously affect the water at the intake and endanger the health of the citizens who use the water, without an analysis of the water at the point of intake, is insufficient, under the facts and circumstances of this case, to authorize injunctive relief, especially where defendant's proof shows that there are many obstructions to the passage of deleterious matter and many natural means of purification between the site of defendant's mill and the intake.

7. Revisal, sec. 3051 (Laws 1903, ch. 159, sec. 13), prohibiting the discharge of sewage into any stream from which a public drinking supply is taken, is not confined to the watershed of 15 miles above the intake as defined in sections 2 and 3 of said act (Revisal, secs. 3045-6), but extends beyond 15 miles from the intake of any stream from which water is taken to be supplied to the public for drinking purposes.

8. Revisal, sec. 3051 (Laws 1903, ch. 159, sec. 13), prohibiting the discharge of sewage into any stream from which a public drinking supply is taken, without reference to the distance of such discharge from the point of

intake, is not unconstitutional as a taking of property without condemnation and without compensation, but is a valid exercise of the police power of the State to secure the public health.

ACTION by the city of Durham and T. A. Mann against Eno (616) Cotton Mills, pending in the Superior Court of DURHAM, and heard by *Ferguson, J.*, at chambers in Durham, on 10 February, 1906, upon a motion for an injunction to the final hearing.

The action was brought for the purpose of enjoining the defendants from emptying its sewage into the waters of the Eno River, from which stream the plaintiffs allege the water supply of the city of Durham is obtained partly in the summer months. The material part of the complaint is as follows:

That the defendant owns and operates a cotton factory located about 300 feet from Eno River, at the town of Hillsboro, in Orange County, North Carolina, and employs in and about its factory about 300 operatives.

That said defendant maintains water-closets in its said factory for the use of its said operatives, and the deposits of human excrement therein are flowed and discharged through an 8-inch terra-cotta sewer pipe directly into the Eno River, at a point about 300 feet from said factory; that at times said sewer pipe becomes choked and stopped up, and then said deposits or excrement and sewage are run (617) through an open ditch and a small drain into said Eno River at about the point of discharge of said sewer pipe above-mentioned; that it also maintains in connection with its said closets and system of sewage a manhole or brick chamber, which is just outside of its said factory, which manhole or brick chamber frequently overflows on account of the choked condition of the discharge pipe, and the overflow therefrom is deposited on the ground at and around the manhole, and is washed into the Eno River.

That the defendant also discharges large quantities of dye waste on the ground just outside of its factory, which flows and empties into the river, near the point where defendant's sewer pipe empties.

That said defendant owns about sixty dwelling-houses, located on both sides of said Eno River, and on its watershed, which are occupied by the operatives in defendant's factory, and maintains in connection with said dwelling-houses a large number of open privies without a tub system, some of which said privies are within 100 feet of the Eno River, and that the fecal matter from said privies is washed by the rains into the Eno River.

That the said city of Durham and its inhabitants are now and have been for the past seventeen or eighteen years supplied with drinking-

water from a plant which is located on the Eno River at a point a few miles below defendant's said factory; and that the public drinking-water supply of Durham and its inhabitants is taken from the Eno River at said plant.

That the city of Durham has demanded of the said defendant that it provide some other method of disposing of its sewage and dye waste, and other dangerous and foul matter, and that it discontinue to empty and discharge the same into the said Eno River, all of which said defendant has refused and still refuses to do; but on the contrary, (618) willfully, negligently, unlawfully, and in disregard of the comfort, safety, and health of the inhabitants of the city of Durham and of the plaintiff T. A. Mann, is flowing and discharging its raw sewage into the Eno River, from which the public drinking-water supply of the city of Durham is taken, without having said sewage passed through some well-known system of sewage purification approved by the State Board of Health or any other system of purification, and has avowed its purpose to continue to do so.

That as plaintiffs are informed and believe, the waters of the Eno River have become and are now being polluted and made unfit for drinking purposes, and that the health of the inhabitants of the city of Durham and of the plaintiff T. A. Mann are seriously menaced because of the acts of the defendant complained of above.

The prayer is for a perpetual injunction. His Honor granted a restraining order, with an order to show cause why an injunction to the hearing should not be issued.

The plaintiff in support of the allegations of its complaint filed several affidavits of physicians to the effect that the sewage, dye waste, and other deleterious matter, which are discharged into the river from the defendant's premises at Hillsboro, not only pollute the stream at that place, but will, in the opinion of the witnesses, pollute it at the place of intake near Durham where the plant of the waterworks company is located. Affidavits were also filed which tended to show that large quantities of feculent matter and dye waste are daily discharged into the river from the defendant's premises. It is not necessary to set forth the statements of these affidavits more fully, as they are quite sufficient to show that the water of the Eno River at Hillsboro is polluted by the acts of the defendant, and that one of the principal sources of such pollution is the daily deposit in the river of the contents of the defendant's sewer, and this is not only not denied by the defendant, but expressly admitted. One physician, whose affidavit was read by the plaintiff, expressed the opinion that the condi- (619) tions at defendant's mill had much to do with the presence of

typhoid fever in Durham and with the impurities found in the water supply of said city, and that, if there should be typhoid fever among the defendant's mill operatives, it is more than probable that it would be communicated to the inhabitants of Durham through the water and cause a serious epidemic, if present conditions are allowed to be continued. No evidence was offered by plaintiff tending to show that an analysis of any kind had been made of the water at the point of the intake near Durham to ascertain if there had been in fact any pollution of the stream at that place.

The defendant, while admitting the pollution of the river at its mill site, near Hillsboro, denies that it extends to the water at the intake of the water company, near Durham. In support of its denial it offers proof of the following facts: The volume of sewage conveyed into the river is very small, compared with the volume of water into which it flows. The sewerage pipe is only 8 inches in diameter and empties 18 miles above the water company's intake. The excreta are carried through the pipe, by the flushing of the closets with fresh water, to the river 200 yards distant, and by the time of arrival at the outlet of the sewer the solid matter is practically dissolved. The sewage then passes immediately into the "upper reaches of a pond," which extends one and a half miles below the mill, and there are two other ponds below and four backwaters of former ponds with their dams now broken. There is necessarily sedimentation, which is a means of precipitation recognized by all the authorities upon the subject. In the stretch between the defendant's discharge pipe and the intake of the water company are numerous spring branches, creeks and brooks of fresh and pure water, flowing into the Eno River millions of gallons every 24 hours. Thus dilution takes place, another recognized means of precipi- (620) tation. That the flow of sewage is not only small, as already alleged, but is never constant. The dyestuffs are discharged into an open drain at said mills after their coloring matter has been as much as possible removed, and little of the dye makes its way to the river, and not enough to discolor the water, and that none of it, as defendant is informed, would be injurious to health. That a flowing stream constantly renews from its sources and the accessions from other water courses and the interruptions of the current of this river by ponds and backwaters as described, would give the water polluted at the mouth of the sewer and drain ample time, considering the distance to be traversed, to become chemically and bacteriologically pure before it reaches the intake. The defendant also alleges that while the water company's plant was located on the Eno River before its mill was built near Hillsboro, yet that water was not taken from the stream for the purpose of supplying the city of

Durham until three or four years after the defendant began to discharge sewage into the river and otherwise to use its premises as stated in the complaint. It further avers that the plaintiff could have an abundant supply of pure water from Nancy Rhodes Branch, if the water company had not carelessly and negligently permitted its pond, which is supplied by that branch, to fill, so that the volume of water it could have held was greatly diminished, and that the water company or the city of Durham can easily obtain a sufficient supply of pure water from two or more creeks conveniently located. That a plant for purifying sewage could be erected at defendant's mill only at great expense and would add nothing to the purity of the water at the intake of the water company, while the water company at little expense rid the water of any impurities which it might gather as it flows and carry along with it to the intake. It is further averred that the water company has not a sufficient settling reservoir at its plant.

There are other matters stated in the affidavits of the respective (621) parties, but it is not necessary that they should be set forth. The presiding judge made the following finding of facts and the following order thereon:

This cause coming on to be heard by consent in the city of Durham, on 10 February, 1905, and being heard upon the affidavits filed, after argument of counsel, it appears to me from said affidavits filed in the cause:

That the Durham Water Company, a corporation, supplies water to the city of Durham, for the use of its citizens for drinking and other purposes. That the water with which said city of Durham is supplied, for a considerable portion of the year, is taken from the Nancy Rhodes Branch, a tributary of Eno River, but that when the waters become low, during the summer and other seasons, when there is not much rain, the Nancy Rhodes Branch does not afford a sufficient supply for the needs of the city of Durham and its inhabitants, and on such occasions and for such times the water has been taken from Eno River and conveyed through pipes to the city and used by the inhabitants for drinking and other purposes.

Eno River is a stream some 7 miles from the city of Durham; has its source in Orange County, and flows by the town of Hillsboro and the mill settlement of the defendants, the Eno Cotton Mills, which are situated near the town of Hillsboro and close to, some 300 yards from the river, and about 17 miles above the intake of water for the plaintiff and the city of Durham.

The defendant, the Eno Cotton Mills, is a corporation and has a large plant near the Eno River, as above set out, in which it employs 300 or

more operatives, and has dwellings on or near the banks of said Eno River for the occupancy of its operatives and their families. That in said mill are closets, for the use of its operatives; that the discharge from said closets is conveyed, in its raw state, through terra-cotta pipes and open drains, into Eno River, and the refuse of dyestuffs from (622) the said mill is emptied out on the ground and flows and is washed into the river; that the operatives at their dwellings use privies, from which once a week the excrement is hauled off and buried. That the discharge from said mills and the dwellings of said operatives flow into Eno River and pollute and render unwholesome the water of the river at the place of discharge of said sewage, and for some distance below said mill.

It further appears, from said affidavits filed, that the pollution of the water of said river, by reason of the discharge from said mills, continues to such an extent down to the intake of the water supply for the city of Durham as to render the water less wholesome and in case of an epidemic at said mill, such as typhoid fever, would be dangerous to the health of the citizens of Durham using water from said river for drinking purposes.

The defendant has used no precautions to prevent polluting the water of Eno River and does not propose to do so. The Durham Water Company established its plant on Eno River, 7 miles from the city, before the defendant constructed its mills or built its plant, but did not use the water of the river for its supply of water to the citizens of Durham until after the defendant built its plant and had its mill in operation with the same system of sewerage and the same method for the disposal of its dyestuff and the human excrement as now used—with like pollution of the stream.

It further appears from said affidavits that the water now being used by the citizens of Durham is supplied from Nancy Rhodes Branch, and that the flow of said branch in all probability will be sufficient to supply the inhabitants of the city of Durham until the summer months, and that said water is pure, but that when the dry weather comes, and the streams become low, the flow of Nancy Rhodes Branch will not be sufficient to supply the city with water, and then the water for such supply will necessarily in part have to be taken from the Eno (623) River.

It is therefore considered, ordered, and adjudged, that the restraining order heretofore issued be suspended in its operation until 20 April, 1906, in order that the defendant, in the meantime, may provide some well-known system of sewage purification, to be approved by the State Board of Health.

That from and after 20 April, 1906, the defendant, its agents, servants, and employees, under its control, is and shall be restrained from flowing or discharging any sewage into said Eno River until the same shall have passed through some well-known system of sewage purification approved by the State Board of Health and from depositing human excrement and dyestuff, on the watershed of the Eno River at Hillsboro, so near to said river that the same shall flow or be washed into said river, until the final hearing of this action. From this order the defendant appealed.

Fuller & Fuller and R. B. Boone for plaintiff.
S. M. Gattis, J. W. Graham, and Frank Nash for defendant.

WALKER, J. This is an application for an injunction to restrain the defendant from polluting the Eno River, which, it appears, is in part the source of supply to the city of Durham of water for drinking and other purposes requiring it to be kept free from impurities. The plaintiffs, although they have stated but one cause of action, base their right to relief upon two grounds: 1. That as the water supply of Durham is obtained partly from the Eno River at a place on that stream where the water company's plant is located, it has the rights in the water of the river of a riparian proprietor. 2. That if this is not so, it has the right to have the defendant enjoined from polluting the waters of the (624) river under the recent act of the General Assembly (Revisal, sec. 3051), which reads as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the State Board of Health; and the continual flow and discharge of such sewage may be enjoined upon application of any person." This enactment, in connection with the fact alleged that the city of Durham actually draws its water supply at a certain season of the year from the Eno River, is claimed to confer upon it the right to enjoin any act of the defendant in violation of the statute which tends to contaminate the water of the river at the outlet of its sewer near Hillsboro, where its cotton factory is situated. We will consider these questions in their order.

It is well settled by the authorities that at common law a riparian owner has the right to have the natural stream of water flow by or through his land in its ordinary, natural state, both as to its quantity and quality, as incident to the ownership of the land by or through which the watercourse runs, and that right continues, unless it has been lost or in some degree abridged by adverse user or by grant. This, it

must be understood, is not an absolute and unlimited right, but the principle as thus stated should be qualified so as not to interfere with the equal rights of other upper and lower proprietors on the same stream. The riparian right, therefore, expressed with greater accuracy, is to have the stream to flow by or through the land in its ordinary purity and quantity, without any unnecessary or unreasonable diminution or pollution of the stream by the owners above. The several proprietors along the course of the stream have no property in the flowing water itself, which is indivisible and not the subject of riparian ownership, but each one may use it as it comes to his land for any purpose to which it can be applied without material injury to the just rights of others. (625) This right to the use of water in its natural flow is not an easement nor is it merely an appurtenance, but it is something inseparably annexed to the soil itself and exists *jure naturæ* as parcel of the land. We think these principles will be found to be sustained by the authorities upon the subject. Gould on Waters, secs. 204 to 224; *Mason v. Hill,* 5 B. and Ad., 1; *Wood v. Wand,* 3 Exch., 748; *Waterworks Company v. Potter,* 7 H. and N., 160; *Canal Co. v. Waterworks Company,* L. R., 9 Ch. App., 45 (*S. c.,* L. R., 7 H. L., 697); 1 Farnham on Waters, secs. 62 to 65; *Mayor v. Mfg. Co.,* 59 Md., 96. In *Prentice v. Geiger,* 74 N. Y., 345, the doctrine is thus stated: "The use of the water, as it passes, is the only right which, in the nature of things, he (the riparian proprietor) can have in it, and he acquires no exclusive right beyond its actual appropriation. But as all proprietors on the stream have an equal right to the use of the water and to share in the benefits from its use, the right of the several persons is not an absolute, but a qualified one, and the use of each must be such as is consistent with the substantial preservation of the equal rights of others. There are some uses which by common consent a riparian owner may have of the water, as it flows upon his premises, although such use may to some extent interfere with the use of the stream in its natural flow by the proprietors below. As, for example, the proprietor above may use the water for domestic purposes—the watering of cattle and the like—although such may diminish the volume of the stream to the detriment of lower proprietors. The right to such uses—without which all beneficial use of the water by the riparian owner would be prevented—is allowed *ex necessitate,* and is universally recognized."

The Court in *Canal Co. v. Waterworks Co., supra,* says: "All (626) streams, however, are *publici juris,* and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream; and therefore any person living on the banks of the stream has an undoubted right to the use of the water for himself, his

family, and his cattle, and for all ordinary domestic purposes, such as brewing, washing, and so on. Those are the common purposes of water in the ordinary mode of using water."

The principle is well stated in *Strobel v. Salt Co.,* 164 N. Y., at page 320, as follows: "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force: *aqua currit et debet currere ut currere solebat.*"

After all that can be said, the question is whether the upper riparian proprietor is engaged in a reasonable exercise of his right to use the stream as it flows by or through his land, whether with or without retaining the water for a time or obstructing temporarily the accustomed flow, and whether he is so doing, as the above authorities show, is a question for the jury under the proper guidance of the court as to the law applicable to the particular state of facts. *Hayes v. Waldron,* 44 N. H., 580; *Strobel v. Salt Co., supra.* But in order that this right to have (627) the water of a stream flow with undiminished quantity or unimpaired quality may be successfully asserted, the person who sets up a claim to its enjoyment must show that he is a riparian proprietor or that in some way he has acquired riparian rights in the stream. There is nothing in this case, as now presented, which tends to prove that the plaintiffs are riparian proprietors in respect to the Eno River. They do not allege that the city of Durham is the owner of any part of the banks of that stream, but, on the contrary, the proof tends to show that it is not. The Durham Water Company has a plant abutting on the river and has been using its waters for some years to supply the city of Durham; but that company for some unexplained reason has not been made a party to this suit, nor does it appear even by inference what kind of contract it has with the city for furnishing water. As to all of these matters, we are left without any information. It would seem, therefore, that we cannot proceed to administer relief to the plaintiffs by enjoining the acts of the defendant, if this case is treated simply as one for the sup-

pression of a nuisance, unless we had more definite allegation and proof as to the right of the plaintiffs to maintain this action, without the presence in the record of the water company as a party. We express, though, no decided opinion as to this feature of the case, as we find it unnecessary to do so.

Assuming that the city of Durham is a riparian owner or has riparian rights in the river, we yet think that the plaintiffs' proof falls short of being sufficient for the Court to interpose at this stage of the case a preliminary injunction and restrain the defendant until the hearing from continuing to commit the acts alleged to be injurious to the plaintiffs. If the defendant, being an upper riparian proprietor, and as such entitled to the ordinary use of the water, including the right to apply it in a reasonable manner to domestic uses and even to purposes of trade and manufacture, is using the water of the stream in an unreasonable manner, and has defiled the same to such an extent as to constitute (628) an actual invasion of the rights of the plaintiffs, then both are clearly entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. *Mayor v. Mfg. Co., supra,* and cases cited.

Injunction is undoubtedly a proper remedy to prevent the fouling of the water of a running stream by its improper and unreasonable use when prejudicial to the rights of others interested in having the water descend to them in its ordinary natural state of purity. *Goldsmith v. Tunbridge Wells Co.,* L. R., 1 Ch. App., 349, and cases *supra.* But have the plaintiffs made out any such case? They must not only establish that they have a right to be protected, but they must, in addition, show by satisfactory proof that the right has actually been infringed in some material way or that the defendant is about to commit some act which will tend so far to impair the right as that the damage will be irreparable. "It is a well-settled rule of equity procedure that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting, and the injury be doubtful, that will constitute a ground for withholding the process. When the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate." *Aqueduct Board v. Passaic,* 45 N. J. Eq., 393; 2 Story Eq. Jur., 924a; *Brookline v. Mackintosh,* 133 Mass., 215; *Atty.-Gen. v. Heishon,* 18 N. J. Eq., 410; 1 High on Injunctions (4 Ed.), secs. 774 and 811; *Crossley v. Lightowler,* L. R., 2 Ch. App., 483.

In this case the plaintiffs have not shown by any satisfactory proof, such as the law requires, that the river at the intake of the water company has been polluted. It was an easy matter for the plaintiffs (629) to have the water analyzed at the place where it is drawn into the mains through which it is conveyed to the city, and it appears by the evidence in the case that a chemical and bacteriological analysis could have been made, which would have ascertained, with a reasonable degree of certainty at least, whether the water had been corrupted at the intake by the sewage and waste material deposited in the stream at defendant's mill. There is proof on the part of the defendant that there are so many obstructions in the way of the passage of deleterious matter from the site of the mill to the intake and so many natural means presented for the renewal and purification of the stream by the influx of great quantities of fresh and pure water from its tributaries and by sedimentation as to make it improbable, if not impossible, that any deadly germs could "survive the journey" for so many miles between the two points on the river. The only evidence offered in answer to the proof introduced by the defendant and the inference to be fairly drawn from the failure to make a proper analysis to establish the contention which seems susceptible of demonstration in that way, are the opinions of several physicians and one or two laymen, to the effect that the pollution at the outlet of the defendant's sewer will injuriously affect the water at the intake and endanger the health of the citizens of Durham who use the water taken from the river. Opinions of this kind are of the highest value under certain circumstances, but the law requires something more tangible and definite as a basis for seriously interfering with important industrial enterprises. In a case somewhat similar to this, in which just such proof was relied on, the Court said: "Speaking with all possible respect to the scientific gentlemen who have given their evidence, we think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are no (630) doubt in such cases of great value in aid of or in explanation or qualification of the facts which are proved, but in our judgment it is upon the facts which are proved, and not upon conclusions, we ought in these cases to rely. In our view, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." *Goldsmith v. Tunbridge Wells Co.*, 1 Ch. App., 349. That case was reviewed at length and approved in *Aqueduct Board v. Passaic, supra,* where a most learned discussion of the subject will be found; and the same may be said of *Mayor v. Mfg. Co., supra,* where *Judge Alvey,* who delivered the opinion of the Court, states with his usual clearness

and force the true principles and grounds upon which the courts proceed in such cases as the one we have under consideration. See, also, *Missouri v. Illinois,* 180 U. S., 208; *Atty.-Gen. v. Mayor,* 45 L. J., 736. The injury here is entirely prospective, and it is only possible to form an opinion upon evidence which does not enable us to do more than conjecture whether the apprehension of the plaintiffs is well grounded and free from reasonable doubt. So far as the present state of the proof goes, the jurisdiction of a court of equity is invoked to restrain that which is alleged may, or at the most will, create a nuisance, and not that which in fact does create a nuisance. *Missouri v. Illinois,* 26 Sup. Ct. Rep., 331; *Dorsey v. Allen,* 85 N. C., 358. But if the court should interfere by injunction where it is merely probable that a nuisance will result from the acts of the defendant, we do not think the plaintiffs have sufficiently brought their case within the operation of this rule. *Ellison v. Comrs.,* 58 N. C., 57; *Barnes v. Calhoun,* 37 N. C., 199; *Simpson v. Justice,* 43 N. C., 115; *Vickers v. Durham,* 132 N. C., 880; *Dorsey v. Allen, supra; Stockton v. R. R.,* 50 N. J., Eq., 80. Proof easily accessible to the plaintiffs and which would have established the fact of nuisance beyond any doubt was not produced, but the Court is urged to resort to evidence of a secondary and less satisfactory nature upon which to determine the important rights of the parties. Under (631) the facts and circumstances, as disclosed by the record, we would have been obliged to reverse the ruling of the court below and leave the plaintiffs to the necessity of making good their allegation of nuisance at the hearing, in order to entitle themselves to injunctive relief, and this course would be pursued, if we were confined in our investigation of this case to the mere fact of nuisance. But we are not so restricted, as the Legislature has spoken upon the subject of this controversy, and it is our duty to give due heed to what it has said. Its declared will is the law and must be enforced, if it has been sufficiently expressed or by fair construction it can be ascertained.

The Legislature by chapter 670, Laws 1899, undertook to protect public water supplies from contamination by providing for a thorough system of inspection and the adoption of such sanitary measures as would be likely to contribute to that end. This law contained no provision as to the discharge of sewage into any streams of the State from which a public water supply is taken, but simply related to the subjects of inspection and sanitation. Believing that such a system was not adequate to the full protection of the people of this State from contamination of the water used for drinking and other domestic purposes, the Legislature passed another act, it being chapter 159, Laws 1903, entitled, as the former act, "An Act to Protect Water Supplies." This act contained

all the features of the act of 1899 and provided generally in section 1 that water companies should take reasonable precautions to insure the purity of water supplied to the public. It is provided in section 2 that companies which are supplied from lakes, ponds, or small streams not more than 15 miles in length shall at their own expense have a sanitary inspection of their entire water-shed not less than once in every
(632) three calendar months, and special inspections when circumstances seem to require them. It then directs how the inspection shall be made, namely, by a particular examination of the premises of every inhabitant of the water-shed and a search in passing from house to house for dead bodies of animals or the accumulation of filth, excepting uninhabited fields and wooded tracts which are free from suspicion. Where the supply of water is drawn from rivers or large creeks having a minimum daily flow of ten million gallons the provisions of section 2 shall apply only to the 15 miles of water-shed draining into the said river or creek next above the intake of the water company. Provision is then made for an inspection by every city or town having a public water supply of its entire water-shed, and it is declared to be a misdemeanor to deposit dead animals or human excreta on the water-shed of any water supply or to defile, corrupt, or pollute any well, spring, drain, branch, brook, creek, or other source of a public water supply. Then follows section 13 of the act, which is as follows: "No person or municipality shall flow or discharge sewage into any drain, brook, creek, or river from which a public drinking-water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the State board of Health; and the continual flow and discharge of such sewage may be enjoined upon application of any person."

This act has been inserted in the Revisal as chapter 76, and is not materially different as there found from what it was in the original form. The provision in regard to the flowing or discharging of sewage into a stream from which a public water supply is taken seems to be very explicit, and susceptible of but one construction. The defendant contends: (1) That section 13, chapter 159, Laws 1903, it being section 3051 of the Revisal, applies only to sewers maintained within the distance of 15 miles above the intake, which is the water-shed as defined in the second and third sections of chapter 159 of the act and sections 3045 and
(633) 3046 of the Revisal. (2) That if the provision of section 13 is construed to apply to this defendant, whose mill is situated 17 miles above the intake of the Durham Water Company, then it is unconstitutional and void as being in effect a taking of the defendant's prop-

erty without condemnation and without compensation; in other words, it is confiscation.

We cannot assent to either of these propositions. If we could think that the acts of the defendant are not within the inhibition of that law or that its property is about to be unlawfully taken or interfered with, we would not hesitate to interpose and protect it from such contemplated action. But the meaning of the Legislature is so clear to us and its power thus to legislate is so well established, that we could not so act without plainly disregarding the mandate of the lawmaking body given in the rightful exercise of its constitutional power. As to the defendant's first contention, it is clear that by the second and third sections of the act the Legislature intended to establish a water-shed solely for the purpose of inspection. This is to be deduced from the very language in those sections, and, further, it appears from the manner in which the inspection is required to be made that sewage was not the source of infection or pollution intended to be guarded against by the inspection of the water-shed. It is plainly excluded by the very terms of those two sections. At least, it so appears to us. But if there could be any doubt as to the true meaning of that part of the act, we think that section 13 (Revisal, sec. 3051), which is quoted above, is so broadly worded as to absolutely preclude the construction that the Legislature intended to limit the acts therein prohibited to be done to the water-shed of 15 miles above the intake. We can give to that section no other meaning unless we read into it something that is not there and clearly not intended to be there. The act forbidden is "the flow or discharge of sewage into any river from which a public drinking supply is taken," unless purified as therein provided. It does not confine its operation to the water- (634) shed, but extends to any stream from which water is taken to be supplied to the public for drinking purposes. To limit its scope as suggested would be to defeat the clearly expressed intent of the Legislature, and this we are not permitted to do. We entertain no doubt as to what was intended, and we are constrained to hold that the admitted acts of the defendant are within the prohibition of the statute.

The second position is equally untenable. It will be observed by reading the act that it is not required that the sewage discharged into the stream should injuriously affect the water at the intake; it is quite sufficient if it pollutes the river at the sewer's outlet. The Legislature has decided that it is desirable to preserve our natural streams in at least their present state of purity, and, where they have been polluted, to remove the cause as speedily and effectually as possible. It has, therefore, said that no person shall deteriorate the water at all by sending sewage into a natural stream until it has been purified and made whole-

some or until all the noxious matter in it has been eliminated. And this means, of course, that the water shall not be poisoned by sewage at the outfall. We must assume that the defilement of the water is an injury which is forbidden by the Legislature for perfectly good and sufficient reasons. It is not for us to question the policy or expediency of such an enactment. In this respect the Legislature has a large discretion, to be exercised in such way as will in its judgment promote the interests and advance the welfare of the people, and it has this discretion to such an extent as to be virtually a law unto itself so far as the manner of its exercise is concerned. Such legislation is not intended merely to abate an existing nuisance, but to prevent that being done which is a menace to the public health and which it is supposed may become a deadly peril and a public nuisance because fatal in its consequences. It is not, therefore, a void law because it is founded
(635) upon mere apprehension of evil, but is a precautionary measure which is clearly within the police power of the State and to be adopted when deemed necessary to secure the public health. We think the general principles we have thus stated will be found clearly stated by *Sir George Jessel,* for the Court, and supported by cogent reasoning in *Attorney-General v. Cockermouth,* L. R., 18 Eq., 172. That case and this one are not unlike in the facts to which the principle was applied. But a more elaborate treatment of the doctrine in its relation to the police power as its basis will be found in *S. v. Wheeler,* 44 N. J. L., 88. The facts in that case were also like those we now have before us in this record. The language of *Judge Magie,* speaking for the Court, would seem to have been uttered with reference to the facts we have here, did we not know that it was actually used in another case. Its appositeness must be our apology for quoting copiously from that case. The Court says: "The whole act plainly shows a design to protect from pollution the waters of creeks, etc., used as the feeders for reservoirs for public use, without any reference to whether such pollution in fact appreciably affects the waters when arrived at the reservoir. Nor does such a construction render this act objectionable. The design of the act is not to take property for public use, nor does it do so within the meaning of the Constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the State. Such acts are plainly within the police power of the Legislature, which power is the mere application to the whole community of the maxim, *'Sic utere tuo, ut alienum non lædas.'* Nor does such a restraint, although it may interfere with the profitable use of the property by its owner, make it an appropriation to a public use so as to entitle him to compensation. Of the right of the Legislature thus to restrain the use of private property in order to secure the general

comfort, health, and prosperity of the State, 'no question ever (636) was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.' *Redfield, C. J.*, in *Thorpe v. R. R.*, 27 Vt., 149. The same view has been always held in this State, and notably in *S. v. Common Pleas,* 7 Vroom, 72. It was also there held that the extent to which such interference with the injurious use of property may be carried is a matter exclusively for the judgment of the Legislature when not controlled by fundamental law. Nor is there anything to render such legislation objectionable because in some instances it may restrain the profitable use of private property, when such use in fact does not directly injure the public in comfort or health. For to limit such legislation to cases where mutual injury has occurred would be to deprive it of its most effective force. Its design is preventive, and to be effective it must be able to restrain acts which tend to produce public injury. Many instances of such an exercise of this power can be found. The State regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The State is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such a hospital there, because it is likely to spread contagion. So the keeping of dangerous explosives and inflammable substances, and the erection of buildings of combustible materials within the limits of a dense population may be prohibited because of the probability or possibility of public injury. Such instances might be indefinitely multiplied, but these are sufficient to illustrate this case. The object of this legislation is to protect the public comfort and health. For that purpose the Legislature may restrain any use of private property which tends to the injury of those public interests. That the pollution of the sources of the public water supply does so (637) tend, no one will deny."

We might well content ourselves with stopping here and resting our judgment upon the unanswerable argument there presented, and we would do so but for the great importance of the question and far-reaching consequences of our decision. The police power, by virtue of which this legislation is vindicated and justified, is no new or unusual exercise of the sovereign will. It had its origin in the most ancient maxims of jurisprudence. All property was originally acquired subject to regulation in its use by those cardinal principles embodied in the maxim, "The safety of the people is the supreme law," and the other maxim "So use your own as not to injure another." This was the original condition imposed upon the right of property in things, that it should be enjoyed

subject to reasonable regulations when considered necessary to promote the general good of society. A good statement of the nature and extent of this police power is to be found in *Thorpe v. R. R.*, 27 Vt., 140, where *Redfield, C. J.*, says: "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State, according to the maxim, *Sic utere tuo, ut alienum non lædas,* which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right, in the Legislature, to do which no question ever was or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the (638) right to do so in regard to railways should be made a serious question. This objection is made generally upon two grounds: (1) That it subjects corporations to virtual destruction by the Legislature; and (2) That it is an attempt to control the obligation of one person to another, in matters of merely private concern. The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use."

He then proceeds to demonstrate conclusively that the police power resides primarily and ultimately in the Legislature, and that private interests of every kind fall legitimately within the range of legislative control, both in regard to natural and artificial persons. "It seems incredible," he says, "how any doubt should have arisen upon the point now before the Court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied." The general conclusion reached is that there can be no manner of doubt that the Legislature may, if the public good is deemed to demand it—of which it is the judge, its judgment in all doubtful cases being final—require property to be used by persons, as well as their business to be conducted, so as to prevent harm or injury to the public. The same principle is strongly stated in *S. v. Common Pleas,* 36 N. J. L., 72. "While alcoholic stimulants are recognized as property and are entitled to the pro-

tection of the law, ownership in them is subject to such restraints as are demanded by the highest considerations of public expediency. Such enactments are regarded as police regulations, established for the prevention of pauperism and crime, for the abatement of nui- (639) sances and the promotion of public health and safety. They are a just restraint of an injurious use of property, which the Legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law. It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition 'that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.' Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed expedient. If, therefore, the Legislature shall consider the retail of ardent spirits injurious to citizens, or productive of idleness and vice, it may provide for its total suppression. Such inhibition is justified only as a police regulation, and its legality has been recognized in well-considered cases. It is neither in conflict with the power of Congress over subjects within its exclusive jurisdiction, nor with any provisions of our State Constitution, nor with general fundamental principles. Cooley on Const. Limitations, p. 583, and cases there referred to; *Thurlow v. Massachusetts,* 5 How., 504. It is not necessary to amplify discussion on this point or to criticise the cases in detail. The view here taken underlies the whole subject of police regulations, and cannot logically be narrowed in its application."

In *Comrs. v. Alger,* 7 Cush., 53, Chief Justice Shaw, referring to the police power, says: "This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the (640) power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits of its exercise. There

are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable." He then cites numerous instances in which the power can be rightfully exercised, and among them the use of property near inhabited villages in such a way as to produce dangerous exhalations, injurious to health and dangerous to life, and proceeds: "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. He (the owner) is restrained, not because the public have occasion to make any use of the property, or to make any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non lædas.* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." A case directly in point is *S. v. Streeper,* 5 N. J. L., 115.

The very contention made in this case that the property of the defendant is taken unlawfully and without due process of law,
(641) and that it is denied the equal protection of the laws, thereby violating the Fourteenth Amendment to the Constitution of the United States, was fully met and answered in *Mugler v. Kansas,* 123 U. S., 623, a leading and authoritative decision upon this question. The Court, by *Harlan, J.,* there says: "Undoubtedly, the State, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the General Government. But neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." He then asks the question, "Who shall determine whether the particular use of property is injurious to the public?" and gives this answer: "Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few. Under our system that power is lodged with the legislative branch of the Government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures

are appropriate or needful for the protection of the public morals, the public health, or the public safety." Summing up and stating the result of all the decisions of that Court, it is further said: "The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied in substance in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held (642) under the implied obligation that the owner's use of it shall not be injurious to the community. This Court has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests."

It was said in *Munn v. Illinois,* 94 U. S., 124, that while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and to use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *Sic utere tuo, ut alienum non lædas.* From this source come the police powers, which, as was said by *Chief Justice Taney* in the *License cases,* 5 How., 583, are nothing more nor less than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things." And again, at page 124: "A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." The same Court said in *Beer Co. v. Massachusetts,* 97 U. S., 32: "If the public safety or the public morals require the discontinuance of any (643) manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are

held subject to the police power of the State." But the case of *Fertilizing Co. v. Hyde Park,* 97 U. S., 659, seems to be directly in point. It involved the validity of an ordinance against conducting an unwholesome business within the corporate limits of the village of Hyde Park, and the plaintiff, who at great expense had erected fertilizer works in the county and transported animal matter through the village, sought to enjoin the enforcement of the ordinance, which it claimed would utterly ruin its business. The same contention was made there as here. The Court in *Mugler v. Kansas,* 123 U. S., at page 666, referring to that case and answering the contention, said: "The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the Court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It (the Court) said: 'We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.' "

Cases might be cited almost without number to sustain the general proposition now being considered. We will refer to several de-
(644) cided in the courts of other States which have a direct bearing upon the question. *S. v. Griffin,* 69 N. H., 1; *Durango v. Chapman,* 27 Col., 169; *Com. v. Russell,* 172 Pa. St., 506; *Haskell v. New Bedford,* 108 Mass., 208.

This Court has said in *Brown v. Keener,* 74 N. C., 714: "It is too late to question that the police power of a State (which is a part of its general legislative power) extends to the providing for every object which may be reasonably considered necessary for the public safety, health, good order or prosperity, and which is not forbidden by some restriction in the State or Federal Constitution, or by some recognized principle of right and justice found in the common law. It is unnecessary to consider at present the limits of this extensive power, since it clearly includes the right to provide for and compel the clearing out not only of such water-courses as are naturally navigable, but of all such water-courses and drains as are not and never were navigable, but which are necessary for carrying off the surplus rain water, thereby promoting

the public health and enabling a considerable portion of territory otherwise uninhabitable to be brought into cultivation. *Norfleet v. Cromwell,* 70 N. C., 634; *People v. Brooklyn,* 4 N. Y., 440; *Coster v. Tidewater Co.,* 18 N. J. Eq., 54; *S. v. Blake,* 36 N. J. L., 442; *Reeves v. Wood County,* 8 Ohio St., 343; Cooley Const. Lim., ch. 16; 2 Dillon Mun. Corp., sec. 506." Other cases which have been decided by this Court involving in one form or another questions arising out of the exercise of the police power are: *S. v. Muse,* 20 N. C., 463; *Intendant v. Sorrell,* 46 N. C., 49; *Pool v. Trexler,* 76 N. C., 297; *Norfleet v. Cromwell,* 70 N. C., 634; *S. v. Joyner,* 81 N. C., 534; *Winslow v. Winslow,* 95 N. C., 24; *S. v. Yopp,* 97 N. C., 477; *S. v. Pendergrass,* 106 N. C., 664; *S. v. Stovall,* 103 N. C., 416; *S. v. Hay,* 126 N. C., 999; *Hutchins v. Durham,* 137 N. C., 68; *S. v. McGinnis,* 138 (645) N. C., 724.

It is of course no defense that pure and wholesome water can be obtained from other sources than the Eno River. 2 Farnham on Waters, sec. 515. The fact is that the water supply of Durham is drawn from that stream, and that is what protects it under the act from being fouled by sewage. The preservation of the public health was the chief concern of the Legislature and the purpose of the act was to remove any possible danger which should menace it. Whether the plaintiffs would have any standing in court without the aid of the statute, and if left to depend upon its right to use the water of the Eno River under its contract with the water company, if it has one, is a question not presented for consideration, and upon it we express no opinion. Our decision must rest solely on the provision of the statute, which is susceptible of but one meaning, and which declares explicitly that streams used as is the Eno River, shall not be polluted, as disease may be communicated to the inhabitants of towns and cities by the use of the water. The fact that the public supply is taken from the stream is sufficient to bring it within the protection of the act, for we must construe the law as it is written and according to its true intent, looking at the evil sought to be remedied and giving it such effect as will not in the least disappoint the will of the people as expressed therein. If any hardship results, it is not from the construction of the law, but from the law itself and the declared policy of the State that the public health must be safeguarded. The welfare of the public is considered in law superior to the interests of individuals, and when there is a conflict between them, the latter must give way. *"Necessitas publica major est quam privata."* As the law is plainly written, so must we decide. The remedy of those who may suffer is by an appeal to the lawmaking body, who alone can abate the rigor of its enactment.

(646) The judgment must be affirmed, but the court below may so draw its order as to give the defendant a reasonable opportunity to comply with the statute. The injunction should operate so as to produce the least possible injury to the defendant's property and business consistent with the maintenance of the rights and interests of the public.

Affirmed.

Cited: S. c., 144 N. C., 706; *Cherry v. Williams,* 147 N. C., 456; *Little v. Lenoir,* 151 N. C., 419; *Shelby v. Power Co.,* 155 N. C., 199; *Berger v. Smith,* 160 N. C., 213; *Hines v. Rocky Mount,* 162 N. C., 414; *S. v. Lawing,* 164 N. C., 495; *Parrott v. R. R.,* 165 N. C., 316; *R. R. v. Light and Power Co.,* 169 N. C., 481; *Scott v. Comrs.,* 170 N. C., 330; *Board of Health v. Comrs.,* 173 N. C., 253, 255; *S. v. Perley, ib.,* 786, 790.

WALLACE v. RAILROAD.

(Filed 28 May, 1906.)

Railroads—Negligence—Evidence—Master and Servant—Use of Appliances—Contributory Negligence—Pleadings as Evidence.

1. In an action for the death of a brakeman alleged to have resulted from the giving way of an insecurely nailed crosspiece used to keep steady lumber loaded on a flat car, which deceased took hold of in getting down from the lumber to the floor of the car to make a coupling, evidence that it was customary for brakemen on lumber cars, loaded as this one, to make use of the crosspieces as deceased did, was competent.

2. Where, in an action for the death of a brakeman alleged to have resulted from the giving way of a crosspiece insecurely nailed to standards on a flat car loaded with lumber, which deceased took hold of in getting down from the lumber to the floor of the car to make a coupling, there was evidence that though the primary use of the crosspiece was to keep the lumber steady, such crosspieces were customarily used by brakemen in descending from the lumber to the floor of the car to make a coupling, the court did not err in refusing to nonsuit the plaintiff.

3. The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose.

4. The duty of the railroad company to have the crosspiece secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car.

5. Where the railroad company recommended to shippers that crosspieces, used to keep steady lumber on flat cars, should be secured to the standards by ten-penny nails, it was a question for the jury whether the use of eight-penny nails was evidence of negligence in that respect.

6. The introduction of a modified admission of one allegation of the complaint cannot have the effect of changing the entire theory of the case.

7. Where the evidence was conflicting in regard to the safest way to have made the coupling, the court did not err in refusing to hold as a conclusion of law that plaintiff's intestate was guilty of contributory negligence because he selected the most dangerous way.

ACTION by Sarah A. Wallace, administratrix of Minor T. (647) Wallace, against Seaboard Air Line Railway, heard by *Cooke, J.*, and a jury, at October Term, 1905, of MECKLENBURG. The defendant appealed.

Brevard Nixon and J. D. McCall for plaintiff.
Burwell & Cansler for defendant.

CONNOR, J. The defendant excepted to the ruling of the court admitting testimony regarding the customary way by which brakemen on lumber cars, loaded as the one upon which intestate was (654) injured, descended from the lumber piled on the car, to the floor of the car for the purpose of making coupling. Freeland says: "I know custom of couplers getting down to the front of a moving car, loaded with lumber, by catching hold of the crosspiece for the purpose of making coupling." In reply to a question he says: "It would have been necessary for him to get where he could see whether the coupler was properly adjusted. If these knuckles had been adjusted right he could have gotten down to the floor of the lumber car and adjusted the coupling as it approached the other car. . . . In going down to the front end of the car he would have been compelled to hold to the crosspiece on the end of the car in getting down, and after he got down he would have been compelled to hold to the ends of the lumber while making preparations to adjust the coupling. I don't know of my own knowledge what the custom of defendant's employees is anywhere except in Charlotte and Savannah." He then gives the extent of his knowledge and observation. Dellinger says that he knew the customary use to which crosspieces of standards at the end of lumber cars, loaded as this one, was put by the employees of the defendant company. That the crosspiece is put there to hold the lumber together, but they use it for holding to it in going up and down over the end of the car. He would take hold of the crosspiece and then take hold of the ends of the lumber. The only

way for a man to get off a lumber car would be to go over the end of it. He could not have gotten off on the side—he would have killed himself. By going to the front end of the car to make the coupling he can get his work done quicker." Bradley testified that he knew the custom, etc. "The crosspieces are put there to stay the load as far as the shipper is concerned and to keep the standards from spreading at the top, but it is an habitual thing, with switchmen and couplers, in going over (655) lumber cars, when they go to get down the ends of them to catch hold of the crosspiece to get down by. They do it frequently when the standards are close enough to the end for them to do so. . . . When they are anywhere like 15 or 20 inches from the end they make a good handhold to get down by, and practically the only handhold that they have got. . . . I would just climb down over the pile of lumber and stand on the floor of the car in a 10-inch space, reach out and put my foot on the bumper and adjust the knuckle and then turn around and climb back. Have done it many a time and seen it done many a time." Troutman, yard conductor for Southern, testified that he saw the car on which intestate was killed; he described the manner in which the car was loaded, standards and crosspieces. They are put on by shipper and removed by him when car is unloaded. He described manner of men in getting on top of lumber, etc. We have omitted those parts of the testimony upon which defendant relies to sustain its defense. We will consider them in that connection. The materiality of the testimony in regard to the custom of employees engaged in making couplings of cars loaded with lumber, as the one upon which intestate was killed, arises out of the fact that the crosspiece to which intestate caught hold was not primarily intended for that purpose. The liability of defendant for negligence in regard to securing them is dependent upon the secondary use to which it is claimed they were put by the employees. As we shall see later on, this question becomes both material and pivotal in one aspect of the case. Defendant's counsel in the conclusion of their able and exhaustive brief say that the exceptions, 1st to 8th inclusive, are to be considered in connection with the 9th exception to the refusal of the judge to sustain the demurrer to the evidence. We think, for the purpose for which it was received, the testimony objected to was competent. If the crosspieces are to be treated as coming within the statutory definition of "ways or appliances," much of this testi- (656) mony would be immaterial and irrelevant. That they do so is vigorously contested by the defendant. The probative force of this testimony as sustaining the plaintiff's contention is for the jury, and was so submitted by his Honor. Taking, for the purpose of the demurrer, the fact of the custom to be established, we have the following

facts bearing upon the defendant's alleged negligence: A train of nine cars (plaintiff's intestate being upon the rear one) was being backed over the defendant's road in the city of Charlotte for the purpose of coupling with others standing upon the track. The rear flat car was loaded with lumber, sawed plank, piled on the car to the height of 4½ or 5 feet. The ends of the planks came within 8 to 10 inches of the end of the car. Standards or pieces of wood of the proper size were placed in sockets on the sides of the car to steady the lumber. A piece of wood of sufficient size was nailed to the standards near the end of the car over the top of the pile of lumber, secured by three eight-penny nails at each end. The car was loaded and the standards and crosspieces furnished and placed on the car by the shipper. The defendant recommended to its patrons, loading cars with lumber for shipment over its lines, compliance with the rules of the Master Car Builders' Association, revised 1901, that when the specified fastenings are by means of boards, there must be two boards for every pair of standards and be fastened at each end by not less than three ten-penny nails. These crosspieces were placed for the purpose stated by the plaintiff's witnesses, and used by employees in the manner herein stated by said witnesses. On the night of the injury, the conductor and the intestate were on the lumber car while being backed to the other cars for the purpose of coupling. As the said train was being backed, as aforesaid, towards the freight depot, the conductor told intestate that there were two cars somewhere near the bridge, and that they were to couple the said cars onto said train or lumber car and shift back uptown. The cars were some 400 or 500 feet away at that time. It was the duty of the plaintiff's intestate to obey said orders. (657) While attempting to climb down over the front end of the moving lumber car to the floor, the intestate took hold of, and held to, the said crosspieces, which pulled off, or were jerked loose by the intestate, who thereupon fell upon the track, when the car ran over and killed him. The car was used by the defendant in its interstate commerce for the transportation of lumber.

The defendant contends that upon these facts the court should hold as a matter of law: (1) That crosspieces were not an appliance. (2) That the intestate was using a crosspiece for a purpose for which it was not intended. (3) That it was not defective.

For support of these propositions counsel cite a number of cases. In the view which we take of the case, and in which it was submitted to the jury by the judge below, it is not necessary to decide whether the crosspiece is within the meaning of the statute (Revisal, sec. 2646) "a way or appliance," with the resulting consequences for a defect therein. It may be conceded that it is not such an appliance as the automatic

coupler, or iron handhold, or many other parts of the equipment of the car, coming clearly within the language of the statute. It may also be conceded that the primary purpose for which it is placed on the car or nailed to the standard is to keep the lumber steady—the witnesses concurring in that statement, and many of the authorities cited by the defendant tend strongly to sustain its contention in that respect. The question, however, upon which the defendant's liability depends is whether, in addition to the primary use, it was adapted to and used by the employees for a secondary purpose—descending from the lumber to the floor of the car for the purpose of adjusting the knuckle and making the coupling. If this contention is correct, and the custom of using the crosspieces was sufficiently established to fix upon the defendant
(658) notice thereof, thereby imposing a liability to use reasonable care to have such crosspieces reasonably safe in their attachment to the standards, the authorities would seem to sustain the court in refusing to nonsuit the plaintiff. Judge Thompson, after stating the general rule in regard to the use of appliances not contemplated, says: "But this does not exclude the conclusion that the master may be liable when he has constructed an appliance for a particular use, but permits his servant to put it to another use, and in so using it the servant is injured through its negligent construction." 4 Thompson Neg., 4000. In *Brimer v. R. R.,* 109 Mo. App., 493, it appeared that the car upon which the plaintiff was employed when injured was used for hauling dirt; it had standards on either side about 3 feet high with forked tops; planks were used to hold the dirt, and secured by being placed in the forks; the plaintiff worked on a car equipped with standards and planks; and he was ordered by the foreman to work on another car on which one of the standards had no fork, and one of the planks rested on the top of the standard—a flat surface. The plaintiff was ignorant of this condition, and while the train was in motion, to steady himself, he put his hand against the plank, one end of which was in the fork and the other on the standard, having no fork. It slipped off and the plaintiff was thrown from the car and injured. It was shown that the workmen were in the habit of steadying themselves, while the train was in motion, by putting their hands on the boards on the standards. *Goode, J.,* said: "The main propositions invoked here are that the defendant was not guilty of negligence, inasmuch as the boards and standards were suitable for use as they were intended to be used, to wit, retaining the dirt on the car; that in attempting to use them for another purpose the plaintiff assumed the incident risk and that he was guilty of contributory negligence in not looking to see if both ends of the board rested in forks before he put his hand against it. We must decline to accept either

of these propositions. They may be considered together, as (659) they were based on the theory that the planks and standards were intended only to keep the car-load of dirt in place, and being reasonably safe for that purpose, the defendant's whole duty was discharged. No doubt the primary purpose in supplying the car with standards and planks was to retain the dirt, but the railroad company was bound to use care to provide its workmen a reasonably safe place to work, and the evidence shows beyond doubt that this duty was disregarded. When laid in the forks of the standards, as they were in every instance except one, the planks afforded so convenient a means of steadying the standing workmen as the train moved along, that the men would inevitably put their hands against them to resist the jolting of the train. This was habitually done, according to the evidence, and should have been anticipated by the company, not only as a customary, but as a perfectly natural act. Now, in leaving an end of one plank loose on the smooth top of a standard, while all the other planks securely rested in forks 12 inches deep, the defendant furnished the plaintiff and his coworkmen an unsafe place to work; for the crew properly may be said to have worked in traveling to and fro between the loading and unloading places. At any rate, they were in the line of duty. As ordinarily the boards rested in the forks when the train was in motion, and thereby afforded the men a means of supporting themselves and a protection against being jolted from the train or jostled about, it was negligence not to have the boards lodged so they could not slip under pressure of the hand." In *Babcock v. Johnson,* 120 Ga., 1030, 1035, *Lamar, J.,* discussing the principle involved in regard to the legal responsibility of the employer for injuries sustained in the use of instrumentalities furnished for other purposes, says: "Whether it would make any difference in the legal responsibility would depend in part upon his duty, at the time, in reference to the care, maintenance, and inspection of the instrumentality causing the peril. That, in turn, would in part depend upon the use for which it was intended and upon whether (660) the master knew that the servant must, or probably would, divert the appliance to a use not originally intended. For if a master directs an appliance to be used or knows that it will reasonably be used, for some purpose other than that for which it was originally intended, he puts it in the same position as if he had originally furnished it for that purpose. But the fact that it had been diverted to a new use will not render him liable, if that diversion occurred without his knowledge or consent." In *McDonald v. Svenson,* 25 Wash., 441, a longshoreman was injured in using, as a support, some part of the rigging of a vessel in passing from the ratline to the wharf and was injured in its giving

away. The Court in discussing the question of liability, said: "The rigging was thus used commonly, and by the master, for the purpose of reaching the wharf. The respondent was justified in concluding that it was intended to bear a man's weight. That would be its natural and obvious purpose. And we are unable to see that, as a question of law, the respondent was guilty of contributory negligence in using the means provided for ascending from his work to the wharf." *Bushby v. R. R.*, 107 N. Y., 374; *Coates v. R. R.*, 153 Mass., 297. A large number of cases are cited by counsel for plaintiff and defendant showing some divergence of opinion in the application of the principle to the peculiar facts of each case. Mr. Labatt, in his valuable work on Master and Servant, reviews the cases and concludes: "If new functions are imposed upon an instrumentality by the master himself, or his representative, and the servant is thereby exposed to undue risks, the master must answer for the injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied. The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same posi-
(661) tion as if the appliance had been originally furnished for that purpose. Accordingly, a qualification of the rule that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred, is admitted in cases when it appears customary for employees to put it to that use, and that the master knew of this custom." 1 Labatt, sec. 27. This, we think, is the correct rule. His Honor, therefore, in the light of the evidence, could not have withdrawn the case from the jury for the reason that the use of the crosspiece by the intestate was improper. In *Babcock v. Johnson, supra,* there was no evidence that the brace to which plaintiff caught hold was used for the purpose of supporting the defendant's servants in the discharge of their duty. That the duty of the defendant to have the crosspiece secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car is well settled. If the defendant permits the shipper to load the car, it is as much, and in the same degree, liable for an injury sustained by its servant by negligence on the part of the shipper as if its own servant had loaded it. *Bushby v. R. R., supra.* It would seem that the rule adopted by the Master Car Builders' Association, requiring the crosspiece to be secured to the standard by three tenpenny nails at each end, the observance of which rule was recommended by defendant to its customers, is evidence that it was the safe way of

securing the crosspiece, and the admission that in the crosspiece on the car upon which plaintiff's intestate was injured only eight-penny nails were used is evidence that the crosspiece was not reasonably secure. In the view which we are now considering the evidence, these facts were admitted. We cannot say as a matter of law that the failure to use the ten-penny nails, and the use of the smaller size, was no evidence of negligence in that respect. His Honor fairly submitted the (662) question to the jury.

While defendant notes a number of exceptions to the refusal to instruct the jury as requested and to the instructions given, counsel, in concluding their brief, say that the real controversy is dependent upon the 9th exception. "All other exceptions as appear in the record are abandoned except in so far as they have a direct bearing upon the 9th exception."

The motion for judgment of nonsuit involves in addition to the first issue the proposition that upon the most favorable view of plaintiff's evidence her intestate was guilty of contributory negligence. Before discussing this phase of the case it is proper to notice a question raised by defendant in regard to paragraph 19 of the complaint. After describing the position of her intestate on the car and the order of the conductor, she says: "The plaintiff's intestate then got down in a stooping position on the front end of the said lumber car, and in doing so he held to the piece of lumber that was nailed across the top of said lumber car. That he took hold of said crosspiece as a support to sustain him, as he had a right to do, and as was usual in such cases, in order to prepare the coupling, or see that it was prepared, so that it would couple to the said two cars for which said train was being backed." These two paragraphs are denied. Paragraph 19: "The plaintiff's intestate took hold of and held to the said crosspiece, which pulled loose with him, or let him fall on the track, when the car ran over him," etc. The answer contains the following, which was introduced by plaintiff: "Answering article 19 of the complaint, this defendant says that it admits that the plaintiff's intestate while attempting to climb down over the front end of the moving lumber car took hold of and held to the said crosspiece therein referred to, which pulled or was jerked loose," etc. Defendant contends that having introduced this admission for the purpose of proving the manner of the death of her intestate, that she thereby conclusively established the facts it purports to admit and that (663) plaintiff was precluded from contradicting such facts. That the effect of this admission is to establish the fact that intestate, when he took hold of the crosspiece, attempted to get off the moving car at the front end thereof. If this is so, and the defendant is correct in saying

that it is solemnly fixed by such admission, there would seem to be no doubt that, in view of the entire evidence as well as the reason of the thing, intestate was guilty of gross negligence which would, as a matter of law, be the proximate cause of his death. Every witness says that this would have been dangerous, one saying that if this was the purpose, he must have "meant to commit suicide." If defendant is correct in its contention in this respect, of course no evidence in regard to a custom to take hold of the crosspiece for the purpose of getting over the end of the lumber onto the floor of the car to adjust the knuckle of the coupler was competent. It is difficult to understand how a sane man would attempt to get off the front end of a moving car, thereby courting certain death. Certainly, the language of the complaint taken as a whole is not, in our opinion, reasonably capable of such construction. We cannot think that the defendant by making a modified admission of one allegation connected with others, being different links in the narrative, can change the entire theory of the case. There can be no doubt of the proposition laid down by the learned counsel regarding the probative force of admissions. We do not think that they sustain the conclusion sought to be drawn from that. The manifest purpose of the plaintiff was to allege that her intestate, being told by the conductor that they were to couple the cars, went to the front end of the lumber piled on the car and took hold of the crosspiece for the purpose of letting himself to the floor of the car to make the coupling. This, we think, is a fair construction of the pleadings, and while the only living witness to the accident was not introduced, this view is sustained by the
(664) testimony. Every witness upon cross-examination said that while they had seen couplers get upon the floor of the car, they never saw one get off the front end of a moving car. The entire complaint in respect to the manner in which intestate came to his death should be read in connection with the admission in the answer and should be liberally construed with a view to substantial justice between the parties. Revisal, sec. 495.

Defendant next insists that his Honor should have held as a conclusion of law that plaintiff's intestate was guilty of contributory negligence, because he selected the most dangerous of two ways to do his work. That he should have gone to the rear end of the car, gotten upon the ladder on the end of the box car next thereto and swung himself onto the ground, going thence to the front of the flat car and making the coupling from the ground. The evidence in regard to the relative safety in doing this was conflicting. Dellinger says: "I do not think it would have been safer to have gone to the rear of the car and gone down by

way of the ladder." It is not practicable to set out all of the testimony, but an examination of it discloses considerable diversity of opinion in regard to the safest way to have made the coupling, frequently the same witness upon cross-examination giving different opinions. In this condition of the evidence his Honor could not have taken the case from the jury and directed an affirmative verdict upon the second issue. This is too well settled to require the citation of authority. The language of *Holmes, J.*, in *Coates v. R. R., supra,* is applicable to this case. Discussing a similar question, he says: "The jury were warranted in finding that the plaintiff, although not directed to get on this particular car, naturally would do so and would be expected to do so in carrying out his orders, and in the way in which he did, and that he might have done so prudently if the jawstrap had been there. We cannot say, as a matter of law, that there was no prudent way of getting onto this kind of car for men experienced in the business, or that the way (665) adopted was not the best." In this case the conductor was in charge of the train; he gave the order to make the coupling, which it was the duty of plaintiff's intestate to obey in the usual, customary way, unless it was obviously dangerous. There was evidence tending to show that if the crosspiece had not given way he could with safety have performed the duty in the way he was pursuing. It would undoubtedly have required care after reaching the floor to have maintained his position on the very narrow space afforded, not over 10 inches, but by reason of the crosspiece giving way he never reached the floor, hence the conditions with which he would have been confronted did not arise. He may have successfully met them. The proximate cause of his fall was the failure of the crosspiece to sustain him. It is evident that the conductor did not intend to stop the train before making the coupling. He was approaching the car slowly. If there was any negligence in this respect it is under our fellow-servant law imputed to the defendant. *Fitzgerald v. R. R., ante,* 530. We have examined this record and the exhaustive, well-considered briefs, together with many of the authorities cited, with care. We find no error in his Honor's ruling. The jury, upon competent testimony and correct instructions, have passed upon every phase of the case.

The judgment must be

Affirmed.

Cited: Britt v. R. R., 144 N. C., 252; *Dermid v. R. R.,* 148 N. C., 197; *Blevins v. Cotton Mills,* 150 N. C., 500.

(666)

WILMINGTON v. BRYAN.

(Filed 28 May, 1906.)

Municipal Corporations—Collection of Taxes—Employment of Counsel —Contracts—Power Coupled with an Interest—Termination—Irrevocable Contracts—Impairment of Contract by Repeal of Statute—Quantum Meruit—Revocation, What Constitutes.

1. Where, under authority, of chapter 182, Laws 1895, empowering the city of Wilmington to collect its arrearages of taxes, and making it the duty of the city attorney, together with such associate counsel as he might select, to bring actions against delinquent taxpayers, the then city attorney associated other attorneys with himself for the collection of taxes, the contract for the collection of such taxes was one made with the city attorney, and not with his associates, and as such terminated with the expiration of his term of office.

2. The employment of counsel to collect arrearages of taxes, under chapter 182, Laws 1895, without any duration (unless it was the term of office of the then incumbent as city attorney), and without limitation as to time, was, in law, a contract terminable at the will of either party.

3. Where back taxes were placed in the hands of the city attorney for collection under an ordinance ordering their collection, and that when collected "it shall be the duty of the city attorney to return the books and take a receipt therefor," there is nothing in the resolution carrying a property right or power coupled with an interest, or creating a perpetual and irrevocable contract, either with such city attorney or with one of his subagents.

4. A resolution providing that the city shall pay 10 per cent of all taxes collected without suit and 20 per cent of all taxes collected by suit, does not confer any interest in the taxes, but is merely a method of measuring the compensation to be paid on the amounts collected, so long as the authority to collect is unrevoked.

5. If the interest is in that which is produced by the exercise of the power, then it is not a power coupled with an interest.

6. Where, under chapter 182, Laws 1895, the city of Wilmington was given authority to collect its arrearages of taxes, and it was made the duty of the city attorney, together with such associate counsel as he might select, to bring actions against delinquent taxpayers, the relation sustained by an associate counsel to the city was merely that of agent, and when the statute was repealed he had no contract right which was impaired.

7. The board of aldermen of a city could not make a contract for the employment of legal services binding for an unlimited time and irrevocable by their successors.

8. Where a city attorney and his subagents, including defendant, were employed to collect back taxes, receiving a certain percentage of the

taxes collected as compensation, defendant was not entitled on the termination of the contract to recover on a *quantum meruit* for legal services in thereafter preparing claims for suit, for an obligation on an implied contract never arises when an express contract covers the same ground.

9. Where the employment of the defendant as an attorney to collect back taxes was under a contract at will and revocable, the action of the plaintiff in demanding its tax books from the defendant was a revocation and termination of the contract, and all collections made by the defendant thereafter were tortious and gratuitous.

WALKER and CONNOR, JJ., dissenting.

ACTION by the city of Wilmington against E. K. Bryan, heard (667) by *W. R. Allen, J.*, at October Term, 1905, of NEW HANOVER, upon the referee's report. From a judgment for the defendant, the plaintiff appealed.

Empie & Empie, J. D. Bellamy, William J. Bellamy, and Marsden Bellamy for plaintiff.

Junius Davis, Rountree & Carr, and H. McClammy for defendant.

CLARK, C. J. This is an action to recover $1,076.52 back taxes collected by the defendant after the revocation by the plaintiff of his authority to collect the same, payment thereof having been (668) demanded by the plaintiff and refused by the defendant. The answer admits the collection of the money, but sets up as a defense that the defendant had a continuing contract with the plaintiff which was to last till all the back taxes were collected, and sets up a counterclaim for $7,500 commissions on back taxes collected by the city attorney after the defendant's employment was revoked.

By chapter 182, Laws 1895, the city of Wilmington was given authority to collect its arrearages of taxes, and it was made the duty of the city attorney, together with such associate counsel as he might select, to bring such actions against delinquent taxpayers. This act was repealed. Laws 1897, ch. 517, ratified 9 March, 1897.

Under the authority of the act of 1895, D. B. Sutton, then city attorney, associated the defendant and several other attorneys with himself for the collection of back taxes. By virtue of this association the defendant and others now claim an irrevocable contract with the city, even after the repeal of the statute and after the expiration of the term of Sutton, on whom as city attorney the duty was imposed to make the collection, with the aid of agents to be selected by him. C. P. Lockey succeeded D. B. Sutton as city attorney, 4 April, 1898, and the board of aldermen turned over to him, as such city attorney, for collection,

the back taxes for the years 1894-5-6-7, and on 25 April, 1898, passed the following resolution:

"Resolved, the board of audit and finance concurring, That the city attorney be and he is hereby authorized, empowered, and instructed to collect all taxes due the city for the years 1894-5-6-7, and to institute all actions in court that may be necessary to enforce the collection of such taxes. As compensation for making said collection, the city attorney may deduct and retain 10 per cent of all moneys collected under this resolution.

"Resolved further, That the city attorney be and he is hereby directed and instructed to join and coöperate with the attorneys now in
(669) charge of the collection of the back taxes due the city for the years prior to 1894 upon such terms as may be agreed upon by him and said attorneys."

The board of audit and finance, 11 May, 1898, amended the said resolutions by changing the second paragraph of the first resolution to read as follows: "As compensation for making such collection, the city attorney shall be paid 10 per cent of all moneys collected by him, which amounts so paid to the city attorney shall include all costs and expenses to the city of any kind whatsoever. The city attorney shall make weekly reports of all moneys collected and render his bill for his commissions and shall give bond in the sum of $5,000," and as thus amended, adopted the aforesaid resolutions.

The defendant was one of the attorneys referred to in the second resolution, and was accordingly associated by the city attorney with himself in making collections of said back taxes. T. W. Strange succeeded Lockey as city attorney and was himself succeeded in that office in 1899 by Iredell Meares, who, some time after his election, made a demand upon the defendant for the tax books containing the back taxes due to the city prior to 1894. The defendant declined to surrender the same, claiming that he and his associates had an irrevocable contract for the collection of those taxes. The board of aldermen then passed a resolution directing the defendant and his associates to deliver to City Attorney Meares the said tax books, authorizing the said city attorney to collect said back taxes; and the board notified the defendant and his associates to proceed no further in the collection of taxes. The defendant again refused to surrender said books, claiming an irrevocable contract to collect the taxes, alleging ability and willingness to collect and averring that he would hold the city responsible for damages if he were stopped from proceeding further to collect. Afterwards, the said tax books were taken from the office of the defendant by said
(670) City Attorney Meares by direction of the city authorities, and

said city attorney and his successor in office have since that time been collecting said back taxes and have received the pay therefor.

The $1,076.52 demanded in the complaint is for back taxes which it was admitted were collected by him after Meares had become city attorney and had demanded the said tax books and had been refused, and this sum is held by him on the sole claim that the city is due him $7,500 as damages for refusing to permit him to continue the collection of the taxes. It was agreed that if the defendant was entitled to any counterclaim at all for his alleged damages (which are for loss of commissions and the value of services in issuing writs and notices and preparing for further collections), the amount should be fixed at $4,000, from which should be deducted the $1,076.52 due the city, collected as aforesaid after the notice of the termination of his attorneyship, and for the recovery of which this action is brought.

So the whole question is simply narrowed down to one of law, whether the city had a right to terminate the authority it had given, under which the defendant was collecting the back taxes, or did the defendant hold a perpetual and irrevocable contract to collect the back taxes.

There was error, as pointed out by the plaintiff's exception 1, in that the judge found on the above facts as a conclusion of law that the plaintiff entered into a contract with "E. K. Bryan and his associates." The facts show that the contract, if any, was made by the "board of aldermen with D. B. Sutton, as city attorney," and as such the contract terminated with the expiration of his term of office.

The court also erred in overruling the plaintiff's exceptions 2 and 8 to the referee's findings of law and in holding that the contract was a continuing one, when upon the facts found it was the employment of counsel to collect, without any duration (unless it was the term of office of the then incumbent as city attorney), and being with- (671) out limitation as to time, it was in law a contract terminable at the will of either party. *Abbott v. Hunt,* 129 N. C., 403. The ordinance of 30 July, 1895, set out in the referee's report, under which the back taxes prior to 1894 were placed in the hands of Sutton, city attorney, to collect, simply ordered those taxes to be collected, and that when collected "it shall be the duty of the *city attorney* to return the books and take a receipt therefor." There is nothing in that resolution carrying a property right, or power coupled with an interest, or creating a perpetual and irrevocable contract, with the then city attorney, who has long since passed out of office, as principal, and still less with the defendant as one of his subagents.

That a principal who appoints an agent, without limitation as to time, may revoke at any time, unless it is a power coupled with an in-

terest, is elementary law. *Ins. Co. v. Williams,* 91 N. C., 69; *Ballard v. Ins. Co.,* 119 N. C., 187. The resolution providing that the city "shall pay 10 per cent of all taxes collected without suit and 20 per cent of that collected by suit," does not confer any interest in the taxes, but is merely a method of measuring the compensation to be paid on that collected, so long as the authority to collect is unrevoked. *Missouri v. Walker,* 125 U. S., 339. If the interest is in that which is produced by the exercise of the power, then it is not a power coupled with an interest; *Abbott v. Hunt,* 129 N. C., 403, where the authorities are collected at page 405, and which is conclusive of this case; *Barr v. Schroeder,* 32 Col., 609. "A mere power to collect money and receive property, the agent to have one-half of the net proceeds as compensation, is not a power coupled with an interest, and is revocable." *Bancroft v. Ashhurst,* 2 Grant Cas., 513; *Blackstone v. Buttermore,* 53 Pa., 266.

(672) The relation which the defendant sustains to the city was merely that of agent, and when the statute was repealed he had no contract right which was impaired. *Mial v. Ellington,* 134 N. C., 131; *Missouri v. Walker, supra; Pennie v. Reis,* 132 U. S., 464. Nor could the board of aldermen make a contract for the employment of legal services binding for an unlimited time and irrevocable by their successors. Abbott Mun. Corp., sec. 259; *Wadsworth v. Concord,* 133 N. C., 587. That would be worse than the inconveniences and shackles from which we were happily freed by the decision in *Mial v. Ellington, supra.*

Nor is there any force in the defendant's claim of a *quantum meruit* for legal services in preparing claims for suit when his agency was terminated (and indeed the judgment in his favor seems based solely on the fees paid to Meares and Bellamy, the succeeding city attorneys, for the collections made by them), for an obligation on an implied contract never arises when an express contract covers the same ground. The plain terms of this employment were that the then city attorney and his sub-agents, including the defendant, would collect the back taxes, under their express contract to receive for the work 10 per cent of taxes collected without suit and 20 per cent of the amount collected by law. This was the only compensation and bargain, and it is clear from the nature and terms of the contract that the same could be terminated at any time by either party, and it could not have been in contemplation that, in any event, it would last longer than the term of the principal agent, the city attorney, unless renewed with his successor, as each should come into office.

There was no contract for pay except for collection. The contract having been terminated rightfully and the only compensation being provided by express contract, there is no implied contract to exact any

other or further payment for any other or further services. The express contract covers the entire ground and that was terminable at the will of either party. *Abbott v. Hunt, supra.* The defend- (673) ant knew the law, and if he had wished other pay for incidental services in regard to collections not made at the termination of the employment, he should have stipulated therefor. The city attorneys have under authority of law made the subsequent collections of back taxes and the city has paid them the fees, some $4,000 (it is agreed) for such services. The defendant ought not to be paid by the city over again the same sum for having been willing to collect these taxes, when we find that his claim of a right to do so is erroneous. And in no view of the case could this defendant have recovered in full for a demand which, if due at all, was recoverable by himself in common with several others.

The counterclaim set up cannot be sustained. The judge below having found as a fact in the judgment that the sum of $1,076.52, demanded by the plaintiff of the defendant, was collected by the defendant after Meares had been elected city attorney, and after the tax books had been demanded by the plaintiff from the defendant, which the defendant refused to surrender, the employment of the defendant being under a contract at will and revocable, the said action of the plaintiff in demanding the said books from the defendant was a revocation and a termination of the said contract, if any, with the defendant. All collections made by the defendant thereafter were tortious and gratuitous, and the plaintiff is entitled to recover the aforesaid sum with interest from 1 September, 1900, and costs. Judgment should be entered below in accordance with this opinion.

Reversed.

BROWN, J., concurring: I concur fully in all that is so well said in the opinion of the Court in this case.

1. The contract which defendant claims has been violated by plaintiff, and for the breach of which defendant claims damages by way of counterclaim, was entered into by plaintiff by legislative authority. Laws 1895, ch. 182. Without such act it had no power to make (674) the contract, but must pursue the remedies provided in its charter for the collection of all taxes which had been levied for municipal purposes. *Gatling v. Comrs.*, 92 N. C., 540; Cooley on Taxation, pp. 15 and 16. When Sutton and his associates agreed with plaintiff to collect "back taxes" by suits at law under the act for a percentage of the collections actually made, they did so with full knowledge that such method of collecting plaintiff's taxes could be abolished at any moment by legislative will. They acquired no vested rights which could not be re-

voked. The power to levy, assess, and collect taxes conferred by the legislative power of the State is a governmental function and cannot become the subject of vested rights. It is held at the pleasure of the legislative authority, and it must necessarily follow that the repeal of the law by the supreme legislative power, by which the right to collect taxes by means of suits at law is destroyed, will not make the municipality liable to attorneys employed solely upon a commission basis, for damages for an alleged breach of the contract of employment. They accepted employment upon the express condition that their fees should be dependent solely upon their collections and with full knowledge that the continuance of the contract must terminate if the act should be repealed. There is no right of property in the remedy for the collection of taxes given to the city which is not entirely under the control of the Legislature. Cooley Const. Lim., p. 125; *Gatling v. Comrs., supra.* Sutton and his associates could acquire no property rights in the collection of taxes or in the city tax book. *Wallace v. Trustees,* 84 N. C., 164. When the act of 1895 was repealed by the Legislature of 1897, chapter 517, the so-called contract was annulled, not by the plaintiff, but by the supreme legislative power. If it was annulled at the time when Sutton and his associates had made preparations to bring suits and had issued summons and filed complaints, it is their misfortune,
(675) not the fault of the plaintiff. Their compensation would be that which they had received already as commissions in the general collection of back taxes under the agreement, which appears to have been no inconsiderable sum. If they continued to sue after the repeal of the act, it was their folly. If they have any other grievance, they must look to the Legislature for redress. The contract which an attorney may make with an individual or a private corporation for the collection of debts, or other personal services, has no relation to a contract for the collection of taxes. It stands upon a different footing and is not so entirely subject to legislative control.

2. If there were any legal merits in the counterclaim for damages for breach of contract, it could not be pleaded as against a demand for the $1,076.52 tax money collected by the defendant and in his hands. No counterclaim is valid against a demand for taxes. *Gatling v. Comrs., supra.* This must likewise be true when the fund sought to be recovered is the proceeds of the city tax lists in defendant's hands for collection. "No set-off can be made to tax money while on the way from the taxpayer to the treasurer of the town or city imposing the tax." *Waterbury v. Lawler,* 51 Conn., 171; Waterman on Counterclaim, sec. 38; *Wilson v. Lewiston,* 1 W. and Segt., 428; *Com. v. Rodes,* 5 Mon., 318.

If the defendant had any cause of action, his remedy would be by original suit against plaintiff in case the authorities refused to recognize his demand.

WALKER, J., dissenting: It will be necessary, in order to have a clear and full understanding of this case, to state the material facts. The plaintiff sued to recover the sum of $1,076.52, which it alleged the defendant, claiming to act as attorney for the plaintiff, had collected in suits against divers persons who were delinquent taxpayers and owed the city that amount for "back taxes." The defendant in his answer averred that he was employed by the city to collect all (676) the taxes due to it for the years prior to 1897 and under two separate contracts, by which the city agreed to pay the defendant 10 per cent on amounts collected without suit and 20 per cent on amounts collected by suit, as to all taxes due prior to 1894, and 10 per cent (free of cost and expenses to the city) on all taxes due since that year. That the city was expressly authorized by Laws 1895, ch. 182, to make the contract with the defendant through its then city attorney, if any statutory authority was required, and that defendant collected a large amount of said taxes ($39,000), for which he received his commissions, and, in addition, the said sum of $1,076.52, and also another sum for which he had not received his commissions, they amounting to $300. That he had also brought a large number of suits, after carefully compiling the facts and investigating the legal questions involved as to the right of the city to collect back taxes, and that he bestowed great labor and gave much of his time and attention to the work of preparation for the trials of those suits. That he prepared and filed pleadings, prosecuted cases and brought two of them by appeal to this Court. That a considerable portion of the money received by him as commissions on amounts actually collected was expended in performing the work of collecting the other taxes, which taxes amounted in all to $100,000, and of this sum at least $60,000 could have been collected. That the city in the year 1899, without his consent, took the tax books from the defendant and canceled the contract, instructing him not to proceed any further with the collection of taxes. That the city has availed itself of the labor performed and professional services rendered by the defendant and has settled some of the suits he instituted, and has generally received the benefit of what he had done in the way of preparation for collecting taxes up to the time it canceled the contract and refused to permit the defendant to proceed any further in the performance of his part of the agreement, he being at all times able, (677)

ready, and willing to carry out the contract on his part. That his services so rendered and for which he has received no compensation were worth $4,000. There were two counterclaims stated in the answer; one for breach of the contract, in which the defendant sought to recover the compensation fixed by the agreement, or damages for the breach to be measured by such compensation, and the other, in which he sought to recover, as upon a *quantum meruit,* the reasonable value of his services. The case by consent of the parties was referred, and the referee reported his findings of fact and conclusions of law. It appeared from the report that the defendant was by agreement associated with the city attorney in the collection of back taxes, and that the latter by resolution of the board of aldermen, concurred in by the board of audit and finance, was required to report weekly all moneys collected by him for back taxes and render a bill for his commissions and give a bond in the sum of $5,000. The board of audit and finance, which was created by chapter 143, Laws 1876-'77, had full knowledge of the terms of the two contracts with the defendant, and in May, 1897, approved and ratified them by joining the aldermen in a resolution to that effect. That reports of taxes collected by the attorneys were made to the city authorities and bills rendered for commissions were passed by the aldermen, approved by the board of audit and finance, and paid, except the commission of $100 on one claim and the commission on the $1,076.52, which amounts to $215. The referee further finds that the compensation fixed by the contracts was fair and reasonable, and that the defendant in all things faithfully performed the contracts on his part and was ready and willing to fully perform the same, and, further, that the city reaped the benefit of his labors and the expenses incurred by him in preparing for and bringing the suits, which were considerable, and for which he had received no compensation, and that some of
(678) the suits are still pending. That after the discharge of the defendant and the substitution of other attorneys successively in his place, the latter collected $56,000 of back taxes. The referee further finds that the city authorities were kept well informed by Judge Bryan of the collections and the commissions charged, and not only ratified, approved, and paid the same, but at all times recognized and dealt with him and his associates as the duly employed attorneys for the collection of said taxes upon the terms and for the compensation agreed upon, and already stated. The referee reports the following agreement as having been made by the parties with his consent: "It is agreed that if the defendant is entitled to recover upon his counterclaim, he will be entitled to recover $4,000, without interest, of which the sum of $1,076.52,

which is already in his hands, shall form a part, without interest." The referee held as his conclusion of law that the city had made a valid and binding contract with the defendant and was liable for the breach thereof by it, the amount fixed by the agreement of the parties being the measure of the damages he is entitled to recover, and he recommended that judgment be entered for that sum. The plaintiff filed numerous exceptions to the referee's findings of fact, which were overruled by the court and need not be considered, as we cannot review the court's ruling. It also excepted to the conclusions of law in several particulars. The court found an additional fact, from the admissions of the parties, that the defendant collected the $1,076.52 after Mr. Meares, his successor, had been appointed and after the plaintiff had made demand for the tax books, and that the defendant's successors had continued the collection of back taxes included in the defendant's contract and had received from the plaintiff, as commissions, more than $4,000. The court thereupon confirmed the report and adjudged that the defendant recover of the plaintiff $2,923.48 (that is, $4,000 less $1,076.52) and his costs. The plaintiff excepted and appealed.

The plaintiff resists the defendant's counterclaim upon three grounds: (1) That a set-off or counterclaim cannot be asserted against a demand for taxes due to the plaintiff and collected by the de- (679) fendant. (2) That the defendant's contract with the plaintiff was not approved by the board of audit and finance, as required by section 8, chapter 143, Laws 1876-'77. (3) That chapter 182, Laws 1895, was repealed by chapter 517, Laws 1897, and thereby the power to collect back taxes was revoked, and consequently the plaintiff had the right to annul the contract with the defendant and discharge him. These contentions will be considered in the order stated:

First. The position that the defendant cannot set up a counterclaim in this case because it is brought for the recovery of taxes is not tenable. It is true that neither a taxpayer nor a sheriff can plead a set-off in a suit against him for taxes due and owing. *Cobb v. Elizabeth City,* 75 N. C., 1; *Battle v. Thompson,* 65 N. C., 406; *Gatling v. Comrs.,* 92 N. C., 536; *Guilford v. Georgia Co.,* 112 N. C., 34. The reason why this cannot be done in the cases put is well explained by *Clark, J.,* in the last-cited case; but that reason is not at all pertinent to a case like this. A tax, while considered as a debt for some purposes—that is, as a thing due and therefore collectible—is generally regarded as an impost, and is not liable to set-off by the taxpayer or even by an officer of the law appointed to collect it. This is so upon the ground of public policy. To permit a taxpayer, or an officer charged with the col-

lection of taxes, to set up an opposing claim against the State or a city might seriously embarrass the Government in its financial operations by delaying the collection of taxes to pay current expenses. It has generally been held that a tax is not a debt in the sense that it will admit of a set-off. *Guilford v. Georgia Co., supra.* But in this case the defendant was neither a taxpayer nor an officer, and the principle forbidding a counterclaim or set-off should not have any applica-
(680) tion here. In *Battle v. Thompson, supra, Pearson, C. J.* (seeming to have just such a case as ours in his mind), says: "When the defendant's claim falls under clause 1, section 101, C. C. P., and arises out of the contract or is connected with the subject of the action, it may be that the defense may be made against the State, and the claim be allowed in diminution of the amount to be recovered, or to prevent a judgment in favor of the State when the claim is equal to or in excess of the demand of the State; but it would be on the ground that the claim is in the nature of a payment or a credit, to which the defendant is entitled, and that the demand of the State is in fact only for the balance." The reason why it was said the claim could be used only as a set-off or treated as a payment was that *Battle v. Thompson* was a suit by the State, and, as said by *Judge Pearson,* the latter could not be sued so as to be subject to a judgment upon a cross-claim; but this reason does not apply here, as a municipal corporation can be sued. Judge Bryan was employed under a definite contract as an attorney to collect taxes due to the city, and did not sustain any kind of official relation to it, but only a contractual one. *Hall v. Wisconsin,* 103 U. S., 5. As an attorney he had the right of retainer and a lien in respect of funds collected, so far as necessary to satisfy his claim for services rendered in the particular transactions which are covered by the terms of his employment (Weeks on Attorneys, 614), and no valid reason can be assigned for his being deprived of his rights as an attorney in this kind of a case. *Missouri v. Walker,* 125 U. S., 339. Besides, the agreement of the parties sufficiently disposes of this objection. Why should we undertake to make the parties do what they have agreed should not be done? They wished to end the litigation, if the court held that the defendant had a good cause of action against the city by reason of the facts alleged in the counterclaim, either on the special contract or on a *quantum meruit.* Why, they said, prolong litigation uselessly?
(681) In this spirit they entered into that agreement and provided that if the defendant is entitled to recover at all, the amount shall be fixed at $4,000, "of which sum $1,076.52, which is already in his hands, shall form a part." Where is there any room for doubt as to the mean-

ing of this agreement? The parties desired their substantial rights determined, divested of all technicalities, and wanted the final decision made in this case. This is in accordance with the spirit of The Code. In their brief, the plaintiff's counsel lay little or no stress upon this position, but with their usual frankness they admit that the case depends mainly upon the validity of the repealing act of 1897 and its legal effect upon the defendant's contractual rights as against the city. But there is another conclusive answer to this contention. If there had been no agreement, and it be true that the counterclaim cannot be used as a set-off, *pro tanto,* and so that the defendant can have judgment for the excess, the result will be that the plaintiff is entitled to judgment against the defendant for the amount of its claim and to execution thereon. But this would not prevent the defendant from having judgment for the amount of his demand, treated as an independent claim existing at the commencement of the action, the same as if he had brought a separate action therefor, provided the plaintiff is liable to him. Code, sec. 249; Revisal, sec. 558. This would satisfy the principle that a set-off is not pleadable to an action for the recovery of the tax, as the plaintiff (the city) could have its judgment and execution, if it so desired, and the defendant a separate judgment for his counterclaim. Clark's Code, sec. 424 (3) and sec. 244. Indeed, The Code provides that a plaintiff may take judgment for the excess of his claim over the defendant's counterclaim—Clark's Code, sec. 385 (2)—but does not expressly make any such provision in favor of the defendant when his counterclaim exceeds in amount the plaintiff's demand (Code, sec. 249; Revisal, sec. 558), and seems to contemplate that there may be (682) separate judgments. But however this may be, the parties could waive this formality and agree, as they have done, that there should be one judgment for the excess, as in the case where the plaintiff's demand exceeds in amount that of the defendant, and thus conform the procedure to the true spirit of The Code, system, that all controversies should be settled in one action and as far as possible by one judgment, and also to the actual practice in the courts. Why should we defeat the purpose of this reasonable agreement by giving it a strained construction or by reasoning merely technical? It all comes to this, that if there had been no agreement, and the defendant cannot use his cross demand as a set-off against the plaintiff's claim for taxes so as to extinguish it, he may have judgment upon his counterclaim as an independent cause of action existing when the action was commenced (Code, sec. 249; Revisal, sec. 558), and the plaintiff's remedy becomes thereby unobstructed. But the agreement affords an easy way of settling the whole contro-

versy once for all. Why turn the defendant out of court and require him to bring a separate action for his money, when the result will ultimately be the same? To do so would accord with the old procedure, but not with the new.

Second. If it was essential to the validity of the contract that the board of audit and finance should have approved it, there are facts found by the referee which appear to show conclusively that said board, in conjunction with the board of aldermen, approved and ratified the contract with full knowledge of the facts, and by reason thereof the defendant was induced to proceed with the collection of the unpaid taxes. 20 A. & E., p. 1182; *Supervisors v. Schenck,* 5 Wall., 772. *Chief Justice Shaw,* in *Crenshaw v. Roxbury,* 73 Mass. (7 Gray), 374, said: "The mayor being the chief executive officer of the city, and issuing the advertisement in his official capacity, professed to act for the city; (683) and although, from want of sufficient authority, his act did not bind them, yet, being done in their behalf, if the city afterwards, by the city council, who had authority to do the act, with full knowledge of what the mayor had done, ratified it, the city was bound by it. Subsequent ratification by the principal gives the act of the agent the same effect as if it had been done by a previous authority. Of course, it relates to the time of the act done, and gives it effect from that time." *Cotton Mills v. Comrs.,* 108 N. C., 695. But Laws 1895, ch. 182, sec. 2, not only authorizes, but makes it the duty of the city attorney to employ counsel to assist him in bringing suit to recover the taxes, and expressly directs that such counsel shall receive reasonable compensation. Here is full and adequate provision for the making of this very contract without any board's approval or consent. By The Code, sec. 683, it was once required that, "Every contract of a corporation, by which a liability may be incurred exceeding $100, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto." Construing and applying this statute in *Roberts v. Woodworking Co.,* 111 N. C., 432, this Court held that although the company's contract was *ultra vires,* it not having been made as the statute required, the plaintiff could recover the value of work and labor done and materials furnished under the contract upon a *quantum meruit;* but could not recover upon the contract itself. To the same effect is *Curtis v. Piedmont Co.,* 109 N. C., 401, and in the latter case it was said that the statute (Code, sec. 683) should have been specially pleaded. This objection of the plaintiff is also answered by what will hereafter be said.

Third. The plaintiff further contends that the authority of (684) the city to make the contract with the defendant was given by the act of 1895, and as the latter act was repealed by the act of 1897, the authority has thereby been revoked; but the defendant replies that the repeal of the act could not have the effect to annul a contract already made under and by virtue of its provision or to impair any of the defendant's contractual rights. It is needless to inquire which of the two positions is the correct one, as the recovery of the defendant can be sustained without reference to the special contract. The principle already stated and supported by authority, showing a ratification of the contract or a sufficient approval by the board of audit, should perhaps require serious consideration, even if the only basis of defendant's right to judgment upon his counterclaim is the contract itself; but such is not the case. If the contract is not in force for any of the reasons assigned by the plaintiff, it cannot escape liability if it has accepted and retained the benefit of the services rendered and the money advanced by the defendant. It would produce an inequitable result to hold otherwise. "If a party has performed a part of the contract, and some fact has arisen which discharges or excuses him from further performance, he may have reasonable compensation for what he has done under the contract. Thus, if a contract contains a term reserving a right of cancellation to one party, and such right is exercised, the adversary party may recover a reasonable compensation for the work which he has done under the contract." 3 Page Cont., sec. 1598. A perusal of the section just cited will show the extreme length to which the law has been carried in favor of a fair remuneration to a party who has performed work and labor under a contract afterwards revoked. Some of the courts have even held that if a party himself had the right of cancellation, which he exercised in a fair and reasonable manner, he may recover the value of services rendered while the contract was existing. *Ibid.* In *Picket v. School District,* 25 Wis., 551, the contract being voidable, it was held that the thing contracted for being in itself lawful and beneficial, it would be unjust to allow a party to retain the benefit without any com- (685) pensation at all. When, therefore, the contract had not been fully executed, but only partially fulfilled, the party accepting and availing himself of the partial benefit would become liable on a *quantum meruit* upon the same principle, as in other cases. Many other decisions can be cited showing the application of the principle to a variety of cases where the contract is either void, voidable, or subject to cancellation or revocation, the general result being that the value of the services may be recovered, even where the contract is rightfully canceled,

and especially if the party claiming the right to recover is without fault. *Booth v. Ratcliffe,* 107 N. C., 6; *Roberts v. Woodworking Co., supra; Curtis v. Piedmont Co., supra; Smith v. Stewart,* 83 N. C., 408; *King v. Brown,* 2 Hill (N. Y.), 485; *Barr v. Van Duyn,* 45 Iowa, 228; *Cox v. McLaughlin,* 76 Cal., 60. The doctrine has been applied to contracts of attorneys. 3 A. & E. (2 Ed.), 430; *Baird v. Ratcliffe,* 10 Texas, 81; *Carter v. New Orleans,* 5 Rob., 238. "If the special agreement (of attorney and client) is rescinded, or is void for champerty, the attorney may recover on a *quantum meruit* for his services." Weeks on Attorneys, sec. 345. This author also says generally that an attorney who is discharged by his client without any fault on his part is entitled to recover the value of services rendered; and it would seem, he says, that because of the confidential nature of the relation of attorney and client and the inability of the former to appear for the other side after his discharge, and the consequent loss of business, the attorney should be permitted to recover the full amount of the fee, especially if he kept himself in constant readiness to perform his part of the contract by a continuing tender of his services. Weeks on Attorneys, sec. 366. See, also, *Morgan v. Robert,* 38 Ill., 65; *Myers v. Crockett,* 14 Texas, 257; *Wilhelm v. Cedar Co.,* 50 Iowa, 254; *Kersey v. Garton,* 77 Mo., 645; *Moyer v. Cantieny,* 41 Minn., 242; *Bright v. Taylor,*

(686) 36 Tenn. (4 Sneed), 159. "There can be no doubt," it is said in a well-considered case, "that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract, such as requires that it should be held void in the whole— the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for." *E. St. Louis v. E. St. L. G. L. and D. Co.,* 98 Ill., 427. "A general rule," says Parsons, "has, however, been asserted which certainly rests upon reason and justice. It is, that where a party has accepted and made his own the benefits of a contract, he has estopped himself from denying in the courts the validity of the instrument by which those benefits came to him." 2 Parsons on Contracts (8 Ed.), 790. But in *Shipman v. State,* 42 Wis., 377, the very question here presented was decided. In that case the plaintiff was employed to prepare plans for the building of a hospital and to superintend its construction for 5 per cent on the cost of it, under the provisions of an act of the Legislature, which expressly reserved the right to the commissioners to discharge the building superintendent at their discretion and at any time. The plaintiff was discharged before the completion of the work,

and it was held that notwithstanding the reserved power to discharge him, he was entitled to recover at least the value of his services as upon a *quantum meruit.* It is therefore a mistake to suppose that the repeal of the act of 1895 has anything to do with the right of the defendant to recover on his counterclaim. The city could still collect back taxes by appropriate methods and procedure (*Guilford v. Georgia Co.,* 112 N. C., 34), and had the power to employ an attorney for that purpose (20 A. & E. 2 Ed., 1159), and having this authority it could, of course, continue in its service an attorney already retained by it. The city was not, therefore, as contended, without a full and sufficient remedy for the collection of the taxes due to it and did not lose its rights to collect them by the repeal of the act, as has been shown. *Guil-* (687) *ford v. Georgia Co., supra.* But if it did lose the power by the repeal of the act, it must pay for what had already been done and restore the money advanced.

Recurring to the main question, the right to recover on a *quantum meruit* when the contract has been terminated without the fault of the plaintiff is generally allowed for the purpose of preventing the unjust enrichment of the defendant, and not solely for the purpose of awarding damages for the breach of any contractual duty. When the plaintiff has expended money or labor with a resultant loss to him and a gain to the defendant, and in the expectation that he would be permitted ultimately to reap his reward under the contract, which expectation has been frustrated by even the lawful act of the defendant, it is against conscience that the latter should be enriched by a benefit thus acquired at the expense and to the injury of the plaintiff. The obligation to pay may therefore be deemed an equitable as distinguished from a legal one, and rest on principles independent of the law of contract. Keener on Quasi Contracts, 214. This Court has applied the same equitable principle in the case of contracts void under the statute of frauds. The refusal of the party to perform the contract is in a legal sense rightful, for he merely exercises an admitted power to avoid the contract and is not therefore in fault, but equity and fair dealing require him to pay for the benefit he has received from labor performed while the contract was in force. *Albea v. Griffin,* 22 N. C., 9; *Tucker v. Markland,* 101 N. C., 426, and cases cited. In *Albea v. Griffin, Judge Gaston* says: "The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the caprice of the defendant this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched

(688) by gains thus acquired to his injury. If they 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." It may well be doubted if the city had the legal right to cancel the contract, as, notwithstanding the repeal of the act of 1895, it still had the authority to collect back taxes. If it wrongfully broke the contract, it was clearly liable to the defendant.

But the defendant is entitled to recover on another ground. He was not a public officer whose office could be abolished at will. His relations with the city were wholly contractual, as much so as would be those of any other person who makes a contract with the city for work and labor to be performed. This view is sustained by the highest authority, the Supreme Court of the United States, and not only so, but that court has decided that such a contract is protected by the clause of the Federal Constitution against impairing the obligation of a contract. In *Hall v. Wisconsin,* 103 U. S., 5, it is held that although an office is an employment, it does not follow that every employment is an office. (*U. S. v. Maurice,* 2 Brock, 96.) A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer, and when a contract is made between the State and a party, whereby he is to do certain work or to perform certain duties at a stipulated compensation, he is entitled to be paid for the service actually rendered at the contract rate, whatever it may be, although before the expiration of the period the State repealed the statute pursuant to which the contract was made. In that case, Hall, the plaintiff in error, who occupied the same position as does Judge Bryan in this case, and who was asserting a similar claim, was employed as an attorney at law to perform professional services. The Court emphasizes the distinction between official and contractual employment, and says: "In a sound view of the subject, it seems to us that the legal position (689) of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration, or repair of public buildings, or to supply the officers or employees who occupy them with fuel, light, stationery, and other things necessary for the public service. The same reasoning is applicable to the countless employees in the same way, under the National Government. It would be a novel and startling doctrine to all these classes of persons that the Government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of

contract rights." It further said that when the State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly, and the same rules are applied to it as to private persons. See, also, *Davis v. Gray,* 16 Wallace, 203. The same principle was asserted in *Stewart v. Police Jury,* 116 U. S., 131, where an attorney had been employed to render certain professional services to the parish of Jefferson, a municipality. The Court there says that where services are performed under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied promise to pay for those services, and this implied contract is as complete as an express one. "Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note." 116 U. S., 134. (690) The Court affirms the same doctrine in *Auffmordt v. Hedden,* 137 U. S., 310, and says that such an employment, simply because it arises out of a contract with the Government, is not for that reason an office—it is still contractual, having none of the elements of an office, such as tenure, duration, continuing emolument, or continuous duties; and being such, it is entitled to the protection of the Constitution. In all of these cases the Court fully recognizes the doctrine laid down by this Court in *Mial v. Ellington,* 134 N. C., 131. This case has no feature in common with that one. Nor is the right of the aldermen to make a contract extending beyond their term involved in this case. That question was not passed upon or involved in *Wadsworth v. Concord,* 133 N. C., 587. It was mentioned only in the opinions of the concurring judges. The contract here was to render a certain service, single in its nature and for a fixed compensation, and, besides, I am not disputing the *power* of the aldermen to discharge Judge Bryan. They could do so, as any client may discharge his attorney; but if they do, law, equity, and common fairness require that they should pay for the benefit received or of which they have chosen to avail themselves. Even if the other question could be involved, aldermen cannot take the benefit of services already rendered and plead the right to discharge the person

who performed them in bar of a suit to recover his just compensation. That is contrary to sound morality as well as to settled principles of law. It may be further said that the aldermen were expressly authorized by statute to make this very contract, and the mere fact that its performance might extend beyond their term can make no difference, and, as I have shown by cases binding upon us as authorities, the Legislature by a repeal of the statute could not take away the right to recover for services already rendered, even if the discharge was effec-
(691) tual.

Cases sustaining my view and directly in point, as I think, are *Lord v. Thomas,* 64 N. Y., 107; *Danolds v. State,* 89 N. Y., 36; *Cadman v. Markle,* 76 Mich., 448; *Davis v. Com.,* 14 Mass., 241; *Comp. Co. v. Comp. Co.,* 70 Miss., 669; Keener on Quasi Contracts, p. 277, sec. 2. In *Danolds v. State, supra,* the principle is thus stated: "Where a valid contract has been entered into, on behalf of the State by its duly authorized agents, for the construction of a public work, it cannot, in the absence of any stipulation authorizing it so to do, destroy or avoid the obligation of the contract. While it may refuse to perform and arrest performance on the part of the contractor, it is liable for the breach of the contract the same as an individual, and the contractor is entitled to claim prospective profits. The constitutional provision which denies to the State the power to pass laws impairing the obligations of contracts applies as well to contracts made by the State as to those made by individuals." In *Wilmington v. Stolter,* 122 N. C., 395, a case very much in point, this Court held that the repeal of the act of 1895 did not affect pending proceedings for the collection of taxes, nor did the resignation of the city attorney affect the right of his associates (Judge Bryan being one of them) to continue as counsel, and it therefore follows, necessarily, that they had the right to be compensated for services rendered either under the express or the implied contract.

Abbott v. Hunt, 129 N. C., 403, and decisions of a like kind are not applicable to the facts of this case. The mere fact that Judge Bryan was an attorney at law does not prove that he was acting under a power as a real estate broker does. He made a contract with the city to do a specific piece of work at a stipulated price. He was acting, not under any power, but under a binding contract. A power of the kind that Abbott had could be revoked, and so may a person break his contract and practically revoke it. He has the power to do so, but not
(692) the right. It is true, he cannot be made to perform it unless it is of such a nature that a court of equity can compel specific performance, but when he breaks it the law will require him to make

full restitution by paying damages as a compensation for the wrong, and the party injured may sue either upon the express contract or, treating that as rescinded, upon a *quantum meruit*. The right to these damages is based upon a contract created by law in order to do justice between the parties. The doctrine that the existence of an express contract prevents recovery upon an implied one does not apply, as the breach by one party entitles the other to treat the express contract as rescinded, and then arises his right created by law to recover for the benefit conferred by what he has done under the contract. Clark on Contracts, 693 and 694. At page 695 it is said: "The existence of the special contract in these cases which has been rescinded precludes the implication of any other contract in fact. The obligation, therefore, is necessarily imposed by law." This is familiar and elementary learning. The contracts of attorneys come within the operation of this rule. There is no *honorarium* under our law as there was under the civil law. The services of an attorney are not gratuitous, but are to be paid for like services rendered in any other calling or profession, and his contracts are governed by the same principles as ordinary contracts for service. He may recover on an express contract, or on a *quantum meruit* when the express contract is broken or rescinded. The mere fact that he is called an attorney does not imply in the least that he acts under a power in the sense that his agreements with others may be revoked at will. His relation with his client is created by contract and his rights are therefore contractual.

In this case it appears by the report of the referee, and the opinion of the majority concedes, that the city has deliberately availed itself of the services rendered by Judge Bryan, and it is gravely argued
that it should not be required to pay for them, and the position (693)
is attempted to be sustained, in part at least, upon the ground
that it has since paid some one else for the identical services. Surely, this does not acquit the city of liability. If the wrong person has been paid, the one rightfully entitled to the money should not be made to suffer for the mistake.

It can make no difference in the conclusion to be reached upon what ground the referee or his Honor decided the case, whether upon the idea that there had been a breach of the contract or that the defendant was entitled to recover for the value of his services or for the value of the benefit conferred upon the plaintiff as upon a *quantum meruit*. The referee has found the facts, which finding is equivalent to a special verdict, and if in any aspect the defendant can recover, he is entitled to a judgment for the amount agreed upon.

I have just seen the concurring opinion, and have had no sufficient opportunity to collect and cite the authorities for the purpose of showing the fallacy upon which I think it rests. I can only say briefly that the principle stated therein and the authorities cited to sustain it apply strictly to officers appointed by law to collect taxes and who act solely in their official capacity. They are within the rule laid down in *Mial v. Ellington,* 134 N. C., 131. Judge Bryan acted not in an official capacity, but under a contract which I think has been shown to be governed by a very different principle, in reference to the right to recover either on the special or on the implied contract. It is perfectly clear that the mere fact that he was employed to collect taxes gave the city no right to violate its contract with impunity or without any liability for its breach.

CONNOR, J., concurs in the dissenting opinion.

Cited: Graded School v. McDowell, 157 N. C., 317; *Comrs. v. Hall,* 177 N. C., 491.

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WINDERS v. HILL.

(Filed 28 May, 1906.)

Specific Performance—Breach of Contract—Joinder of Causes—Defect of Parties—Contracts—Performance—Reasonable Time—Agency—Option—Sales on Credit—Ratification.

1. A cause of action for specific performance may be joined with one for damages resulting from a breach of the contract, or for a delayed performance, or for any other damages growing out of the transaction.

2. Where a contract of sale was made directly with a syndicate, composed of plaintiff "and others," Revisal, sec. 404, providing that a trustee of an express trust may sue alone, does not apply, and where plaintiff sued without joining his associates, a demurrer for defect of parties should have been sustained.

3. The general principle is that when no time is specified in a contract for the performance of an act or the doing of a thing, the law implies that it may be done or performed within a reasonable time.

4. The power to an agent to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash.

5. Where defendant wrote H. that if he could handle defendant's land so as to net defendant a certain sum, he might do so and that the offer was good for four months, and that if H. should meet with some success in

selling it about the end of four months, defendant would give an extension, and the letter used the expression, "This note should be used as an option to purchase," and H. sold the land within four months purporting to act as agent for defendant: *Held*, even if the correspondence amounted to an option to H. to buy, he did not avail himself of the option, but acted as defendant's agent, and although he exceeded his authority in selling on credit, if the defendant ratified the act he would be bound, and this question of ratification must be submitted to the jury.

ACTION by J. B. Winders against E. J. Hill and I. F. Hill, (695) heard by *W. R. Allen, J.*, upon defendant's demurrer, at January Special Term, 1906, of DUPLIN. From a judgment overruling the demurrer, the defendants appealed.

This action was brought by the plaintiff for the purpose of compelling specific performance of a contract which he alleges was made by the defendant with him and by which the latter agreed to convey to him a tract of land described in the contract as follows: "Situated in Warsaw Township, Duplin County, N. C., extending from the corporate limits of Warsaw to the Boyette Mineral Spring and lying on both sides of the Williams road, adjoining the lands of W. L. Hill, W. H. Williams, and others, and containing 2,500 acres, excepting 100 acres in the immediate vicinity of what is known as the Boyette Mineral Spring, located near the Williams road, and on the branch immediately adjoining the Williams land." It is alleged in the complaint that by correspondence, which is fully set out, the defendant either appointed the plaintiff his agent to sell or gave him an option to buy the land, according as the correspondence should be construed, the agency or option to continue from 6 June, 1905, to 7 October, 1905. We will state the material parts of the correspondence and exhibits. In June, 1887, the defendant, then about to leave the State to reside in San Francisco, appointed his brother, I. F. Hill, of Durham, N. C., his attorney for the following purpose: "To ask, demand, sue for, recover, and receive all such sums of money, debts, goods, wares, and other demands whatsoever, which are or shall be due me or owing, payable, and belonging to me in any way or manner, either at law or in equity. To take possession of, rent out, lease, sell, bargain, grant, and convey upon such terms, in such quantities, and at such prices (as he may deem most beneficial to my estate) all my interest, right or title in certain lands and real estate located in said county of Duplin (describing the tract in controversy and other land), and generally to do, execute, and (696) perform all such acts, deeds, matters, and things touching my entire estate and effects, both real and personal, as shall and may be requisite and necessary to be done and performed for the prudent man-

agement of my property and the profitable conduct of my business, as fully in all respects and to all intents and purposes as I myself might or could do if personally present. I, the said Edward J. Hill, hereby ratifying and confirming all the acts and things done by my said attorney lawfully in pursuance of these presents." On 23 May, 1905, the defendant wrote from San Francisco, Cal., to L. F. Hall, of Pocomoke, Md., as follows: "Some time last summer you were making an effort to purchase my land near Warsaw. If you are in a situation to handle it, advise me. I am anxious to dispose of the property, although the price of land is rising in that section." Hall replied: "Your favor of the 5th to hand, and I note what you say in same. Now, I will say that I believe I can handle your property and make sale of the same at the price of $18,000, but when you place a higher consideration on it you drive away contemplated buyers from you. Now, if you feel inclined to give me an option on your property, say from four to six months, I may be able to take parties down to whom I may be able to close out the whole." To this the defendant replied by letter, dated 6 June, as follows: "Yours of 29 May to hand, and if you can handle my property so as to net me $20,000 you are at liberty to do so. This offer is good for four months from this date. There are somewhere in the neighborhood of 2,500 acres of it. The amount I will not guarantee; probably it would turn out to be considerably more on a survey. From this offer is excluded 100 acres in the immediate vicinity of what is known as the Boyette Mineral Springs, located near Williams road, and on the branch immediately adjoining the Williams land. This I wish to reserve, so as to show my identity in the county. This note (697) should be used as an option to purchase." "P. S.—Of course, should you meet with some success in selling it about the end of four months and wish an extension of time, I will give it to you. In case you do not meet with encouragement from your prospective buyer, advise me, as I have some parties wishing to buy the timber if I cannot sell the land." Hall, in a letter of 13 June, acknowledged the receipt of the "option" and expressed a fear that the price was too high for any profit to him, but agreed to try and see what could be done at the price fixed, and intimated that he might want more time within which to sell. In a letter of 17 July he states that he had looked over the property with certain parties, who asked for a reduction of the price, and were told by him that $20,000 was the limit price unless defendant would make a concession, and he would see what could be done. He then inquired if defendant would take a certain part in cash, the purchaser to have the privilege of paying the balance by cutting the timber and paying the defendant $2 per 1,000 for the same, to be applied at

that rate to the purchase money until all is paid. To this the defendant, by letter of 27 July, replied: "As to the price of the land, I do not feel that I can knock off anything whatsoever. Upon the question of cash and time payments, I suggest you write me what is the best you can do. I want as much cash as I can well get, and the balance can go at the highest rate of interest allowable in North Carolina; interest payable annually. Write me at once what are the best terms you can give. I have some other purchasers for this property. I put my price down so low that I thought it would be grabbed up at once. I suggest that you take the matter up with my brother, Isham F. Hill, at Durham, but should you see fit to write him, send me a copy of the letter, so that I can be in communication with him. You might take a trip to Durham to see him. Let me hear what you can do." On 29 July, and before he had received any answer to his last letter, Hall sold the land to the plaintiff and his associates for $20,000, collected $100 of (698) the purchase money and gave the following receipt: "Received of a syndicate, composed of J. B. Winders and others, the sum of $100, as part payment on tract of land near Warsaw, N. C., belonging to E. J. Hill, of San Francisco, Cal., and by authority from said E. J. Hill, dated 6 June, 1905, authorizing me to sell the same for him so as to net him $20,000, I have this day sold to the said syndicate of J. B. Winders and others the said land of E. J. Hill, as agent for said Hill, as per authority contained in same. The lands are said to contain 2,500 acres, more or less, and do not include the mineral springs and 100 acres reserved with same. Balance of purchase money to be paid by 7 October, 1905, as may be agreed upon by said Hill and purchasers. (Signed) L. F. Hall, Agent." Hall also assigned to them the option of 6 June. On the same day he sent to defendant the following telegram: "Closed deal for your lands as per option." and also mailed to him a letter giving the details of the sale and inclosed a check for the $100 and a receipt to be signed by the defendant for the $100, which also set forth the terms of the sale and provided that upon payment of the balance of the purchase money on or before 7 October, 1905, the defendant should make title to the purchasers. The plaintiff then alleges that upon receipt of the said telegram and letter of 29 July the defendant notified his brother, I. F. Hill, who lived in Durham, that he had sold his lands to the plaintiff for $20,000, and I. F. Hill thereupon notified a party in Warsaw to the same effect. That a few days afterwards a real estate company in Wilmington offered I. F. Hill an advance of $2,000 on the price, or $22,000 for the land, and thereupon I. F. Hill came to see the plaintiff, and as agent of the defendant, his brother, and stating that he was acting in that capacity, offered the plaintiff $500 to

release the defendant from the contract made by L. F. Hall for the sale of the land to him. This offer the plaintiff declined. That I. F. Hill then conferred with the real estate company and in a few days called again to see the plaintiff, and, acting as agent of the defendant and so representing himself to be at the time, offered to give the plaintiff $1,500 if he would release the defendant from the contract, which the plaintiff refused to do and insisted on a deed for the land under the contract. Thereupon the said I. F. Hill stated to plaintiff that he had a telegram from his brother placing the lands at his disposal, and he then offered to resell the land to the plaintiff, but the latter declined to make any agreement with him and again insisted on the fulfillment of the contract he had made with Hall. I. F. Hill then stated that he had authority to sell the land and to make a deed therefor and he intended to do so, and that plaintiff could sue the defendant for damages, but that he could not recover more than $1,500, which sum had already been offered him, and urged the plaintiff to relinquish his claims, which he again refused to do. Hall received no reply to his telegram and letter of 29 July until 24 August, 1905, when the defendant wrote him a letter, dated 14 August, stating that after receiving his telegram, he waited for his letter, which he had received. He then refused to be bound by the contract of Hall with the plaintiff, upon the ground that Hall had not accepted his offer made in his letter to him of 6 June, as Hall had stated in his letter of 17 June to the defendant that his price was too high and had asked for a reduction of the price and an extension of the time of payment, and that, in his letter of 27 July, he had asked Hall for the best terms he could make, to which request he had received no reply. He then refused to accept the $100 and charged Hall with pretending to act as his agent without any authority to do so, as Hall's

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letter of 27 July, in which he asked for a concession on the price and time, canceled his offer of 6 June, and stated that in the future that offer would not be respected. He then agreed to consider a new proposition from Hall for cash, but declined to deal with a "mythical syndicate" or to receive local bank checks or small payments or to permit Hall as his agent to encumber his title to the land. Hall replied to this letter on 25 August and expressed great surprise at its contents and asserted that the defendant first opened the negotiations, and that he (Hall) had acted strictly according to the authority conferred upon him by defendant's letter of 6 June, and that he had acted in good faith in the matter. On 29 August the defendant by telegram to Hall withdrew all propositions to him for the sale of the land. Plaintiff then alleged that on 19 September, 1905, he tendered payment of the full amount of the purchase money to Hall as defendant's agent,

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and demanded a deed for the land. Hall stated that he had no authority to make a deed, and referred him to I. F. Hill, who had the necessary power to do so. That plaintiff went to Durham and tendered to I. F. Hill, as agent of the defendant, the amount of the purchase money, and demanded a deed. I. F. Hill before leaving conferred with his counsel and then informed the plaintiff that he would neither accept nor reject the tender. That he made a second tender to I. F. Hill, "who refused to accept the money and make the deed, although he had the power and authority to do so." That the defendant was notified by telegram on 20 September that a tender of the money had been made to Hall and was asked where to deposit the same. To this telegram defendant made no reply. The plaintiff further alleges that the defendant refused to receive the purchase money and make title to the plaintiff for the reason solely that he had been offered a higher price by the real estate company in Wilmington after Hall, as defendant's agent, had sold to the plaintiff. The plaintiff has always kept his tender good. That the plaintiff, relying on the good faith of the defendant, entered into possession of the land immediately after (701) it was sold to him by Hall, as agent of the defendant, and made extensive preparations to manufacture and sell the timber and to develop the land, and was put to great trouble, cost, and inconvenience in securing the money to pay for it. He prays judgment, (1) for specific performance, and (2) for $20,000 damages; (3) for general relief and his costs. The defendant demurred to the complaint on the following grounds:

1. There is a misjoinder of causes of action in that the plaintiff has improperly united a cause of action for specific performance of an alleged contract by E. J. Hill to convey land, with a cause of action for damages for the breach of said alleged contract.

2. It appears from the complaint that there is a defect of parties plaintiff in that it is alleged that said sale was made to J. B. Winders and others, and the suit is brought by J. B. Winders alone.

3. It appears from the complaint that the alleged offer of 6 June, 1905, was not based on a consideration, and that before its acceptance it was revoked by E. J. Hill in his telegram of 29 August, 1905, to L. F. Hall.

4. The complaint fails to allege a proposal of sale to the plaintiffs and an acceptance of the same in the terms offered by the defendant, and particularly an offer to sell at $20,000 and an acceptance of the same.

5. It appears from the complaint that the contract is alleged to have been entered into by plaintiff with defendant, the latter acting through

his agent, L. F. Hall, and it does not appear that, at the time the plaintiff dealt with L. F. Hall as agent of the defendant, the latter had the power or authority to act for the defendant.

6. That the alleged contract contains no sufficient description of the property to be conveyed, in that it is not sufficiently shown by it how and where the reservation of 100 acres in the immediate vicinity of the Boyette Mineral Springs is to be laid off to E. J. Hill.

(702) 7. That there has been no tender of the purchase money to E. J. Hill.

The court was of opinion, and so held, that the grounds of demurrer were untenable, except the third, fourth, and fifth; and as to these, if it be held that Hall had no authority to sell on a credit, but was required to sell for cash, it appearing that I. F. Hill has a power of attorney from the defendant to sell the land, his dealings and transactions with the plaintiff constituted an adoption and ratification of the contract made by Hall. The demurrer was thereupon overruled. The defendants excepted and appealed.

George E. Butler and J. O. Carr for plaintiff.

Stevens, Beasley & Weeks, Fuller & Fuller, and E. J. Hill for defendants.

WALKER, J., after stating the case: The complaint contains so many evidentiary facts that we have experienced great difficulty in stating its substance, and at the same time preserving to the defendant the benefit of every fact which he is entitled to have considered in passing upon the demurrer, without the appearance of prolixity. The function of a complaint is not the narration of the evidence, but a statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy, but they are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. Those from which a legal conclusion may be drawn and upon which the right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: "The ultimate facts are those which the evidence upon the trial will prove, and not

(703) the evidence which will be required to prove the existence of those facts." *Wooden v. Strew,* 10 How. Pr., 48; 4 Enc. of Pl. and Pr., p. 612.

The first ground of the demurrer is untenable. It is well settled that a cause of action for specific performance may be joined with one for damages resulting from a breach of the contract, or from a delayed performance, or for any other damages growing out of the transaction to which the plaintiff may show himself entitled. It is the object of the reformed procedure to administer full relief in one and the same action, and consequently, if a complaint states facts constituting a cause of action for specific performance and also one for damages for a breach of the contract, a failure as to the first will not prevent a recovery on the second, whatever may be the form of the prayer for relief. Pomeroy Cont., sec. 480; *Sternberger v. McGovern,* 56 N. Y., 12. When the court finds for the plaintiff upon the general equity of the case, but declines in the exercise of its sound discretion to decree specific performance, or when the defendant is unable to comply with this contract, it may award damages, 20 Enc. Pl. and Pr., pp. 482, 488; or specific performance may be decreed, and, in addition, damages may be given for unjustifiable delay in doing what should have been promptly done. *Ibid.,* 490; Clark's Code, sec. 267, and notes; *Gregory v. Hobbs,* 93 N. C., 1; *Lumber Co. v. Wallace, ib.,* 22. Much stress was laid upon this ground of demurrer in the argument, but it cannot be sustained. We do not mean to intimate that the plaintiff has suffered any damages, but only to decide that, if he has, they may be recovered in this action.

The next objection made by the demurrer, that the associates of J. B. Winders should have been made parties, was said by the plaintiff to be fully answered by the statute which provides that "a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include (704) a person with whom or in whose name a contract is made for the benefit of another." Revisal, sec. 404. Under this section, when a person contracts in his own name, but really for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. 15 Enc. Pl. and Pr., 724; 16 *ibid.,* 897; Bliss on Code Pleading (3 Ed.), sec. 55 *et seq.* The law requires that every action shall be prosecuted in the name of the real parties in interest, and the right to sue in the name of a trustee of an express trust is an exception to the general rule. Winders cannot be regarded as such a trustee because, here, the contract was made directly with the syndicate which was composed of Winders and his associates, and the case is the same as if it had been made with a firm composed of certain members. If the associates had been designated by their individual names, instead of by the pronoun, no doubt would be entertained upon the ques-

tion, and we are unable to see why the failure to mention their names can make any difference in the application of the statute. It also appears that there were other parties, besides Winders, who were actually dealing with Hall, the agent, and it may be reasonably inferred that they were the associates. This ground of demurrer is sustained.

We are now brought to the consideration of the two principal questions in the case. The defendant's letter of 6 June which gave Hall the authority to sell does not fix any time for the payment of the purchase money, and the general principle is that when no time is specified in a contract for the performance of an act or the doing of a thing, the law implies that it may be done or performed within a reasonable time. *Michael v. Foil,* 100 N. C., 178; *Bunch v. Lumber Co.,* 134 N. C., 116; 2 Page Cont., sec. 1154. That principle would apply in this case if there had been an option. *Houghwout v. Boisaubin,* 18 N. J. (705) Eq., 315; Clark Contracts, 596. But we do not think the contract disclosed by the correspondence between the defendant and Hall amounted to an option. Hall acted as agent for the sale of the property, and the contract with Winders and his associates is executed by him in that capacity. It is apparent from the correspondence that the parties contemplated that Hall should sell and not buy. This is made perfectly clear by reference to the defendant's letter to Hall, dated 6 June, in which we find the following passages: "If you can handle my property so as to net me $20,000 you are at liberty to do so. This offer is good for four months. Of course, should you meet with some success in selling it about the end of the four months and wish an extension of time, I will give it to you. In case you do not meet with encouragement from your prospective buyer, advise, as I have some parties wishing to buy the timber, if I cannot sell the land." It is true that the defendant in that letter uses this expression: "This note should be used as an option to purchase"; but calling it an option did not necessarily make it so. Its character as an option or as agency must be determined by the law from the nature of the dealing between the parties and the language of the correspondence. When the defendant said that the note should be regarded as giving an option, he meant no more nor less than that Hall should have the right to sell the property within four months. But if we should look at it in another way, namely, that Hall should himself have the right to buy the land within four months, and that, so far as this right is concerned, it should be treated as an option, and that he should also have the authority to sell within the same time, viewing the matter in a double aspect, we find that Hall did not avail himself of the option or profess to do so. He acted and assumed to act throughout the transaction between him and the de-

fendant, not for himself, but as the defendant's agent engaged in the effort to sell the land to third parties, and the dealing was finally consummated in this way. We are quite sure that the presiding (706) judge must have considered the case as presenting a question of agency, for he decided it upon the ground of ratification. Hall sold the land to Winders and others within the four months, or during the existence of the agency, and the defendant is bound by what he did, provided Hall acted in conformity to his authority, or, if he did not, provided further that the defendant has either waived his departure from the instructions or acquiesced in and ratified his acts.

The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash. Mechem on Agency, secs. 325 and 353; 2 Page Cont., sec. 693; *Brown v. Smith,* 67 N. C., 245; *Moye v. Cogdell,* 69 N. C., 93; *Burke v. Hubbard,* 69 Ala., 379; *School Dist. v. Ins. Co.,* 62 Me., 330; *Lumpkin v. Wilson,* 5 Heisk., 555. In *School Dist. v. Ins. Co., supra,* the Court says: "It is needless to cite cases to establish the general principle that a specific authority or direction to sell does not authorize a sale on credit, unless, at the place of sale, there is an usage, general or special, in reference to which an authority to sell upon credit is supposed to be given." Assuming therefore, that when Hall undertook by his own contract with Winders and his associates to sell on credit, that is, to extend the time of payment, so that the purchase money would be payable "by October, as may be agreed upon," and that in this respect he exceeded his authority, the question still remains, Has the defendant ratified this unauthorized act?

In passing upon a demurrer to a pleading, we deem it proper to say as little about the merits of the case and to comment as little on the facts as possible, or as is consistent with a full statement of an opinion upon the question of law involved and necessary to be decided in order to dispose of the appeal. Should we go beyond this, there is danger that something will be said which may necessarily prejudice (707) one or the other of the parties in the future trial of the cause. We desire to refrain from giving utterance to anything that may have such an effect.

We therefore content ourselves with saying that we have carefully examined the facts alleged, and admitted by the demurrer, and have concluded that there are some which should be submitted to the jury, upon the question of ratification, with proper instructions from the court as to what would, under the circumstances, constitute a ratification. *Brown v. Smith, supra.*

The ruling of the court as to parties is reversed, but in all other respects its rulings are sustained. The associates of J. B. Winders must be made parties to the action by order of the court below, and all necessary process should be issued for that purpose.

Modified and affirmed.

Cited: S. c., 144 N. C., 615; *Burns v. McFarland,* 146 N. C., 384; *Martin v. Mask,* 158 N. C., 443; *Holden v. Royall,* 169 N. C., 678.

COFFIN v. HARRIS.

(Filed 28 May, 1906.)

Courts—Property in Custodia Legis—Injunctions—Conflicting Jurisdiction.

Where the plaintiffs brought an action against nonresidents for the recovery of money, and as a basis of jurisdiction levied an attachment upon certain land, and the action was removed to the Federal courts, where it is still pending, the plaintiffs cannot maintain an action in the Superior Court against residents of this State to enjoin a trespass upon the property attached, as it is *in custodia legis* of the Federal court, and the fact that both the plaintiffs and defendants are citizens of this State has no bearing.

HOKE and CONNOR, JJ., dissenting.

(708) ACTION by E. C. Coffin and another against C. J. Harris and others, pending in the Superior Court of SWAIN, heard by *McNeill, J.,* at chambers at Hayesville, N. C., on 16 April, 1906, upon defendant's motion to vacate the injunction theretofore issued, for want of equity in the bill. From an order dissolving the injunction, the plaintiffs appealed.

Norwood & Norwood for plaintiffs.
Dillard & Bell for defendants.

CLARK, C. J. In 1904 the plaintiffs began an action in the Superior Court of Swain County for the recovery of money against C. R. Flint and others, nonresidents of this State, and as a basis of jurisdiction levied an attachment upon certain realty, the property of said defendants. That action was removed to the United States Circuit Court, where it

is still pending. This is an action in the Superior Court of Swain County alleging that the defendants, residents of this State, are trespassing upon said land, cutting and removing timber and bark therefrom, which the plaintiffs allege will lessen and impair the value of the property attached, and asking injunctive relief to protect the same and the appointment of a receiver to take possession of the timber already felled and the lumber produced therefrom, and dispose of the same under the orders of the said Superior Court.

This is not the case where a plaintiff has brought an action in ejectment or to remove a cloud upon the title against one defendant and a separate action against another defendant as a trespasser, and asking an injunction. This would be necessary, for the plaintiff would have a standing in court by reason of his title to the property, and there would be distinct causes of action against different parties.

But here the plaintiffs have no title to or interest in the land. They have no standing in court except by reason of the lien of the attachment, the efficacy of which process they aver is being impaired by the conduct of these defendants. The action against Flint and others (709) having been removed to the Federal court, the attachment is now process of that court as fully as if the action had been originally begun therein. *Winslow v. Collins,* 110 N. C., 119. As such process, it will be protected against impairment of its efficacy by orders of that court alone, either by a rule as for contempt in violating property *in custodia legis,* or by an ancillary bill for injunction or otherwise, as the plaintiffs may be advised. *Freeman v. Howe,* 65 U. S., 460. The Superior Court of Swain County cannot entertain an independent action to give protection to property *in custodia legis* in the Federal court or in any other court. This would be a work of supererogation.

The fact that both the plaintiffs and defendants are citizens of this State has no bearing, as it is a proceeding in aid of an order in an action pending in the Federal court protecting property which has been taken *in custodia legis* in that action, and this can be done by a bill in equity in that court, "not as an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties." *Freeman v. Howe, supra.* In that case the property had been attached in an action pending in the Federal court and the mortgagees attempted to get possession by replevin in the State court. The United States Supreme Court decided that this proceeding in the State court could not be maintained, notwithstanding both parties to the replevin proceeding were citizens of the same State—the Federal court having first obtained jurisdiction by the attachment proceeding.

It was held that the remedy of the mortgagees was to intervene by a bill in equity in the Federal court, as ancillary to the action therein pending, and that only thus could the order and harmony of the
(710) two jurisdictions be maintained. If the mortgagees could not assert their superior rights in an independent action, certainly the plaintiffs here, who are already parties to the action in the Federal court, cannot protect their lien of attachment in that court against trespassers by an independent action in the State court. *Freeman v. Howe*, 65 U. S., 460, citing *Taylor v. Carryl*, 61 U. S., 583, and both these cases were discussed and reaffirmed in *Covell v. Heyman*, 111 U. S., 176, the Court holding that the levy of an attachment or execution was a taking into *custodia legis*, and whatever court thus first obtained jurisdiction held exclusive jurisdiction on such property and of all orders affecting it or its custody, *pendente lite*. The property cannot be taken out of its possession by order of any other court, and, of course, invasions of such possession can only be restrained or punished by the court that has it in its custody and keeping. In *Taylor v. Carryl, supra*, jurisdiction had first been obtained by an attachment in the State court of a vessel, and it was held that this could not be interfered with by a libel for the wages of the seamen in the United States Court of Admiralty, for the reason that the property "could not be subject to two jurisdictions at the same time"; the first levy, whether State or Federal, withdraws the property from the reach of the process of the other. *Hagan v. Lucas*, 35 U. S., 403. To same purport, *R. R. v. Gomila*, 132 U. S., 478. *Buck v. Colbath*, 70 U. S., 334, simply holds that "a third person, a stranger to the suit and claiming as owner, may sue the officer either personally for damages or on his bond" for trespasses, such action "not affecting the custody of the property." *Covell v. Heyman, supra.*

An injunction may issue to protect or safeguard property taken into the custody of the court by an attachment (*Cauffman v. VanBuren*, 20 L. R. A., 446, and notes); but it is an ancillary proceeding to
(711) that action and must be issued by the court that holds the property in its custody. As the basis of the plaintiff's claim is the lien of the attachment, it would be necessary for the State court to determine its regularity and validity before it could proceed, and this it could not do as to an attachment in a case still pending in another court.

The judgment discharging the restraining order which had been granted in this case is

Affirmed.

HOKE, J., dissenting: I differ from the Court in the disposition made of this case and consider the questions involved of sufficient importance to justify some statement of the reasons for my dissent. The plaintiffs, Coffin & McDonald, have heretofore, to wit, on 24 November, 1904, instituted an action in the Superior Court of Swain County, N. C., against Charles R. Flint and others, to recover damages to a large amount for an alleged breach of contract on the part of the defendants. Those defendants being all nonresidents of the State, an attachment was sued out in the action and levied on a large tract of land, about 78,000 acres, situated in Swain County. The defendants then made a general appearance, and on their application the cause was removed into the Federal Court for the Western District of North Carolina, where the same is now pending. Afterwards, to wit, in April, 1906, the plaintiffs instituted the present action in the Superior Court of Swain County against C. J. Harris, W. H. Woodbury, and William Tabor, and filed a verified complaint, alleging the pendency of the former action in the Federal court against Charles R. Flint and others and the existence of a valid attachment and levy on the 78,000 acres of land belonging to said Flint and his codefendants. The plaintiffs further allege that the land so levied on is chiefly valuable for the timber growing thereon, and that the defendants have wrongfully entered upon said land and are cutting down the timber and manufacturing and re- (712) moving the same, and that these wrongs and trespasses constitute an irreparable injury to the plaintiffs by lessening the security which the plaintiffs hold for the amount they may recover, and rendering said recovery fruitless.

The plaintiffs in this second action in the State court having obtained a restraining order, the defendants, on notice duly given, moved to vacate the same on the complaint for want of "equity in the bill," and on the hearing, the court below, being of opinion with the defendants, vacated the restraining order, and the plaintiffs excepted and appealed.

It will be noted that, so far as the record now discloses, the present defendants have no connection whatever with Charles R. Flint and others, defendants in the suit now pending in the Federal court, and by accepting the statements in the bill as true, it is admitted:

1. That the land belongs to Charles R. Flint and his codefendant in the original suit.

2. That the plaintiffs hold an attachment duly levied upon this property and the only security available for their recovery.

3. That the defendants in the present suit are wrongfully cutting the timber on the land and removing the same, and their wrongful conduct,

unless restrained, will so impair the value of the property as to render the plaintiffs' recovery fruitless.

The decision of the Court is made to rest on the position that, inasmuch as the cause in which the attachment was issued has been regularly removed to the Federal court, any action to protect and conserve the interest in the property acquired and held by the plaintiffs under the warrant of attachment must be brought and maintained in that court. But I do not understand this to be correct doctrine, and am of opinion that it is not the law on the facts presented in this appeal.

(713) It is conceded the order for removal transferred to the Federal court the original action between the plaintiffs and Charles R. Flint and his codefendants, together with all the incidental questions at issue between these litigants, and the said defendants having appeared generally and become parties, the action which, as at first constituted, was more strictly one *in rem*, by that appearance has become one *in personam*. Waples on Proceedings in Rem, sec. 580; *Cooper v. Reynolds*, 77 U. S., 308. The status of the plaintiffs, then, in reference to this suit in the Federal court, is that of actors seeking to recover damages *in personam* for breach of a contract and holding an inchoate lien on the realty as a security for the amount they may recover in that action. Such a position gives the plaintiffs no right to possession of the property nor to the rents and profits thereof, and the motion, therefore, for a receivership was properly disallowed.

The plaintiffs, however, on the facts stated, are entitled to injunctive relief against wrongful trespasses upon the property, which threaten to destroy its value and render their recovery fruitless. Revisal, sec. 806; *Webb v. Boyle*, 63 N. C., 271; *Gordon v. Lowther*, 75 N. C., 193; *Jones v. Britton*, 102 N. C., 166; *Latham v. Lumber Co.*, 139 N. C., 9; *People v. VanBuren*, 20 L. R. A., 447; High on Injunction (4 Ed.), sec. 658, citing *Camp v. Bates*, 11 Conn., 51. And there is no reason that occurs to me why the plaintiffs shall not be permitted to assert this right in the State as well as in the Federal court. Both plaintiffs and defendants in the present action are citizens, resident in the State of North Carolina, where the property is situated. The issue between them is in no way, so far as now appears, involved in the other action.

There is nothing here which threatens or tends to threaten the validity of the attachment lien, nor which impairs nor tends to impair the value of the security, nor which obstructs or tends to obstruct the due and orderly procedure of the action now pending in the Federal

(714) court or to prevent or interfere with the due application of the property to whatever judgment that court may render. On the contrary, the present action, being for the purpose of preventing a

trespass on land on which it is admitted that the plaintiffs have a valid attachment lien, is in aid of the Federal suit and tends to preserve the property held as security. I think, therefore, the plaintiffs should be allowed to proceed with their action and that on the facts admitted the restraining order should have been continued to the hearing.

The cases apparently to the contrary cited in the opinion of the Court are all cases where personal property has been seized and was held under process from the Federal court, and, by reason of such seizure and possession, the property was held to be in the custody of the law, and on that account was protected from interference. I respectfully suggest that the fallacy, if there be such, in the principal opinion arises from not having been advertent to the distinctions which exist between the levy of an attachment on realty, as here, and the seizure of personal property by levy, as in the decisions relied upon.

Possibly, if the defendants in the original action had not appeared and the suit was one more strictly *in rem,* the authorities cited by the Court might be considered as controlling; but I apprehend no case can be found where, in an action *in personam,* the levy of an attachment on realty in the Federal court and before any final judgment had by which conflicting rights are declared has been held to draw the property into the custody of the law to such an extent as to prevent action by a State court seeking to enforce a right or redress a wrong of which it would otherwise have full jurisdiction. In 3 A. & E., 215, it is said: "The effect of a levy on real estate, however, in this respect, differs materially from that of a levy on personalty. No estate or interest passes to the officer. He acquires no right to take the rents, issues, or (715) property. The possession and the right to these remain in the defendant undisturbed." And in 4 Cyc., 605, it is said: "Since in the case of a levy on realty, the officer levying acquired no possession nor special property, there is no reason why an attachment creditor may not acquire a valid lien by the levy of a writ of attachment on land on which another officer had already levied an attachment or execution, subject, of course, to the lien of the prior levy."

The decided cases support the doctrine as stated. *In re Hall & Stilson Co.,* 73 Fed., 527, it is said:

1. The rule of comity which forbids the seizure of property, subject to the jurisdiction of one court, by another court of concurrent jurisdiction, applies only where there is active or constructive possession of the property by the former court.

2. The levy of an attachment upon real estate gives to the court from which the process issues neither actual nor constructive possession of

the property, but only creates a lien thereon in favor of the attachment creditor.

3. Where real property, under attachment upon process from a State court, is taken into the possession of a receiver of a Federal court, leave should not be granted by the latter court to sell such property under execution in the attachment suit, if the property is not ample to meet all claims upon it, or if the condition of the title is such that the property would be likely to be sacrificed if sold before the title is cleared up by a decree.

This case is an apt authority in support of the view here contended for, and many others might be cited. *Powers v. B. and L. Assn.,* 80 Fed., 705; *Stanton v. Embry,* 93 U. S., 548.

Even in one of these cases relied upon by the defendants, *Buck v. Colbath,* 70 U. S., 334, it is held: "The rule that among courts of concurrent jurisdiction that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the
(716) case, is subject to some limitations and is confined to suits between the same parties or privies seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may, by possibility, become involved in it."

In the case before us the plaintiffs, holding an inchoate lien on realty by virtue of process in a suit now pending in the Federal court, which, as we have seen, they have a right to protect by injunctive relief, institute an action in the State court against a trespasser. There is nothing in the action, so far as it now appears, which interferes or tends to interfere with any property right or interest involved in the original suit. On the contrary, it is in aid of the relief sought in the Federal court, and in my judgment the plaintiffs should be allowed to proceed.

CONNOR, J., concurs in the dissenting opinion.

HICKORY v. RAILROAD.

(Filed 29 May, 1906.)

Railroads—Enlargement of Freight Depot—Nuisance—Injunction——Municipal Corporations.

1. In an action to enjoin the enlargement of a freight depot in the center of a city, the railroad cannot complain of a charge that if the enlargement would seriously interfere with the streets by obstructing them for an

unreasonable portion of time or render it unsafe for travelers to cross the railroad at public crossings, it would be a public nuisance; but if it would merely give inconvenience to the public or cause some delay, incident to the operation of a railroad, it would not be a nuisance.

2. A municipality is a proper party to institute an action to prevent a public nuisance by the proposed enlargement of a freight depot in the city.

ACTION by the city of Hickory against Southern Railway (717) Company, heard by *Cooke, J.*, and a jury, at February Term, 1906, of CATAWBA. From the judgment rendered, both parties appealed.

E. B. Cline, T. M. Huffman, and Self & Whitener for plaintiff.
Witherspoon & Witherspoon and S. J. Ervin for defendant.

PLAINTIFF'S APPEAL.

CLARK, C. J. This is an action to restrain the defendant from enlarging its freight station in the town of Hickory, the plaintiff alleging that the increase in traffic and shifting of more trains would make it a nuisance and dangerous, and averring that the defendant can and should locate a building to accommodate its increased traffic at some point further off and not enlarge its present building in the center of the growing and populous town. Both parties appeal, but the whole matter can be treated in one opinion.

Three main questions are presented: (1) The title to the lot in controversy. (2) Whether the proposed addition of 70 feet at the end of defendant's depot will be a nuisance which the courts can and should enjoin; and (3) Whether the plaintiff can maintain this action.

The defendant claimed title as follows: (1) A deed by H. W. Robinson and several others, 9 November, 1855, granting to the Western North Carolina Railroad Company a right of way over their respective lands wherever situated, the same to be "so much and no more of said lands" than said company "would have the right to condemn for its use" under the provisions of its charter. It is admitted that H. W. Robinson was the owner of the lot in question; that the defendant had succeeded to all the rights and property of said Western North Carolina Railroad Company, and that the right of condemnation extended (718) to 100 feet on each side of the track.

(2) A deed from H. W. Robinson to the Western North Carolina Railroad Company, 26 May, 1859, and recorded in November, 1905.

(3) The defendant further relies upon section 29, chapter 228, Laws 1854-'55 (the charter of the Western North Carolina Railroad Company, which is a provision that "in the absence of any contract" for

the right of way, the construction and operation of the road for two years without claim shall bar any action for any land covered by the right of way). The railroad was constructed at this point in the fall of 1859 and has been in operation ever since.

(4) A deed from H. W. Robinson, 10 March, 1880, to the Western North Carolina Railroad Company, for a lot 400 by 500 feet, giving specific boundaries and embracing the station as its central point, conveying said property "for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory, not to be built up or exclusively occupied by any one to the exclusion of the public as a free common." This deed was drawn by the president of the Western North Carolina Railroad Company, who indorsed thereon, "The original deed having been destroyed without record, this deed is accepted in lieu thereof." This deed was proved and recorded in April, 1880. The deed of 1855 was not presented in the evidence when this case was before us (137 N. C., 189), and this point was not passed upon.

We think, therefore, the court did not err in instructing the jury, as a matter of law upon all the evidence, to find that the defendant owned the 100 feet on each side of the railroad by virtue of the deed of 1855, and that it did not hold that part of the lot in trust for the town, and the jury found under proper instructions that the defendant held the balance of the lot under the trust set out in the deed of 1880 (No. 4 above). As to these findings, except the last, the plaintiff does not (719) appeal, but that exception is without merit, since it was adjudicated in the former appeal (137 N. C., 189). Indeed, it is stated in this case (137 N. C., at p. 203) that the record shows "the defendant in open court agreed that it did not claim any part of the land described in the deed and plats, except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by the order of the court."

This disposes of the plaintiff's appeal.

DEFENDANT'S APPEAL.

As to the defendant's appeal: It appeared in evidence that the present freight depot is too small to store the goods shipped over the road, and that in consequence a great number of cars constantly stand upon the sidetracks; also, that upon complaint made and after due investigation the Corporation Commission in December, 1903, adjudged "that the present depot facilities at Hickory for the handling of freights are insufficient and inadequate, and as at present operated are *unsafe*," and

ordered that the defendant should "provide adequate and *safe* facilities for the handling of freights" at Hickory. From this order the defendant did not appeal, and notwithstanding the adjudication that the handling of freight at the present location, in the center of the town, was unsafe, the defendant was proceeding to enlarge its warehouse; whereupon this action was begun, not to compel a removal of the warehouse now there, but to require that the additional facilities should be erected at a point where the increasing freight traffic and additional cars used might be shifted and handled without danger and delays to those crossing constantly from one side of the town to the other. There was ample evidence of the many dangers and inconveniences to the people of the town arising from the handling of the volume of freight at that point at present, and the certainty of increased danger in the future, both from the steady increase in the volume of freight and from (720) the great increase of population in the town, and there was evidence of many eligible locations in or near the edge of the town where the defendant might readily locate its freight depot, separate and apart from its passenger station, as is now usual at all other towns of any size.

The court charged the jury that if "the enlargement of the defendant's present freight depot by an extension on the eastern side" would "seriously interfere with and interrupt the streets of the town which are in general use and necessary for the convenience of the citizens and for the business in respect of travel or course of business, either by obstructing the streets for an unreasonable portion of the time or by having it so that travelers along said streets which cross the railroads at public crossings cannot, by the exercise of reasonable, ordinary care, with safety pass over such crossings, that they should find as to that issue that the enlargement would be a public nuisance. But that if it would merely give inconvenience to the public or cause some delay in their movements, which is incident to the operation of a railroad, it would not be a nuisance." The defendant has no just ground of exception to this charge. The jury found that the proposed enlargement would be a public nuisance.

Railroads are chartered for the public convenience and are operated by the exercise of a public franchise. Such exercise must be subordinate to the public welfare, and they are subject to public regulations as to their charges and conduct. If they exercise their functions in such manner as to become a public nuisance, they are liable to damages or to injunctive relief. The operation of their freight business, growing rapidly as it is shown to be, in the center of a large and growing town, will necessarily impede and render dangerous the circulation of the

people and business from one side of the town to the other. It necessitates the keeping of many box cars on the sidetracks and their
(721) constant shifting up and down, cutting off the view of approaching passenger and, indeed, of other freight trains. The jury has found this dangerous, inconvenient, and a public nuisance. Indeed, we might almost say that it would be a matter of common knowledge. If there are any good reasons why the defendant should have resisted the application of the town authorities and should not rather have anticipated the public wishes and convenience, by removing its freight depot to a more suitable location, they do not appear in this record.

The plaintiff, acting through its official board, was a very proper party to institute this proceeding to render the passage of its streets across the railroad track safer, and prevent their obstruction by shifting freight cars. While any citizen might have recovered damages by showing that the enlargement of the depot was a nuisance to him (*R. R. v. Church,* 108 U. S., 317), it is especially appropriate that this action to prevent a public nuisance should be brought by the municipality in the interest of all its citizens.

While this judgment, which we affirm, restrains only the addition to the freight depot, it is to be presumed that the defendant will not only place the building and sidetracks to give the additional freight facilities ordered by the Corporation Commission at a more suitable spot, where they will not be so dangerous and will not interrupt the traffic of the town, but that it will remove all its freight business to that point.

As to both appeals, we hold that there is

No error.

Cited: S. c., 143 N. C., 451; *In re Utilities Co.,* 179 N. C., 164.

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(722)

STATE v. JARRELL.

(Filed 29 May, 1906.)

Homicide—Evidence—Res Gestæ—Common Purpose—Principal and Accessory—Aiding and Abetting.

1. In an indictment for murder against two defendants, the statement by one of the defendants to the deceased and his companion, "We will whip you in a minute," made at the time of the attack and while the two defendants were together and both were running down the road toward

the deceased and his companion with the evident purpose and common design of making an attack on them, was competent as a part of the *res gestæ* and as evidence of the common purpose on the part of both to attack deceased and his companion.

2. Where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty.

3. A principal in the second degree is not an accessory, but a coprincipal.

4. The rule that an accessory cannot be tried and convicted before the principal has no application as between two principals in first and second degrees.

5. In an indictment for murder, where the evidence tends to prove that defendant jumped out of the buggy simultaneously with his companion and ran with him towards the deceased, that he either heard or made the remark, "We will whip you in a minute," and that though he must have seen his companion draw his knife, made no effort to stop the murderous assault, but on the contrary threatened deceased's companion, and said, "If you get off your horse, I will eat you up": *Held*, the evidence was sufficient to go to the jury that defendant was present for the purpose of aiding and abetting his companion, and is consequently a coprincipal.

INDICTMENT against Burton Jarrell and one Garfield Hicks, as coprincipals in the murder of W. G. King, heard by *Long, J.*, and a jury, at December Special Term, 1905, of WARREN.

The jury failed to agree as to Hicks and were discharged. They rendered a verdict of murder in the second degree as to Jarrell, and from the judgment pronounced, he appealed. (723)

Robert D. Gilmer, Attorney-General, for the State.
J. C. L. Harris & Son for defendant.

BROWN, J. There was evidence tending to prove that the deceased and one Barnes were riding in company on the public road in Warren County when they were accosted by some one in a buggy, who said, "Look out, give us the road." The persons in the buggy were the prisoners, Hicks and Jarrell. After some words the deceased said: "You can pass, but we would like to know what you are fussing about." Each prisoner at once jumped out of the buggy. Both ran down the road towards the deceased and Barnes and at the same time one of the defendants said: "We will whip you in a minute." When Hicks got in four or five steps he drew his knife and turned to the deceased and said, "No damn white man could run over him." He had the knife in his hand. The deceased struck him with the lash of his buggy whip. Hicks struck the deceased with his knife and cut his throat, from which wound the deceased shortly afterwards died. In the meantime Jarrell said to Barnes: "If you get off your horse, I will eat you up."

The defendant Jarrell excepted to the ruling of the court admitting the statement, "We will whip you in a minute," upon the ground that it was not proved which one of the defendants made it. We think this exception without merit. At the time the threat was made the two defendants were together. Both were running down the road towards the deceased and Barnes with the evident purpose and common design, if the evidence is believed, of making an attack on them. This declaration, made, as it was, at the time of the attack, was not only a part of the *res gestæ* (the essential circumstances surrounding the transac-
(724) tion), but, being made in the hearing of both defendants, it was competent evidence of a common purpose on the part of both to attack Barnes and the deceased. There is nothing in *S. v. Matthews,* 78 N. C., 535, cited by defendant's counsel, which controverts this.

The principal exceptions relied upon by Mr. Charles Harris in his well-considered argument and brief for the defendant Jarrell, relate to the insufficiency of the evidence to convict Jarrell of any participation in the offense, and also to the defendant's contention that inasmuch as Hicks has not been convicted as yet, Jarrell cannot legally be convicted and sentenced for murder in the second degree. We will first consider this last contention, for if it is sound there would be no need to examine the other.

If Jarrell had been indicted as an accessory before or after the fact there would be much in the contention. But he is indicted as a principal. There is practically now no degrees as to principals, as Bishop, Wharton, and other writers state. One principal can be convicted when the other has not been tried. 1 Bishop Cr. Law (8 Ed.), sec. 604. Where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. A principal in the second degree is not an accessory, but a coprincipal. *S. v. Whitt,* 113 N. C., 716; *King v. Wallace,* 1 Salk., 334, is exactly in point, where *Chief Justice Holt* ruled that where one principal was acquitted at a former trial, it was no bar to the trial of the others in the indictment. See, also, *Brown v. State,* 28 Ga., 199. The rule that an accessory cannot be tried and convicted before the principal has no application as between principals in first and second degrees. 1 McClain, sec. 216.

As to the other contention so earnestly pressed by counsel, we are of opinion that there was evidence sufficient to go to the jury that Jarrell was present at the time of the homicide for the purpose of aid-
(725) ing and abetting Hicks, and is consequently a coprincipal. The learned judge who tried the case in the court below presented this feature of the case to the jury with clearness.

The evidence tends to prove that the defendant Jarrell jumped out of the buggy simultaneously with Hicks and ran with him towards the deceased; that he either heard or made the remark, "We will whip you in a minute." If he heard it, he was made aware of Hicks' purpose. He must have seen Hicks draw his knife, if the evidence is believed, and he made no effort to stop the murderous assault. On the contrary, he threatened Barnes and said: "If you get off your horse, I will eat you up." He thereby endeavored to prevent Barnes going to the rescue of his companion, and made no effort himself to stop the homicidal assault with the knife. It is a fair inference from the evidence that the presence of Jarrell at the homicide was not accidental, but that he was purposely there. That fact itself is evidence, but no more than evidence, to go to the jury. 1 Wharton Cr. Law, sec. 211. There is much in the conduct of Jarrell, according to the evidence, which indicates a design to encourage and aid Hicks in the assault. "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouraging." Wharton, *supra,* sec. 211a, who cites many cases in support of the text. Jarrell was in a situation to be able readily to go to Hicks' assistance if necessary. The knowledge of this was calculated to give additional confidence to Hicks. In contemplation of law this is aiding and abetting. *Ibid.,* sec. 211a; *Thompson v. Com.,* 1 Metc. (Ky.), 13; *S. v. Douglass,* 38 La. Ann., 523; 15 Cox Cr. Cases, 51, 52. "If A comes and kills a man and B runs with intent to be assisting him, if there should be occasion, though *de facto* he doth nothing, yet he is principal, being present." Hale P. C., (726) 439.

We have examined the other exceptions relating to the admission of evidence, and think they are without merit.

No error.

Cited: S. v. Worley, post, 768; *S. v. Cloninger,* 149 N. C., 572; *S. v. Hinson,* 150 N. C., 830; *S. v. Spivey,* 151 N. C., 681; *S. v. Knotts,* 168 N. C., 190.

STATE v. MORGAN.

(Filed 27 February, 1906.)

Bastardy—Failure to Give Bond—Imprisonment—Right to Discharge—Imprisonment for Debt—Working on Roads—Costs in Criminal Cases.

1. Revisal, sec. 1519, originally enacted in 1773, must be construed in connection with the other sections of the Revisal, 1352 and 1355, and does not repeal the latter statutes, which authorize and direct the working upon the public roads of those sentenced for nonpayment of costs in criminal cases.

2. Imprisonment of the putative father for failure to obey an order of maintenance, or to give the bond, is a matter of legislative discretion, and is not imprisonment for debt.

3. Revisal, secs. 1352 and 1355, do not include among those authorized to be worked upon the roads those "sentenced to the house of correction," nor does it include those who fail "to give bond for maintenance of a bastard," nor for "failure to pay costs," except "those imprisoned for nonpayment of costs in criminal causes"; therefore a defendant who was imprisoned for failure to give bond pursuant to a judgment in bastardy proceedings was entitled to his discharge, as bastardy is not a criminal action.

INDICTMENT for bastardy against Charles Morgan, heard by *Moore, J.*, at April Term, 1905, of WAKE, on appeal by the State from an order of the clerk permitting the defendant to take the insolvent debtor's oath and be discharged. From a judgment affirming the order of the (727) clerk, the State appealed.

Robert D. Gilmer, Attorney-General, and J. C. L. Harris for the State.

No counsel for defendant.

CLARK, C. J. The defendant, tried before a justice of the peace on a charge of bastardy upon the complaint of the mother of the child, did not deny the paternity, and was therefore adjudged to pay her $50 allowance (Revisal, sec. 254) for the maintenance of the child, a penny fine and $3.80 costs of the action and to give bond in the sum of $100 with surety to indemnify the county against any and all charges for the maintenance of the bastard child. This judgment was in accordance with sections 254 and 259 of the Revisal of 1905.

The judgment further provides: "And in default of such payments and of the execution of said bond, that he be committed to the house of correction of Wake County for the term of ten months, with authority to the commissioners of said county to work him on the public roads of

the county," etc. Section 262 of the Revisal provides: "In all cases arising under this chapter when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall by law be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper: *Provided,* that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select," etc. "The price obtained shall be paid to the county treasurer."

The defendant did not comply with the order of the court nor (728) accept the option given him to bind himself as an apprentice to some person selected by himself. Thereupon the sentence to "ten months in the house of correction" became operative, if there was such "house of correction."

The Revisal, sec. 1352, authorizes the county commissioners to work upon the public works, highways, and streets any person imprisoned in jail "upon conviction of any crime or misdemeanor or who may be committed to jail for failure to enter into bond for keeping the peace, or for good behavior, and who fail to pay the costs," *provided* "such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court," and also provided the court should so authorize in its judgment. The Revisal, sec. 1355, makes it the duty of the judge, where "any county has made provision for the working of convicts upon the public roads," to sentence for the term of their imprisonment "all persons convicted of offenses" and sentenced to imprisonment in jail, or to the penitentiary for less than ten years, and all sentenced to imprisonment for "nonpayment of costs in criminal cases." This statute has often been held constitutional. See cases cited in *S. v. Young,* 138 N. C., 573.

The defendant having remained in jail twenty days, filed a petition before the clerk of the Superior Court of Wake, under authority of Revisal, secs. 1915-1918a, and upon taking the oath prescribed by section 1918a was discharged from custody. The State and the woman appealed, assigning as grounds: (1) The imprisonment of the defendant was for a definite and fixed term, under Code, sec. 38 (now Revisal, sec. 262), and the clerk had no power to discharge him. (2) Because the defendant did not aver that he had paid or worked out half his costs, as required by chapter 419, Laws 1889 (now Revisal, sec. 1355).

The defendant relies for his discharge upon the Revisal, sec. 1915, which authorizes such discharge, upon the procedure provided for in that chapter, of— (729)

1. Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance.

2. Every person committed for the fine and costs of any criminal prosecution.

But that section, originally enacted in 1773, must be construed in connection with the other sections of the Revisal, and does not repeal the later statutes, which authorize and direct the working upon the public road of those sentenced for nonpayment of costs in criminal cases, as Revisal, secs. 1352, 1355, and others, which are a modification of the general terms of the earlier statute (now Revisal, sec. 1915). That earlier statute applied to a condition of things when the working out of costs was unknown, and the defendant, without this provision for relief, would be imprisoned without hope of discharge. It does not apply to counties where provision for working out the costs is now made. The earlier statute, section 1915, does not repeal those enacted much later, sections 1352, 1355, but the latter modify it. This has been so held in *S. v. Manuel,* 20 N. C., 146. All three sections being reënacted into the Revisal at the same time, they must be construed together.

That section 1915 of the Revisal, authorizing the discharge of insolvents in the mode therein prescribed, is modified by the later statute (passed in 1887), now Revisal, sec. 1355, may be seen by reference to the following language of section 1355: "When any county has made provision for the working of convicts upon the public road . . . it shall be lawful for, and the duty of, the judge holding court in said counties to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the State's Prison, the following classes of convicts (naming them). In such counties . . . also, all *insolvents,* (730) who shall be imprisoned by any court in said counties for nonpayment of costs in criminal causes, may be retained in imprisonment and worked on the public roads until they have repaid the county to the extent of the half fees charged up against each county for each person *taking the insolvent oath.*" There are further provisions that the "rate of compensation allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation"; and section 1352 further provides that such insolvent "shall not be detained beyond the time fixed by the judgment of the court."

Some one must labor to pay off the half costs incurred by an insolvent convicted of crime, and the Legislature thought it better that the lawbreaker should do this, and to that extent improve the public roads, than that the punishment should fall upon hard-working citizens of earning

money to pay what convicted criminals should earn by their own labor; and the criminals are safeguarded both by fair valuation for their services and the judgment limiting the time they may serve. There is no constitutional provision denying this power to the Legislature.

The defendant then relies upon the ground that the sentence to the house of correction is unconstitutional because it is for nonpayment of debt. There is a failure to discharge a public duty, to wit, to provide for the maintenance of the bastard child and prevent its being a charge upon the county, and to give bond to protect the public from such liability. This public duty can be enforced by appropriate remedy, like failure to work the public roads, to serve on the jury, to serve in the army, to pay alimony ordered (*Pain v. Pain,* 80 N. C., 325), or the like, and it was competent for the General Assembly to provide that upon failure to save the public harmless from being taxed to support the defendant's bastard, or to select some one to whom he might apprentice himself to earn money for that purpose, the court could sentence the defendant "not exceeding twelve months." *S. v.* (731) *Palin,* 63 N. C., 471; *S. v. Beasley,* 75 N. C., 212; *S. v. Edwards,* 110 N. C., 512. This is not punishment for crime, but enforcement of the order of the court, as in case of a refusal to obey an order for alimony or contempt in disobeying any other order; the statute in this case making the limit twelve months. The sentence to the house of correction is valid enough, if there was a house of correction. The defendant, however, did not complain of that sentence, which he was not undergoing, but of being ordered to work on the public roads.

The defendant further contends that any order of imprisonment for nonpayment of a fine and costs or that the defendant be set to work them out, on the public roads, is unconstitutional because it is "imprisonment for debt." It is true that a fine and costs are also debts, but they are more. A fine and costs in criminal actions are a part of the punishment imposed as a result of the conviction and judgment, and, if not paid, imprisonment at hard labor can be imposed upon such failure. This has always and everywhere been held. "It is competent for the Legislature to impose hard labor upon a defendant for nonpayment of the costs of the prosecution, this being part of the punishment." 11 Cyc., citing *Joice ex parte,* 88 Ala., 128; *S. ex parte,* 87 Ala., 46; *Berry v. Brislan,* 86 Ky., 5; *S. v. Brannon,* 34 La. Ann., 942; *Meyer ex parte,* 57 Miss., 85; *Eaton v. State,* 15 Lea., 200; 8 A. & E., 992, 993. "Neither fines, forfeitures, nor costs in criminal cases are debts within the meaning of the prohibition against imprisonment for debt." *In re Sanborn,* 52 Fed., 583, and other cases cited 10 Century Digest, sec. 151½, cols. 1472-1479.

"Imprisonment for nonpayment of the costs of the prosecution is not repugnant to the constitutional prohibition of imprisonment for debt."

8 Enc. Pl. and Pr., 994, citing numerous cases from Alabama,
(732) Connecticut, Illinois, Indiana, Kansas, Maryland, Mississippi,
North Carolina, Tennessee, and Texas. The decisions as well as the statutes in this State are fully in accord with these authorities. Among them are *S. v. Manuel,* 20 N. C., 146, where the subject is interestingly and exhaustively discussed by *Judge Gaston* (p. 159); *S. v. Cannady,* 78 N. C., 542; *S. v. Wallin,* 89 N. C., 580.

Working out fines and costs in criminal cases has always been held a matter within legislative power. *Ex parte Meyer,* 57 Miss., 85; *Ex parte State,* 87 Ala., 46; *Ex parte Joice,* 88 Ala., 128; *Eaton v. State,* 15 Lea, 200. "No practice is better settled," says *Judge Catron. Hill v. State,* 2 Yer., 247; *S. v. Williams,* 97 N. C., 414; 1 Bishop Cr. Pr., sec. 1321. An offender against the ordinances of a city may be imprisoned for nonpayment of costs of conviction. *Berry v. Brislan,* 86 Ky., 5. A prosecutor taxed with the costs of a malicious or frivolous prosecution may be imprisoned for nonpayment of the same. *Green v. State,* 112 Ga., 52.

Imprisonment of the putative father for failure to obey an order of maintenance, or to give the bond, is sustained wherever the statute so authorizes. It is a matter of legislative discretion, and is not imprisonment for debt. *S. v. Palin,* 63 N. C., 471; *S. v. Edwards,* 110 N. C., 512; *Woodcock v. Walker,* 14 Mass., 386, and other cases cited 6 Century Digest, sec. 209, vol. 1988, *et seq.* Also numerous cases cited 5 Cyc., 670, 671; *S. v. Yandle,* 119 N. C., 874; *S. v. Nelson, ib.,* 797. The last two cases have been overruled only in so far as they held that bastardy is a criminal action. *S. v. Liles,* 134 N. C., 735.

The defect, however, in the contention for the State is that Revisal, secs. 1352 and 1355, do not include among those authorized to be worked upon the roads those "sentenced to the house of correction," nor does it include those who fail "to give bond for maintenance of a
(733) bastard," nor for failure to pay costs, except "those imprisoned for nonpayment of costs in *criminal* causes." In the recent case of *S. v. Liles,* 134 N. C., 735, the Court reviewed all the cases upon the nature of bastardy proceedings and held, in accordance with our long line of decisions (overruling two or three later cases to the contrary) and in accordance with the almost uniform holding in other States (134 N. C., p. 741), that bastardy is not a criminal action at all, but it is a *quasi*-civil regulation to enforce police regulation for the purpose of securing the maintenance of the child and to prevent the costs thereof falling upon the taxpayers, and that the object of such proceeding is not the punishment of the father. The criminal offense is fornication and

adultery, and in that the mother, instead of being complainant, would properly be a codefendant.

For these reasons the defendant was entitled to be discharged from custody. Whether he ought not rather to have been set at large upon a writ of *habeas corpus* than by this proceeding is a matter we are not called upon to discuss, since we cannot remand him to illegal custody.

Affirmed.

WALKER and CONNOR, JJ., concur in result.

Cited: S. v. Addington, 143 N. C., 687; *S. v. Moore,* 146 N. C., 654; *Bryant v. Bryant,* 171 N. C., 747.

(734)

STATE v. ATKINSON.

(Filed 27 February, 1906.)

Assault—Pointing Pistol—Pauper Appeals in Criminal Cases—Sufficiency of Affidavit.

1. In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of Revisal, sec. 3622.
2. An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error.
3. Under Revisal, sec. 3278, the affidavit to appeal in criminal cases, without giving bond, is fatally defective where it omits the averment that it is "made in good faith," and such an appeal must be dismissed as a matter of right.

INDICTMENT against Dennis Atkinson for assault with a deadly weapon, heard by *Jones, J.,* and a jury, at September Term, 1905, of PITT. From a verdict of guilty and a judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendant.

CLARK, C. J. Indictment for assault with a deadly weapon, to wit, a pistol. The court charged the jury that if the State had "satisfied them beyond a reasonable doubt that the defendant pointed a pistol at

(735) the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty. Laws 1889, ch. 527 (now Revisal, sec. 3622), expressly so provides, whether the unloaded pistol is pointed at another in fun or otherwise, and it is unnecessary to consider whether this would be so, independent of the statute.

The court further charged the jury that if they were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket, and, "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault, and they should find the defendant guilty." This was not error. Firing a pistol concealed in the pocket of a coat, through the cloth, without the risk of first taking it out of his pocket, is a most cowardly and unfair advantage, and such use should be punished more severly than the use of the weapon openly, when the other party would have some warning. Pointing the pistol at the prosecutor in this manner was an assault.

We pass upon these exceptions, though we dismiss the appeal because the affidavit to appeal, without giving bond, is fatally defective in that it omits the averment that it is "made in good faith." This is required as to such appeals in criminal cases (Revisal, sec. 3278), though this is not required as to appeals *in forma pauperis* in civil actions. Revisal, sec. 597. Such dismissal is a matter of right, and does not rest in the discretion of the court. An appeal without bond is valid only when the statutory requirements are complied with. *S. v. Bramble,* 121 N. C., 603, and numerous cases there cited.

Appeal dismissed.

Cited: Honeycutt v. Watkins, 151 N. C., 653; *S. v. Smith,* 152 N. C., 842; *S. v. DeVane,* 166 N. C., 283; *S. v. Martin,* 172 N. C., 977.

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(736)

STATE v. RAILROAD.

(Filed 6 March, 1906.)

Municipal Corporations—Railroads—Licenses—Police Power—Regulation of Streets—Ordinances—Violation.

1. A license granted by a city to a railroad company to lay a track upon and to that extent use the streets, in the absence of an express power in the charter to do so, such license cannot be construed into a grant of a permanent easement.

2. Where a contract between a city and railroad company amounted merely to a license granted to the company to lay its tracks on the street and

run its cars thereon, the power of the city to make such laws and regulations controlling the use of the streets by the defendant as the safety and comfort of the citizens demanded was not in any degree restricted thereby.

3. Any and all franchises and privileges conferred upon persons or corporations respecting the use of the streets, wharves, parks, or other public property of the city are conferred and accepted subject to the police power vested in the city.

4. The shifting of cars in a street in making up a train constitutes a violation of an ordinance providing that no engine or train shall be stopped on any street except at the foot of the same for the reception and delivery of freight.

INDICTMENT against the Atlantic and North Carolina Railroad Company, heard by *Jones, J.*, and a jury, at October Term, 1905, of CRAVEN.

The defendant corporation is charged with violating an ordinance of the city of New Bern, which provides "that it shall be unlawful for any corporation or person or employee to operate any engine, train, or railroad cars upon any railroad track upon the streets of the city of New Bern, in any manner in violation of the terms of the contract subsisting between the said city of New Bern and the railroad company or corporation, between whom and the city a contract was made, now remaining in force, under which the said railroad company was (737) permitted to lay its tracks upon the said streets of the city of New Bern . . . and for each violation of said terms the persons or corporation . . . shall be fined for each offense the sum of $50." By section 98 of the ordinance of said city it is provided "that no engine, locomotive, or car or cars shall be stopped on any railroad or on any street in the city of New Bern south of Johnson Street and south of Queen Street from its intersection with Johnson Street westwardly to the limits of the city, except at a depot for the purpose of receiving and delivering freight at such depot." For a violation of the ordinance a fine of $50 is imposed. The case was carried by appeal to the Superior Court, and from an adverse verdict and judgment the defendant appealed to this Court.

Robert D. Gilmer, Attorney-General, for the State.
Simmons & Ward for defendant.

CONNOR, J. It was not denied that defendant at the time charged in the complaint was engaged in shifting cars on its track and sidings on the streets of the city within the prohibited limits. Defendant contended that in doing so it was exercising a right secured to it by a contract entered into between the city and itself on 12 April, 1856. The contract was introduced in evidence. It appears from an examination

of its provisions that the city granted to the defendant a right of way in and through Hancock Street from the north side of Queen Street to the channel of Trent River. It was provided, "That there shall be only one track of road except such branch or branches as may be required for the discharge of freight at the river Trent and for connecting with the several lines near the depot at the head of Hancock Street." Following several other provisions, not material to the decision of this appeal, is the following: "Nor shall said engine or train be
(738) stopped on said streets, except at the foot of the same for the reception or delivery of freight."

The State introduced testimony tending to show a violation of the ordinance. Mr. Whitford, who was in charge of the engine at the time of the alleged violation, was introduced by defendant, and, after describing the manner in which he was handling the train, said: "We were shifting cars, not unloading them. We were locating loaded cars in the train that was going to Morehead City. We were not receiving or delivering freight." Mr. Davis, who was the agent at the freight warehouse at foot of Hancock Street, testifying for defendant, said that on the day of the conduct of which complaint is made "they were making up freight on train for Morehead City." His Honor, at the request of the defendant, instructed the jury that "The contract and ordinance authorize such sidings and such stopping of engines and cars as is reasonably necessary in receiving and delivering freight at the warehouse at the foot of Hancock Street, either in whole car-loads or less than car-loads, and if the defendant had used the street only for this purpose, the jury shall find the defendant not guilty"—to which he added the words, "Provided, if you find that the defendant could shift somewhere else, you should still find the defendant guilty." To this the defendant excepted. The case was tried below and argued in this Court upon the assumption that the contract of April, 1856, restricted the power of the city of New Bern to make and enforce ordinances controlling, by reasonable limitation, the manner in which the defendant should operate its trains on Hancock Street. It is exceedingly doubtful whether such is a correct view of the law in that respect. Without bringing into question the power of the commissioners of a town to grant license to a railroad company to lay a track upon and to that extent use the streets, we think it clear that in the absence of an express power in the charter to do so, such license cannot be construed
(739) into a grant of a permanent easement. As the contract appears to us, a license to lay the track and run the cars thereon is given. The corporation in consideration thereof makes certain stipulations with the city, one of which is that "no engine or train shall be stopped on

said street, except at the foot of the same for the reception and delivery of freight." We do not think that either the language by which the license is given or the stipulation in regard to its use affects the right or power of the city to regulate the movement of trains on the street. This right is inherent in the city, as a portion of the police power conferred by the State, and cannot be sold or bartered away. Any and all franchises or privileges conferred upon persons or corporations respecting the use of the streets, wharves, parks, or other public property of the city are conferred and accepted subject to the police power vested in the city. For instance, the defendant company stipulates that it will not run its trains through said streets at a higher rate of speed than three miles an hour. Can it be doubted that even if the language be construed into the grant of the privileges of running its trains at that rate of speed, the governing body of the city could, if in their judgment such speed was dangerous, restrict it to some other reasonable rate? The law is thus laid down by Judge Elliott: "The grant of a right to use a street does not by any means imply that the municipality surrenders the right to make needful police regulations, nor does it authorize the company to unnecessarily obstruct the street or to negligently operate its road. The right to make necessary rules for the safety of the public is a legislative power, and is not surrendered, if indeed it can be capable of surrender." Roads and Streets, sec. 479. *Mr. Justice Brown,* in *R. R. v. Defiance,* 167 U. S., 88, says: "Indeed, the general principle that the legislative power of a city may control and improve its streets, and that such power when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation is so well (740) established, both by the cases in this Court and in the courts of the several States, that a reference to the leading authorities upon the subject is sufficient." In *Balto. v. Balto. Trust Co.,* 166 U. S., 673, it appeared the city council in 1891 passed an ordinance authorizing the North Avenue Railway Company to lay a double track on Lexington Street. Thereafter an ordinance was passed revoking the first and restricting the road to one track. *Peckham, J.,* says that it is unnecessary to discuss the question whether the council had the power to grant the license, and, if so, whether the ordinance constituted a contract; concluding, he says: "It is sufficient for the decision of this case to hold that the direction to lay but one track through Lexington Street, between the points mentioned, did not substantially change the terms of the contract, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of that street by the railroad company, and that the original contract

(assuming that one existed) was entered into subject to the right of the city to adopt such a regulation." In Smith on Mun. Corp., sec. 1288, it is said: "The powers of a municipal corporation in respect to opening, improving, and controlling its streets are held in trust for the benefit of the public, and cannot be surrendered by contract to private persons, or to a corporation by resolution of the common council or in any other manner." The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. *R. R. v. Defiance, supra.* In the light of these and many other authorities of uniform import, we hold that in no aspect of the testimony could the judge below have held that the defendant was not guilty. Treating the license given by the instrument of April, 1856, as a contract, only for the purpose of ar-
(741) gument, we do not think that it in any degree restricted the power of the city to make such rules and regulations controlling the use of the streets by the defendant as the safety and comfort of the citizens of New Bern demanded. *Glenn v. Comrs.,* 139 N. C., 412. The defendant's witnesses showed clearly that the train was not unloading or receiving freight, but shifting cars in making up a train for Morehead City. His Honor's charge was more favorbale than the testimony warranted. There is

No error.

Cited: White v. New Bern, 146 N. C., 450; *Staton v. R. R.,* 147 N. C., 440; *S. v. R. R.,* 168 N. C., 111.

STATE v. DURHAM.

(Filed 6 March, 1906.)

Homicide—Self-defense—Resisting Arrest—Manslaughter.

1. Where deceased, a deputy sheriff, had arrested the prisoner upon a warrant for a misdemeanor, and while he was writing the bond the prisoner escaped, and deceased, following to capture him, with pistol in hand, fired at the prisoner and in the altercation the prisoner shot and killed deceased, an instruction that the prisoner was at least guilty of manslaughter was correct.

2. The law of self-defense applicable to encounters between private persons does not arise in the case in which a person sought to be arrested kills the officer seeking to make the arrest.

WALKER and CONNOR, JJ., dissenting.

INDICTMENT for murder against Frail Durham, heard by *Council, J.*, and a jury, at August Term, 1905, of POLK. The defendant was convicted of murder in the second degree, and from the sentence of the court pronounced thereon appealed.

Robert D. Gilmer, Attorney-General, for the State.
Smith & Schenck and A. H. Dean for defendant.

BROWN, J. The evidence tends to show that the deceased was a deputy sheriff and had a warrant for the arrest of the prisoner for carrying concealed weapons. Deceased approached prisoner for the (742) purpose of effecting his arrest, and some conversation ensued, the prisoner finally agreeing to give bond for his appearance. The prisoner, the deceased and others started to the office in the feed store of one Engel for the purpose of signing the bond. Hilton, the deputy sheriff, sat down at the table to write the bond, and while thus engaged the prisoner escaped from the room, Hilton following to capture the prisoner, and in the altercation which followed, the prisoner shot and killed Hilton.

In one of their briefs the prisoner's counsel admit that if the decision in *S. v. Horner,* 139 N. C., 603, is to be adhered to, all their exceptions are untenable except the fourth; and as to that exception it is insisted that the court below erred in charging the jury that in any view of the evidence the defendant was guilty of manslaughter, thereby depriving him of his plea of self-defense. In the able argument of Mr. Dean, as well as in their well-considered briefs, counsel for defendant endeavored to draw a distinction between the case at bar and *Horner's case.* After most careful consideration, we fail to see the distinction. In fact, the cases appear to be "on all-fours."

The deceased, Hilton, was a deputy sheriff and had arrested the prisoner upon a warrant for carrying a concealed weapon—a misdemeanor. The defendant, according to his own evidence, recognized Hilton's authority and went with him to give bond for his appearance. When they arrived at the office the deceased commenced to write the bond. As to subsequent occurrences the defendant testified: "Hilton then sat down and got to writing, and while he was doing so I slipped out of the side door of the store, and after I had got about twenty yards, I looked back and saw Hilton coming with his pistol in his hand, coming towards me. I was running and he was running. I ran on about five or ten

(743) steps and looked around and saw Hilton with his pistol pointing towards me. Up to this time I had not drawn my pistol. I then drew my pistol and continued to go forward sideways, holding my pistol pointing in the direction of the left side (describes attitude). The range of the pistol was not on Hilton. I looked around as I was going away, and as I did so he fired on me. I then turned and fired. I did not aim at him this shot. I did not attempt to hit him. I did not want to hit him this shot. When I fired the first shot I came to a little stop—a moment's stop. I then went two or three steps and Hilton shot again and the bullet grazed me on the left arm. I then fell back a little bit—standing against a little sapling. Up to this time Hilton had fired two shots and I one, and after this he fired two more before I fired any more. I then fired one and killed him. At the time I fired the last shot Hilton was standing up aside of a sapling, his pistol pointing at me. After the last shot I ran off and went home."

The defendant further testified that when Hilton arrested him he laid hands on the defendant and said, "Give me your gun"; that he had a pistol in his pocket and did not give it up or allow Hilton to search him; that he had a bottle of liquor in his right hip pocket; that he fired on Hilton and killed him because he thought Hilton would kill him, and that Hilton ordered him to stop as he ran off. One Kuy Kendall corroborates the defendant, but states that he never saw the defendant when he drew the pistol, and never saw it until the defendant turned and fired. This is not necessarily inconsistent with the defendant's statement.

We have stated only the material evidence offered by the defendant and most favorable to him, because in passing on this exception that testimony alone should be considered. The facts in *Horner's case,* briefly stated, are that Nichols, a deputy sheriff, had a warrant for Hor-
(744) ner for a misdemeanor, viz., whipping his daughter-in-law. Horner refused to submit to arrest and attempted to escape. The testimony most favorable to Horner was his own (139 N. C., 610): "I was in the woods; dog had treed a squirrel; Nichols and Breez came on down the road. Nichols called to me and I answered. He said, 'Come on and go with me'; had a warrant; he read it. I said I am not going to do it; he said if I would promise to be at Squire Terry's tomorrow at 3 o'clock, he would go. I refused. He came on me and said to me with an oath, 'If you do not go with me I am going to shoot you.' Then I picked up gun and walked off; he shot at me; I ran *about 50 yards;* he shot again and I threw gun 'round and shot; I was going away from him; was out there for a squirrel. I ran against a tree when he was after me—knew deceased was a deputy sheriff." Horner was convicted of murder in the second degree and appealed. His Honor had instructed the jury,

as in the case at bar, that Horner was guilty of manslaughter at least. In almost every respect the cases are similar.

Ever since *S. v. Garrett,* 60 N. C., 145, it has been thought that in this State the principle of self-defense does not apply to the case of one who places himself in the posture of armed defiance to the process of the State. In that case the *Chief Justice* says: "When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense." The law of self-defense, applicable to encounters between private persons, does not arise in the case in which a person sought to be arrested kills the officer seeking to make the arrest. In this State, we think this is most essential to "preserving good order and asserting the supremacy of the law." After mature consideration, this rule was reaffirmed in *Horner's case* by a unanimous Court. The well-considered opinion delivered by *Mr. Justice Connor* is not open to any possible misconstruction so far as we can see. Much of his language would apply with aptness to this case. The (745) learned justice says: "The prisoner knew that the deceased was a deputy sheriff and that he had a warrant for his arrest. It was his duty to submit to arrest, and in resisting it with a gun in his hand it is not open to him to say he acted in self-defense. Conceding that as he (the prisoner) was going away from the officer, refusing to submit to arrest, the officer was not justified in shooting him to make the arrest, does not affect his right to kill. If there was a necessity to shoot the deceased to save his life, it was the result of his unlawful act in resisting the mandate of the law. The position of the prisoner is similar in this respect to one who brings on or provokes a difficulty, and in the progress of it kills. It is not *se defendendo,* because he brought on the necessity. This is elementary and uniformly sustained by numerous cases in our own and other jurisdictions."

The officer is not excused if he, with undue violence, menaces the life of the defendant when he attempts to arrest a person for a misdemeanor. The officer may be convicted and punished. But his crime will not excuse or condone the crime of the defendant in making open resistance to the process of the State. We are aware that in some jurisdictions it is held otherwise, and that while an officer, in attempting to arrest for a misdemeanor, dangerously menaces the life of the accused, the latter may defend himself to the extent of taking the officer's life, and the plea of self-defense is open to him. But in this State we have a statute (Laws 1889, ch. 51) which enacts that "any person who willfully and unlawfully resists, delays, or obstructs a public officer in discharging or attempting to discharge a duty of his office shall be guilty of a misdemeanor." At the time he killed the deceased the defendant was engaged in an unlawful

act, not only *malum in se* (being in armed resistance to the process of the State), but an act directly connected with, and which finally resulted in the death of the officer; for it is plain that had the defendant (746) himself not resisted the law but submitted to arrest, there would have been no homicide by any one. *S. v. Hall,* 132 N. C., 1094; *S. v. Turnage,* 138 N. C., 566; Wharton Cr. Law, vol. 1 (10 Ed.), sec. 305. There *is*

No error.

WALKER, J., dissenting: I am unable to concur with the majority of the Court in the conclusion they have reached in this case. As the effect of the decision is to deprive the citizen of the important right of self-defense when upon the plainest principles of law he is justly entitled to it, I deem it but right that my views should be stated somewhat at length, supported, as I think they are, by the highest and weightiest authority. In order to understand the precise question presented, it will be necessary to summarize the facts, for they are not stated in the opinion of the Court, as I understand them.

The defendant was indicted in the Superior Court of Polk County, at Fall Term, 1905, for the murder of L. C. Hilton, at Tryon, on 26 March, 1905. The trial resulted in a verdict of murder in the second degree, and the defendant was sentenced to fourteen years imprisonment. The facts and circumstances connected with the killing are practically undisputed, and are as follows: The deceased was a deputy sheriff of Polk County and held a warrant for the arrest of defendant for carrying concealed weapons. On Sunday, 26 March, 1905, defendant was in Tryon and deceased attempted to arrest him; the deceased, the defendant, and several others were in the back part of Shore & Engel's barn, discussing the matter of arrest and the giving of bond, the defendant at first demurring to the arrest upon the ground that the officer could not arrest him on Sunday; finally, upon the advice of his friends, the defendant yielded, (747) and, in the language of McFarland, the only eye-witness introduced by the State in chief, "then they, Frail and others, started on to the store to get the bond signed, *Frail deciding to give it.*" One Engel had agreed to sign the defendant's bond, and this arrangement had been accepted by the deceased. The deceased was requested to sit down at the table and prepare the bond. While he was in the act of writing it, the defendant slipped out of the side door of the feed-room; the deceased asked, "Has he gone?" Some one answered, "Yes." Mr. Engel, who was to become surety on the defendant's bond, said to the deceased: "Never mind, let him go; I will sign the bond." The deceased made no reply, but bolted out of the door after Durham, with his hand on his pistol. After the defendant had gone about twenty yards he looked back and saw

the deceased coming with his pistol in his hand; they were both running; the defendant ran five or ten steps, and, looking around, saw the deceased with his pistol pointed towards him; the defendant then for the first time drew his pistol, continuing his retreat sideways, holding his pistol towards his left side, not on the deceased; the deceased fired; the defendant returned the fire, but not intending to hit; the deceased fired again, the shot grazing the defendant's left arm; defendant fell back a little, standing against a sapling; the deceased fired two more shots and was in the act of firing again, when defendant fired the shot that killed deceased. The defendant's last bullet grazed the knuckle of deceased's right hand and pierced his eye, showing that the deceased was then in the act of aiming and firing. Defendant testified that he fired at Hilton because he thought Hilton would kill him. Another witness had testified that he was present and saw what occurred. When Hilton went out, he drew his pistol, about ten feet from the door, then ran on about the distance of twenty-five steps from the door and held it up in his hands and fired at Durham. He held his pistol in both hands after taking it out. He did not see defendant draw his pistol until he turned and fired at Hilton. He did not have his hand on his hip pocket as he ran off. Hilton fired three times and defendant twice. (748)

The defendant requested the court to charge the jury as follows: "The law does not justify an officer in killing one accused of a misdemeanor, in order merely to stop his flight, and an attempt to do so by an officer would constitute an assault against which the person assaulted would have a right to defend himself." The court gave the instruction, omitting the words, "against which the person assaulted would have a right to defend himself," and added to the instruction, as thus stripped of its essential feature, the following: "That while this is true, yet when one resists lawful arrest, or, having been arrested, flees, and the officer resorts to means to arrest or re-arrest which amounts to an assault, still the person so arrested or fleeing from arrest has no right to defend himself against such an assault, unless he satisfies the jury from the evidence that he no longer resists arrest, or has ceased to flee and yielded to arrest. This not appearing from the evidence, the defendant would at least be guilty of manslaughter in this case."

If in any view of the case the defendant was entitled to have the plea of self-defense submitted to the jury, there was error. We understand this to be conceded. At any rate, the right of the defendant to have it submitted is unquestionable.

The fallacy in the opinion of the Court arises out of a total misconception of the distinction between resistance to arrest and resistance to a felonious assault. If the defendant resisted arrest, which he did not do, the deceased had the right to use so much force as was necessary to ac-

complish his arrest and compel submission to the mandate of the law. And right here it is well to state that there is a wide difference between resistance to arrest and the mere avoidance of arrest by fleeing or running away from the officer. The latter is an escape. With this distinction clearly before us, let us proceed to examine the case. If there
(749) is anything settled as law by this Court, it is that an officer has no right to endanger the life of one fleeing from him who is charged merely with the commission of a misdemeanor. "A very different principle prevails where a party charged with a misdemeanor flees from an officer, who is intrusted with a criminal warrant or capias, in order to avoid arrest. The accused is shielded in that event, even from an attempt to kill with a gun or pistol, by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offense, when it is probable that he can be arrested another day and held to answer. An officer who kills a person charged with a misdemeanor while fleeing from him is guilty of manslaughter at least. When a prisoner charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest; and if in the pursuit he intentionally kills the accused, it is murder; and if it appear that death was not intended, the offense will be manslaughter." *S. v. Sigman,* 106 N. C., 728. The Court further says that such use of a deadly weapon by an officer, as aiming it at one who is fleeing under such circumstances, is an assault, even if the officer did not in fact intend to shoot. *Sossaman v. Cruse,* 133 N. C., 470. In the latter case this Court said: "But assuming, for the purpose of the argument, that he could lawfully have pursued the defendant beyond the corporate limits in order to effect his arrest, he clearly had no right to use excessive force, and the use of a pistol, which is a deadly weapon, in attempting to arrest one charged only with the commission of a misdemeanor, is excessive force. In such a case the life of the offender must not be imperiled when he is only fleeing from arrest and trying to escape. This doctrine is well settled." This was the admonition of Mr. Justice Foster: "With regard to the ministers of justice executing ordinary process, and likewise to private persons endeavoring to arrest, it
(750) behooveth them to be very careful that they do not misbehave themselves in the discharge of their duty; if they do, they may forfeit the special protection of the law." Foster's Crown Law, 319. When an officer transcends his right in making an arrest by using excessive force and thereby putting human life in jeopardy, he becomes, by all the authorities, a trespasser from the beginning (*ab initio*), and they say that he stands in no better plight than an individual not clothed with official authority. He is no longer, as one of its ministers, under the

protection of that law which he has himself grossly violated. An assault thus committed by him with a deadly weapon is like one committed by an unofficial person, so far as the right of the person assaulted to defend himself against the attack is concerned. *S. v. Worley,* 33 N. C., 242; *S. v. Queen,* 66 N. C., 617; *S. v. Brittain,* 25 N. C., 17. How could the law be otherwise and be consistent with itself and true to its cardinal principles? Can it be assumed that the law denounces the wrongful act of the officer as a serious crime, and, if death ensue, as a capital felony, and yet that it does not permit the person assaulted to defend himself when he is not resisting the officer or making any attempt upon his life, but simply attempting to escape—an act which the same law says is not of sufficient gravity to justify the assault, as the fleeing person may again be taken, and which certainly does not forfeit life and require the person thus fleeing to tamely submit to be killed and thus lose his life without being permitted to defend it? Does the law, under such circumstances, leave him defenseless and to be dealt with at the mercy of a lawless officer? I have diligently searched the books and have been able to find no case decided by this or any other court, and no expression of a text-writer, which gives countenance to any such doctrine. The law is supposed to be humane, and I believe my brethren are greatly mistaken in their interpretation of the cases they cite, and I will attempt to show later on that they are so mistaken, if they think that they (751) sustain such a principle. No case like the one we have presented in this record has ever been before this Court. Cases like it have been decided by courts in other jurisdictions, and those courts have, it appears, been unanimous in rejecting the doctrine and asserting the very contrary to be the true and only one.

As the officer, by using excessive force in attempting to shoot the escaping misdemeanant, acts in his own wrong and is a trespasser from the beginning, the same as if he had no official authority to arrest, and as his act constitutes an assault with a deadly weapon which puts the life of the fleeing party in jeopardy, the latter by every ordinary principle of criminal law has the right to defend himself and save his life. "It will be observed that the law does not authorize the killing of a person, charged with a felony, unless he resists or flees, and cannot otherwise be taken. If the alleged felon can be otherwise taken, the killing is manslaughter at least, in the officer. And it is a felony in the officer if he wound a person not charged with a felony who is fleeting to escape arrest, and he is guilty of murder if he kill in pursuit one charged with a misdemeanor only, or required in a civil suit." Murfree on Sheriffs, sec. 1164 (p. 663). And he adds, in discussing the same subject, that an officer "when transcending his powers, or abusing his authority, may himself be lawfully resisted." Section 1160. "If unlaw-

ful violence is resorted to in the attempt to make an arrest for a misdemeanor, where it is not lawful to imperil life, the person whose arrest is attempted will be justified in taking life." 1 McLain Cr. Law, sec. 302. The reasonableness of the apprehension that his life is about to be taken or that great bodily harm is threatened is to be judged from the standpoint of the defendant at the time, and not from that of the jury, the two questions being: (1) Did the accused believe himself in imminent danger? (2) Were the circumstances such as would justify
(752) such a belief in the mind of a person of ordinary firmness and reason? *Ibid.*, sec. 306. "It is also true that it is the duty of every citizen to submit to lawful arrest. There is, however, a broad distinction between resistance and avoidance; between forcible opposition to arrest and merely fleeing from it. See *S. v. Anderson,* 1 Hill (S. C.), 346. There is no rule of law that he who flees from attempted arrest in cases of misdemeanor thereby forfeits his right to defend his life. It is certainly possible for an officer of the law to commit a felony by shooting at a man or by other excessive violence, even when attempting his arrest, and it would follow that the party thus feloniously assaulted might defend his life." *Tiner v. State,* 44 Texas, 128. Deciding a similar case, it is said by the Court in *S. v. Oliver,* 2 Houston (Del.), 608: "Under this view of the case, the resistance of the prisoner to an unlawful attack, though such resistance should result in the death of the aggressor, could not amount to murder, but manslaughter only or homicide in self-defense. The law of self-defense justifies the repelling of force in such cases, even unto death, but gives no protection to wanton or unnecessary aggression." The Court further says that unless the prisoner resists instead of flees, and thus obliges the officer to resort to violence, he may not fire upon him, and if he is not resisted or opposed in such a way as to make that kind of attack prudent and necessary, but proceeds to execute even lawful authority in an unlawful way, he thereby clearly justifies resistance by the prisoner. *Ibid.,* 606. And so it was held in *Hardin v. State,* 40 Texas Cr., 208. "If," says the Court, "appellant did not resist the officer, but was merely attempting to escape or evade an arrest, then the officer had no right to kill him; and if, under such circumstances, deceased first drew his pistol and shot at appellant to kill him or prevent his escape, the officer had no right to do this; and in such case appellant's right of self-defense would be perfect. This latter phase of the
(753) case was not given to the jury at all, and yet there is some testimony tending to raise this phase of the case." Another Court says: "The law does not allow a peace officer to use more force than is necessary to effect an arrest. If he does use such unnecessary force, he thereby becomes a trespasser from the bginning, and may be lawfully

resisted." *Plummer v. State,* 135 Ind., 313, citing authorities to sustain the decision. The Court further says that the principle of self-defense applies as well to an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of excessive force and violence, as it does to a private individual who unlawfully uses violence. By his abuse the officer divests himself of his official character and immunity from attack. "It must not be assumed that an officer in the execution of process would be protected in acts of violence upon the prisoner committed of his own wrong and not warranted in the performance of his duty. The conditions under which an officer is deprived of the protection of his process are those in which in executing it he, of his own wrong, commits acts of violence against the accused which are not justified in the execution of his process. Under such circumstances a right of self-defense by the accused may arise." *Bullock v. State,* 65 N. J. L., 572. To the same effect, *People v. Burt,* 51 Mich., 199; *Doolin v. Com.,* 95 Ky., 29; *Bissot v. State,* 53 Ind., 416; *Galvin v. State,* 46 Tenn. (Cold.), 291; *Agee v. State,* 64 Ind., 340; *Miers v. State,* 34 Texas Cr., 161; 1 Kerr on Homicide, p. 217, sec. 189; *Creighton v. Com.,* 84 Ky., 103; *S. v. Underwood,* 75 Mo., 230; *Alford v. State,* 8 Texas App., 545; *Minniard v. Com.,* 87 Ky., 213; *Noles v. Com.,* 26 Ala., 31; *S. v. Scheele,* 57 Conn., 307; *Wright v. Com.,* 85 Ky., 123. "An officer in the execution of a valid order has the legal right to use such force as is necessary to execute it, but no more. Any unnecessary force or violence that may be used in the execution of such order or process is without authority of law; and such excess, if any, may be lawfully met by force or violence sufficient to overcome it." *U. S.* (754) *v. Terry,* 42 Fed., 317. "If an officer in attempting to execute process shall exceed the power conferred by the writ, he will be liable as a trespasser, but this will not authorize the defendant to resort to personal violence against the officer while so endeavoring to exceed his authority unless to protect his own person from violence and injury." *Smith v. People,* 99 Ill., 445. "Whether the arrest be legal or not, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or some bodily harm. In such a case, though the attempted arrest was lawful, the killing would be justifiable." *Jones v. State,* 26 Texas App., 12. "If one, even an officer, undertakes to arrest unlawfully, the latter may resist him. He has no protection from his office, or from the fact that the other is an offender." 1 Bish. New Cr. Law, sec. 868. "One may defend himself against the wrongful assault of an officer, as well as against the assault of a person who is not an officer." *Appleton v. State,* 61 Ark., 592. In *Williams v. State,* 44 Ala., 44, the Court held that while the citizen

should submit when he has no reasonable cause to apprehend any worse treatment than a legal arrest will subject him to and seek redress from the law, instead of resisting, yet "in misdemeanors, it will be murder to kill the party accused for fleeing from the arrest, though he cannot otherwise be taken, and though there be a warrant to apprehend him. The citizen may resist an attempt to arrest him, which is simply illegal, to a limited extent, not involving any serious injury to the officer. He may oppose a felonious aggression upon him in the execution of a lawful arrest, even to slaying the officer, when it cannot otherwise be prevented." That an officer who exceeds his lawful authority by the use of violence becomes a trespasser *ab initio* and is in no better position with respect to the accused for whom he has process of arrest than an unofficial person, is clearly shown in *Commonwealth v. Kennard,* 25 (755) Mass. (8 Pick.), 133, and *Six Carpenters' case,* 1 Smith's Leading Cases (9 Am. Ed.), 261. To the extent, therefore, that the force is excessive, it may be met by the accused with such force as reasonably appears to him necessary to defend himself against illegal attack which is threatened. If the officer is in the wrong and the life of the accused is endangered by his unlawful act, and no more force is used than is adequate to the protection of his life, the accused by no principle of law or justice can be adjudged a criminal. The mere fact that he attempted to avoid arrest, or to escape from one already made, by running away, was, of course, an unlawful act, for which perhaps he may be punished; but he was not thereby outlawed and put beyond the pale of the law's protection, and his unlawful act did not justify the officer in assaulting him with a deadly weapon. Resistance to this abuse of power, but not resistance to arrest, was a lawful act if properly exerted. He was not resisting arrest, but merely avoiding it by flight. If a person resists a lawful arrest and kills the officer, it is murder; if an illegal arrest, and no excessive force is used, it is manslaughter; but if the officer uses excessive force and threatens the life of the accused, when the arrest is for a misdemeanor, the latter may defend himself, if he is merely escaping, whether the arrest is legal or illegal. This is clearly established by the great weight of authority, and this Court practically stands alone in asserting the contrary doctrine.

Before taking leave of this part of the case, and in this connection, we may not inappropriately quote the language of a learned text-writer: "The manner in which an arrest should be made is a matter of no small importance. It is hardly necessary to say that the law, while requiring a strict obedience to its mandates, will tolerate in its ministers no unnecessary violence. *Molliter manus imponere* is as far as, under any normal circumstances, an officer can go with safety, and one who

endangers the lives or limbs of others, or inflicts great bodily (756) injuries in the discharge of his official duties, should be prepared to justify his conduct by proof showing that he acted under the pressure of an irresistible necessity. It may be remarked, however, that there is prevalent, not only among officers of every grade, but throughout the community, an exaggerated idea of the powers in this respect which the law vouchsafes to its ministers. A sheriff, constable, or policeman, with a revolver, and a warrant charging a misdemeanor, is popularly supposed to hold the keys of life and death, and as he frequently shares in the delusion, he abuses his powers with, sometimes, very tragical results. What the law does allow in the use of physical force is the very minimum by which the desired object can be obtained. Whatever a rash or overzealous officer may do in excess of this is without warrant of law." Murfree on Sheriffs (1884), sec. 148; *Brockway v. Crawford,* 48 N. C., at p. 440. As he then becomes the aggressor, the accused, who was originally a wrongdoer, by escaping is remitted to his right of self-defense, whereas if he had resisted he would not be. The fact must not be overlooked, but emphasized, that the defendant, as the evidence of an eyewitness shows, did not draw his pistol until he was first fired upon by the officer. At least the jury could have inferred this to be the case. A more flagrant violation of the law by the officer could not be imagined. The defendant was a lawbreaker, but was not an outlawed felon. At the time, he was perfectly harmless, and yet, under such circumstances, it is said he had no right to defend himself against a most violent assault which put his life in immediate jeopardy. Surely, that cannot be the law of this age. As the Court remarked in *S. v. Campbell,* 107 N. C., 948, the fact that he had a pistol on his person afforded stronger reason why he should not have been attacked contrary to law.

But it is said that this Court has decided otherwise than as I contend is the law, in *S. v. Garrett,* 60 N. C., 145, and *S. v. Horner,* 139 N. C., 610. In my judgment, they do not so decide, but are in (757) perfect harmony with the authorities cited in this opinion. The indictment in *S. v. Garrett, supra,* was against the officer for murder in killing the deceased, for whom he had a warrant and who was openly resisting him, as the jury found under the evidence and charge, and not merely attempting to avoid arrest by flight. The *Chief Justice* there says that if the deceased had been attempting to make his escape by moving off, there would have been no necessity for shooting him, and the officer would have been guilty of an abuse of his power and would have become a trespasser *ab initio.* It is only when the officer has a right to kill, as in the case of resistance, or when a felon is pursued, and it becomes necessary to do so, that he is justified and is not a trespasser. The case recog-

nizes the very distinction we have endeavored to show in fact exists. It does not, it is true, decide the question involved in this case, as the officer was indicted and not the party for whom the process had been issued. It is not, for this reason, an authority against my view, but expressions in the opinion of the Court tend strongly to sustain it.

In *Horner's case* the defendant was the person against whom the warrant was issued, and he killed the officer. This is our case, but the evidence most favorable to the defendant tended to show that Horner not only resisted, but defied the officer to arrest him. He was no escaping misdemeanant, and the Court so says. Here is its language: "It was his duty to submit to arrest, and in resisting it with a gun in his hand it is not open to him to say that he acted in self-defense." I concurred in this statement of the law and still concur. The evidence in that case shows that at no time before the killing did Horner occupy any attitude but that of an obstinate and armed resistance to the law. There was no evidence that he was merely running away to avoid arrest, as was (758) the defendant in this case. He was in easy reach of his gun, which he could have used with deadly effect in an instant, and actually picked it up and still defied the officer. He ran when the officer shot, but he was then running from the shot and not merely from the law. For the time being he was doubtless frightened by the situation in which he had involved himself, but he soon recovered his courage and made another bold stand against the officer. It is to be noted that, when the officer fired, Horner was walking off with his gun in his hand, not running to avoid arrest. He had just picked it up and the officer might well have supposed for the purpose of using it. A moment before he was standing by it and refusing to be taken. He was in a sullen and defiant mood, and his conduct indicated bitter hostility to the officer. This was a clear case of resistance, and the Court so regarded it. How different from our case, in which it appears that the defendant fled with all possible speed, making no resistance whatever until his life was put in imminent peril, when he fired evidently to save it. There was no necessity for the officer to shoot, as in *Horner's case,* when the defendant was standing before him in armed resistance, his every word surcharged with anger and his every act and movement menacing the life of the officer. In a case like ours, the merciful rule of the law is that it is better to let the accused escape, when the charge is so trivial, than to shed human blood, as he may be taken another day and held to answer. *S. v. Sigman, supra.* As to the position of the party assaulted under such circumstances, I cannot do better than to conclude with the words of an eminent writer, whose perfect knowledge of the science of the law is beyond question: "The right of resistance to illegal official action,

it must be remembered, is essential, not merely to all free government, but to any government whatsoever. The Roman law has been charged with being despotic; but by the Roman law this right is repeatedly and unreservedly recognized. If there be no jurisdiction in the officer, then issues the terse command, *'Vim vi repellere licet.'* When an (759) officer transcends his powers, obedience to him may become even an offense." 1 Wharton Cr. Law (9 Ed.), sec. 646. The law requires that each member of the body politic, citizen as well as officer, should be kept in his due orbit, the latter exercising only such powers as the law confers and only in the way allowed, and the former being free to resist aggression when necessary in his own defense. Dr. Wharton thought that a sound, free, and enlightened jurisprudence required a very close approximation of the principles of the Roman jurists and a rejection of the feudal policy which exacted of the vassal implicit obedience and abject submission to the lord and his bailiff or, as the alternative, his life.

It must not be inferred that I think the defendant was entitled to an acquittal. Not by any means. He might, perhaps, have been convicted of murder, if he fired without any apparent necessity; and of manslaughter, if he fired without legal provocation or other circumstances to reduce the killing below the grade of murder, or he might have been acquitted, the verdict being determined by the facts as the jury should find them to be and the law as declared by the court. If he shot upon malice, it would be murder; if upon legal provocation, manslaughter; but if in self-defense against a deadly assault by the deceased, who, at the time, had ceased to be under the protection of the law as an officer and had become a trespasser, then he should be acquitted. When the court instructed the jury that he was guilty *at least* of manslaughter, and thereby excluded the principle of self-defense from the case, an error, in my opinion, was committed which entitled the defendant to a new trial.

The statute cited by the Court (Laws 1889, ch. 51, p. 65) cannot possibly make any difference in the result. It is merely declaratory of the common law, and even if it had been the enactment of a new principle, it could not take the case out of the operation of the rule upon which rest the decisions in other jurisdictions cited by us. (760) Nor do I know of any special conditions existing in this State which render the principle of the decision in this case "essential to preserving good order and asserting the supremacy of the law."

CONNOR, J., concurs in the dissenting opinion.

Cited: S. v. McClure, 166 N. C., 331.

STATE v. PINER.

(Filed 13 March, 1906.)

Intoxicating Liquors—Public-Local Act—Illegal Sale—Intent—Wine—Judicial Notice—Public Act—Indictment—Surplusage.

1. The Legislature may pass laws prohibiting the sale of liquor within any designated locality.
2. Chapter 350, Laws 1901, making it unlawful to sell in Pender County any spirituous, vinous, malt, or fermented liquors, or any liquors of any name or kind which is intoxicating, is not affected by Code, sec. 3110, which provides that certain wines may be sold in bottles not to be drunk on the premises, nor is it repealed by the Watts Law (chapter 233, Laws 1903), as its proviso withdraws all local acts from its operation.
3. In an indictment for unlawfully selling liquor, the law implies the unlawful intent from the doing of the act which is prohibited, and it is no defense that the defendant did not in fact intend to violate the law.
4. In an indictment under chapter 350, Laws 1901, which prohibits the sale in Pender County of vinous or fermented liquors, it is not necessary for the jury to find that the wine sold was intoxicating.
5. Wine is an intoxicating liquor, and the courts will take judicial notice of the fact.
6. An act of a public-local nature need not be specially averred in the indictment, as the court will take judicial notice of it.
7. Under Code, sec. 1183, useless matter in an indictment may be rejected as not affecting the substance of the charge.

(761) INDICTMENT against Thomas Piner for unlawfully selling liquor, heard by *Webb, J.*, and a jury, at January Term, 1906, of PENDER.

The jury returned a special verdict, and found that the defendant sold a gallon of wine of his own manufacture, on his own premises, which was made from the products of his own vineyard, none of which was drunk on his premises. It was put in a jug, which was corked, and carried away by the purchaser without being opened. Upon the facts so found the court held that the defendant was guilty. He was adjudged to pay a fine and the costs, and appealed.

Robert D. Gilmer, Attorney-General, for the State.
Stevens, Beasley & Weeks for defendant.

WALKER, J., after stating the case: The defendant contends that he was authorized to sell the wine by the general statute (Code, sec. 3110), which provides that all wines made in this State from grapes, etc., raised

therein, may be sold in bottles, which are corked or sealed up, in quantities greater or less than a quart, but must not be drunk on the premises; and he also justifies under chapter 233, Laws 1903 (Watts Law), sections 1 and 6, which permits a person to sell, by the gallon or in larger quantities, wine made from fruit or grapes grown by himself, provided it is not drunk on the premises when sold. But that act further provides (section 19) that it shall not be construed to repeal, alter, or amend any special act prohibiting or regulating the manufacture and sale of liquors in any county or other locality; and this brings us to the consideration of the special act, which the State insists that the defendant has violated. Laws 1901, ch. 350, sec. 1. It provides among other (762) things that it shall be unlawful to sell in Pender County any spirituous, vinous, malt, or fermented liquors, "or any liquor of any name or kind which is intoxicating."

The Legislature may pass laws prohibiting the sale of liquor within any designated locality. This is settled beyond question. *S. v. Joyner,* 81 N. C., 534; *S. v. Barringer,* 110 N. C., 525; *S. v. Snow,* 117 N. C., 774. We think it clear that the defendant was indictable under the act of 1901, which is not affected by The Code, sec. 3110, if that section is now in force and he complied with it, which it is not necessary now to decide. The two provisions are not in conflict—one is of general application and the other local in its operation. *S. v. Joyner, supra.* Nor is it repealed by the chapter 233, Laws 1903. On the contrary, the proviso to that act expressly withdraws all such local acts from its operation. *S. v. Joyner, supra.* So that if all the acts are construed together, as relating to the same subject-matter—and the defendant's counsel argues that they should be so regarded and construed—the conclusion is inevitable that the court correctly adjudged the defendant to be guilty upon the special verdict, unless he can succeed in some of his other contentions.

The defendant says he did not intend to do wrong. His motive in selling, however good or praiseworthy, does not shield him from the consequences of his acts. No intent appears in this case except that which the law infers. This is one of the kind of offenses in which the law implies the unlawful intent from the doing of the act, which is prohibited, and it can make no difference that he did not in fact intend to violate the law. *S. v. Downs,* 116 N. C., 1064. That case is directly in point and fully answers this contention. It would not do to permit a defendant to exculpate himself by showing that he did not intend to do that which he did and which is in itself unlawful. He is presumed, in such case, to intend the consequences of his act. *S. v.* (763) *Gibson,* 121 N. C., 680.

The defendant's next contention is that the jury did not find that the liquor was intoxicating. If that is necessary to be done under this act, which mentions vinous and fermented liquors by name, we yet think that wine is of the general class of liquors known to all men to be intoxicating if taken freely or in sufficient quantity. Not only is it a familiar fact that wine is intoxicating, but the law-writers have so treated it in discussing questions similar to the one now under consideration. "The decided weight of authority is that wine is an intoxicating liquor, and that the courts will take judicial notice of the fact." 17 A. & E. (2 Ed.), 199. There is said to be only one case to the contrary. *Ibid.* "A sale of wine made from grapes or blackberries is within a statute making it unlawful to sell 'vinous or alcoholic' liquors." *Ibid.* It would seem that the Legislature intended thus to classify it in chapter 350, Laws 1901, though it is not required that we should so decide at this time, as the cases in this Court are decisive upon the question that wine is an intoxicating liquor. *S. v. Packer,* 80 N. C., 439, decides the very question, and of like import are the following cases: *S. v. Giersch,* 98 N. C., 720; *S. v. Scott,* 116 N. C., 1012; *S. v. Parker,* 139 N. C., 586. It seems that the Legislature has by numerous acts recognized wine as an intoxicating liquor.

But, as we have said, by the act in question the sale in Pender County of vinous or fermented liquors is prohibited, and that is sufficient to sustain the verdict. This disposes of the two assignments of error, which, indeed, are substantially the same.

The act of 1901 is of a public local nature and need not be specially averred in the indictment, as the court will take judicial notice of it. *S. v. Chambers,* 93 N. C., 600; *S. v. Wallace,* 94 N. C., 827. The (764) offense appears to be sufficiently alleged in the indictment, useless matter being rejected as not affecting the substance of the charge. Code, sec. 1183. An examination of the entire record discloses no error in the judgment and proceedings below.

No error.

Cited: S. v. Wynne, 151 N. C., 645.

STATE v. WORLEY.

(Filed 13 March, 1906.)

Homicide — Evidence — Harmless Error — Declarations of Deceased — Killing with Deadly Weapon — Failure to Charge — Aiding and Abetting.

1. Exceptions to the admission of evidence tending to prove premeditation will not be considered where the record shows there was no conviction of murder in the first degree.
2. In an indictment for murder, declarations of deceased in relation to a prior difficulty with one of the defendants was inadmissible, where the language contained no threat.
3. A killing with a deadly weapon implies malice, and, when admitted or proved, the prisoner is guilty of murder in the second degree, and the burden rests upon him to prove the facts upon which he relies for mitigation or excuse, to the satisfaction of the jury.
4. An omission to charge on a given point is not error, unless there is a prayer to instruct thereon.
5. Where the defendants were acquitted of murder in the first degree, an exception to the charge of the court relating to that feature of the case is without merit.
6. In an indictment for murder, a charge that "If the defendant aided and abetted his codefendant (his brother) in an assault on the deceased, then he would be guilty of murder in the second degree, manslaughter, or excusable homicide, according as his brother was guilty or excusable. But to convict defendant the jury must be satisfied beyond a reasonable doubt that he aided and abetted his brother. If his purpose was to extricate his brother, he would not be guilty of any offense," was correct.

INDICTMENT against Thomas F. Worley and Clem Worley for (765) the murder of one Ed. Warters, heard by *O. H. Allen, J.*, and a jury, at June Term, 1905, of LENOIR.

The defendant, Thomas F. Worley, was convicted of murder in the second degree and Clem Worley of manslaughter. From the judgment pronounced, both defendants appealed.

E. M. Land and G. V. Cowper, with the Attorney-General, for the State.

N. J. Rouse, Wooten & Wooten, and Aycock & Daniels for defendants.

BROWN, J. In the consideration of this appeal we have been greatly aided by most carefully prepared briefs filed by the defendants' counsel, as well as by the Attorney-General, who in the investigation of State cases never fails to be of great assistance to the Court.

The defendants are charged with the murder of one Ed. Warters on 22 April, 1905, in the county of Lenoir. There was evidence on the part of the State tending to show that the deceased and the Worleys were in Kinston on the day of the homicide and left there in the afternoon, the deceased and Cully Williams leaving first in a cart, and the Worleys following soon thereafter in a buggy. On the way the parties reached a stock-law gate. Thomas Worley got out of the buggy, and, speaking to Cully Williams, said: "Mr. Williams, was that you spoke to me back yonder?" Williams replied, "Yes," and Thomas said, "I thought so; I do not speak to that fellow you are with, for he is a d—d coward." About this time it appears that the deceased and the other Worley alighted from their vehicle and were standing near the gate cursing each other. The deceased had a pistol in his hand and, as the Worleys started towards him, fired four shots, injuring no one, and then threw the (766) weapon on the ground. When the firing ceased, the Worleys rushed up and a struggle ensued. The deceased broke away and ran down the road, Thomas and Clem following 35 or 40 steps, and in the pursuit Thomas drew a knife and inflicted a number of wounds upon the person of the deceased, from the effect of which he died in a few minutes. Evidence was introduced by the defendants tending to prove that the homicide was committed in self-defense. They contended that the deceased fired at them four times, and that they rushed up for the purpose of disarming him in order to save themselves from death or serious bodily harm.

The defendants being indicted for murder in the first degree, it became necessary for the State to prove premeditation. There was evidence admitted by the court tending to prove premeditation, such as prior threats and the like. There was also evidence offered by the defendants tending to rebut the charge of premeditated killing, and to prove that, although the defendants and the deceased had a difficulty four months before, they had become reconciled. Practically all of the exceptions to testimony relate to alleged errors in admitting or rejecting this species of evidence. We find no error in his Honor's rulings, but we refrain from discussing them, as the record shows that there was no conviction for murder in the first degree, and such testimony was unnecessary to support a conviction for the crimes of which the defendants stand convicted.

Exception 7 relates to the rejection by the court of the declarations of the deceased in relation to a prior difficulty which Thomas Worley and the deceased had some time before the homicide. The evidence was clearly inadmissible. It contained no threat, and was a narrative of a

past transaction. Had the language contained a threat, there is no evidence that it was ever communicated. *S. v. Turpin,* 77 N. C., 473; *S. v. Sumner,* 130 N. C., 718.

Exception 8: In apt time the defendants in writing requested the judge to instruct the jury: "The presumption of innocence which the law raises in behalf of every defendant and the presumption (767) of malice arising against Thomas Worley by his admission of the use of a deadly weapon, are both evidence and are to be considered in connection with the other evidence, and if, after considering all of said evidence, the jury have a reasonable doubt of the guilt of Thomas Worley of murder in the second degree, they will find him not guilty of murder in the second degree, and then consider whether he is guilty of manslaughter or whether he acted in self-defense." The judge refused to so instruct the jury.

Exception 9: In apt time the defendants requested the judge to instruct the jury that while the law presumes malice from the use of a deadly weapon, there also arises a presumption of innocence where good character is proved, and the burden is upon the State to prove beyond a reasonable doubt the guilt of the defendants.

It must be admitted that these prayers for instruction present some novel views of the law. But, as the briefs of counsel disclose, they do not expect us to entertain them unless we are prepared to overrule a long and unbroken line of decisions of this Court. Counsel admit that our courts are committed to the rule that "the use of a deadly weapon implies malice, and under the rule it would be murder in the second degree, nothing further appearing." No principle in our criminal law is better settled than that a killing with a deadly weapon implies malice, and, when admitted or proved, the prisoner is guilty of murder in the second degree, and the burden rests upon him to prove the facts upon which he relies for mitigation or excuse, to the satisfaction of the jury. *S. v. Booker,* 123 N. C., 713; *S. v. Hicks,* 125 N. C., 636; *S. v. Capps,* 134 N. C., 622; *S. v. Clark, ibid.,* 698; *S. v. Exum,* 138 N. C., 599.

Exception 10 is based upon the failure of the judge below to instruct the jury as to the application and effect of threats. No request along this line was submitted by the defendants. An omission to charge on a given point is not error unless there is a prayer to instruct thereon. *Justice v. Gallert,* 131 N. C., 393; *S. v. Scott,* 19 N. C., (768) 35; *S. v. Varner,* 115 N. C., 744; *S. v. Groves,* 119 N. C., 822.

Exception 11 is directed to the language of the court in charging the jury. It is perfectly apparent and could not be misunderstood that the judge was stating only the *contentions* of the State, as he likewise did those of the defendants, and there is evidence in the record tending to

support such contentions. But suppose there was not, they relate to murder in the first degree, and the defendants have been acquitted of that crime.

Exception 12: The court charged that if Clem Worley aided and abetted Thomas Worley in an assault on the deceased, then he would be guilty of murder in the second degree, manslaughter or excusable homicide, accordingly as Thomas was guilty or excusable, adding: "But to convict Clem the jury must be satisfied beyond a reasonable doubt that he aided and abetted his brother. If his purpose was to extricate his brother, he would not be guilty of any offense." We find no error in this instruction. *S. v. Gooch,* 94 N. C., 987; *S. v. Whitt,* 113 N. C., 716; *S. v. Finley,* 118 N. C., 1161; *S. v. Jarrell, ante,* 722.

There is also lack of merit in the remaining exceptions, 13, 14, and 15, and it is useless to discuss them. A careful study of the record and of the judge's charge convinces us that the defendants have been in no wise prejudiced by any error on the part of the court, and that they have been fairly tried. The judge correctly stated the law as to murder in its two degrees, as to manslaughter and as to excusable homicide, and the verdict of the jury is supported by abundant evidence.

No error.

Cited: S. v. Banner, 149 N. C., 525; *S. v. Quick,* 150 N. C., 823; *S. v. Cox,* 153 N. C., 642; *S. v. Simonds,* 154 N. C., 200; *S. v. Johnson,* 161 N. C., 266; *S. v. Tate, ib.,* 282; *S. v. Lane,* 166 N. C., 339; *S. v. Robertson, ib.,* 365; *Buchanan v. Lumber Co.,* 168 N. C., 47; *S. v. Heavener, ib.,* 164; *S. v. Orr,* 175 N. C., 776; *S. v. Spencer,* 176 N. C., 715.

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(769)

STATE v. HILL.

(Filed 13 March, 1906.)

Assault and Battery—Self-defense—Question for Jury—Deadly Weapon —Direction of Verdict.

1. In an indictment for assault with a deadly weapon, where defendant's evidence showed that he drew his knife and cut at his assailant, a stronger man, to keep him from striking defendant with his fist, his assailant at the time rushing on him with his hand drawn back as if to strike with his fist, the plea of self-defense should have been submitted to the jury.

2. As a general rule, or under ordinary conditions, the law does not justify or excuse the use of a deadly weapon to repel a simple assault. This principle does not apply, however, where the use of such a weapon was or

appeared to be reasonably necessary to save the person assaulted from great bodily harm, such person having been in no default in bringing on or unlawfully entering into the difficulty.

3. In no event, in a criminal case, is the judge permitted to direct a verdict against the defendant.

INDICTMENT of W. F. Hill for assault with deadly weapon, heard by *Councill, J.*, and a jury, at July Term, 1905, of ONSLOW.

There was evidence of the State tending to show that the defendant was guilty of an inexcusable assault with a knife on one H. A. Jarman. The defendant in his own behalf testified: "On 30 May I went down in the field after breakfast to finish thinning corn; hadn't been there long before H. A. Jarman came down in the field with a little sack on his shoulder, and when he got in speaking distance of me he said, 'Why in hell didn't you replant this corn like I told you?' I said to him, 'I did replant a lot of it yesterday morning; it was so dry and didn't rain as I thought, hence I didn't think it necessary to replant it.' He said, 'You *thought!* Damn it, why in hell didn't you do like I told you? What do you reckon I want you to tend the land for and (770) nothing on it?' I said, 'You can plant field peas in the missing places.' Then he said. 'G—d damn it, who is boss, you or I?' I said, 'Mr. Jarman, when you want me to do anything, tell me like somebody; don't come rearing and cursing.' Jarman set his sack down, and with his right hand drawn back and his fist doubled up, made at me, saying, 'I have fooled with you as long as I intend to, G—d d—n you.' He is a stronger man than I, as I am weakly and subject to asthma. He advanced on me with his right hand drawn back in a striking position, coming 'kinder' sideways. I did not see anything in his hand, but he had it drawn back as if to strike me with his fist, and in that position he rushed on me and I drew my knife and cut at him to keep him from striking me with his fist. When I cut at him he stumbled and fell. I never did anything else to him."

On cross-examination: "When he put his sack down on the ground he clinched his fist and threw his hand around behind him in a striking attitude. I could not see his hand at all times. I did not see any weapon in his hand. He advanced on me sideways with his right hand held out behind him in a striking attitude."

At this point in the defendant's testimony the judge stated in the presence of the jury that he would instruct them that the defendant was guilty upon his own statement. The defendant excepted. The defendant had other material witnesses, but did not introduce them owing to the court's intimation. Verdict of guilty as charged in the bill of indictment, and from the judgment pronounced the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
C. L. Abernethy for defendant.

(771) HOKE, J., after stating the case: The defendant, by exceptions properly noted, assigns for error, first, that on the testimony he was entitled to have his plea of self-defense passed on by the jury; second, that in any event the court erred in directing a verdict against him. We are of opinion that both points are well taken.

It is true, as a general rule, or under ordinary conditions, that the law does not justify or excuse the use of a deadly weapon to repel a simple assault. This principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm—such person having been in no default in bringing on or unlawfully entering into the difficulty. This was held in *S. v. Matthews,* 78 N. C., 523.

In such case a defendant's right of self-defense is usually a question for the jury; and it is not always necessary to the existence of this right that the first assault should be with a deadly weapon. It may, in exceptional instances, arise when the fierceness of this assault, the position of the parties and the great difference in their relative sizes or strength show that the danger of great bodily harm is imminent. This was held in *S. v. Hough,* 138 N. C., 663.

Applying the principle of these two decisions to the case before us, we hold that the defendant's claim of self-defense should have been submitted to a jury. Of course, we express no opinion on the merits. There is evidence of the State, full and ample, if believed, to justify a verdict of guilty, and the jury may reject the defendant's version altogether, but it is for them to decide. And in no event, in a criminal case, is the judge permitted to direct a verdict against the defendant. When a plea of not guilty has been entered and stands on the record undetermined, it puts in issue not only the guilt, but the credibility of the evidence. As is said in *S. v. Riley,* 113 N. C., 651, "The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since
(772) there is a presumption of innocence which can only be overcome by the verdict of a jury."

And as said in *S. v. Dixon,* 75 N. C., 275: "In this verdict the jury must not only unanimously concur, but must be left free to act according to the dictates of their own judgment. The final decision on the facts rests with them, and any interference by the court tending to influence them into a verdict against their convictions is irregular and

without the warrant of law." And this has been held to be the correct doctrine, though guilt may be inferred from the defendant's own testimony, as in *S. v. Green,* 134 N. C., 658.

Where there is no evidence tending to establish the plea of self-defense, and in any aspect of the testimony the defendant's guilt is manifest, the judge may tell the jury "if they believe the evidence," or as suggested in *S. v. Barrett,* 123 N. C., 753, "if they find the facts to be as testified," etc., "they will render a verdict," etc. But this verdict must be rendered by them, and, in no criminal case, can it be directed by the judge. There is error, and a new trial is awarded.

New trial.

Cited: Smith v. R. R., 147 N. C., 609; *Bank v. Fountain,* 148 N. C., 594; *S. v. R. R.,* 149 N. C., 512; *Bank v. Griffin,* 153 N. C., 75; *S. v. Dove,* 156 N. C., 658; *Bank v. Branson,* 165 N. C., 348; *S. v. Gaddy,* 166 N. C., 348; *Smathers v. Hotel Co.,* 168 N. C., 72; *S. v. Beal,* 170 N. C., 765; *S. v. Horner,* 174 N. C., 793; *S. v. Alley,* 180 N. C., 663.

(773)

STATE v. WHEELER.

(Filed 20 March, 1906.)

Taxation—Labor on Roads—Double Taxation—Constitutional Law—Fourteenth Amendment—Poll Tax—Property Tax—Time.

1. A statute requiring the working of the public roads by labor is not unconstitutional as double taxation.
2. There is no constitutional prohibition against double taxation.
3. The Fourteenth Amendment does not require equality in levying taxation by the State. How the State shall levy its taxation is a matter solely for its Legislature, subject to such restrictions as the State Constitution throws around legislative action.
4. The requirement to work the roads is not a poll or capitation tax.
5. Chapter 667, Laws 1905, amendatory of chapter 551, Laws 1903, providing for the working of the public roads of Wake County, is not unconstitutional because it exacts labor only of "able-bodied male persons between the ages of 21 and 45," and excepts "residents in incorporated cities and towns and such as are by law exempted or excused."
6. Time is not money, nor is labor property in the sense that it can be liable to a property tax.
7. The conscription of labor to work the public roads is not a tax at all, but the exaction of a public duty.

STATE *v.* WHEELER.

INDICTMENT against T. J. Wheeler for failure to work the public roads, heard by *Justice, J.*, and a jury, on appeal from a justice of the peace, at September Term, 1905, of WAKE. There was a special verdict, and from a judgment of guilty thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, and H. F. Norris for the
(774) *State.*

R. H. Battle and S. G. Ryan for defendant.

CLARK, C. J. The defendant appeals from a conviction and sentence for failing to work the public raods of Wake County, as required by chapter 667, Laws 1905, amendatory of chapter 551, Laws 1903. The appeal rests upon the alleged unconstitutionality of the statute. The defendant contends:

1. Time is money. Labor is a man's property, and therefore to exact his labor and time to work the roads is to levy a tax on property, and such is unconstitutional unless *ad valorem.*

2. That if working the road is a poll tax, the act is unconstitutional, because it exacts this labor only of "able-bodied male persons between the ages of 21 and 45," and excepts "residents in incorporated cities and towns and such as are by law exempted or excused," whereas the poll tax (Const., Art. V, sec. 1) is to be laid on "every male inhabitant between the ages of 21 and 50."

3. That the requirement to work the roads is not placed upon those living in incorporated towns and cities, and therefore there is a denial of the equal protection of the laws required by the Fourteenth Amendment to the Constitution of the United States.

4. That inasmuch as the roads are now worked partly by taxation, supplemented by labor exacted by the statute, and the latter is a property tax (a man's labor being his property), therefore this is double taxation.

These points have been repeatedly passed upon adversely to the contentions of the defendant. *S. v. Sharp,* 125 N. C., 628, which has been cited and approved in *S. v. Covington,* 125 N. C., 641; *S. v. Carter,* 129 N. C., 560; *Brooks v. Tripp,* 135 N. C., 161; *S. v. Holloman,* 139 N. C., 648. But counsel ask us to reconsider them, and we have
(775) given the matter full deliberation.

For near two hundred and fifty years the roads of this State were worked solely by the conscription of labor. It may have been inequitable, but it was never thought by any one to be unconstitutional, nor has the idea been advanced heretofore that to work the roads by labor was to work them by taxation. The validity of working the roads

by labor is sustained in *S. v. Halifax,* 15 N. C., 345, and has been recognized in countless trials for failure to work the roads. Under this statute, Wake County works its roads partly by labor, supplemented by funds raised by taxation and other funds and the work of its convicts. If the exaction of the labor of residents of the locality is, as counsel contend, a tax upon property, then we simply have a higher tax, but not double taxation. The tax does not seem to be more than enough to keep the roads in good order; but if it should so prove, the people themselves, acting through their elected representatives in the General Assembly, and the board of county commissioners, will reduce it. The tendency of the times is to require better roads, which necessarily demands higher taxes for road purposes, which is more than offset, it is claimed, by the benefits derived from better roads. But that is a matter of legislation and administration. The courts cannot meddle with it. Nor is there any constitutional prohibition against double taxation. *Comrs. v. Tobacco Co.,* 116 N. C., 448; Cooley Const. Lim. (7 Ed.), 738, and cases there cited. It exists in many instances that will readily occur to any one, as the taxation of mortgages and indebtedness in the hands of a creditor, and taxation at the same time of mortgaged property, and of the real and personal property of a debtor, without reduction by reason of the mortgage or other indebtedness; the taxation of the tangible property of a corporation and also of its capital stock and of its franchise and also of the certificates of shares in the hands of the shareholders. *Sturges v. Carter,* 114 U. S., 511; *Comrs. v. Tobacco* (776) *Co., supra.* There are many other instances, but this is a matter of legislation. Certainly, this is not double taxation any more than taxing the dweller in town to keep up his streets (all of which falls upon him), and also laying a tax on his property to aid in working the roads.

Nor does the Fourteenth Amendment require equality in levying taxation by the State, if this exaction of labor be taxation. How a State shall levy its taxation is a matter solely for its Legislature, subject to such restrictions as the State Constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of Federal supervision. Besides, as the dwellers in the towns keep up their streets at a greater expense than the value of the statutory labor put on the roads, there is no discrimination of which the defendant can complain, especially as the tax money expended on the roads to supplement the statutory labor is levied on town property as well as upon that in the country.

The requirement to work the roads is not a poll or capitation tax, which is a sum of money required to be paid by "every male inhabitant over 21 and under 50 years of age," which "shall be applied to the pur-

poses of education and the support of the poor." Const., Art. V, secs. 1 and 2. Certainly, "four days work on the public roads" in one's own township are not capable of being applied to education, or the poor, or anything else except to the roads.

This brings us to the first ground urged. To say that "time is money" is a metaphor. It expresses merely the fact that time is of value, and that the use of a man's muscles, or of his skill, or of his mentality will usually procure money in exchange.

Time is intangible, invisible, vanishing into the past even while we speak.

> "Like the snowfalls on the river,
> A moment white, then melt forever,
> Or like the borealis' race
> That flits ere you can point its place."

But money is tangible, though evasive to the grasp, and elusive to hold.

Time is not money, nor is labor property, in any other sense than that it is usually of some value and its proceeds belong to the indi-
(777) vidual or to the parent or guardian if he is a minor, or to the State if he is a convict. But it is not property in the sense that it can be liable to a property tax.

As already pointed out in *S. v. Sharp,* 125 N. C., 634, the conscription of labor to work the public roads is not a tax at all (Cooley, *supra,* 737; *Pleasant v. Kost,* 29 Ill., 494), but the exaction of a public duty, like service upon a jury, grand jury, coroner's inquest, special venire, as a witness, military service, and the like, which men are required to render either wholly without compensation or (usually) with inadequate pay, as the sovereign may require. *Guilford v. Comrs.,* 120 N. C., 26; *S. v. Hicks,* 124 N. C., 837. Originally, none of these received any pay whatever (*S. v. Massey,* 104 N. C., 878), the duration of military service only having a time limit. And to this day witnesses, above two to each material fact, receive no pay (Revisal, sec. 1300), and witnesses for the losing party receive none unless he is solvent, and talesmen summoned upon a special venire unless chosen on the trial panel receive (except in a few counties) no pay; which was true till recently of witnesses summoned before the grand jury in all cases where "not a true bill" is returned; and witnesses for the State in criminal cases where the convicted are insolvent receive only half pay. Even when a witness or a juror receives a prescribed *per diem,* in most cases it is less, in many cases far less, than what his time was worth or he could have earned. If the State can take his services for less than their value, it is because it has a right to require them as a public duty, and hence it can, as of old,

require them to be rendered without any compensation at all. Who will say that $10 per month is compensation for the time of a citizen sent to the front in time of war, or to put down riots, and for the hardships, and the exposure to weather, to disease, to danger, and to death? If the State can exact such services it can exact labor to improve its public roads for the public benefit. The worker on the roads (778) gets back some benefits therefrom. It was a crude and not very accurate calculation or balancing of benefits, but was a necessity perhaps in former times when currency was scarce and difficult to be obtained even by taxation. It is still a matter resting in the legislative discretion. Justices of the peace and some other officials formerly discharged the public duties required of them without compensation.

In the progress of time we have gradually commenced payment, to a limited extent, for most public services exacted as a public duty. Justices of the peace receive fees. Some witnesses and jurors are paid, usually less than the value of their time, but many witnesses and special veniremen usually still go unpaid, and compulsory military service is paid only what the Legislature sees fit. The public duty of the residents of any locality to work upon its roads has been reduced in Wake County by this statute to four days per annum, and such service is supplemented by the work of the force of county convicts, by a tax of 12½ cents upon the $100 worth of property in the cities as well as in the country to hire labor and purchase labor-saving machinery, by the appropriation of four-tenths of the net proceeds of the dispensary in Raleigh, and further by a special tax which any township shall see fit to vote for the benefit of the roads therein, and the four days labor required can be commuted by the payment of $2.50, with which the county will hire labor instead.

This is a very great advance upon the still recent custom, which has been in force for more than two centuries, of working the roads entirely and solely by labor called out in the discharge of the public duty of the inhabitants of each locality to keep the highways in order. Whenever in the judgment of the people of Wake County the four days labor, per annum, still exacted, should be reduced, or entirely abolished, they can send representatives to the General Assembly who can (779) doubtless procure such changes as the people may wish in the manner of working the public roads. As we said at last term, in *S. v. Holloman,* 139 N. C., at page 648, "It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of those methods—and this may vary in different counties and localities to meet the wishes

of the people of each, and can be changed by subsequent Legislatures."

And there, after the fullest consideration, we again leave the matter. If the system of working the public roads in any locality is not satisfactory to the majority of its people, relief or change of method must be sought from the lawmaking department.

No error.

BROWN and WALKER, JJ., concur in result.

Cited: Dalton v. Brown, 159 N. C., 177; *S. v. Taylor,* 170 N. C., 694, 695; *Brown v. Jackson,* 179 N. C., 369.

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(780)

STATE v. POWELL.

Filed 3 April, 1906.)

Intoxicating Liquors—Sufficiency of Indictment—Illegal Sale—Knowledge of Intoxicating Quality—Mistake of Fact—Presumption.

1. In a bill of indictment for retailing intoxicating liquor, the words "willfully and unlawfully," or words of equivalent import, should be used, though such language is not found in the statute.

2. In an indictment for retailing intoxicating liquor, evidence of the defendant that the article purchased by him was known as "phosphate" and came within the category known as a "soft drink," and that he had a guaranty from the manufacturer that it was nonalcoholic and nonintoxicating, that the agent of the manufacturer furnished him with what purported to be a statement from the Commissioner of Internal Revenue that it was not taxable, that he purchased it in good faith and in the full belief that it contained no alcohol, that he received it on the 5th day of the month, sold only one day; hearing it was charged to be intoxicating, he immediately closed it to the manufacturer, was competent to show that the defendant did not knowingly sell intoxicating liquor; that in doing so he was acting under a mistake of fact.

3. A mistake of fact neither induced nor accompanied by any fault or omission of duty, excuses the otherwise criminal act which it prompts.

4. When the statute does not make knowledge or intent an essential element, the State may, upon proof of the commission of the act, rest and rely upon the presumption that knowledge is in accord with the fact. The duty then devolves upon the defendant to show the exculpatory facts.

INDICTMENT against Sylvester Powell for retailing intoxicating and spirituous liquor contrary to the statute, heard by *Justice, J.,* and a jury, at February Term, 1906, of ROBESON.

The State introduced Jim Ezzell, who testified that on Tuesday, 6 February, 1906, at the store of the defendant, in Lumberton, he purchased at two or three times a certain drink called "Phos- (781) phate," or something of the kind; that it would take about a quart of this drink to intoxicate; that he paid 25 cents a quart for the liquid so purchased by him. On cross-examination he further testifies that he returned to defendant's Wednesday morning and offered to purchase more, but defendant declined to sell him any, telling him that he had understood that it was alleged that the "Phosphate" drink was intoxicating, and if so, he would sell no more of it, but would return it immediately to the maker; and he asked defendant two or three times on Wednesday morning to let him have more, but he refused. There was no evidence that defendant had ever sold any of this liquid except on the Tuesday named.

The State rested its case, and the defendant offered himself and other witnesses to show that the drink so called by him was purchased as a "soft drink" under a guaranty from the manufacturer that it was nonalcoholic and nonintoxicating, that at the time of the purchase the agent of the manufacturer furnished him with what purported to be a statement from the Commissioner of Internal Revenue, that it was nontaxable; that he purchased it in the full belief that it contained no alcohol; sold it so believing; that he received from the manufacturer the only purchase made by him on Monday, 5 February; only sales made by him were on Tuesday, 6 February, and having heard Tuesday night that it was charged that this "Phosphate," the name being given to it by the manufacturer, Burmanco, was intoxicating, he immediately closed it up and shipped it back to the manufacturer, having had it in his possession only one day, and refusing to make any sales after he was informed of the charge that it was intoxicating.

His Honor declined to admit this evidence, and the defendant excepted. Under the charge of his Honor the jury returned a verdict of guilty. From a judgment upon the verdict, the defendant appealed. (782)

Robert D. Gilmer, Attorney-General, for the State.
McLean, McLean & McCormick for defendant.

CONNOR, J., after stating the case: It will be observed that the bill of indictment charges the sale of the intoxicating liquor to have been made "willfully and unlawfully." This language is not to be found in the statute, but this court has several times held that these words, or words of equivalent import, should be used in indictments for violating statutes

prohibiting, or making criminal the doing or omitting to do the acts described. In *S. v. Simpson,* 73 N. C., 269, the indictment was drawn under a statute declaring it a misdemeanor to kill or abuse live stock in any inclosure not surrounded by a lawful fence. Neither the words "with intent" or "willfully, or unlawfully," nor any words qualifying or giving character to the mental attitude of the party are to be found in the statute. Because the words "unlawfully and willfully" were not in the indictment, judgment was arrested. *Pearson, C. J.,* said: "The statute by its necessary construction must be qualified by the addition of the words 'willfully and unlawfully.' Common sense forbids the idea that it was the intention of the General Assembly to send to jail every person who by accident kills or injures stock in an inclosure not surrounded by a lawful fence." In *S. v. Parker,* 81 N. C., 548, it was held that an indictment under the same statute, charging the act to have been "unlawfully" done was defective and judgment was arrested because of the failure to charge that it was "willfully" done. These rulings do not conflict with those which hold that when a person intentionally does the act forbidden by the statute, the criminal intent attaches to the act, as in *S. v.* (783) *King,* 86 N. C., 603, and many other cases in our Reports. The distinction is said to be: if the criminal character of the act is made to depend upon the *intent,* as in disposing of mortgaged property with intent to defraud the mortgagee, the intent must be charged and proven, whereas, if the *act* is made criminal, the intent need not be proven or charged, as in indictments for removing crops, but, as we have seen, it must be charged that the act was willfully—that is, intentionally—done, the criminality attaching. See discussion of *Smith, C. J.,* in *S. v. King, supra.* The proposed testimony was not offered to show that the defendant knowingly sold intoxicating liquor, but had no criminal intent; for such purpose it was clearly incompetent. The purpose of the testimony was to show that he did not knowingly sell intoxicating liquor; that in doing so he was acting under a mistake of fact. The principle is well illustrated in *S. v. Nash,* 88 N. C., 618, in which the defendant, hearing unusual noises at night near his dwelling, ringing of bells, blowing of horns, discharge of pistols and guns, etc., his child, who was sleeping near a window in the house, through which the noise was heard and the flashes of the discharge of the guns seen, ran to defendant with blood on her face, whereupon he took his gun, went to the door and fired into the crowd, wounding several. It turned out that the crowd consisted of boys who were, in that peculiar manner, serenading defendant. *Ashe, J.,* said: "Did the defendant have reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was

continuing? If he had, then he ought to have been acquitted." The decision is based upon the ruling in *Selfridge's case* (Mass.), Wharton on Homicide, 417. It is said that the defendant did the act prohibited by the statute—sold an article containing intoxicating liquor—and that it is immaterial with what intent he did it. So Nash did an act prohibited by law—he fired a pistol into a crowd who were engaged in harmless amusement. Selfridge fired upon and killed a man approaching him with an empty pistol pointed at him. In both cases the defense was sustained upon the well-settled principle that they (784) acted under a mistake of fact. In neither case were the defendants in any danger from the conduct of the persons assaulted, but the jury were instructed to acquit if in their opinion they acted under a reasonable apprehension and belief that the fact was as they supposed. The principle is essential in the administration of the criminal law. Without it the law would become an engine of wrong and oppression. In almost every case involving the plea of self-defense it is announced from the bench and applied by juries. Mr. Bishop states the law so clearly and so strongly vindicates the principle that we prefer to adopt his language: "Of course, to make such defense available, the defendant must have acted in good faith and with due care and caution. And when this good faith and this due care do exist, and there is no fault or carelessness of any kind, and what is done is such as would be proper and just were the fact what it is thus honestly believed to be, there is no principle known to our criminal jurisprudence by which this morally innocent person can be condemned because of the existence of a fact which he did not know and could not ascertain. On the other hand, to condemn him would be to violate those principles which constitute the very foundation of our criminal jurisprudence. Honest error of fact is as universal an excuse for what would otherwise be a criminal act as insanity. And it is a universal rule in the interpretation of criminal statutes that when an expression is general in terms, it must be taken with such limitations and exceptions as the principles of the unwritten law have established; to justify a different interpretation the statute must be specific and name the particular thing in respect of which there is to be a departure from this fundamental rule. Thus a statute forbidding or making penal a thing in general terms does not justify the punishing an insane person who commits the act or a child under seven years of age or a sane person of full years who does the (785) forbidden thing under a compulsion which he cannot resist, or, as we have just seen, who does it from a pure mind under a mistake of facts which he cannot overcome. These exceptions are grafted upon the statute by the common law; and, if the courts did not recognize this

effect of the common law to modify the general terms, courts and statutes would alike be abated—and they ought to be as public nuisances, by the uprising of the popular instinct." We find no direct authority in our Reports. The cases relied upon to sustain his Honor's ruling arose out of efforts to avoid criminal liability either by claiming that there was no intent to violate the law, as in indictments for carrying concealed weapons (*S. v. McManus,* 89 N. C., 555), removing crop (*S. v. Williams,* 106 N. C., 646), or by showing that the defendant did not know that the act was prohibited by statute. *S. v. Downs,* 116 N. C., 1064. In none of these cases is the question here presented involved or decided. We have examined, with care, the cases cited by the Attorney-General, who, with his usual industry, has gathered all of the cases decided by this Court bearing upon the subject. In *S. v. McBrayer,* 98 N. C., 619, *Merrimon, J.,* says: "That the defendant in good faith thought that he had the right to sell the minor the spirituous liquor, did not excuse him from criminal liability," showing clearly the principle upon which the decision went. He concludes the discussion with the maxim, *"Ignorantia legis neminem excusat."* In *S. v. Scoggins,* 107 N. C., 959, and *S. v. Kittelle,* 110 N. C., 560, the question is not raised. Counsel for defendant cite a decision made by the Supreme Court of Ohio, which is directly in point, *Farrell v. State,* 32 Ohio St., 456. Defendant was indicted for sale of intoxicating liquors. He set up as a defense that if the bitters sold contained such liquors, he was wholly ignorant thereof; that he bought them upon information and in the belief that the bitters were free from alcoholic properties. *Ashburn, J.,* said: "Testi-
(786) mony tending to prove the accused was ignorant of that fact or condition which constitutes the criminal element of the criminal charge is competent. In such case the maxim of the criminal law, *'Ignorantia facti excusat,'* applies to his case. Ignorance or mistake in fact, guarded by an honest purpose, will afford, at common law, a sufficient excuse for a supposed criminal act." Blackstone thus states the principle: "Ignorance or mistake is another defect of the will, when a man intending to do a lawful act does that which is unlawful. For, when the will and the deed act separately, there is not that conjunction between them which is necessary to form a criminal act. But it must be an ignorance of fact and not an error in point of law." 4 Com., 25. The distinction between right and liability growing out of mistake of law and of fact is recognized both in civil and criminal jurisprudence. In point of natural justice there is no very sound distinction, but of necessity and to prevent confusion and anarchy the maxim, *"Ignorantia legis neminem excusat,"* is adopted. To omit the word *"legis"* and insert *"facti"* would be shocking to our sense of justice and right. It

would destroy one of the most essential elements of the first law of nature and make a felon of every man who, under an honest, well-grounded mistake of fact, took human life. As said by Mr. Bishop, "It would be more just to send to prison or impoverish by a fine a person admitted to be insane, because an insane person could not so keenly feel the wrong or be so indignant at the injustice inflicted, or do so much damage to the State if his instincts should impel him to appeal to the moral sentiment of mankind. And to deal thus with an insane person would be no wider departure from the established principles of the criminal law than it is to deal thus with a sane man or woman whose honest act is prompted by a mistake of facts of a sort not to be guarded against. Indeed, the violence done to the law is precisely the same in one instance as in the other."

"According to all of our books, mistake of fact is quite different (787) in its consequences, both civil and criminal, from ignorance of law. There is no necessity, or technical rule of any sort, requiring it to be dealt with in any other way than is demanded by pure and abstract justice. . . . To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because misled—while he was cautious, he honestly supposed the facts to be the reverse of what they were—would restrain neither him nor any other man from doing a wrong in the future; it would inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts and promote vice instead of virtue." Bishop Crim. Law, 302. The proposition is thus stated: "A mistake of fact neither induced nor accompanied by any fault or omission of duty, excuses the otherwise criminal act which it prompts." Baron Parke says: "The guilt of the accused must depend on the circumstances as they appear to him." *S. v. Turpin,* 77 N. C., 473. For an interesting and enlightening discussion of this subject, see 1 Bish. Crim. Law, 330, note 4.

In *Myers v. State,* 1 Conn., 502, the defendant was indicted for a violation of a Sunday law. *Gould, J.,* said: "Now the defendant would not have been within the spirit or reason of the statute, upon the supposition that he actually believed a case of necessity or charity to exist, from that fundamental principle, as well of criminal law as of natural justice, that to render any act criminal the intention with which it is done must be so, or, in other words, the will must concur with the act. (4 Black., 20-4.) Upon this principle it is that idiots, lunatics, and infants under a certain age are, in judgment of law, incapable of any offense whatever. Hence, also, ignorance or mistake in point of fact (for ignorance of law, I admit, cannot be averred) is, in all cases of supposed offense, a sufficient excuse."

In *Com. v. Presby*, 14 Gray, 65, it appeared that a statute made it the duty of a police officer to arrest any person found in the high-
(788) way in an intoxicated condition. The defendant, having made such an arrest, was indicted for an assault. To the suggestion that, in fact, the prosecutor was not intoxicated, the officer alleged that he honestly, and upon a well-grounded belief, thought that he was in such condition. The Court, by *Hoar, J.*, said: "It is argued on behalf of the Commonwealth, that if Harford was not intoxicated, this statute affords no jurisdiction for his arrest, because the fact, and not a suspicion or belief, however reasonable, of intoxication, is requisite to such justification." After a review of the standard authorities on criminal law, the Court held that if the defendant "acted in good faith and upon reasonable and probable cause of belief, without rashness or negligence, he is not to be regarded as a criminal because he is found to be mistaken." The recognition of the principle *"ignorantia facti"* is essential to the safety of all peace officers who are required to make arrests for offenses committed in their presence. As said in *Neal v. Joyner*, 89 N. C., 287: "A peace officer may now justify his arrest, without proof of the actual commission of the crime, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party. . . . Although the arrested party may prove to be innocent, they (the officers) can defend against actions for false imprisonment, when the arrest is shown to have been made upon information reasonably sufficient to warrant the belief that crime has been committed, and that it was committed by the person arrested." *S. v. McNinch*, 90 N. C., 695. It would seem, if not seriously controverted, that a principle so consonant with elementary principles of natural justice and right would require for its vindication neither argument nor authority. Some confusion has arisen because of a failure to note the distinction between intentionally doing the prohibited act and doing an act entirely lawful but for the existence of some element, condition, or fact unknown to the person which brings
(789) the act within the description of the offense. We have recently held that when a person hunting, supposing that a noise nearby was made by a wild turkey, acting in good faith and free from negligence, shot and killed a man, he was not guilty of any crime. *S. v. Horton*, 139 N. C., 588.

We have so far discussed the question upon the theory that the proposed testimony would, if believed by the jury, justify the conclusion that the defendant was in fact ignorant of the presence of intoxicating liquor in the "Phosphate" which he sold, and that he was not negligent in that respect. It may be that his Honor excluded the evidence because of the opinion that, if true, it did not show that defendant was free from

negligence. It is clear that when the statute does not make knowledge or intent an essential element, the State may, upon proof of the commission of the act, rest and rely upon the presumption that knowledge is in accord with the fact. The duty then devolves upon the defendant to show the exculpatory facts. It would seem that if the testimony offered by defendant was found by the jury to be true, the conclusion that his conduct measured up to the standard of the ideal prudent man would reasonably follow. He proposed to show that the article purchased by him was known as "Phosphate" and came within the category known as a "soft drink"; that he had a guaranty from the manufacturer that it was nonalcoholic and nonintoxicating; that the agent of the manufacturer furnished him with what purported to be a statement from the Commissioner of Internal Revenue, that it was not taxable; that he purchased it in good faith and in the full belief that it contained no alcohol; that he received it on the 5th day of the month, sold only one day; hearing that it was charged to be intoxicating, he immediately closed it and shipped it to the manufacturer. It was in his possession only one day, and he refused to make any sales after hearing that it was charged to be intoxicating. What more could he have done? It may be suggested that he should have analyzed the phosphate. (790) We take notice of the fact that to do this required not only learning and skill in chemistry, but instruments and appliances not in common use. It is doubtful whether such an analysis could be made in the town or county in which defendant resided. In *Byars v. City,* 77 Ill., 467, the principle involved in this appeal is in no wise questioned. The testimony was admitted. The difficulty was that, as said by the Court, "He was the manufacturer and was bound to know what it contained." The case does not weaken the authority of the one from Ohio. The common law is "the perfection of human reason"—to be applied in a reasonable way, to reasonable conditions, resulting in reasonable conclusions. The standard of duty in respect to obedience is that of a sane, honest, intelligent, prudent man presumed to know the law. When the conduct of the citizen measures up to this standard there can be no sound public policy, no matter how desirable the end to be accomplished, which will make him a criminal. It was said on the argument that to permit the defense of *"ignorantia facti"* to prevail would "open the door" to violations of the many wise and beneficent statutes designed to suppress the liquor traffic. It behooves the courts to give to statutes such a reasonable construction as will advance the remedy and suppress the evil, but they may not do violence to those well-established principles of the common law, builded upon the wisdom of the ages, the custom of the people, and the experience of centuries. To them, in times of

strife and struggle with passion and power, the people must, as they have ever done, look for safety and security. The same objection was made to the construction of the statute in *Myers v. State, supra.* To it *Gould, J.*, wisely said: "The objection that this construction will facilitate evasions of the statute is not, I think, very well founded, even in point of fact. The danger of collusion will always be known to the
(791) triers; and the probability of it, in any supposable instance, will be open to discussion. But, at any rate, considerations of this kind ought never to influence a court when, as in the present case, a construction, dictated by them, would manifestly contravene the spirit of the law as well as the universal immutable principles of justice."

The testimony should have been received and, under proper instruction, submitted to the consideration of the jury. For the error in that respect, the defendant is entitled to a

New trial.

STATE v. THOMAS.

(Filed 3 April, 1906.)

Municipal Corporations—Powers of Mayor Pro tem.—Warrants in Criminal Cases.

1. A mayor *pro tem.* appointed under the provisions of Revisal, sec. 2933, is authorized "to exercise the duties" of the mayor during his absence as fully as he could do if present.

2. The power conferred upon a mayor *pro tem.* "to exercise the duties" of mayor during his absence includes that of issuing warrants in criminal actions.

WALKER, J., dissenting.

INDICTMENT against Henry Thomas, heard before *Moore, J.*, and a jury, at February Term, 1906, of UNION. There was a special verdict, and upon the facts therein set forth his Honor adjudged that the defendant was not guilty, and the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
A. M. Stack for defendant.

CLARK, C. J. The defendant was arrested upon a warrant for violation of a town ordinance in being "drunk and disorderly and
(792) using profane language upon the streets." He is indicted for

resisting the officer in the discharge of that duty. His defense is that the warrant was void because signed by "Davis Armfield, Mayor *pro tem.*" The special verdict finds that Davis Armfield, an alderman of the town of Monroe, had been duly chosen mayor *pro tem.* by the board of aldermen on 16 March, 1905, and was still exercising the duties of that office on 19 November, 1905, when he issued this warrant.

The Revisal, sec. 2933, provides: "The mayor shall preside at the meetings of the commissioners, but shall have no vote except in cases of a tie; and in the event of his absence or sickness, the board of commissioners may appoint one of their number *pro tempore* to exercise his duties." The defendant contends that the election only authorized the mayor *pro tem.* to preside at the meeting. If so, the words used would have been "appoint one of their number *pro tempore* to preside at such meeting." But the Legislature prescribed that the purpose of the appointment of a *pro tempore* occupant of the office of mayor should be "to exercise his duties." The only question there is, What are "the duties" of the mayor? The very next section (2934) prescribes among his duties that of being a conservator of the peace and that he shall have within the city limits "the jurisdiction of a justice of the peace in all criminal matters"; and the next section (2935) makes it his duty to execute the ordinances, laws, and rules of the government and regulations of his town or city; and sections 3156-3162, in naming those by whom warrants in criminal actions may be issued, include "mayors or other chief officers of incorporated towns." "The duties of a mayor are to cause the laws of the city to be enforced, and to superintend inferior officers." 2 Bouvier Law Dict., "Mayor." A *pro tem.* officer is a substitute who shall discharge the functions of the office during the absence of the officer. (793)

The mayor *pro tem.* here was chosen in March, and was still in office in November. It does not appear why the mayor was so long disabled. The election of the mayor *pro tem.* must be taken as regular. This is not questioned in this case and could not be questioned collaterally in this mode. The only point is, taking the election of mayor *pro tem.* as properly made, does the power conferred by the statute "to exercise the duties" of mayor include that of issuing warrants when the mayor could have done so? There is nothing to indicate that he is not, like all other *pro tem.* officers, vested with all the duties of the principal whose place he temporarily occupies. In this very case it would be singular if from 16 March to 19 November—more than eight months—all the duties of mayor of the town should go undischarged, save the least important one, probably, that of presiding at the meetings of the board of aldermen or town commissioners. The language used by the

Legislature was intended, we think, to provide that in case of the absence of the mayor, from sickness or other cause, the board of town commissioners should appoint one of their number "to exercise the duties" of such mayor till his return, as fully as he could do if present, in order that the public might suffer no inconvenience or detriment by reason of his absence.

The word "mayor" first occurs in English history in 1189, when Richard I. substituted a mayor for the two bailiffs of London. The Romans styled such officer *"prefectus urbi,"* and originally the English title for such officer was either "bailiff" or "portreeve," just as the sheriff (who had, however, far greater functions than our officer of that title) was "shirereeve," *i. e.,* sheriff. In 5 Words and Phrases, 4450, it is said that the word mayor comes from the old English word "maier," which means "power," "authority," and not from the Latin "major"—

greater. He represents the power and authority of the town, and
(794) the duty of presiding at meetings of the town commissioners is only one of the duties he exercises. While the power and duties of mayor may vary according to the charter of the town or the laws of the State, it is probably without any exception his duty to execute the laws and local regulations of his city and to supervise the discharge of their duties by the subordinate officers of the city government. Such an office could not be left vacant, without public inconvenience, during the illness or absence of the incumbent, and hence our statute provides a mode of selecting a substitute, a *pro tem.* mayor who shall "exercise his duties"—meaning all his duties (for there is no restriction) and as fully as he could have done.

Ingersoll Pub. Corp., 221, says that when the mayor is absent "his office may be supplied by a *pro tem.* election from among the members of the board, and the person thus chosen mayor *pro tem.* has the powers and may perform the functions of the mayor, for the time being." Where a statute required for the validity of an ordinance "approval by the mayor," it was held that "approval by the mayor *pro tem.*" was sufficient. *Saleno v. Neosho,* 127 Mo., 636; 48 Am. St., 653. The same was held, if the mayor by reason of his absence was unable to perform his duties. *Detroit v. Moran,* 46 Mich., 213.

In *Bank v. Dubuque,* 19 Iowa, 467, it was held that where the law authorizes the appointment of a mayor *pro tem.,* a deed executed by such officer, if otherwise regularly executed, is sufficient as if executed by the mayor.

An officer *pro tem.* is one who *pro tempore*—for the time being—is such officer, fully, completely; and he is, as Revisal, sec. 2933, provides, authorized "to execute the duties" of such office. This is true of a

speaker *pro tem.* of a legislative body (the most usual instance), who, as we know, can swear in members, issue subpœnas, or discharge any other function of the speaker, "unless otherwise provided by law or the rules of the body." Cushing Leg. Assem., 313; and so of any other officer appointed *pro tem.* Upon the special verdict the jury should have been instructed to return a verdict of guilty. (795)

Reversed.

WALKER, J., dissenting: It cannot be questioned that there should be some way of filling a temporary vacancy in the office of mayor, as the prompt and efficient administration of the criminal law would thereby be promoted. But while I recognize the necessity for such a provision of law and regret my inability to agree with the Court that it now exists, the language of the Revisal, sec. 2933, quoted in the Court's opinion, is to my mind so free from ambiguity and points so clearly to the absence from sickness or other cause of the mayor as presiding officer and to his ministerial duties pertaining to that office that my assent to the conclusion of the Court must be withheld. It is impossible for me to read that section and not see that the Legislature is referring to the mayor as the presiding officer at the meeting of the commissioners, and that the power given in that section to appoint one of their number to perform *pro tempore* his duties has reference solely to the duties therein mentioned and imposed on him as presiding officer, and not to his judicial duties. This section relates to the legislative proceedings of the commissioners and has no apparent connection with the following section, which relates to the mayor's judicial functions. Why require the commissioners to select one of their number to act *pro tempore* with judicial functions, when by section 2931 they are given the power to fill a vacancy in the office without this restriction? As the mayor has the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the State or the ordinances of the city, it was thought that, when he is absent or under a temporary disability, a justice could perform his judicial duties for him (Revisal, sec. 2934), and this, it seems, has been the practice in such cases. If this be not so, and there is a *casus omissus,* the Legislature, and not this Court, (796) must provide for it. We must administer the law as we find it, and cannot supply the omission by interpretation. The language of section 2933 of the Revisal is susceptible of but one construction, which excludes the idea of a mayor *pro tempore* exercising any judicial function. He is not even a judicial officer *de facto,* as there must be some semblance of judicial authority before a person assuming to act as a judicial officer can be so regarded. The commissioners had no more

right to appoint one of their number as mayor and thereby clothe him with judicial powers than they had to appoint a judge. Their act in that respect was utterly void and without any legal efficacy whatever. Entertaining the view that the person alleged to have been resisted was not, for the reason stated, a lawful officer, and that the defendant cannot therefore be convicted of the offense charged against him, I must dissent from the opinion and judgment of the Court.

(797)

STATE v. PERKINS.

(Filed 3 April, 1906.)

Intoxicating Liquors—Statutes—Repugnancy—Repeal—Effect Upon Pending Prosecutions.

1. Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed.
2. Chapter 497, Laws 1905, which enacts that the sale of liquor "shall be" prohibited in Union County, and provides that all laws and clauses of laws in conflict with the act are repealed, and that the act shall take effect 1 June, 1905, is prospective in its operation and applies only to sales after 1 June, 1905, and does not repeal chapter 434, Laws 1903, prohibiting the sale of liquor in said county, as to sales made prior to 1 June, 1905.
3. Repeals by implication or construction are not favored, and they should not be extended so as to include cases not within the intention of the Legislature.
4. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed.

INDICTMENT against Richard Perkins, heard by *Ferguson, J.*, and a jury, at November Term, 1905, of UNION.

The defendant was indicted in one count for selling and in the other for keeping for sale, liquor, without having a license, as provided by law, and was convicted. The offense was committed in 1904 and the indictment was found at July Term, 1905. The defendant requested the court to charge the jury that, as the offense was committed, if at all, prior to 1 June, 1905, the defendant should be acquitted, and he moved to quash the bill and to arrest the judgment upon the same ground.

The instruction and the motions were all refused, and the defend- (798)
ant excepted. There was a judgment upon the verdict, and the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
A. M. Stack for defendant.

WALKER, J., after stating the case: The ruling of the court was in all respects correct. The indictment was drawn under chapter 434, Laws 1903, prohibiting the sale of liquor in Union County, or the keeping of it for sale without a license. By chapter 497, Laws 1905, it is enacted that the sale of liquor and the keeping of it for sale "shall be" prohibited, with certain exceptions not necessary to be stated. There is no clause in the latter act unqualifiedly repealing prior enactments upon the same subject, but by sections 26 and 27 it is provided that all laws and clauses of laws in conflict with the act are repealed, and that the act shall be in force and take effect from and after 1 June, 1905. The decision of this case must, therefore, turn upon the question whether the act of 1903 is repealed by the act of 1905, to the extent of defeating this prosecution against the defendant.

Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed, because the act must be punishable when judgment is demanded, and authority to pass sentence must then reside in the court. This is the well-settled principle, and it is essential in order to give effect to the clear intention of the Legislature and to require that the decision and judgment of the courts shall be based upon existing law. *S. v. Cress,* 49 N. C., 421; *S. v. Nutt,* 61 N. C., 20; *S. v. Long,* 78 N. C., 571; *S. v. Massey,* 103 N. C., 356; *S. v. Biggers,* 108 N. C., 760; 26 A. & E. (2 Ed.), 755. The rule is so familiar and well grounded in reason that we need not stop to discuss it further, except to (799)
say that it necessarily relates to an unqualified and express repeal, in the view we take of it, as to its effect upon pending prosecutions for offenses committed under the prior statute before the repeal, or upon prosecutions for such offenses afterwards instituted. As thus considered, it has no application to the facts of this case, for the act of 1905 does not expressly and unqualifiedly repeal the act of 1903, but repeals only to the extent that it conflicts with it. If the Legislature had intended to repeal the act of 1903 absolutely, it was easy to have expressed that intention in words of unmistakable meaning; but it preferred not to do so, but to repeal it only so far as it is repugnant to

the provisions of the later statute. The act of 1905 is by its very language prospective in its operation. It refers to sales made after 1 June, 1905, when it became effective, and could not under our Constitution apply to antecedent acts, so as to make them criminal or punishable if not so at the time they were committed. If it does not affect prior acts which are covered only by the earlier statute, how can it be said to conflict with the latter as to those acts? There can be no repugnancy except as to the offenses which are punishable under the later statute, and as to these the earlier act is repealed and has no further operation. Repeals by implication are not favored, and they should not be extended so as to include cases not within the intention of the Legislature. The act of 1905 forbids the sale of liquor, and prescribes a much greater punishment than that fixed by the act of 1903 for selling liquor without a license, and its general features clearly indicate a purpose on the part of the Legislature to adopt more drastic measures for the suppression of the liquor traffic. Can it be reasonably supposed that, with this object in view and in its then frame of mind, it designed to extend pardon and forgiveness to those who had violated the
(800) provisions of the former act? Why should we come to such a conclusion and give to the repealing clause of the act of 1905 the same meaning we would to words of unqualified repeal, which is so much at variance with the declared will of that body? Will it not be more reasonable and more likely to effectuate the intention of the Legislature if we hold that the act of 1903 is still in force as to offenses already committed when the act of 1905 took effect, and to confine the latter act to its proper and legitimate sphere by applying it to offenses thereafter committed? This brings the two acts into harmonious operation by repealing the former act so far as it conflicts and leaving it in full effect where it does not interfere with the full operation of the other act. There is abundant authority, we think, for this construction. Coke says: "It must be known that forasmuch as acts of Parliament are established with gravity, wisdom, and universal consent of the whole realm for the advancement of the Commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated, but ought to be maintained and supported with a benign and favorable construction." *Dr. Foster's case,* 11 Rep., 63. Sedgwick thus expresses the same idea: "In this country it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is therefore but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is ir-

reconcilable; and hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together." Sedg. Stat. and Const. Law, 127. "It is a general rule that subsequent statutes, which add accumulated penalties and institute new methods of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words. Nor hath a later act of Parliament ever been (801) construed to repeal a prior act, unless there is a contrariety or repugnancy in them, or at least some notice taken of the former act, so as to indicate an intention in the lawgiver to repeal it. Neither is a bare recital in a statute, without a clause of repeal, sufficient to repeal the positive provisions of a former statute. The law does not favor a repeal by implication unless the repugnance be quite plain; and such repeal carrying with it a reflection on the wisdom of former parliaments, it has ever been confined to repealing as little as possible of the preceding statutes. Although, then, two acts of Parliament are seemingly repugnant, yet if there be not a clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication." Potter's Dwarris on Statutes, 156, 157. "Every effort must be made to make all the acts stand, and the later act will not operate as a repeal of the earlier one if by any reasonable construction they can be reconciled. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed." 26 A. & E. (2 Ed.), 726, 727. "Where a provision of law is thus modified or cut short, it is not in any proper sense repealed. And we may lay down the doctrine broadly that no repeal takes place if the earlier provision can stand, to any extent consistently with the later. Yet this proposition must not be misapplied. For if the later statute conflicts in any particular with the earlier, then the earlier is so far abrogated; though we do not say, speaking of the earlier as a whole, that it is repealed." Bishop Stat. Crimes (1873), sec. 165.

The quotations we have made from Lord Coke and the text-writers are but forceful statements of the universal rule applicable to such cases. We find, though, that these general principles of statutory construction have been extended and applied to just such (802) a case as we have presented in this record. This Court, in *S. v. Putney,* 61 N. C., 543, in passing upon a similar question, the punishment for the offense having been increased, said, by *Reade, J.:* "It is true that the defendant cannot be punished under a law which was not in existence at the time when the offense was committed, because that

law would be *ex post facto,* unless where it lessens the punishment. It is equally true that, where a new law expressly or impliedly repeals the old law, there can be no conviction under the old law. But the act of 1866-'67 has no application to the case before us, because it does not repeal the old law, but is only prospective in its character, and is to be read thus: If any person shall hereafter steal a mule, etc., he shall suffer death. All larcenies committed before that act are to be tried and punished without reference thereto." The motion in arrest of judgment was accordingly overruled. It has been suggested that this case conflicts with subsequent decisions of this Court, and especially with the principle applied in *S. v. Massey,* 103 N. C., 356. We are not aware of any case in this Court where the rule, as laid down in *S. v. Putney, supra,* has been differently stated; nor do we think any such case can be found. A careful search induces us to believe that in every case where the question has been decided at all, the doctrine so tersely stated by *Judge Reade* in *S. v. Putney,* as applicable to the facts then before the Court, has been approved. We are quite sure that the judge who decided *Massey's case* accepted it as the doctrine of this Court and distinguished it from the rule that obtains when there has been an express and unqualified repeal, as was declared in *Massey's case* to be the effect of the statute then under consideration. No stronger proof of the full acceptance and approval of the rule can be furnished than by quoting from the opinion of the Court in *Massey's case,* as delivered by *Avery, J.:* "There is a marked distinction between the case at
(803) bar and *S. v. Putney,* 61 N. C., 543, cited by the Attorney-General. The defendant Putney was convicted at Fall Term, 1867, of the Superior Court of Wake County, under an indictment found in December, 1866, of the larceny of a mule. On 25 February, 1867, the General Assembly, after reciting that the crime of stealing horses and mules hath of late, notwithstanding the punishment provided by law, become much more common than formerly, enacted that every person who shall steal any horse, mare, gelding, or mule, and shall be thereof convicted according to due course of law, shall suffer death. Before that time larceny was punishable by whipping or fine or imprisonment. The Court held that the old and new law would be construed so as to give effect to both by interpreting 'shall' according to its natural import, as referring exclusively to offenses thereafter committed, and the preamble certainly indicated that intent. No law or part of the law was expressly or by necessary implication repealed; and the old and new law were both left operative. Potter's Dwarris, 133." *S. v. Massey* was decided upon the theory that the later statute, by its very terms and as if in so many words, had unqualifiedly and expressly repealed the earlier

one. It did not provide, as here, that the earlier act, where it conflicted with the later one, should be repealed, but it actually repealed so much of it as affected the defendant's criminality and conferred the power to punish him, by striking it from the earlier statute. There could not be a stronger illustration given of an express and direct repeal. It was the same as if the act had provided that so much of the earlier statute as made the defendant's act criminal and punishable, as therein provided, was thereby repealed, and the Court so regarded it. Whether that was the true construction is not now the question. We are merely attempting to explain the reason for that decision, without regard to its merits, in order to show that the Court recognized fully the authority of *Putney's case* and held it was not inconsistent with the *Massey case.* The dissenting justices in the latter case rested their (804) contention upon the construction of section 3761 of The Code, by which they said the amending act should be given prospective operation. *Massey's case,* therefore, instead of rejecting the doctrine of *Putney's case* or in the least impairing its force, must be taken to have affirmed it in the most positive language.

The question presented has been considered in the courts of some of the other States, and their decisions sustain the conclusion we have here reached. In *Pittman v. Commonwealth,* 2 Rob. (Va.), 804, the Court said: "It is agreed, however, that though there is no express repeal of the previous laws, there is an implied one; that the act prescribes a new punishment for past offenses—an aggravated punishment —by increasing the fine from $20 to $30; that it is inconsistent with the former laws, and, being the last expression of the legislative will, must abrogate them, upon the principle, *leges posteriores priories contrarias abrogant.* The authorities cited at the bar show that implied repeals are not favored; that two affirmative statutes shall coexist if they can, and this notwithstanding the use of general words, whose grammatical construction might imply the contrary. 6 Bac. Abr., 439. Let us, then, inquire why we are obliged to imply a repeal of the previous laws and discharge the previous offenses. Did the Legislature intend such repeal and discharge? For we admit that in this act, as in all others, we must inquire into the legislative intent and give effect to it if we can. Admitting, then that the act varied and increased the punishment prescribed by former laws, the question occurs, To what offenses does it apply? Does it apply to violations committed before its passage or to those committed afterwards? If it applies only to offenses committed after its passage, it does not conflict with the former law, and consequently both will stand. If it applies or can be legally applied to previous offenses, then the conflict will arise and the (805)

last law only will have effect." And *Field, J.*, in the same case, said: "This law, therefore, so far as it was intended to apply to offenses which had been committed before its passage, was void, and, being void, it cannot have the effect of repealing by implication any previously existing law, with which it would have been in conflict if it had been a valid law. It is not in conflict with any law against unlawful gaming, as to offenses theretofore committed, because it is void and as a piece of blank paper. But as to offenses committed after the passage of the act, it is in conflict with the old law, because it increases the penalty from $20 to $30. From this view of the case it follows that as to offenses of which the defendant has been convicted (both of which were committed before 1 March, 1842), the old law was in force and is yet in force, and judgments shall be rendered against him for the fine of $20 only and costs." In *Pegram's case,* 1 Leigh (Va.), 569, it was said by the Court: "Although the principle is correct that *leges posteriores priores contrarias abrogant,* yet they only abrogate them from the time that the latter law is passed or goes into effect. The principle on which this rule prevails is that the latter statute being incompatible with the former, they cannot exist together, and the latest expression of the will of the Legislature is the law. But there is no incompatibility in the statutes now under consideration. A punishment affixed to an offense prior to the first of May, 1828, is not incompatible with a different punishment, either lighter or more severe, affixed to the same offense subsequent to that date. They may well stand together. The punishment prescribed by Laws 1827-'28 being different from that prescribed by Laws 1822-'23, is certainly an implied repeal of it, as to new offenses, from the time it goes into effect; but, by the very terms of the law, the new punishment is only applied to the offenses happening *after* 1 May, 1828, leaving the old punish-
(806) ment to be applied to the offenses happening before that day."

There are decisions in Alabama to the same effect. "No court," it is said in *Miles v. State,* 40 Ala., 42, "will, if it can be consistently avoided, determine that a statute is repealed by implication. *Ludlow v. Johnston,* 3 Ohio, 553. When two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. *Dodge v. Gridley,* 10 Ohio, 178. The Code, sec. 3184, and the act of December, 1865, being both affirmative statutes, when does the contrariety or repugnance in them effect a repeal of the former by the latter? The latter statute has operative effect only as to the offenses named therein, when committd subsequent to its passage. It cannot have retrospective operation, as its language and the Constitution both alike forbid it. There is no conflict in the two

statutes, then, as to the offenses named, if committed *prior* to the enactment of the latter statute; and consequently, as to the offenses thus committed, there is no repeal by the latter of the prior law. To this extent the two may well stand together; but when the field of operation becomes entirely covered by the latter statute, the former is repealed by the repugnance of the two, by analogy to a principle in nature that no two things can occupy precisely the same space at the same period of time." And in *Moore v. State,* 40 Ala., 53, it is said: "The punishment, as to a certain class of persons, who after its passage 'shall be guilty,' is prescribed, and it is greater than the punishment prescribed by the prior law for the same offenses, and this, upon principles of the common law, neither expressly nor by implication repealed the former statute. Repeals by implication are not favored, and for such a repeal to take effect, the repugnancy must be clear. A statute is never repealed by the repugnancy of matter in a subsequent one, except to the extent of such repugnancy. If such repugnancy between two statutes effects a repeal of the former to the extent of the oppo- (807) sition, and leaves a field still for the independent operations of both, the latter does not repeal the former as to such matter not affected by the latter statute." See, also, *David v. State,* 40 Ala., 67; *Wade v. State, ibid.,* 74; *Com. v. Wyatt,* 6 Randolph, 694, and especially the case of *Shepherd v. People,* 25 N. Y., 412. A like construction was given to the statute of frauds (29 Car. II., ch. 5) in *Gilmore v. Shuter,* 2 Lev., 227. It is true, that was a case of a promise in consideration of marriage, but the underlying principle of the decision, that the new act operates prospectively and does not conflict with the old, bears directly upon our case, though the two cases are not of the same kind. This Court, in *Winslow v. Morton,* 118 N. C., 491, approved the following rule in the construction of statutes with reference to implied repeals, namely, that the law does not favor implied repeals, and the implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the earlier only to the extent that it is plainly inconsistent and irreconcilable with it, citing *Simonton v. Lanier,* 71 N. C., 498, in which *Judge Bynum,* for the Court, said that it is true every affirmative statute is a repeal of a prior affirmative statute, so far as it is contrary to it, under the maxim, *leges posteriores priores contrarias abrogant;* but the law does not favor an implied revocation, nor is it to be allowed unless the repugnancy be plain; and where, in the later act, there is no clause of *non obstante,* it shall, if possible, have such construction that it will not operate as a repeal, citing *S. v. Woodside,* 31 N. C., 498, where the same rule is clearly stated by *Judge Nash.* Applying this rule to the construction of

the act of 1893, creating degrees of homicide, this Court said, in *S. v. Coley,* 114 N. C., 883: "The controversies that have heretofore provoked discussion have arisen upon the question whether particular language could be construed as implying a legislative intent to
(808) limit the operation of an act to offenses committed after its passage and leave the preexisting law in force as to those previously committed. (*S. v. Putney,* 61 N. C., 543; *S. v. Long,* 78 N. C., 571; *S. v. Williams,* 97 N. C., 455; *S. v. Massey,* 103 N. C., 356.) As the purpose that the act of 1893 should operate prospectively, and that the common law should remain in force as to homicides committed prior to its passage, is expressed in unequivocal terms in the proviso to the act, we think that the question whether the offense with which the prisoners are charged should be classified as murder in the second degree did not arise." It can make no difference how the intention of the Legislature, that an act should have prospective operation, is expressed; whether it is done by unequivocal terms in the act, or by a proviso, or is to be gathered from its general scope and tenor, so that it appears with sufficient clearness that such is the intention. This is too plain for argument, for at last it is the intention that we seek to find in the act, and, when found, we enforce it. The principle of the decision in *Coley's case,* therefore, applies to the case at bar, as the two cases, with this understanding of the law, become parallel, and the repealing act in each must have the same construction and be in like manner restricted in its effect, as it is perfectly apparent that the Legislature intended the act of 1905 to operate prospectively. The use of the words "it shall be unlawful" in the first section clearly evinces such a purpose, not only by their grammatical construction, but by the meaning assigned to them in the decisions of the courts. *S. v. Putney, supra; Moore v. State, supra.* The spirit and purpose of the two acts and the object with which they were passed forbid the conclusion that the Legislature intended a repeal of the prior act. The Legislature, when it passed the second act, was apparently not in a forgiving mood. The evils of intemperance no doubt had increased, and called for more stringent provisions for the
(809) future, but not for the exercise of mercy in dealing with past offenses.

It follows that the defendant can derive no aid from the last enactment in making good his contention that the act of 1903 has been repealed, and, therefore, that there is no law now under which he can be punished for his unlawful act, committed in 1904. There was ample authority for the sentence imposed.

No error.

Cited: Cook v. Vickers, post, 106; *S. v. Scott,* 142 N. C., 609; *S. v. Cantwell, ib.,* 610; *Parker v. Griffith,* 151 N. C., 601; *S. v. Broadway,* 157 N. C., 600; *Comrs. v. Henderson,* 163 N. C., 120; *S. v. Russell,* 164 N. C., 484; *Power Co. v. Power Co.,* 171 N. C., 256; *S. v. Johnson, ib.,* 802; *Sanatorium v. State Treasurer,* 173 N. C., 813; *Allen v. Reidsville,* 178 N. C., 529; *S. v. Mull, ib.,* 750, 751.

STATE v. McWHIRTER.

(Filed 3 April, 1906.)

False Pretense—Variance.

Where a bill of indictment charged that the defendant by certain false representations obtained from the prosecutor a certain note and mortgage, and all the evidence tended to show that the prosecutor did not surrender said note and mortgage, there was a fatal variance between the allegation and the proof.

INDICTMENT for obtaining property under false pretenses against G. P. McWhirter, heard by *Ferguson, J.,* and a jury, at November Term, 1905, of UNION. From a verdict of guilty and a judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Stewart & McRae, R. L. Stevens, and Tillett & Guthrie for defendant.

WALKER, J. The defendant being indebted to the prosecutors, executed to them on 23 November, 1903, a note for $315, and also a paper-writing in form a crop lien to secure advancements and a chattel mortgage to secure a debt, but no description of the note for $315 is inserted in this paper-writing, which is called in the case Exhibit (810) A. The defendant, in January, 1904, paid $50 on the $315 note and executed a new note for $265 for the balance and a mortgage to secure its payment, which were given in lieu of the $315 note, and were a payment and satisfaction of it and a substitution for it. The case was tried upon the theory in the court below that such was the nature and legal effect of the transaction, and we must so regard it here. *Allen v. R. R.,* 119 N. C., 710.

The defendant is charged in the indictment with having falsely represented to the prosecutors that he was the owner of two mules and that

there was no lien on them, whereas in fact there was a lien on them at the time, and that by said false pretense he did obtain from the prosecutors "one note and mortgage of the value of $265, executed 28 January, 1904, of the goods and chattels of the said E. M. Griffin & Co." (the prosecutors).

All the evidence tended to show that the prosecutors did not surrender the note and mortgage for $265, nor did the defendant obtain the same, as alleged in the indictment, but that he did surrender the note for $315 and the instrument known as Exhibit A. The defendant requested the court to charge the jury that there was a variance between the allegation of the bill and the proof, and that they should acquit the defendant. This request was refused, and the defendant excepted. There was a verdict and judgment, from which the defendant appealed.

We do not perceive why the defendant was not entitled to the instruction asked for in his prayer. The prosecutor testified that the $265 note and mortgage had not been delivered to the defendant, but that they were then in his possession. This was contrary to the allegation of the bill. Proof of the surrender of the $315 note and Exhibit A surely could not have the effect of sustaining the charge. So far (811) as the latter is concerned, there was a clear and substantial variance and the allegation was not only left without proof to support it, but it was disproved by the prosecutor's own testimony. The allegation and proof must correspond. We cannot hold that the fact of the delivery of the mules of the prosecutor in payment of the $265 note, if such was the fact, was sufficient to sustain the allegation, and if we correctly interpret the charge of the court we hardly think it was intended so to instruct the jury. There was a fatal variance between the allegation and the proof, if not a failure of proof. *S. v. Corbett,* 46 N. C., 264.

The error of the court in refusing the instruction and afterwards submitting the case to the jury, without any corresponding evidence at all to establish the specific charge of the bill, entitles the defendant to another trial.

New trial.

Cited: S. v. Davis, 150 N. C., 852; *Warren v. Susman,* 168 N. C., 462; *S. v. Gibson,* 169 N. C., 322; *Coble v. Barringer,* 171 N. C., 447; *S. v. Carlson, ib.,* 827.

STATE v. BASKERVILLE.

(Filed 10 April, 1906.)

Police Court—Jurisdiction—Constitutional Law—Construction.

1. Section 27, Article IV of the Constitution, conferring jurisdiction on justices of the peace, is so modified by section 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits of the same.
2. Chapter 36, section 13, Laws 1895, in so far as it confers exclusive jurisdiction on the police court of the city of Raleigh of any and all violations of the city ordinances committed within the corporate limits, is a constitutional exercise of legislative power.
3. Construction by cotemporaneous legislation in matters of doubtful import, while not controlling, should be received as an aid to correct decision.
4. An act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers.
5. In case of ambiguity, the whole Constitution is to be examined in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument and not to raise any conflict between its parts which can be avoided.

INDICTMENT against Sarah Baskerville, heard on appeal from (812) a justice of the peace, by *Justice, J.*, and a jury, at September Term, 1905, of WAKE.

Defendant, on warrant duly issued, was tried, convicted, and sentenced in a court of a justice of the peace of Raleigh Township, for violating a valid ordinance of the city, and thereupon appealed to the Superior Court, contending that the justice of the peace had no jurisdiction to try the case. The cause coming on for hearing in the Superior Court, defendant moved to dismiss for want of jurisdiction. Motion overruled, and defendant excepted.

Defendant admitting that on the facts she was guilty, if the court had jurisdiction, the verdict was so entered, sentence imposed, and defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
J. C. L. Harris & Son for defendant.

HOKE, J., after stating the case: In chapter 36, section 13, Private Laws 1905, the Legislature established a police court for the city of Raleigh and defined its jurisdiction as follows:

(*a*) Exclusive original jurisdiction over all offenses arising from the violation of the provisions of this act, or of all violations of ordinances, by-laws, rules, and regulations of the board of aldermen made in
(813) pursuance of this act, within the corporate limits of the city of Raleigh and within Raleigh Township.

(*b*) Jurisdiction, power and authority for the trial and determination of all misdemeanors created by the laws of the State of North Carolina committed within the corporate limits of the city of Raleigh and within Raleigh Township.

In the case before us the defendant was tried and convicted before a justice of the peace of a misdemeanor in violating a lawful ordinance of the city of Raleigh. The act in question gives exclusive jurisdiction of such offenses to the police justice, and if the act is valid the justice of the peace who tried and sentenced the defendant was without jurisdiction of the case, and the motion of the defendant should have been allowed.

The sections of our Constitution in Article IV bearing on the question now before us are as follows: Article IV, section 2, provides that "The judicial power of the State shall be vested in a Court for the trial of Impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

Section 12: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the Government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide, also, a proper system of appeals and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

(814) Section 14: "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."

And section 27, so far as pertinent to this case, provides that the several justices of the peace shall have jurisdiction of the criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days.

In *Rhyne v. Lipscombe,* 122 N. C., 650 *et seq.,* the Legislature had created a criminal circuit court embracing several western counties;

had given same, to a certain extent, concurrent jurisdiction with the Superior Courts in that portion of the State, providing, among other things, that an appeal would lie in certain cases from a justice of the peace to said criminal court, and from this court direct to the Supreme Court; and the Supreme Court, in substance, decided:

(1) "The Superior Courts and courts of justices of the peace were created by the Constitution (sec. 2, Art. IV), and the General Assembly cannot abolish them.

(2) "While the General Assembly may, under section 12 of Article IV of the Constitution, allot and distribute the jurisdiction of the courts below the Supreme Court, it must be done without conflict with other provisions of the Constitution.

(3) "In construing legislation establishing courts inferior to the Supreme Court and affecting the jurisdiction of the Superior Courts, the term 'Superior Court' must be interpreted in the sense it had at the time of the adoption of the Constitution which established such court, which was that it was the highest court in the State next to the Supreme Court and superior to all others, from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity. (815)

(4) "The Superior Court cannot, under section 12, Article IV of the Constitution, be deprived of the preëminence and superiority attaching to it at the time of its adoption by the Constitution or shorn of either its criminal or civil jurisdiction without conflict with the constitutional provisions creating it; and while its jurisdiction may be made largely appellate by conferring such part of its original jurisdiction on such inferior courts as the General Assembly may provide, its jurisdiction must be retained by original or appellate process.

(5) "The allotment and jurisdiction provided for in section 12 of Article IV of the Constitution cannot be such as to take from justices of the peace the jurisdiction conferred by section 27 of such article, or to repeal the right of appeal given by that section, both in criminal and civil actions, to the Superior Court from the courts of justices of the peace."

The court thereupon held the statute unconstitutional in so far as it was in conflict with these principles. In that case the Supreme Court was only considering the relative position, as to power and jurisdiction, of the Superior Courts as part of our judicial system, and the right of such courts alone to hear appeals from justices of the peace. The jurisdiction of the justices' courts, as established by section 27 of Article IV, was only incidentally in question, and was only considered in so far as the same was affected by section 12 of Article IV, conferring power on

the Legislature to "allot and apportion the jurisdiction which does not pertain to the Supreme Court among the other courts prescribed by this Constitution, or which may be established by law in such manner as it may deem best . . . so far as this may be done without conflict with other provisions of this Constitution."

Section 14 of this article, which confers on the General Assembly the power to provide for the establishment of special courts for the
(816) trial of misdemeanors in cities and towns, was in no way involved in the decision of *Rhyne v. Lipscombe,* nor was the effect of this section, as affecting the jurisdiction of justices of the peace, in any wise determined. While some expressions in the opinion gave intimation to the contrary, the decision is only authority and precedent on the material facts then before the court, established or accepted as true. *Cooper v. R. R.,* 140 N. C., 209. Accordingly, the opinion of the Court in *S. v. Lytle,* 138 N. C., 738, written by the present *Chief Justice,* who also wrote the opinion in *Rhyne v. Lipscombe,* treats this point as an open question, and the same is now presented for our consideration.

This section 14, providing for the establishment of special courts for the trial of misdemeanors in cities and towns, was *in ipsissimis verbis* in the Constitution of 1868 as section 19, and there has been no change, constitutional or otherwise, which restricts or tends to restrict the power therein granted. Soon after the promulgation of the Constitution of 1868, there were acts creating courts under this section, which gave to the chief officers of the towns, where established, exclusive jurisdiction of certain misdemeanors arising from violation of their own municipal regulations, and while no case perhaps necessarily raised the question directly, this was the construction put upon these acts by the Court, and such construction was then accepted without question. *S. v. White,* 76 N. C., 15; *S. v. Threadgill, ibid.,* 17.

It is a familiar principle that construction by cotemporaneous legislation in matters of doubtful import, while not controlling should be received as an aid to correct decision, and it is proper that these acts should be so considered here. And while, in *S. v. Wood,* 94 N. C., 855, the Court rendered a decision having a different effect, this was put expressly on the ground that the act itself had been so changed, and
(817) not from any lack of power in the Legislature to confer the exclusive jurisdiction. The reason is thus stated by *Ashe, J.*: "And it was this provision in the second section of the act—'shall be subject to the provisions of this act'—that led this Court to decide in *S. v. Threadgill* and *S. v. White, supra,* that the mayor or chief officer of a city or town had exclusive jurisdiction of violations of the ordinances of cities or towns of which they were chief officers. But when the act of 1871

was carried forward into The Code, the words, 'and shall be subject to the provisions of this chapter,' were omitted, so that the section read, 'Any person violating an ordinance of a city or town shall be guilty of a misdemeanor and shall be fined not exceeding $50 or imprisoned not exceeding thirty days.' There are no restrictive words. The very terms of the enactment are such as to confer jurisdiction upon justices of the peace, and our opinion is, under this section of The Code, the justice of the peace had jurisdiction, and it was error to quash the warrant on that ground."

In *Washington v. Hammond,* 76 N. C., 33-37, *Bynum, J.,* delivering the opinion of the Court, said (at p. 37): "It is clear beyond doubt that as the act of 1871-'72 has established special courts in cities and towns, as is authorized by the Constitution as it was and as it is now amended (Art. IV, sec. 25), the General Assembly has the power to vest in these courts original and final jurisdiction over all misdemeanors whatever. Whether it would not be a most beneficial and economical jurisdiction, if extended to the mayors of the principal and most populous cities and towns of the State, thus relieving the Superior Courts of a mass of business, which in some counties has engrossed the whole time of the regular terms of the courts and has been the subject of much complaint, is an inquiry which we cannot pursue."

And it has also been held that the Constitution, in giving the Legislature the right to establish these courts "where the same may be necessary," also gave the right, when such courts are properly (818) organized and equipped for the purpose, to confer upon them such power and jurisdiction over all misdemeanors committed within the corporate limits as may be adequate and necessary to their proper and efficient operation. *S. v. Pender,* 66 N. C., 313. In this case *Rodman, J.,* said: "The words, 'provide for the establishment of,' are very wide, and it seems to us that they not only admit of, but that they cannot receive their full and adequate force, without giving them the interpretation that they authorize the Legislature to establish the courts in any way it may think proper, and to give the judge such power (not exceeding the trial of misdemeanors), and to provide for them and the other officers of the court (if any) such mode of election and such terms and emoluments of office as it may think proper." And in the same opinion, at page 319, it is said: "From the language of section 19 of Article IV (and it is by its language only that we can be guided), we think the leading idea in that was to give the Legislature full power over the establishment of special courts, thus making it an exception to the general provision in section 10 of Article III. This is necessary in order to give to the words their full and adequate force."

It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers. *Sutton v. Phillips,* 116 N. C., 502; *S. v. Lytle, supra.* It is also an accepted canon of construction that in case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument and not to raise any conflict between its parts which can be avoided. Black on Interpretation of Laws, p. 17, clause 10, citing Cooley Const., Lim., p. 58, and *Manly v.* (819) *State,* 7 Md., 135. And the same idea is expressed by our Court in *S. v. Pender, supra,* where the judge says: "It is the duty of the courts of this State, and one which the Court has endeavored faithfully and impartially to perform, to give to the Constitution such an interpretation as will harmonize all of its parts, and without violating any leading idea in it as a whole."

From the principles here stated and the decisions of our own courts, from the language of the Constitution itself, and considering the two sections together and giving to each its proper effect, we think it a correct deduction and hold it to be the law that:

(*a*) Section 27, Article IV, conferring jurisdiction on justices of the peace, is so modified by section 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits of the same.

(*b*) That the act in question, in so far as it confers exclusive jurisdiction on the police court of the city of Raleigh of any and all violations of the city ordinances committed within the corporate limits, is a constitutional exercise of legislative power.

(*c*) That the justice of the peace who tried this cause had no jurisdiction, and the judgment against the defendant must be arrested.

It may be well to note that the Superior Court, having only appellate jurisdiction, the case necessarily is made to depend on the jurisdiction of the trial justice, and has been so considered. *S. v. Lachman,* 98 N. C., 763.

Judgment arrested.

Cited: S. v. Shine, 149 N. C., 482; *S. v. Collins,* 151 N. C., 649; *In re Watson,* 157 N. C., 350; *S. v. Doster, ib.,* 635; *S. v. Rice,* 158 N. C., 638; *S. v. Brown,* 159 N. C., 469; *S. v. Dunlap, ib.,* 493; *S. v. Lawing,* 164 N. C., 497; *S. v. Tate,* 169 N. C., 374; *Oil Co. v. Grocery Co., ib.,* 522; *Faison v. Comrs.,* 171 N. C., 415; *S. v. Boyd,* 175 N. C., 792.

(820)

STATE v. BARRINGTON.

(Filed 10 April, 1906.)

Plea to Jurisdiction—Locality of Offense—Burden of Proof—Question for Jury.

1. The fact that an offense charged was committed in another State is available under the plea of not guilty, and such fact being a matter of defense, the burden of proving it is on the defendant.
2. Where the prosecutor testified that the offense charged was committed in this State, the court was correct in refusing to give defendant's prayer, that if the evidence was believed the jury should render a verdict of not guilty, as the witness's testimony on cross-examination in reference to an official survey of the State line did not justify the court in ignoring his positive statement.

INDICTMENT for assault with a deadly weapon against L. Barrington, heard by *Moore, J.*, and a jury, at January Term, 1906, of RICHMOND.

There was evidence of the State tending to show that on or about 23 September, 1905, defendant made an unlawful assault with a deadly weapon on one Robert Leviner, and that such offense was committed in North Carolina.

Prosecutor, as a witness for the State, testified to the assault, and that same occurred in North Carolina. Witness further stated that the fight was near the home of A. J. Miliken, in Richmond County, N. C., and that said Miliken had always been considered a citizen of North Carolina, and voted and listed and paid taxes in North Carolina. On cross-examination the witness testified as follows:

Q.: "Did the fight occur in North Carolina?" A. "It has been called North Carolina."

Q.: "Has not the line between the two States been recently run and marked?" A.: A line they call the South Carolina line has been run lately, but I do not know whether it is the line or not. Before this, it was said that Mr. Miliken lived in North Carolina." (821)

Q.: "According to this line, and if it is correct, then the place where the fight took place is in South Carolina?" A.: "Yes; but I do not know whether the line is right or not."

There was evidence on the part of the defendant to the effect that under an act of the General Assembly of North Carolina, in 1905, the State line between the counties of Richmond, N. C., and Marlboro, S. C., had been run and marked, and that according to said line the home of A. J. Miliken and the place where the fight occurred was in South Carolina.

A copy from the files of the chief executive office in North Carolina of what purported to be a report from two surveyors, one from North

Carolina and one from South Carolina, was to the effect that under an act of the Legislature of each State they had run and marked the State line in the locality, and that they were engaged in the work from 2 October to 12 December, 1905. No copy of this report was introduced on the trial below, but was filed in the record on motion of defendant's counsel and by consent of the Attorney-General.

The defendant requested the court to charge the jury that if they believed the testimony they would return a verdict of not guilty. This was refused, and defendant excepted. The court charged the jury, among other things not excepted to, that the courts of North Carolina had no jurisdiction of offenses committed in another State, and "if the jury should be satisfied that the offense was committed in South Carolina they would go no further, but return a verdict of not guilty." To this charge the defendant excepted. There was a verdict of guilty, and from judgment on the verdict the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
H. H. McLendon for defendant.

(822) HOKE, J. The authorities of this State are to the effect that the fact that the offense charged was committed in another State is available under the plea of not guilty. They have also established that such fact is a matter of defense, and the burden of proving it is on the defendant. *S. v. Mitchell,* 83 N. C., 674; *S. v. Buchanan,* 130 N. C., 660. There was no error, therefore, in the charge of the court below on this aspect of the case. The judge was correct, also, in refusing to give the defendant's prayer, that if the evidence was believed the jury should render a verdict of not guilty. The copy of the survey, annexed by consent as a part of the record, was not in evidence on the trial, and if it had been, the greatest effect that could have been given it would be to hold that the line thereby established was in law the correct boundary line between the States. Where such line was placed by the survey is a question of fact which could only be determined by the jury.

The prosecutor testified on his examination in chief that the fight took place in North Carolina, and the cross-examination did not disclose such a connection between the survey spoken of by the witness and the official survey as to justify the court in ignoring the positive statement of the witness that the offense was committed in North Carolina.

The case was properly submitted to the jury under a correct charge; they have decided the matter against the defendant, and the Court holds there was

No error.

Cited: *S. v. Long,* 143 N. C., 674.

(823)

STATE v. WHITLEY.

(Filed 17 April, 1906.)

Seduction Under Promise of Marriage—Indictment—Sufficiency—Evidence — Statements of Prosecutrix—Character—Chastity—Innocent and Virtuous Woman.

1. An indictment for seduction under promise of marriage, under Revisal, sec. 3354, alleging that defendant feloniously seduced prosecutrix, an innocent and virtuous woman, under promise of marriage to the prosecutrix made by the defendant, is not defective on the ground that it does not allege a marriage contract.
2. In an indictment for seduction under promise of marriage, it was competent for the prosecutrix to testify under what inducements and circumstances she yielded to defendant.
3. In an indictment for seduction under promise of marriage, statements made by the prosecutrix to her mother after the seduction that defendant had promised to marry her, and that she loved him, were competent to corroborate her testimony on the trial.
4. In an indictment for seduction under promise of marriage, it was not competent to ask a State's witness, on cross-examination, who had not testified as to the general character of the prosecutrix, whether there was not a report in the neighborhood derogatory to her character.
5. In an indictment for seduction under promise of marriage, the court correctly charged the jury that evidence that prosecutrix permitted familiarities not amounting to incontinence in fact was a matter to be considered by them in passing upon the question whether she was a virtuous woman.
6. In an indictment for seduction under promise of marriage, the court correctly charged that a virtuous woman is one who has never had illicit intercourse with any man, and that an innocent woman means that, although there may have been a marriage contract, yet if the prosecutrix yielded on account of lust or from any other motive than of the promise of marriage, she would not be innocent within the meaning of the statute. Whether or not his Honor did not interchange the words virtuous and innocent, the defendant cannot complain of a harmless error.

INDICTMENT for seduction under promise of marriage against (824) C. D. Whitley, heard by *Council, J.*, and a jury, at January Term, 1906, of STANLY. From the judgment pronounced on the verdict of guilty, the defendant appealed.

The indictment alleged that on a designated day defendant did with force and arms at and in a certain county unlawfully, willfully, and feloniously seduce one Flora C. Eudy, an innocent and virtuous woman, under promise of marriage to the said Flora C. Eudy, made by him, the said Devotion Whitley, against the form of the statute and the peace and dignity of the State. Defendant moved in arrest of judgment on the

ground that the indictment did not allege a marriage contract because the allegation following the statement that the seduction was under a promise of marriage reduced the effect of the allegation as to promise to a mere proposition on the part of one of the parties. On the trial, the mother of the prosecutrix was allowed to testify that after she discovered her daughter to be pregnant the daughter had told her that defendant had promised to marry her and that she loved him. On cross-examination of the witnesses for the State the defendant's counsel asked the witness if he had not heard a report in the community that prosecutrix would permit young men to take indecent liberties with her. The question was excluded, and defendant excepted.

Robert D. Gilmer, Attorney-General, for the State.

R. L. Smith, Adams, Jerome & Armfield, and J. R. Price for defendant.

CLARK, C. J. The indictment follows the exact words of the statute. Revisal, sec. 3354. The added words are mere surplusage and do not affect the bill. Revisal, sec. 3254, forbids the arrest of judgment "by reason of any informality or refinement."

(825) In *S. v. Ferguson,* 107 N. C., 850, the Court says: "The crime does not consist in the sexual intercourse, nor in the seduction, nor in the innocence and virtue of the woman, but in committing the act under *promise of marriage,* without which no crime is created by the statute, and which alone makes the seduction criminal." It was clearly competent for the prosecutrix to testify under what inducement and circumstances she yielded to the defendant, the truth of her statement being a matter for the jury.

The statements made by the prosecutrix to her mother were competent to corroborate her testimony on the trial. As to the fourth and fifth exceptions, the witness had not testified as to the general character of the prosecutrix, and it was not competent to ask him (unless, perhaps, on cross-examination if he had been such character witness) whether there was not a report in the neighborhood derogatory to her character. If she were not a virtuous and innocent woman, that fact could not be shown by hearsay, by a mere report that she had permitted, on a certain occasion, familiarities to be taken with her person, not amounting to sexual intercourse.

The first special instruction asked by the defendant was properly refused. If the prosecutrix had permitted the familiarity recited in the prayer, it did not amount to incontinence in fact, and the court could not tell the jury that it amounted to such as a matter of law, but cor-

rectly told the jury that evidence of such conduct, if believed, was a matter to be considered by them in passing upon the question whether she was a virtuous woman within the meaning of the statute. This, indeed, was in accord with the second prayer of the defendant, which was substantially given.

The seventh exception cannot be sustained. In *S. v. Crowell,* 116 N. C., 1058, the Court said: "The law looks at conduct and motive only as shown by conduct, and not at thoughts undisclosed and natural impulses not acted on. The precedents sustain the definition given by the court, that an innocent and virtuous woman is one who never had (826) illicit intercourse with any man and who is chaste and pure (*S. v. Ferguson,* 107 N. C., 841), and properly refused to go further and charge that the prosecutrix must have had 'a mind free from lustful and lascivious desires.'" A woman may not resent language and familiarities in some stations in life, which conduct in other circumstances and surroundings would lead a jury to infer that she was not virtuous and innocent. Such testimony does not amount in law to her being not a virtuous and innocent woman, and the court could go no further than to leave the evidence to the jury. Any inference that could be drawn from it is an inference of fact, and could be drawn only by the jury, not by the court. A woman may use vulgar language and submit to familiarities, if such is the custom of her society, and yet be of impregnable virtue. "Bundling," where it is the custom, is no proof of immorality, though it would be strong evidence where such custom is unknown.

The court refused a prayer, "that in order to find from the evidence that the prosecutrix is not a virtuous woman, it is not necessary for the jury to find that she had ever had actual sexual intercourse with any other person than the defendant," and correctly charged that "A virtuous woman is one who had never had illicit intercourse with any man," and that "An innocent woman means that, although there may have been a marriage contract, yet if the prosecutrix yielded on account of lust or from any other motive than of the promise of marriage, she would not be innocent within the meaning of the statute." Whether or not his Honor did not interchange the words "virtuous" and "innocent," the defendant cannot complain of a harmless error. The gravamen of this offense is the seduction of an innocent and virtuous woman under *promise of marriage.* His Honor charged that the prosecutrix must be found by the jury to be both virtuous and innocent, and that she did not yield her person to the embraces of the defendant from lust or any motive or inducement other than the promise of marriage. (827)

No error.

Cited: *S. v. Raynor,* 145 N. C., 475; *S. v. Whedbee,* 152 N. C., 781; *S. v. Pace,* 159 N. C., 464; *S. v. Lang,* 171 N. C., 779; *S. v. Woody,* 172 N. C., 971; *S. v. Fulcher,* 176 N. C., 727; *S. v. Cooke, ib.,* 734.

STATE v. WILLIAMS.

(Filed 17 April, 1906.)

Homicide—Self-defense—Evidence—Question for Jury.

Where the prisoner asked the deceased, who was drinking and noisy, to leave his sister's house, as she was sick, and deceased threatened to shoot any one who put his foot out of the door, and when the prisoner, unarmed, went out at the front door, deceased shot at him, and the prisoner testified that he went back and stayed about fifteen minutes and then went out at the back door with a rifle, to see if deceased had gone, and that he was shot at by the deceased, and shot back, because he was afraid deceased would shoot again before he got to the house, the court erred in refusing to submit a prayer presenting defendant's theory of self-defense.

INDICTMENT for murder against Robert Williams, heard by *Peebles, J.,* and a jury, at Fall Term, 1905, of DAVIE. From a verdict of manslaughter and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General for the State.
T. B. Bailey, E. L. Gaither, and A. T. Grant for defendant.

CLARK, C. J. The deceased and one Tucker went to the house of prisoner's sister and were drinking and noisy. The prisoner came while they were there and asked them to go away, as his sister was sick. The deceased threatened to shoot any one that put his foot out of the (828) door. The prisoner testified: "I went out at the front door, and as I got about 2 feet from the door deceased shot at me with his gun; I think he was about 50 yards off; heard shot strike some lumber behind me; I had no gun at this time. Went back and stayed about fifteen minutes, and then went out at the back door with a rifle. I went out to see if they were gone. I went about 20 steps until I had passed Fisher Phelps' house. As I passed, deceased saw me; he was squatted down, and he shot at me. As he shot I shot towards him. I shot because I was afraid he would shoot me again before I got in the house; he was about 65 or 70 yards away. I did not know whether I had hit or not." In fact, the deceased was killed.

The court refused to submit a prayer presenting the defendant's theory of self-defense, and charged in lieu thereof, "That if the jury were satisfied beyond a reasonable doubt that the prisoner fired the fatal shot, then the only thing for them to consider was whether the prisoner was guilty of murder in the second degree, or manslaughter. In any view of the testimony, he would be guilty of either one or the other, and it was for the jury to determine which." This was error.

The prisoner's testimony was that he went out of the house, by the other door, after the lapse of fifteen minutes, "to see if they were gone"; that he was shot at, and that he shot back "because I was afraid he would shoot me again before I got in the house." The lapse of fifteen minutes was sufficient cooling time, as his Honor held, and if the prisoner went out for the purpose of renewing the fight, as his Honor seems to have assumed, the charge was even more favorable to the prisoner than he was entitled to. But though his carrying the gun looks suspicious, it was not conclusive of his motive, as he may have carried it for precaution and in self-defense. His testimony presented the phase of self-defense, if believed, and he was entitled to have the jury pass upon it.

Error.

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(829)

STATE v. BECK.

(Filed 24 April, 1906.)

Larceny—Nature of Property—Chattels Real—Statutory Offense.

Brass railing attached partly to the freehold and partly to an engine, the engine being attached to the freehold, comes within the scope and purport of Revisal, sec. 3511, providing that if any person shall enter on the lands of another and carry off any "wood or other kind of property whatsoever, growing or being thereon," with felonious intent, he shall be guilty of larceny.

INDICTMENT for larceny against Lee Beck, heard by *Peebles, J.*, and a jury, at February Term, 1906, of FORSYTH. From a verdict of guilty and a judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
J. S. Grogan for defendant.

CLARK, C. J. The defendant is indicted for the larceny of 30 pounds of brass railing attached partly to the freehold and partly to an engine in an ice plant, the engine being attached to the freehold.

Revisal, section 3511, provides: "If any person, not being the present owner or *bona fide* claimant thereof, shall willfully and unlawfully enter upon the lands of another and carry off, or be engaged in carrying off, any wood or other kind of property whatsoever, growing or being thereon . . . if the act is done with felonious intent, shall be guilty of larceny . . . if not done with such intent, he shall be guilty of a misdemeanor."

Had the act provided "carrying off any wood or other kind of property, growing or being thereon," the rules of construction would restrict "other kind of property" to property of like kind with wood. But (830) the addition of the word *"whatsoever"* shows a clear intent of the Legislature to take this case out of such rule of construction. In the language of *S. v. Vosburg,* 111 N. C., 720, "The obvious intent of the act was to prevent the willful and unlawful entry upon land of another, and the taking and carrying away of such articles as were not, at common law, or by previous statute, the subject of larceny." It is added that money would not come under the words of the statute, for the articles taken must be "of like character with that mentioned by name, the character being that of chattels real, connected in some way with the land, or which once had been so connected and were now severed therefrom." Besides, money had been made "by previous statute the subject of larceny." The article here taken comes within the very scope and purport of the act, which was to cure a defect in the law of larceny, which had before applied only to personal property, by making it applicable to the felonious taking and carrying away of chattels real.

In *S. v. Burt,* 64 N. C., 619, the Court held that the defendant who found a nugget upon a loose pile of rock and carried it away was not guilty of larceny, evidently from the language used, resting the opinion upon the absence of felonious intent, saying: "In public estimation, it has never been regarded as larceny for the fortunate finder of a nugget of gold, or a precious stone, to appropriate it to his own use, although found upon the land of another." Though we disapprove of that decision, since the felonious intent had been properly left to the jury, still it is different from this case, where the defendant did not merely find some brass lying on the ground, but wrenched off the brass railing around a stationary engine, without the knowledge of the owner and without claim of right, and carried it off and sold it. This comes within the purport of the statute, and the failure of the former law of larceny to cover such cases is the very evil the statute was intended to cure. The (831) statute had been very recently enacted when *S. v. Burt* was de-

cided, and was probably not called to the attention of the Court. It is not mentioned in the opinion.

S. v. Graves, 74 N. C., 396, was an indictment for forcible trespass to personal property in taking rails from a division fence of which the defendant also claimed ownership. The case went off on the ground that prosecutrix was not "present and forbidding" till after the rails had been removed from the fence, and hence were no longer in her possession. It is true that *obiter* the Court says (and correctly enough), citing *S. v. Burt, supra,* that at common law it would be neither larceny nor trespass to personalty to remove rails from a fence and carry them off by one continuous act. But there was no reference to the statute under which this indictment is had and no occasion for such reference. This technical distinction, resting upon "one continuous act," is exactly what was repealed by the statute before us, and it was its sole purpose.

S. v. Liles, 78 N. C., 496, also relied upon by the defendant, was an indictment for larceny of growing figs, under an entirely different statute, Revisal, sec. 3503, "Larceny of Growing Crops," and the judgment was arrested because of the omission in the indictment of material words required by the statute, "cultivated for food or market."

No error.

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(832)

STATE v. MARTIN.

(Filed 24 April, 1906.)

Malicious Mischief—Elements of Offense—Injury to Electric Cars—Fixtures—Annexation to Land—Intent—Presumptions—Special Instructions—Verdict Against Weight of Evidence—Remedy.

1. The mere intention to make a chattel a part of the freehold is not by itself sufficient for the purpose of making it so; there must be some kind of physical annexation to the land, though the nature and strength of the union is not material, if it in fact be annexed.

2. Under Revisal, sec. 3676, an electric street car is personalty so as to render a willful and wanton injury to it criminal.

3. In order to sustain a conviction at common law for malicious mischief, it must appear that the property was destroyed, and the act must also have been committed with malice towards the owner of the property.

4. Malicious mischief is not committed when the act alleged to be criminal is prompted by sudden resentment of an injury or a supposed affront; nor is the act willful and wanton when committed under like circumstances.

5. The presumption is that the trial court charged the jury fully and correctly, and that the jury found all the facts necessary to constitute the crime.

6. If a defendant desires a special instruction upon a particular feature of the case, he must ask for it.

7. Where there is some evidence to support the verdict, if the jury decide contrary to its weight, the remedy of the defendant is an application to the judge to set the verdict aside.

8. In an indictment for a misdemeanor there is no error prejudicial to the defendant by reason of the fact that a person against whom the grand jury returned "Not a true bill" was nevertheless put on trial with the defendant.

9. The offense of wanton and willful injury to property under Revisal, sec. 3676, may be committed jointly by two persons, one doing the act and the other, as principal, aiding and abetting him, or participating with him.

10. Though an indictment be returned "Not a true bill" as to one of the defendants, testimony competent against both may be used against the other defendant.

(833) INDICTMENT against Reed Martin, heard by *Peebles, J.*, and a jury, at February Term, 1906, of FORSYTH.

The defendant, Reed Martin, was indicted with Henry Revels for willfully and wantonly injuring an electric street car by breaking its windows with a rock. The grand jury, as appears from the indorsements on the indictment, returned "Not a true bill" as to Henry Revels and a "True bill" as to Reed Martin. Both were put on trial.

J. M. Chitty, a witness for the State, testified: "I was motorman of the car the day the two defendants entered it at Fourth Street. After going about a block or two, one of the defendants appeared to be intoxicated and was put off the car. One of the defendants, Reed Martin, picked up a rock and threw it. The rock missed the conductor, but broke a glass in the window of the car." There was other testimony on the part of the State which corroborated this witness. The defendants did not introduce any testimony, but requested the court to charge the jury that there was a variance between the allegation in the indictment and the evidence, and that the latter would not sustain a verdict of guilty. This prayer was refused, and the defendants excepted. The defendant Revels was acquitted. There was a verdict of guilty as to the defendant Reed Martin, who moved in arrest of judgment. The motion was overruled, and he excepted. Judgment was pronounced upon the verdict, and the defendant appealed. He assigned the following errors:

1. The refusal of the court to instruct the jury, as requested, (834) that there was a variance.

2. There was a misjoinder of parties.
3. The offense could not be committed jointly.
4. That testimony competent only against the defendants jointly was admitted and used to convict the defendant Martin, when it appears that the indictment was returned "Not a true bill" as to Revels, and he was actually acquitted on the trial.

Robert D. Gilmer, Attorney-General, for the State.
J. S. Grogan for defendant.

WALKER, J. The learned counsel for the defendant in his argument before us relied chiefly upon the position that the street car was not personal property, and therefore that the alleged offense was not within the language or the meaning of section 3676 of the Revisal. He therefore contended that the judgment should be arrested. It does not appear from the indictment where the car was when it was injured by the defendant, but the evidence shows that it was then being operated on the track of the Fries Power Company in the city of Winston. The defendant's prayer for instructions is, perhaps, sufficient to raise this question, apart from the motion in arrest of judgment, though it does not distinctly point out this as a defect in the evidence and seems to have been intended to apply only to the question of variance. We will assume that the point is sufficiently presented, as it was clearly intended to be.

The method of changing property, personal in its nature, into realty is well settled in the law. Such property does not become realty by mere use in connection with the land, for if that were true, implements of husbandry, though used only for agricultural purposes, would thereby become a part of the land. Whether or not a chattel has become a part of the realty must to a great extent depend upon the facts of the particular case. The mere intention to make it a part of the freehold, though it may enter largely into the determination of the ques- (835) tion of permanency (*Foote v. Gooch,* 96 N. C., 270), is not, by itself, sufficient for the purpose of making it so. There must be some kind of physical annexation of the thing to the land, though the nature and strength of the union is not material, if, in fact, it be annexed. The annexation is in some cases by gravitation alone, or, in other words, the thing is kept in position by its own weight, as in the case of the planks laid down as the upper floor of a ginhouse and used to spread cotton seed upon, though not nailed or otherwise fastened to the building. *Bryan v. Lawrence,* 50 N. C., 337; *Latham v. Blakely,* 70 N. C., 368. In such a case the planks are necessary for the completion of the structure

and essential to its occupation, use and enjoyment for the purpose of the trade or business to which it is adapted and has been appropriated. *Latham v. Blakely, supra; R. R. v. Deal,* 90 N. C., 110. They have, as it were, a permanent and fixed position, and are in a certain sense stationary—not movable, so as to be in one place today and in another tomorrow. "The very idea of a fixture," says the Court, in *Beardsley v. Ontario Bank,* 31 Barbour, at p. 630, "is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position. But that which becomes by annexation a part of the soil is something more than a fixture, and requires at least as much permanence as to constitute a fixture. The maxim, *"Quicquid plantatur solo, solo cedit,* which tersely expresses the principle, makes the affixing of the chattel to the soil the test by which it is declared to belong to the soil. Hence, courts in determining the questions that have arisen, have looked at the mode and intention of annexation, the object and customary use of the thing annexed, and in determining the intention, the character of the claimant has had its weight." And again at page 635, the Court, in discussing the difference between railroad cars and a loom in a factory, says that

(836) the latter is permanently placed, although not strongly affixed, while rolling-stock is incapable of permanence or of being annexed in any one place, as it is intended for and the whole use is in its locomotive facilities; and the Court then proceeds: "The term by which it is ordinarily designated, 'rolling-stock,' implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of the railroad, but is not a part of the railroad itself. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and everything is ready for the reception of the locomotives and cars; it is equipped when the rolling-stock and all other necessary appliances and facilities for business are finished and put upon it for use." That seems to be the leading case in the books. The opinion delivered by *Judge Allen* (afterwards judge of the Court of Appeals) is devoted to a careful discussion of the subject and goes fully into the authorities. It is well considered and has been followed as a controlling precedent in several subsequent cases. A decision by the same Court, in which the question is also learnedly and ably treated and the same conclusion reached, is *Stevens v. R. R.,* 31 Barbour, 590. The Court of Appeals of New York has expressly affirmed those cases and approved the principles upon which they were decided. *Randall v. Elwell,* 52 N. Y., 521; *Hoyle v. R. R.,* 54 N. Y., 314. To the same effect are *State Treasurer v. R. R.,* 28 N. J. L., 21, and *Williamson v. R. R.,* 29 N. J. Eq., 311. In the last cited case it is said, at pages 329 and 331: "The

criterion for determining whether property ordinarily regarded as personal property becomes annexed to and part of the realty is the union of three requisites:

"1. Actual annexation to the realty or something appurtenant thereto.

"2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated.

"3. The intention of the party making the annexation to make a permanent accession to the freehold.

"Tested by the foregoing criterion, it is manifest that the roll- (837) ing-stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But unattached machinery in a factory, the implements of husbandry on a farm, and furniture in a hotel, are similarly adapted for use in the factory, on the farm, or in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become a part of the realty, engines and cars and the rolling-stock of a railroad utterly fail to answer the requirement of the law." It does not appear in this case that the power company owned the land on which its rails were laid and over which its cars ran. Indeed, it must be that it did not, and this is the fair inference. The only right it had, in respect to the land, was a license to use the streets of the city for the operation of its line of railway. This being so, it had no land of its own to which it could annex its personal property and thereby convert it into realty. Having only a right to use the land for a definite purpose and subject to its joint occupation and use by the city and its citizens, so far as they did not interfere with or obstruct the use by the company, we cannot suppose that either of the parties intended that the nature of the property—that is, the cars— should be changed from personalty into that of realty. There is no valid reason for holding that such a change was contemplated or that it was wrought by a mere use of the streets in the manner already described. The cars were in no way actually and physically attached to the realty, nor were they constructively so annexed, the latter method implying that there exists both adaptation to the enjoyment of the land and localiza- (838) tion in use as obvious elements of distinction from mere chattels personal, which are movable and intended to be so. While there is here an adaptation to use, there is no annexation, no immobility from weight, and no localization in use. Were the same contrivance adopted by a

tenant for the purpose of carrying on his trade upon leased lands, his right to remove both cars and rails would seem to be beyond question. *Hoyle v. R. R., supra; Moore v. Valentine,* 77 N. C., 188; *Overman v. Sasser,* 107 N. C., 432; *Elwes v. Mawe,* 3 East, 38 (2 Smith's Leading Cases, 9 Ed., 1888, p. 1423). We conclude that the cars were personalty, so as to render a willful and wanton injury to them criminal under section 3676 of the Revisal. But the indictment is not sufficient to sustain a conviction at common law for malicious mischief, as contended by the State. In such a case, it must appear that the property was destroyed, and it will be difficult to find a case where an injury, short of destruction, has been held to be indictable at common law. The weight of authority both here and in England is decidedly against the proposition that a criminal offense has been committed where there has been mere injury without destruction. *S. v. Manuel,* 72 N. C., 201; *S. v. Helmes,* 27 N. C., 364; *S. v. Robinson,* 20 N. C., 129. The act must also have been committed with malice towards the owner of the property. *S. v. Robinson, supra; S. v. Landreth,* 4 N. C., 331; *S. v. Jackson,* 34 N. C., 329; *S. v. Sheets,* 89 N. C., 543. And the indictment must either expressly charge malice against the owner or fully otherwise describe the offense in that particular. *S. v. Jackson, supra; S. v. Hill,* 79 N. C., 656. The statute (Revisal, sec. 3676), it seems, was passed to change the law in this respect, though not, perhaps, to supersede the common law as to malicious mischief.

(839) There was no variance that we can see with the present record before us. As the charge of the court is not set out, we are unable to know how the judge instructed the jury. We suppose the variance is alleged to consist in the fact that the evidence tended to show that the rock may have been aimed at the conductor in anger, or in resentment for having been ejected from the car, and that consequently the car was not injured with malice against the owner, nor yet willfully and wantonly, as alleged in the indictment. It is undoubtedly true that malicious mischief is not committed when the act alleged to be criminal is prompted by sudden resentment of an injury or supposed affront (*S. v. Landreth,* 4 N. C., 331), nor is the act willful and wanton when committed under like circumstances, that is, when it is not preconceived and done with reckless indifference to the rights of others, but is merely done impulsively under the influence of suddenly aroused passion. *S. v. Brigman,* 94 N. C., 888. But the jury may have found, under proper instructions from the court, that the deliberate intention was to injure the car and not merely to attack the conductor, and that the act really possessed all the ingredients of a crime within the meaning of the statute

and was not done in the heat of passion. It was for the jury to pass upon the evidence and to find the facts. We cannot presume error to have been committed by the court below. The presumption here is the other way. We must take it that his Honor charged the jury fully and correctly, and that the jury found all of the facts necessary to constitute the crime. If the defendant desired any special instruction upon this feature of the case, he should have asked for it. *Simmons v. Davenport,* 140 N. C., 407. There was some evidence to support the verdict, and if the jury decided contrary to its weight, the remedy of the defendant was an application to the judge to set the verdict aside. *Stewart v. Carpet Co.,* 138 N. C., 60.

The trial proceeded a little irregularly, it seems, in the lower court, as the grand jury returned "Not a true bill" as to one of the defendants, who, was, nevertheless, put on trial. We do not perceive, though, how there has been any misjoinder, nor why the original (840) defendants could not have jointly committed the offense, one doing the act and the other, as principal, aiding and abetting him, or participating with him. *S. v. Stroud,* 95 N. C., 626; *S. v. DeBoy,* 117 N. C., 702; 1 McClain Cr. Law, sec. 210. "The authorities agree that there are in misdemeanors no accessories either in name or in the order of the prosecution. When, therefore, one sustains in misdemeanor a relation which in a felony makes an accessory before the fact, if what he does is of sufficient magnitude, he is to be treated as a principal; the indictment charges him as such, and unless the pleader chooses to make the allegation in the accessorial form, as he may, it does not mention that the act was through another, and he may be proceeded against either in advance of the doer or afterward, or jointly with him." 1 Bish. Cr. Law (8 Ed.), sec. 685; 1 Wharton Cr. Law (9 Ed.), sec. 223. Nor do we see why the testimony, which was competent against both of the defendants, could not be used against this defendant, or how he has been prejudiced by its use, even though the indictment was returned "not true" as to Revels.

There was no error in the trial, and it will be so certified.

No error.

Cited: S. v. Frisbee, 142 N. C., 675; *S. v. Bohanon, ib.,* 699; *Basnight v. Small,* 163 N. C., 17; *Pritchard v. Steamboat Co.,* 169 N. C., 461.

(841)

STATE v. SUMMERS.

(Filed 8 May, 1906.)

Embezzlement—Restoration of Property—Defense—Evidence—Felonious Intent—Burden of Proof.

1. In an indictment for embezzlement, where defendant testified that he had in his pocket the amount claimed to have been embezzled, and exhibited the money, the court properly excluded a question as to whether defendant was willing to deposit the money in the clerk's office to await the termination of the civil litigation about the matter.
2. The fact that a party accused of embezzlement intended to restore the property embezzled, or even that the loss has been made good, does not constitute a defense to a criminal prosecution for the embezzlement.
3. In an indictment for embezzlement, the burden is upon the State to prove beyond a reasonable doubt the felonious intent.

INDICTMENT for embezzlement against George A. Summers, heard by *Shaw, J.,* and a jury, at January Term, 1905, of GUILFORD. From the judgment pronounced on a verdict of guilty, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
John A. Barringer for defendant.

BROWN, J. We have examined each of the twenty exceptions in the record with that care which the importance of the case to the defendant demands at our hands, and we have concluded that such of the rulings of the court below as are at all doubtful as to their correctness were entirely harmless to the defendant, and therefore do not constitute reversible error. We will not comment upon each exception
(842) *seriatim,* as it would needlessly prolong this opinion and be of no value to our legal jurisprudence.

There is evidence in the record amply sufficient to go to the jury tending to prove that the defendant was the agent, at Greensboro, of the Singer Manufacturing Company, and operated under a contract dated 28 December, 1903, under which he was entitled to receive $15 per week and certain commissions. In the course of his employment the sum of $1,416.39 came into his possession, which, in accordance with the instructions of the Singer Company, should have been deposited in the Greensboro National Bank and forwarded by check to the office of the company in Atlanta, Georgia. The defendant, instead, placed the money in his own credit in the City National Bank in Greensboro and

drew out $100 in cash and received the cashier's check for the remainder and left the State, going to Illinois, where he was afterwards arrested and brought back to North Carolina. The defendant contended that the company was indebted to him in a sum larger than that which he retained, growing out of commissions due him on the sales of machines and other transactions connected with the business of selling the same. He further contended that on account of his inability to obtain a settlement of his affairs with the company, he appropriated the amount in part payment of the sum due him from the company.

The defendant testified in his own behalf, and among other statements said: "I have got in my pocket now the $1,416.39 which the company claims is theirs." (Witness exhibits the money.) The defendant's counsel asked, "Are you willing to deposit that in the clerk's office to await the termination of the civil litigation in this case?" The court excluded the question. There was no error in refusing to admit this evidence. The fact that a party accused of embezzlement intended to restore the property embezzled, or even that the loss has been made good, does not constitute a defense to a criminal prosecution for the embezzlement. Clark's Crim. Law, 313; 1 McClain, 641; *Spalding v.* (843) *People,* 172 Ill., 40. In *Meadowcroft v. People,* 163 Ill., 56, it is said: "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment into court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned."

The examination of the defendant shows that he was permitted to give his reasons for taking the money, and he was given the full benefit of that phase of the evidence in the following instruction by the court: "If you find from the evidence that the defendant retained the money in his hands with a *bona fide* belief that the company owed him money, and for the purpose of holding it until he could effect a settlement with the company, whereby his rights could be ascertained and it could be determined how much was due him, and to hold the money for the purpose of satisfying such claims when ascertained, then the holding of the money by defendant, even though the jury should believe it to have been wrongful, would not be such a holding or conversion as would make the defendant guilty of the crime of embezzlement." The question of intent was submitted to the jury with appropriate instructions. They were

told that the burden was upon the State to prove beyond a reasonable doubt the felonious intent. The charge follows the decisions in *S. v. McDonald,* 133 N. C., 680, and *S. v. Blackley,* 138 N. C., 620. The evidence as to the felonious intent was reasonably sufficient to go to the jury. *S. v. Fain,* 106 N. C., 760; *S. v. Costin,* 89 N. C., 511; *S. v. Harris,* 106 N. C., 682; *S. v. Wilson,* 101 N. C., 730; *S. v. Foust,* 114 N. C., 842. We find no error in the record of which the defendant could justly complain, and we find ample evidence to support the verdict of
(844) the jury.

No error.

STATE v. FARRINGTON.

(Filed 16 May, 1906.)

Intoxicating Liquors—Illegal Sale, Punishment Therefor—Cruel and Unusual Punishment—Sentence—Reasons.

1. For violation of a statute prohibiting the sale of spirituous liquor without a license, the person convicted may be imprisoned in the county jail with directions that he be worked upon the public roads.
2. When no time is fixed by the statute, this Court will not hold an imprisonment for two years cruel and unusual.
3. It is proper for the trial judge to state the reasons which impelled him to impose the sentence.

INDICTMENT against T. B. Farrington, heard by *Ward, J.,* and a jury, at December Term, 1905, of GUILFORD.

The defendant was convicted for retailing spirituous liquors without license contrary to the statute. There was no exception to his Honor's ruling upon the trial. The testimony tended to show that he had sold liquor upon two occasions, the last of which was eighteen months before the finding of the bill of indictment. The solicitor introduced several other witnesses who swore that his reputation in the community was particularly bad for selling whiskey contrary to law. Some of the witnesses stated that it was generally reported that he had been engaged in the selling of whiskey for twelve or fifteen months before the
(845) hearing of this case, when he and his sons had been indicted for burning a barn, the property of persons who had been active in prosecuting him for the unlawful sale of whiskey. The court found as a fact that he was an old distiller before the Watts law went into ef-

fect, and that after the enactment of the law he sold a lot of liquor around, creating drunkenness in the neighborhood. The court thereupon sentenced the defendant to imprisonment of twelve months in the county jail, with direction that he be worked upon the public roads. To this sentence defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
John A. Barringer for defendant.

CONNOR, J., after stating the facts: It cannot, at this time, and in view of the many decisions of this Court, be regarded as an open question that for violation of the statute prohibiting the sale of spirituous liquors without a license the person convicted may be imprisoned in the county jail, with direction that he be worked upon the public roads. *S. v. Hicks,* 101 N. C., 747; *S. v. Smith,* 126 N. C., 1057. It is equally well settled that when no time is fixed by the statute, this Court will not hold an imprisonment for two years cruel and unusual. *S. v. Driver,* 78 N. C., 423; *S. v. Miller,* 94 N. C., 904. It is entirely proper for his Honor to state the reasons which impelled him to impose the sentence of twelve months in jail with direction to work defendant on the public roads. While we disclaim any purpose to review his Honor's judgment in this case, it may not be improper to say that we think the reasons given amply sustain the judgment. There is

No error.

Cited: S. v. Dowdy, 145 N. C., 439; *S. v. Woodlief,* 172 N. C., 889; *S. v. Bush,* 177 N. C., 555.

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(846)

STATE v. RAILROAD.

(Filed 22 May, 1906.)

Quarantine Regulations—Health — Cattle — Transportation—Department of Agriculture — Regulations — Judicial Notice — Legislative Power—Delegation—Statutes—Repeal—Evidence—Foreign Laws.

1. The courts will take judicial notice of the political subdivisions of the State, the boundary lines of counties therein, when fixed and declared by public statutes, the geographical positions of cities and towns within the limits of their jurisdiction, and prominent watercourses within such limits when referred to in public statutes.

2. Where the quarantine regulations of the United States Department of Agriculture, relating to the transportation of cattle, which were adopted by the State Board of Agriculture, provided that no cattle originating in the quarantined district as therein described should be moved into "that part of Burke south of the Catawba River," this Court judicially knows that a shipment of cattle from Burlington to Morganton has been across the line fixed as a quarantine line.

3. Laws 1901, ch. 479, sec. 4 (b), authorizing the Commissioner of Agriculture, with the consent of the State board, "to establish and maintain cattle districts and quarantine lines, to prevent the infection of splenic or Spanish fever," confers power to make regulations prohibiting the transportation of cattle.

4. Laws 1901, ch. 479, sec. 4 (b), authorizing the Commissioner of Agriculture and the State board to make regulations concerning the transportation of cattle, is not an unwarranted delegation of legislative power, as the commissioner and board are only given power to establish the conditions and certain administrative regulations under and upon which the statute is made to apply.

5. The regulations of the State Board of Agriculture as to the transportation of cattle, authorized by Laws 1901, ch. 479, are not repealed by prior and subsequent statutes requiring railroads to receive and ship freight, under severe penalties in case of willful failure, as these statutes should be construed as only requiring railroads to receive and ship freight when not forbidden by this or other valid interfering regulations.

6. The regulations of the State Board of Agriculture, certified under the hand of the secretary with the seal of the department, are properly proved, as provided by Revisal, secs. 1616-1617.

7. A pamphlet purporting to contain the regulations of the United States Department of Agriculture, which was not certified by any officer of the department and had no seal attached, and did not purport to have been issued or published by authority of the department, was not properly authenticated, nor otherwise competent for admission as testimony.

8. Regulations of the United States Department of Agriculture concerning the transportation of cattle, made pursuant to public statutes and designed and intended to control the conduct of the general public, have the force of a public law, and the courts having jurisdiction of questions arising thereunder must take judicial notice of their existence, and when such regulations operate and take effect in this State they are not a foreign law within the meaning of Revisal, sec. 1594.

(847) INDICTMENT against the Southern Railway Company, heard by *Justice, J.*, and a jury, at March Term, 1906, of BURKE.

This is an indictment against the defendant for shipping cattle in violation of certain quarantine rules and regulations adopted by the North Carolina Board of Agriculture.

The Congress of the United States, by an act passed 29 May, 1884, established a Bureau of Animal Industry, with authority to provide

for the suppression and extirpation of pleuro-pneumonia and other contagious diseases. Compiled Statutes of U. S., 1901, p. 299. By section 3 of the said act it is provided:

"That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to coöperate in the execution and enforcement of this act."

Under the authority thus conferred, the United States Depart- (848) ment of Agriculture promulgated certain quarantine rules and regulations relating to the transportation of cattle and the same were certified to the North Carolina Board of Agriculture in order to secure the coöperation of that body in the enforcement of the said rules and regulations. At a meeting of the North Carolina Board in 1903, the annual regulations of the United States Department of Agriculture were adopted. From these orders it will appear that a quarantine line extending across the United States was established, and the transportation of cattle was prohibited from the area south of said line to any portion of the United States, north, east, or west thereof, except as provided in the order, for one year from and after 1 January, 1903. Another order was issued 27 December, 1902, modifying order No. 101 in accordance with the action of the North Carolina Board of Agriculture, and provided that during the continuance of order No. 101 no cattle originating in the quarantine district, as described in said order, should "be allowed to move into the counties of Surry, Wilkes, McDowell, and that part of Burke south of the Catawba River." These orders appear in the Nineteenth Annual Report of the Bureau of Animal Industry, 1902, pp. 602, 604, 610, 611. The State of North Carolina lies south and southeast of the Federal quarantine line.

The defendant in October, 1903, transported over its line of railway a heifer from Burlington in Alamance County, North Carolina, to Morganton in Burke County, said State. Burlington lies south of the Federal line and therefore in the quarantine district, and Morganton is situated in that part of Burke County lying south of the Catawba River, and in a territory into which it was unlawful to transport cattle. The indictment alleged that the offense was committed in the year 1903. The first bill was found at January Term, 1904, and the second at March Term, 1906. The defendant moved to quash the bills of indictment. Motion overruled, and the defendant excepted.

The defendant objected to the proof offered by the State and (849)

admitted by the court as to the resolution of the State Board of Agriculture adopting (as regulations of the State board) the quarantine regulations and amendments of the United States Department of Agriculture as to the transportation. This was certified under the signature of T. K. Bruner, secretary of the board, with the seal of the North Carolina Department of Agriculture affixed; admitted by the court, and defendant excepted.

The defendant further objected to the proof offered and admitted by the court as to the quarantine regulations of the United States Department of Agriculture, referred to and adopted by the resolution of the State board; admitted, and defendant excepted.

The proof set forth in the case on appeal as Exhibit B seems to have been a printed pamphlet containing the regulations referred to, purporting to have been made by the United States Board of Agriculture, 26 December, 1902, and an amendment thereto made by said department 27 December, 1902, extending the same for one year over the designated territory, and both purporting to be signed by James Wilson, secretary of the department. This pamphlet does not purport to have been issued or published by the authority of the United States Department of Agriculture, and there seems to have been no proof offered as to the authenticity of this document other than what is contained on its face, *i. e.*, that it is headed "United States Department of Agriculture," "Regulations Concerning Cattle Transportation." An examination and comparison made here disclose that the document offered and admitted in the court below is a correct copy of the Department regulation as contained in the bound volume of the same, purporting to have been made, printed, and issued by authority of the United States Department
(850) of Agriculture and its secretary, James Wilson. But the bound volume was not received in evidence.

At the close of the testimony the defendant prayed the court to instruct the jury that on the entire testimony they should render a verdict of not guilty. Prayer refused, and defendant excepted. The court charged the jury that if they believed the evidence they would render a verdict of guilty. There was a verdict of guilty, judgment, and the defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
S. J. Ervin for defendant.

HOKE, J., after stating the case: The statutes of North Carolina, Laws 1901, ch. 479, sec. 4, subsec. b, authorize the Commissioner of

Agriculture, by and with the advice and consent of the board, "to make investigations adapted to promote the improvement of milk and beef cattle, and especially investigations relating to the diseases of cattle and other domestic animals, and shall publish and distribute from time to time information relative to any contagious diseases of stock and suggest remedies therefor, and shall have power in such cases to quarantine the infected animals and to regulate the transportation of stock in this State, or from one section of it to another, and may cooperate with the United States Department of Agriculture in establishing and maintaining cattle districts or quarantine lines to prevent the infection of cattle from splenic or Spanish fever."

Under and by virtue of this enactment, the State Commissioner, acting with the State Board of Agriculture at its May meeting, 1903, adopted, as regulations of the State board, the "Annual Regulations of the United States Department of Agriculture concerning interstate cattle transportation." These regulations prohibit during the year 1903 the shipment of cattle from the quarantined into pro- (851) tected territory.

It is a well-established principle that the courts will take judicial notice of the political subdivisions of their States, and of the boundary lines of counties therein when fixed and declared by public statutes, of the geographical positions of cities and towns within the limits of their jurisdiction, and also of the existence and placing of prominent watercourses within such limits when referred to in public statutes. 17 A. & E., pp. 904, 912; *S. v. Snow,* 117 N. C., 774; *Montgomery v. Plank Road,* 31 Ala., 76; *De Baker v. R. R.,* 106 Cal., 257; *Wood v. Fowler,* 26 Kan., 682. The quarantine line and the designation of the protected territory having been indicated by the border line of counties in the State fixed by public statutes, except a portion of the protected territory designated as "that part of the county of Burke lying south of the Catawba River," when it is proved that the defendant, within the period covered by the regulations, has shipped cattle from Burlington, N. C., to Morganton, N. C., we judicially know that this shipment has been across the line fixed as a quarantine line; and, assuming that the department regulations have also been established by proper proof, we are of opinion that there has been a criminal violation of law, and the defendant has been properly convicted. The general objections urged against the validity of this conviction can none of them be sustained.

It is contended, first, that the commissioner, with the consent and advice of the board, is only given authority to regulate the transportation of the cattle, and that this does not authorize the prohibition of

such transportation. But this is a misconception of the scope and meaning of the statute. It does confer the power to make regulations about transporting cattle, but the additional power is given—and this is the main and controlling purpose of this section—"to establish and maintain cattle districts and quarantine lines, to prevent the infection of cattle from splenic or Spanish fever." It is not suggested, nor
(852) is there any evidence offered tending to show that this is an unreasonable regulation, or that the same is not calculated to effectuate the end and purpose of the law. The position is that the power asserted is not within the purview of the act; and, as we have seen, there is nothing to warrant giving the act this restricted significance. Regulations of this kind are very generally upheld both in State and Federal decisions. *R. R. v. Smith,* 20 Tex. App., 451; *Reid v. People,* 29 Col., 333; *S. v. Råsmussen,* 7 Idaho, 1; *Kimmish v. Ball,* 129 U. S., 217.

Again, it is urged that the prosecution must fail because the statute is an unwarranted delegation of legislative power to the Board of Agriculture, which is a branch of the executive department of the Government. The answer here, too, is that the statute does not do what is ascribed to it. The crime is fixed and declared by the Legislature as expressed in the act. The commissioner and board are only given power to establish the conditions and certain administrative regulations under and upon which the statute is made to apply. In 8 Cyc., p. 830, it is said that "While a legislative body cannot delegate the power to legislate, the Legislature may delegate the power to determine some facts or state of things upon which a statute makes or intends to make its own action depend," citing numerous authorities. The principle is well established with us and is applied in various instances. *Express Co. v. R. R.,* 111 N. C., pp. 463, 472.

It is further insisted that there are numerous statutes in this State, passed both before and since the one now being considered, requiring the defendant to receive and ship freights under severe penalties in case of willful failure or refusal, and that these statutes should be so construed as to modify or repeal the act in question and protect the defendant from prosecution. This, we hold, would not be in accord with sound and accepted principles of statutory construction. It is well established
(853) that implied repeals are not favored. As is said in 26 A. & E., 726, "Every effort must be used to make all acts stand, and a late act will not operate as a repeal of an earlier one if by any reasonable construction they can be reconciled. In *Winslow v. Morton,* 118 N. C., 486, 491, *Mr. Justice Avery,* in a well-considered opinion, lays down the

correct rules pertinent to this inquiry, as follows: "The courts have universally given their sanction to the rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. *S. v. Woodside,* 30 N. C., 104; *Simonton v. Lanier,* 71 N. C., 498. (2) The implication in order to be operative must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. *Wood v. U. S.,* 16 Peters, 363; *Chew Heong v. U. S.,* 112 U. S., 549; *St. Louis v. Independent, etc.,* 47 Mo., 146. A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. Sutherland Const., sec. 158. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute. *R. R. v. U. S.,* 127 U. S., 466; *S. v. Stoll,* 17 Wall., 425; *Longlois v. Longlois,* 48 Ind., 60; *Casey v. Harned,* 5 Clarke (Iowa), 1; *S. v. Custer,* 65 N. C., 339; Code, sec. 3766; *Breitung v. Lindaner,* 37 Mich., 217; *Trinity Church v. U. S.,* 143 U. S., 457."

Applying these rules to the question here raised, we are of opinion that the correct interpretation of these statutes would require that the defendant should receive and ship freight when not forbidden by this or other valid interfering regulations. We hold, therefore, that on the proof admitted there was no error in overruling the defend- (854) ant's motion to quash the bills or in refusing to charge that if the evidence was believed the jury should render a verdict of not guilty.

The defendant, however, contends that a new trial should be awarded for erroneous rulings of the trial court on questions of evidence: (1) In admitting the resolutions of the State Board of Agriculture. (2) In admitting the pamphlet containing the regulations of the United States Department of Agriculture.

The first was certified under the hand of T. K. Bruner, the secretary, with the seal of the Department of Agriculture affixed, and, if proof were required, this would seem to be in exact compliance with the provisions of the statute. Revisal, secs. 1616 and 1617.

On the second objection: The pamphlet containing the department regulations was not, we think, properly authenticated nor otherwise competent for admission as testimony. The paper was not certified by any

officer of the United States Department of Agriculture and had no seal attached. It did not purport to have been issued or published by authority of the department, and had nothing to indicate that the paper had any connection with that department, except that it contained as a printed heading "United States Department of Agriculture," "Regulations Concerning Cattle Transportation." If proof of these regulations, therefore, had been necessary, the paper-writing was not admissible in evidence, and its admission would have constituted reversible error. No such significance or effect, however, can attach to the ruling of the judge below in this respect, because the Court is of opinion that these regulations were of such a character that the courts of this State are required to take judicial notice of their existence and contents, and there-
(855) fore no proof was required by the State as to either.

It is a well-recognized principle, sanctioned by the great weight of authority, that when in pursuance of a public statute one of the principal departments of our Government frames and establishes regulations, concerning the public interest and by which the general public are to be controlled, such regulations, when properly made and framed by virtue of the statute, have the force of a public law; and the courts having jurisdiction of questions arising thereunder must take judicial notice of their existence. As said in *Lew v. Hanson,* 72 Me., 105; "Rules and regulations of one of the departments established in accordance with a statute have the force of law, and the courts take judicial notice of them," citing *Gratiot v. U. S.,* 4 How., 80, and *Ex parte Reed,* 100 U. S., 13. To same effect are *Caha v. U. S.,* 152 U. S., 211, 222; *Larson v. Bank,* 66 Neb., 595, 598; 16 Cyc., 903. There are authorities to the contrary, but an examination will disclose that in most instances these cases were concerning regulations which originated with the department, or, if made pursuant to a statute, they were departmental regulations simply, not affecting the general public, and not designed or intended to control its conduct.

It is argued that our State statutes (sections 1594, 1616, 1617) provide for a simple method of proof in cases of this character, and that the establishment of this method gives indication that such proof should be required. Section 1594 provides for a method of proof by establishing laws, proclamations, edicts, ordinances of *other* States, Territories, and foreign countries. As heretofore stated, a department regulation made pursuant to the public statutes, designed and intended to control the conduct of the general public, has the force of law. When such a regulation by the Federal Government operates and takes effect in the State of North Carolina, it is in no sense a foreign law, and section 1594

does not provide for its proof. In 13 A. & E., 1053, it is (856) said: "The laws of an American State are never considered as foreign in the Federal courts, and, *vice versa,* those which find their origin in the Federal branch of the Government are treated as domestic laws in the tribunals of the different States." Apart from this, under and by virtue of our State statutes, these regulations have been adopted by our State board and have become quarantine regulations of the State, designed and intended to control the conduct of the citizens of the State, and as State regulations having the force of law, here, by virtue of the State statutes, the courts of this jurisdiction are required to take judicial notice of their existence. The suggestions as to sections 1616 and 1617 are fully met by applying their provisions to those records and documents of which courts do not take judicial notice.

It is further contended that it might, in certain instances, operate with great harshness to apply the principle "of taking judicial notice" to these departmental regulations. But this position, while it has no real bearing on the legal aspect of the question, is not well considered. The principle is only one of procedure, relieving the State of necessity of producing proof of these regulations at the trial, and has no direct bearing as to their force and effect on the conduct of the citizen. So far as the public are concerned—and it is only here that an enforcement without actual notice might operate with some severity—the regulations having the force of law, the citizen must take notice of them at his peril, and this, regardless of how they must be established at the trial. This result is in no way affected by the present decision, which only holds on this question that at the trial the prosecution is not required to produce proof of regulations which have the force of public law.

As a matter of fact, we are informed that our State Department of Agriculture, mindful as it ever has been of its duties, and alert and efficient to do what it can to subserve the public interests (857) and promote the public weal, has furnished copies of these regulations to all common carriers doing business in the State, and has had posted, in durable form, notices in conspicuous places on all public roads where they cross the quarantine lines within the State, so that there is no reasonable probability that any citizen can violate these regulations without having had opportunity of informing himself of their provisions. There is no error in the proceedings below, and the judgment is

Affirmed.

Cited: Staton v. R. R., 144 N. C., 145; *Morgan v. Stewart, ib.,* 428; *Bowser v. Wescott,* 145 N. C., 70; *Wharton v. Greensboro,* 146 N. C.,

359; *Land and Timber Co. v. Kinsland,* 154 N. C., 81; *S. v. Garner,* 158 N. C., 631; *Bunch v. Comrs.,* 159 N. C., 339; *Hinton v. Canal Co.,* 166 N. C., 487; *S. v. R. R.,* 169 N. C., 303; *Hipp v. Farrell, ib.,* 558; *Phillips v. R. R.,* 172 N. C., 90; *Sanatorium v. State Treasurer,* 173 N. C., 813; *S. v. Hodges,* 180 N. C., 753.

STATE v. LILLISTON.

(Filed 28 May, 1906.)

Homicide—Self-defense—Recklessness—Instructions—New Trial for Newly Discovered Evidence.

1. Where two men fight willingly with pistols in a crowded waiting-room and a bystander was killed, both are guilty of murder, one as principal and the other as aiding and abetting.
2. Malice is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life, and, if the death of any person is caused by such an act, it is murder.
3. In an indictment for murder, the court did not err in refusing to charge that there was no evidence either of murder in the second degree or manslaughter, where the evidence is conflicting as to whether the deceased was killed by the prisoner or by another.
4. An excerpt from a charge to the jury is to be construed with the context and in connection with the whole charge.
5. In an indictment for murder, where the prisoner contended that he was suddenly assaulted, the court did not err in charging that in such cases the right of self-defense exists if there is apparent danger from waiting for the assistance of the law and there is no other probable means of escape.
6. A motion for new trial for newly discovered evidence will not be granted, even in a civil case, where the evidence is merely cumulative or where it was withheld by the party moving.
7. Motions for new trials for newly discovered evidence cannot be entertained in this Court in criminal cases.

CONNOR and WALKER, JJ., dissenting.

(858) INDICTMENT for murder against Robert H. Lilliston, heard by *Ward, J.,* and a jury, at January Term, 1906, of WAKE. From a verdict of murder in the second degree and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
Argo & Shaffer and J. N. Holding for defendant.

CLARK, C. J. It was in evidence that the prisoner Lilliston and one Clark were two "fakirs" who had been attending the Raleigh Fair, and on Thursday and Friday nights they with others were at a house of ill-fame, engaged in gambling and drinking, and that a difficulty sprung up there on Friday night between these men over charges of cheating. On Saturday, 21 October, they went to the railroad station in Raleigh to take the train to leave the city, and there in the crowded reception-room they engaged in shooting at each other—the next room, separated only by a glass partition, being occupied by ladies and children. It is admitted by the prisoner that Clark fired two shots and then ran out of the east door and that Lilliston fired five shots. And these two men, who showed this contemptuous defiance of law and of the lives of so many peaceable people who were entitled to the protection of the law in their lives and persons, escaped unharmed, while one bystander was killed, another seriously wounded, and others narrowly escaped. If they fought willingly in such a place, the reckless disregard of law amounts to malice, and if any bystander was killed, both were guilty of murder—one as principal and the other as aiding (859) and abetting. The homicide occurred in a crowded waiting-room.

The doctrine is well settled that "malice is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life, and if the death of any person is caused by such an act, it is murder. The most frequent instance of this species of murder is where death is caused by the reckless discharge of firearms under such circumstances that some one would probably be injured, and even where the discharge was accidental, resulting from handling the weapon in a threatening manner, it was held murder." 21 A. & E. (2 Ed.), 153, and cases cited in the notes.

The jury have acquitted Clark; and Lilliston, convicted of murder in the second degree, presents in substance three grounds of alleged error in the conduct of the trial by the learned and impartial judge. He contends that the judge should have told the jury that there was no evidence against him either of murder in the second degree or manslaughter. It is admitted that Clark stood towards the southeast and fired northwestwardly two shots, one of which struck above the ticket office. Mr. Horton testified that he dropped behind the radiator and was struck on the buttock (which was exposed) by Clark's second bullet, which entered, he says, from the side Clark was on, and which could not have come from the direction where Lilliston was at that time. Of the five

shots fired by Lilliston, the location of four found embedded in the building are admitted. The State contends that Lilliston's other ball was the one found in the body of Smith, the deceased. There was evidence, if the jury believed it, that Lilliston dodged behind Smith, and that in the excitement, Lilliston, the lodgment of whose other balls showing that he was firing wildly, shot Smith. The prisoner contended that this was not true; also, that it was Lilliston's ball that struck Horton, and further that a man named Arnold shot Smith. Only
(860) seven balls were traced, including those lodged in the bodies of Smith and Horton. All these matters were purely issues of fact for the jury and not for the court. The court, in the words of the prisoner's prayer, charged the jury that "the defendant Lilliston contends that there is evidence before the jury that Arnold, one of the State's witnesses, shot and killed Smith in the north aisle of the waiting-room near the ticket office. The court charges the jury that if you have reasonable doubt as to whether Arnold killed Smith or as to whether Lilliston killed Smith, it will be your duty to acquit Lilliston." The prisoner admitted that Smith was not killed by Clark. The bullet did not come from that side. He offered evidence tending to show that he fired in self-defense only, and there was evidence to the contrary, both that he began the difficulty, that he engaged in it willingly and continued firing while the other man was running.

These questions of fact were ably presented to the jury by counsel of great skill and long experience. There was evidence, as the judge properly held, to submit the case to the jury, and their finding is not reviewable by us. Had the judge who tried this cause and heard the witnesses and could judge from their bearing as to the weight to be given their evidence, felt any doubt of the correctness of the verdict, it was in his power and it would have been his pleasure to set it aside. He refused to do so.

The prisoner also excepts to the following excerpt from his Honor's charge: "Another principle of law is, where in an indictment for murder the State has satisfied the jury beyond a reasonable doubt that the prisoner slew the deceased intentionally with a deadly weapon, nothing else appearing, the law presumes that the defendant is guilty of murder in the second degree, and the burden of proof shifts to the de-
(861) fendant to satisfy them, not beyond a reasonable doubt, but to simply satisfy them, that he was excusable or that the crime is for a lesser offense, to wit, manslaughter, which is, as I told you, the unlawful and felonious killing of a human being with malice aforethought —that is to say, that the defendant is called on to satisfy the jury of

the existence of such facts and circumstances as will rebut the presumption of malice raised by the use of a deadly weapon, and reduce the grade of the offense from murder in the second degree to manslaughter, or to go further and satisfy the jury of the existence of such facts and circumstances as will justify the killing on the plea of self-defense, that is, that the prisoner had reasonable apprehension and did apprehend that it was necessary for him to shoot in order to protect his own life or save himself from great bodily harm." This charge is to be construed with the context, and, reading it in connection with the whole charge, we do not find any reversible error. *S. v. Tilley,* 25 N. C., 424; *S. v. Boon,* 82 N. C., 649; *S. v. Holman,* 104 N. C., 867; *S. v. Gentry,* 125 N. C., 735.

The prisoner further excepts to the following paragraph of the charge: "Self-defense exists where one is suddenly assaulted and in the defense of his person where an immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant." This paragraph is quoted from 1 Wharton Crim. Law (9 Ed.), sec. 306. We see no ground for criticism of the word "apparent." It is favorable to the defendant. Had it been omitted and the word "actual" had been used, the prisoner would have excepted. Nor do the words "and there is no other probable means of escape" improperly restrict the right of self-defense upon the circumstances of this case. The judge did not restrict self-defense to cases of sudden assault, but the prisoner contended that this was a sudden assault, and the judge charged that in such cases the right of self-defense exists if there is apparent danger from "waiting for the assistance of the law and there is no other probable means of escape." In *S. v. Kennedy,* 91 N. C., 578, it is said: "There (862) may be cases, though they are rare and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall." This is cited and approved in *S. v. Gentry,* 125 N. C., 733. The doctrine of *S. v. Blevins,* 138 N. C., 688, and *S. v. Hough, ibid.,* 663, is not in point here. Those cases hold that where a man is murderously assaulted, without fault on his part, he is not required to retreat to the wall, but may stand his ground and kill to save his own life; but to confer such right it must appear that the assault upon him was sudden, fierce, and *continuous.* But, here, this was not true, for Clark fired only twice and then ran, and the prisoner testified that he fired himself five times, commencing when Clark was near the radiator in the center of the large room, and that he fired the last as Clark went out the east door. This evidence of Lilliston tends to show that Clark was not firing, but running, trying to escape.

There was much other evidence to the same purport. In such state of facts the law is thus laid down in *S. v. Hill,* 20 N. C., 629: "Even if the prisoner had not begun the affray, but had been assaulted in the first instance, and then a combat had ensued, he could not excuse himself as for a killing in self-defense, unless he quitted the combat before a mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and had then killed his adversary of necessity to save his own life."

Here, though, "the fierceness of the adversary" abated immediately after the second shot (when he fled); the prisoner testified that he shot five times, some if not all of which shots were fired while Clark was getting from the radiator to the door, and as he went out of the door. It is worse than if he had killed the fleeing man, for he not only shot unnecessarily, not for his own protection, but in a crowded wait-
(863) ing-room where his balls were much more liable to hit than if he had only one man before him. His Honor told the jury that "where two people are engaged in an unlawful act, such as an affray in a public place, shooting at each other willingly, that is, fighting willingly, and not forced to fight in self-defense, and one kills a bystander, it is murder in the second degree or manslaughter, according as it is accomplished with or without malice." If Lilliston had killed Clark, the jury would have been justified, upon Lilliston's own evidence taken alone, in finding him guilty, in that there was no necessity to do so to protect himself. He fired wildly, as he testifies himself, and the brief of his counsel says: "The evidence shows that four of the five balls Lilliston fired are located in the walls and seats of the waiting-room." Lilliston's fifth and last ball, his counsel contends, was the one that struck Horton. Horton says that it was the second ball that was fired, and that it struck him coming from Clark's direction. This disputed question was left to the jury, as was also the prayer as to Smith having been shot by Arnold, and the jury said that beyond all reasonable doubt in the minds of the twelve, Lilliston's ball was the one that killed Smith. It is useless to recapitulate the voluminous and somewhat conflicting evidence. The case was fairly and impartially tried, and we find no reversible error.

The prisoner filed a motion in this Court for a new trial for newly discovered evidence, which he avers would prove that Arnold fired the fatal shot. This motion has never been allowed in this Court in a criminal case. But had it been made in a civil action, in which it is sometimes though rarely allowed, this motion would be disallowed, both because it would be merely cumulative of the evidence which was offered

and which was submitted to the jury with a prayer thereon as requested by the prisoner, and, for the stronger reason, that the State filed, before the argument here, the affidavit of O. L. Parham, jailer of Wake County, that Lilliston "was in possession of the evidence of Mrs. Willie Richardson before his trial, because he (Parham) had heard him (864) (Lilliston) talking about it with others in jail." He did not offer that evidence at the trial. The court, even in a civil case, would not seriously consider a motion for a new trial upon evidence which was withheld from the jury by the party moving.

It has uniformly been held that motions "for new trial for newly discovered evidence" and "rehearings" cannot be entertained in this Court in criminal actions.

In *S. v. Jones,* 69 N. C., 16, *Reade, J.,* held that this Court had no power to rehear in a criminal action, saying: "In equity cases and in civil actions, the practice has been common, but, in criminal cases, never to our knowledge."

In *S. v. Starnes,* 94 N. C., 982, where a motion for a new trial for newly discovered evidence was made in a criminal action, it was denied, *Smith, C. J.,* saying: "No such proposition in reference to criminal prosecutions has ever been made or entertained, so far as our investigations have gone, in this Court. The absence of a precedent (for we cannot but suppose such applications would have been made on behalf of convicted offenders if it had been supposed that a power to grant them resided in this appellate court) is strong confirmatory evidence of what the law was understood to be by the profession. We are clearly of the opinion that no such discretionary power, as that invoked, is conferred upon this Court. It appeals from judgments rendered in indictments, our jurisdiction is exercised in reviewing and correcting errors in law committed in the trial of the cause, and to this alone. *S. v. Jones,* 69 N. C., 16."

In *S. v. Starnes,* 97 N. C., 424, *Smith, C. J.,* again says: "The motion, as far as our own and the researches of counsel disclose, is without precedent in the administration of the criminal law on appeals to this Court, and is so fundamentally repugnant to the functions of a reviewing court, whose office is to examine and determine assigned errors appearing in the record, that we did not look into the affidavits offered in support of the motion, nor hesitate in (865) denying it."

In *S. v. Rowe,* 98 N. C., 630, *Davis, J.,* says: "Upon careful consideration, we must adhere to the principle that in criminal actions the appellate jurisdiction of this Court is limited to a review and correction

of errors of law committed in the trial below. *S. v. Jones,* 69 N. C., 16; *S. v. Starnes,* 94 N. C., 973." The cases cited show that the Court adhered to its previous rulings on grounds broad enough to apply both to motions for "new trials for newly discovered evidence" and for "rehearings." The Court then proceeded to point out that there was no ground for the innovation which was sought, since the Governor could look into the entire merits of the case and render any relief justice should demand.

In *S. v. Edwards,* 126 N. C., 1055, the Court dismissed the motion as a well-settled matter, merely saying that "such motions are not entertained in criminal cases, as has been *often* held." In *S. v. Councill,* 129 N. C., 511, the matter was fully considered and the Court held that this Court could not grant either rehearings or new trials for newly discovered evidence in criminal actions. In *S. v. Register,* 133 N. C., 746, it is again said that "the prisoner also moved this Court for a new trial for newly discovered testimony, but such motions can only be made in civil actions. Our precedents are uniform that this Court has no jurisdiction to entertain such motion in criminal actions."

So the point is settled, if the uniform practice of this Court and its repeated and uniform decisions to the same effect can settle anything. But it is contended that all these decisions and the uniform practice are erroneous and should now be reversed. Counsel cite the statutes. In Laws 1815, ch. 895, the power was first conferred to grant new trials in criminal cases (and the prisoner's brief admits that it was then (866) restricted to the Superior Court judges) as follows: "The judges of the Superior Courts of law are hereby empowered and authorized, upon application of the defendant, to grant new trials in criminal cases when the defendant or defendants are found guilty, in the same manner and under the same rules, regulations, and restrictions as in civil cases, any law, usage, or custom to the contrary notwithstanding."

In 1805 the title of the Court of Conference had been changed to "Supreme Court," and in 1810 the Supreme Court had been authorized to elect a chief justice, though it was not constituted as at present till the act of 1818, which went into effect 1 January, 1819. In 1854 (chapter 35, section 35, of the Revised Code) the words "Courts of Law" were substituted for "Superior Court judges," the object being, as stated in prisoner's brief, to limit the authority to the judge when sitting in a court of law instead of a court of equity.

The prisoner rests his argument to overrule the uniform decisions and settled practices of this Court upon the following section 3272 of the Revisal, which reads: "The courts may grant new trials in criminal

cases when the defendant is found guilty, under the same rules and regulations as in civil cases." This clearly refers to the time *"when* he is found guilty," and when that section is turned to, it will be found further that it is under subhead *"Trials, Superior Court,"* under which are grouped all the provisions peculiar to trials in that court, to wit, sections 3262 to 3273, inclusive, and the note of the commissioners to said section 3272 shows that it was chapter 895, Laws 1815, and Revised Code, ch. 35, sec. 35, above quoted, which the prisoner's brief admitted applied only to the Superior Court, and was brought forward as Code (1883), sec. 1202, which was in force when the above decisions were made, and is now again brought forward in the Revisal, sec. 3272.

The Constitution, Art. IV, sec. 8, is conclusive: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of *law or legal inference,* and the (867) jurisdiction of said Court over 'issues of fact' or 'questions of fact' shall be the same as exercised by it before the adoption of the Constitution of 1868." The power the Court is now asked to exercise is not a matter of law or legal inference, and even if it could be deemed "issues of fact" or "questions of fact," such power was not exercised prior to the adoption of the Constitution of 1868, as we have seen. Indeed, even when the court below granted or refused a new trial for other cause than error of law, as for newly discovered evidence, this Court had no jurisdiction to consider it. *Holmes v. Godwin,* 69 N. C., 471. Motions for new trials for newly discovered evidence were equitable in their nature and did not extend to criminal actions until the aforesaid act of 1815, ch. 895, now Revisal, 3272, which extended the power only to the Superior Court.

But even if the Constitution and the precedents did not forbid it and it were an open question, this Court ought not to grant new trials for newly discovered evidence in criminal actions, for several reasons: First, there is no *necessity* for it (the sole ground on which they are allowed in civil actions), for the Governor is vested with power to investigate the facts more fully than we could, and to do what justice shall require. There is no complaint that the executive has not been sufficiently liberal in its exercise. Again, it is the well-known complaint of our governors that, in matters of this kind, insistence and pressure have been often too great. This Court has no time for such applications and no disposition to seek or invite them. The Constitution has wisely restricted our power in criminal cases to reviewing on appeal "decisions of the courts below in matters of law or legal inference."

And, lastly, the odds against the State in a trial for a capital offense are already sufficiently great. The prisoner has twenty-three (868) peremptory challenges against four for the State; the prisoner can be found guilty only by a unanimous verdict, beyond the reasonable doubt, of twelve men; but if one juror entertains such a doubt, there can be no conviction. In England to this day, the defendant cannot appeal in a criminal case; but, here, though the defendant can appeal, the State cannot, however erroneous the rulings of the judge (though formerly the State could appeal here from a verdict of not guilty, and still can do so in Connecticut and some other States). There are, too, many fine distinctions and technicalities which are urged on an appeal, and still other advantages in favor of one charged by a grand jury with killing his fellowman and disadvantages to the State, besides the unlimited right of appeal to the Governor and the absence of any restriction upon his power of commutation, reprieve, or pardon. Even if the Court possessed the power, it should not add another serious disadvantage to those under which the State is already placed, when endeavoring to enforce the guaranty of safety of life and limb to its citizens, by seeking the conviction of those who have done murder. These disadvantages are far greater now than is necessary to make sure the acquittal of the innocent. The "bloodiest" possible administration of the law is that which permits murder, by making conviction of the guilty more difficult.

"Mercy but murders, pardoning those that kill."—Shaks.

In refusing to entertain such motions in criminal cases, we are adhering to the uniform practice and rulings of the Court from the first day of its existence down to the present. We are refusing to make an innovation. The object of punishment for murder is not to reform the offender, but by the certainty of its infliction and its unpleasant nature to deter others from the like offenses. The number of homicides in North Carolina, as recorded in the United States census and the annual reports of the Attorney-General of this State, is much larger annually, in (869) proportion to population, than in most of the other States. The object to be sought in the administration of the law is to diminish the number. This cannot be done by adding to the disadvantages now imposed upon the State, in such trials, beyond what has been done in the past. If punishment deters from crime (which is its object), then that homicides are more frequent here than in most States shows a lack

of efficient enforcement of the law in such cases. It is not for the courts to add additional difficulties to its enforcement.

No error.

CONNOR, J., dissenting: This case has given me much anxious concern. Certainly, there is nothing in the record calculated to arouse any sympathy with the prisoner or his conduct. This fact imposes upon the judge the duty of especially guarding himself against relaxing rules of the law and permitting wrong and injustice to be done him. It behooves the State through its courts to protect the lives of its citizens. One of the means by which this is sought to be done is the detection and, upon conviction, the punishment of those who commit a criminal homicide. It clearly, if not primarily, affects the honor of the State that she permit none to be punished who are innocent or convicted otherwise than by the law of the land. I trust that if I appear to be jealous of the honor of the State in that respect, I may not for that reason be charged with a want of as much concern for the due execution of the law as my brethren. To my mind no greater wrong can be done the State and every citizen thereof than the punishment of an innocent man. It seems from the evidence that the prisoner belongs to a class of persons who purchase "concessions" at state fairs to conduct the business of "fakirs." This fact does not in my judgment throw any light upon the legal aspects of his conduct at the time of the homicide as presented upon this record. In this connection my mind reverts to the lofty sentiment and noble words of a learned, wise, and good judge, when it was being (870) urged against a prisoner that he was a slave. They are worthy to be perpetuated and held in everlasting remembrance. *Gaston J.*, approved by *Ruffin, C. J.*, and *Daniel, J.*, in *S. v. Will,* 18 N. C., 121, (172). I cannot concur in the conclusion that his Honor correctly defined to the jury the right of self-defense. I must confess, with all possible deference to the learned judge who tried the cause, and my brethren, that I do not clearly comprehend the meaning of the language, and while not necessarily so, it is not entirely unreasonable to assume, that the jury may not have fully understood the extent of this right and its legal limitations. His Honor said to the jury: "Self-defense exists where one is suddenly assaulted and, in the defense of his person, where immediate and great bodily harm would be the apparent consequences of waiting for the assistance of the law and there is no other probable means to escape, he kills the assailant." Without undertaking to discuss the question at length, I find the law as approved by this Court laid down by *Mr. Justice Bynum,* in *S. v. Dixon,* 75 N. C., 275 (279):

"The general rule is, 'that one may oppose another attempting the perpetration of a felony, if need be, to the taking of a felon's life,' as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is justified. 2 Bish. Cr. Law, sec. 632. A distinction which seems reasonable and is supported by authority, is taken 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 this class of cases, where there is no deadly purpose, the doctrine of the books applies, that one cannot justify the killing of the other, though apparently in self-defense, unless he first 'retreat to the wall.' In the (871) former class, where the attack is made with murderous intent, the person attacked is under no obligation to flee; he may stand his ground and kill his adversary if need be. 2 Bish. Cr. Law, sec. 6333, and cases there cited. And so Mr. East states the law to be: 'A man may repel force by force, in defense of his person, habitation, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known 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 kills him in so doing, it is called justifiable self-defense."

This I consider to be the correct statement of the law as frequently approved in this Court. *S. v. Matthews,* 78 N. C., 523; *S. v. Castle,* 133 N. C., 779; *S. v. Clark,* 134 N. C., 698; *S. v. Hough,* 138 N. C., 666; Wharton's Crim. Law (9 Ed.), secs. 306, 487. I cannot think that the "sacredness of human life" is promoted by weakening or unnecessarily limiting the right of self-defense. The latter hath in all ages been held to be a protection to human life and the preservation of it in its integrity is, to my mind, a safeguard to the life of the citizen. I cannot but deplore any tendency to place unnecessary restrictions upon it. Its landmarks have been fixed by the sages of the law and should not be departed from. In regard to the motion for a new trial for newly discovered evidence, I can only say that upon the uncontradicted affidavit of the jailer, it appears that the prisoner knew of the testimony of which he now seeks to avail himself. As, however, the question is discussed at length in the opinion, I deem it proper to say that while I recognize the force of the precedent made in this Court, I have never been able to understand why if this Court has the power to grant a new trial for newly discovered evidence in a case involving property of ever so small a value,

it has not like power where the liberty and life of the citizen is (872) involved. I have read with care all that has been said upon this subject. The argument which deprives us of the power to grant this relief, to my mind, applies with equal force against our power to grant it in a civil case. It is one of those questions which, to my mind, will only be settled when reasons more cogent than any yet advanced are found to sustain the conclusion of the Court. The argument *ab inconvenienti* does not impress me. When human life and liberty are at stake I cannot concede the force of this argument. I am much impressed with the learned brief containing a history of our statute upon this subject, filed by the counsel for the prisoner. If the facts set forth in these affidavits are true, coupled with the doubtful character of the testimony, I am impressed with the deep conviction that a grave and fatal mistake has been made in fixing the guilt upon the prisoner. The testimony, to my mind, strongly tends to show that another and a swift witness in this cause took the life of the deceased, who was a friend and partner of the prisoner. Upon his own evidence the prisoner is guilty of a grave and highly criminal violation of the laws of the State. For the reasons given I am constrained to dissent from the conclusion reached by a majority of the Court.

WALKER, J., concurs in the dissenting opinion.

Cited: *S. v. Turner,* 143 N. C., 643, 645; *S. v. Arthur,* 151 N. C., 654, 5, 6; *Murdock v. R. R.,* 159 N. C. 132; *S. v. Ice Co.,* 166 N. C., 404; *Neal v. Yates,* 180 N. C., 267.

(873)

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

STATE *v.* BURBAGE. From Beaufort. *Attorney-General* for State; *Murray Allen* and *Small & McLean* for defendant. Dismissed, on motion of defendant's counsel, for defective record.

WOODLEY *v.* MCGOWAN. From Washington. *W. M. Bond* and *H. S. Ward* for defendant, appellee; no counsel *contra*. Dismissed for failure to bring appeal to proper term and for failure to print brief.

SAWYER *v.* R. R. From Camden. Docketed and dismissed under Rule 17, on motion of *Pruden & Pruden* and *Shepherd* for defendant.

JOHNSON *v.* R. R. From Gates. Docketed and dismissed under Rule 17, on motion of *W. M. Bond* for plaintiff.

TAYLOR *v.* GAY. From Gates. Docketed and dismissed under Rule 17, on motion of *W. M. Bond* for defendant.

MIZELL *v.* WELDON LUMBER CO. From Halifax. *Day, Bell & Dunn, Murray Allen,* and *T. C. Harrison* for plaintiff, appellee; *W. E. Daniel* and *E. L. Travis* for defendant, appellant. Affirmed.

DANIEL, ADMR., *v.* KEARNEY. From Warren. Docketed and dismissed under Rule 17, on motion of *Tasker Polk* and *T. T. Hicks* for plaintiff, appellee.

HENDRICKS *v.* STRICKLAND. From Nash. *W. M. Person* for plaintiff; *Jacob Battle* and *Austin & Grantham* for defendant. Dismissed under Rule 46.

WOODARD *v.* SYKES. From Franklin. Dismissed under Rule 17, on motion of *F. S. Spruill* for plaintiff, appellee.

BATCHELOR *v.* JAMES. From Duplin. *Kerr & Gavin* for
(874) plaintiff, appellant; *Stevens, Beasley & Weeks* and *Thad Jones, Jr.,* for defendant, appellee. Affirmed.

QUINNERLY *v.* TULL. From Lenoir. *E. M. Land* and *G. V. Cowper* for plaintiff, appellant; *Murray Allen, Shaw & Rountree,* and *Emmett Wooten* for defendant. Affirmed.

BECTON *v.* DUNN. From Lenoir. Docketed and dismissed under Rule 17, on motion of *Loftin, Varser,* and *Cowper* for plaintiff, appellee.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

RICHARDSON *v.* MCLAMB. From Harnett. Docketed and dismissed under Rule 17, on motion of *Godwin & Davis* for plaintiff, appellee.

PORTER *v.* TELEGRAPH CO. From Columbus. *J. D. Bellamy* for defendant, appellant. Affirmed.

BROWN *v.* R. R. From Cumberland. *Rose & Rose* for defendant, appellee. Docketed and dismissed under Rule 17.

BASH *v.* MCRAE. From Cumberland. Docketed and dismissed under Rule 17, on motion of *Rose & Rose* for defendant, appellee.

STATE *v.* MELTON. From Anson. *Attorney-General* for State; *H. H. McLendon* for defendant, appellant. No error.

STATE *v.* WILKERSON. From Guilford. *Attorney-General* and *Murray Allen* for State; *Winston & Bryant* for defendant, appellant. No error.

BOGGS *v.* PICKETT. From Durham. *Winston & Bryant* for plaintiff; *Boone, Giles & Boone* for defendant, appellant. Affirmed.

PALMER *v.* YATES, appellant. From Guilford. *J. A. Barringer, L. M. Scott, G. S. Ferguson,* and *C. E. McLean* for plaintiff; *J. N. Wilson* and *Scales, Taylor & Scales* for defendant. Affirmed.

HUBBARD *v.* R. R. From Guilford. *R. C. Strudwick* and *W. P. Bynum, J.,* for plaintiff, appellant. *King & Kimball* for (875) defendant. Affirmed.

PERRIN *v.* BOARD OF PROVINCIAL ELDERS. From Forsyth. *L. M. Swink* for plaintiff, appellant; *Watson, Buxton & Watson* for defendant appellee. Affirmed.

STERNBERGER *v.* JACOBS. From Forsyth. *L. M. Swink* for plaintiff, appellee; *Lindsay Patterson* for defendant, appellant. Affirmed.

RADFORD *v.* TELEGRAPH CO. From McDowell. Dismissed 8 May, by consent of appellant, defendant.

DAVIDSON, appellant, *v.* NANTAHALA CO. From Macon. *Horn & Mann* and *S. L. Kelly* for plaintiff; *Shepherd & Shepherd* for defendant. Affirmed.

WALES *v.* KAOLIN CO., appellant. From Swain. *Bryson & Black* for plaintiff; *W. T. Crawford* and *R. L. Leatherwood* for defendant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

GRIFFIN *v.* R. R. From Halifax. *Claude Kitchin, W. E. Daniel,* and *E. L. Travis* for plaintiff, appellee; *Day & Bell* and *Murray Allen* for defendant, appellant. *Per Curiam:* The Court has carefully examined the record in this case and the exceptions noted thereon, and is of opinion that no reversible error is presented. Judgment affirmed.

GUYTON *v.* TELEGRAPH CO. From Gaston. *A. G. Mangum* for plaintiff, appellant; *Tillett & Guthrie* for defendant, appellee. *Per Curiam;* In this case and under a charge free from error, the jury have determined that the defendant never entered into any contract with the plaintiff, or any one for him, to transmit the message. No error.

(876) COTTON *v.* MANUFACTURING CO. From Mecklenburg. *Stewart & McRae* for plaintiff, appellee; *Tillett & Guthrie* for defendant, appellant. *Per Curiam:* On examination of the entire record and the charge of the judge below, the Court is of opinion that the case has been fairly presented to the jury and there is no substantial error which entitles the defendant to a new trial. No error. WALKER, J., did not sit on the hearing of this appeal.

Cited: *S. c.,* 142 N. C., 529.

HEFNER *v.* MANUFACTURING CO. From Mecklenburg. *Brevard Nixon* for plaintiff, appellant: *Tillett & Guthrie* for defendant, appellee. *Per Curiam:* The Court has carefully examined the record in this case, has given the briefs and argument of counsel full consideration, and is of opinion that there is no error. WALKER, J., did not sit on the hearing of this appeal.

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