[Annotations Include 161 N. C.

NORTH CAROLINA REPORTS

VOL. 142

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1906

BY

J. CRAWFORD BIGGS,

STATE REPORTER

ANNOTATED BY

WALTER CLARK

REPRINTED BY THE STATE
EDWARDS & BROUGHTON PRINTING COMPANY
STATE PRINTERS
1913

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1906.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER.
HENRY G. CONNOR.
GEORGE H. BROWN, JR.
WILLIAM A. HOKE.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

J. CRAWFORD BIGGS.

CLERK OF THE SUPREME COURT:

THOS. S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FALL TERM, 1906.

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

SOLICITORS.

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

LICENSED ATTORNEYS

FALL TERM, 1906.

ADAMS, J. G.	Buncombe.
ALLEN, M. H.	Lenoir.
BAGGETT, HIRAM	Sampson.
BEALL, T. S.	Guilford.
BIGGERSTAFF, H. K.	Buncombe.
CAUDLE, L. L.	Mecklenburg.
CLARK, J. B.	Bladen.
COX, ELIJAH	Onslow.
CURRIE, ARCHIBALD	Mecklenburg.
DAVIS, M. L.	Carteret.
DUNCAN, J. S.	Carteret.
FISHER, H. B.	Buncombe.
FRIZZELLE, J. P.	Greene.
GARDNER, O. M.	Cleveland.
GULLEY, DONALD	Wake.
HALL, C. A.	Person.
HIGDON, T. B.	Rowan.
HOBBS, E. C.	Gates.
HOFFMAN, J. R.	Guilford.
HOWELL, J. H.	Haywood.
HOYLE, J. M.	Lincoln.
HUMPHREY, D. C.	Wayne.
HUTCHINSON, R. S.	Mecklenburg.
JONES, A. C.	Charlottesville, Va.
JONES, H. C.	Mecklenburg.
LISENBEE, C. C.	Buncombe.
LOUGHLIN, C. C.	New Hanover.
LOVENSTEIN, BENJAMIN	Durham.
LOWDERMILK, W. S.	Richmond.
LUCAS, R. G.	Mecklenburg.
MCMULLAN, J. H.	Chowan.
MCNIDER, J. S.	Perquimans.
MONK, P. G.	Washington, D. C.
MOORE, J. R.	Columbia, S. C.
MOORE, O. J.	Caldwell.
NOWELL, J. H.	Bertie.
PERRY, B. H.	Vance.
PHILLIPS, H. H.	Edgecombe.
PARKER, J. A.	Harnett.
POWERS, A. K.	Pender.
PRIOR, W. V.	Henderson.
PROCTOR, J. D.	Robeson.
SALE, F. L.	Beaufort.
SANDERS, J. T.	Mecklenburg.
SCARLETT, CHARLES	Orange.
SIMMONS, N. L.	Beaufort.
SNIPES, E. T.	Hertford.
SPARROW, S. B.	Gaston.
SYKES, R. H.	New Hanover.
TAVIS, BERNIE C.	Forsyth.
VREELAND, L. B.	Mecklenburg.
WEATHERSPOON, W. H.	Durham.
WEAVER, C. G.	Buncombe.
WILSON, J. K.	Pasquotank.
WILSON, S. F.	Yancey.
WILSON, W. T.	Forsyth.
WINBORNE, J. W.	Chowan.
WOMBLE, B. S.	Catawba.
WRIGHT, ISAAC C.	Sampson.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1907

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1907.
First District	February 5
Second District	February 12
Third District	February 19
Fourth District	February 26
Fifth District	March 5
Sixth District	March 12
Seventh District	March 19
Eighth District	March 26
Ninth District	April 2
Tenth District	April 9
Eleventh District	April 16
Twelfth District	April 23
Thirteenth District	April 30
Fourteenth District	May 7
Fifteenth District	May 14
Sixteenth District	May 21

SUPERIOR COURTS

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31.

(The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold.)

FIRST JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge W. R. Allen.
Beaufort—Feb. 11 (2); †April 15 (1); *May 13 (1).
Currituck—Feb. 25 (1).
Camden—March 4 (1).
Pasquotank—†January 14 (2); Mar. 11 (2).
Perquimans—March 25 (1).
Chowan—April 1 (1).
Gates—April 8 (1).
Washington—April 22 (1).
Tyrrell—April 29 (1).
Hyde—May 20 (1).
Dare—May 6 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge C. C. Lyon.
Halifax—*Jan. 28 (1); Mar. 4 (2); June 3 (2).
Northampton—‡Jan. 21 (1); March 25 (2).
Warren—Feb. 11 (1); June 17 (2).
Bertie—‡Feb. 18 (1); April 29 (2).
Hertford—Feb. 25 (1); Apr. 22 (1).

THIRD JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge W. H. Neal.
Pitt—Jan. 14 (2); †March 18 (2); April 22 (2).
Craven—†Feb. 11 (1); *Apr. 8 (1); †May 6 (2).
Greene—Feb. 25 (1); †May 27 (2).
Carteret—March 11 (1).
Jones—April 1 (1).
Pamlico—April 15 (1).

FOURTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge J. Crawford Biggs.
Franklin—Jan. 21 (2); Apr. 15 (2).
Wilson—Feb. 4 (2); May 6 (2).
Vance—Feb. 18 (2); May 20 (2).
Edgecombe—March 4 (1); †April 1 (2).
Martin—March 18 (1); June 17 (1).
Nash—March 11 (1); April 29 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge B. F. Long.
New Hanover—*Jan. 21 (2); *April 1 (1); †April 8 (2); †May 27 (2).
Pender—Jan. 14 (1); Mar. 25 (1).
Duplin—Feb. 18 (2).
Sampson—Feb. 4 (2); April 29 (2).
Lenoir—Jan. 7 (1); March 11 (2); May 20 (1); June 10 (2).
Onslow—March 4 (1); April 22 (1).

SIXTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge E. B. Jones.
Harnett—Feb. 4 (2); May 20 (1).
Johnston—March 4 (2).
Wake—*Jan. 7 (2); †Feb. 18 (2); *March 25 (2); †April 22 (2).
Wayne—Jan. 21 (2); April 8 (2).

SEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge James L. Webb.
Columbus—Feb. 25 (1); April 15 (2).
Cumberland—*Jan. 14 (1); †Feb. 18 (1); ‡March 25 (1); †April 29 (2); *May 27 (1).
Robeson—*Feb. 4 (2); †April 1 (2); †May 20 (1).
Bladen—Jan. 7 (1); March 11 (1).
Brunswick—March 18 (1).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge W. B. Councill.
Anson—Jan. 14 (1); †Feb. 11 (1); †March 4 (1); *April 15 (1); †May 13 (1); †June 11 (1).
Chatham—Feb. 4 (1); May 6 (1).
Moore—†Jan. 21 (1); †March 25 (1); *April 22 (1); †May 20 (2).
Richmond—*Jan. 7 (1); †April 1 (2).
Scotland—†March 11 (1); *April 29 (1); June 3 (1).
Union—*Jan. 28 (1); †Feb. 18 (2); *March 18 (1).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

NINTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge M. H. Justice.

Durham—*Jan. 7 (1); †Jan. 21 (2); †March 18 (2); *May 13 (1).

Guilford—†Dec. 31 (1); †Jan. 14 (1); †Feb. 11 (2); *Feb. 25 (1); *April 1 (1); †April 15 (2); †June 3 (2); *June 17 (1).

Granville—Feb. 4 (1); April 29 (2).

Alamance—March 4 (1); †May 27 (1).

Orange—March 11 (1); †May 20 (1).

Person—April 8 (1).

TENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge Fred. Moore.

Montgomery—*Jan. 21 (1); †April 15 (1).

Iredell—Jan. 28 (2); May 20 (2).

Rowan—Feb. 11 (2); May 6 (2).

Davidson—Feb. 25 (2); †April 22 (1).

Stanly—*Jan. 14 (1); †March 11 (1).

Randolph—March 18 (2).

Davie—April 1 (2).

Yadkin—April 29 (1).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge G. S. Ferguson.

Ashe—Jan. 21 (2); May 27 (2).

Forsyth—*Feb. 11 (2); †March 11 (2); May 20 (2).

Rockingham—Feb. 25 (2); †June 10 (2).

Alleghany—March 25 (1).

Caswell—April 15 (1).

Surry—Feb. 4 (1); April 22 (1).

Stokes—May 6 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge George W. Ward.

Mecklenburg—†Jan. 14 (2); *Feb. 11 (2); †March 11 (2); *April 22 (1); †April 29 (1); *June 3 (1); †June 10 (1).

Cleveland—March 25 (2).

Gaston—Feb. 25 (2); May 20 (2).

Lincoln—April 8 (1).

Cabarrus—Jan. 28 (2); May 6 (2).

THIRTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge R. B. Peebles.

Wilkes—*March 4 (1); †June 17 (1).

Catawba—Feb. 4 (2); †May 6 (2).

Alexander—Feb. 18 (1).

Caldwell—Feb. 25 (1).

Mitchell—May 20 (2).

Watauga—March 25 (2); June 17 (2).

FOURTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge Owen H. Guion.

Yancey—March 25 (2); †June 17 (1).

McDowell—†Jan. 21 (2); Feb. 18 (2).

Henderson—*March 4 (1); ‡May 13 (2).

Rutherford—†Feb. 4 (2); April 8 (2).

Polk—April 22 (2).

Burke—March 11 (2); †June 3 (2).

FIFTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge C. M. Cooke.

Buncombe—Feb. 4 (3); †March 11 (4); April 22 (2); †May 27 (4).

Madison—†Jan. 21 (2); *Feb. 25 (2); †May 6 (2).

Transylvania—Apr. 8 (2).

SIXTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1907—Judge O. H. Allen.

Haywood—Jan. 28 (3).

Jackson—Feb. 18 (2); †May 20 (2).

Swain—March 4 (2).

Graham—March 18 (2).

Cherokee—April 1 (2).

Clay—April 15 (1).

Macon—April 22 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

CASES REPORTED

CASES CITED BY THE COURT

FROM THE NORTH CAROLINA REPORTS.

A.

B.

C.

D.

E.

F.

G.

H.

I.

N.

S.

T.

U.

V.

W.

Y.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1906

SAWYER v. RAILROAD.

(Filed 11 September, 1906).

Slander—Corporations—Torts—Test of Liability—Question for Jury.

1. Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice, or was beyond the scope of corporate authority, constitutes no defense to their liability.
2. Where the question of fixing responsibility on corporations by reason of the tortious acts of their servants depends exclusively on the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it.
3. Where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized.
4. In an action for slander, where it appeared that the plaintiff went to the office of the superintendent of the defendant company to get employment, and the superintendent, after telling the plaintiff that the company did not want to employ him, proceeded to insult and defame him, the company was not responsible.

ACTION by A. Sawyer against Norfolk and Southern Railroad, heard by *Neal, J.*, and a jury, at the March Term, 1906, of (2) CAMDEN.

The pleadings show the contentions of the parties.

Plaintiff testified in his own behalf, as follows:

"I reside in this county, near Sawyer's Creek. Lived in this county all my life and am forty-two years of age. Have been engaged in various pursuits, mostly merchandising, farming, selling guano, and attending to shipping truck at Belcross. Before April, 1904, I had been working for defendant, helping to load truck for two or three years or more. Defendant company had sidetrack at Belcross, and I looked after truck, seeing that they were properly loaded and that each package was placed in proper car and properly billed. I was employed by W. W. King, superintendent of Norfolk and Southern, defendant railroad, and received compensation for my services. My work commenced in May and ended with the trucking season, about August, so I was engaged throughout the trucking season.

Up to 1904 there had been no complaint about my work. In this month I went to Norfolk and went in to see W. W. King in his office. His office was in the general office of the defendant company. The general office is a large building, 60x100 feet, on the second floor. There was a large room cut up into different sections by railings from three to four feet high, and W. W. King's section was to the left as you enter. While in his room I could see many people at work in the several sections; some twenty or thirty were in sight of me, and five or six near enough to hear what was said—these within eight or ten feet of me. I went in Mr. King's office to see him on business, viz., to see if the company wanted to employ me to attend to the loading and shipping of the truck at Belcross station during the trucking season, as they had done in previous years. I asked him, when he came in, if he wanted
(3) to employ me to attend to the loading and shipping of truck at Belcross as he had done heretofore. He said: 'No, I don't want any such man as you are.' That I had robbed the company and was doing so every chance I got. 'And as to the shortage on potatoes you claim, they were never grown, marked, loaded, or put in the cars. If they had been they would have been in there when the car got to New York. I do not intend to pay for them. And as to the stock that has been killed by the company, I have paid for them all.' I then told him that I had not received the pay, if he had paid it; that it must be in the hands of some employee or in his possession. I had never received it. He spoke the whole conversation in such an abrupt and insulting manner that of course I was mad. I then went out of the office into the office of the auditor, Mr. Glazier, which was the adjoining section. I had not at that time been paid for the stock.

"I had not worked for them nor had any connection with them since August, 1903, the close of the trucking season.

"Mr. W. W. King was the superintendent in charge of that work—shipping truck. I had never robbed the company in any way. I looked after the whole of the shipping at Belcross on the sidetrack at my farm. I saw the truck was properly loaded, marked, and counted, and reported to the agent for billing purposes. Each piece was properly counted, loaded, and reported to the agent of the defendant company.

"There had been some shortage in a shipment of potatoes made by my uncle, A. Sawyer. These potatoes were shipped and loaded on the defendant's cars. Mr. Godfrey, my man, saw them loaded. Mr. W. W. King spoke very loudly, like folks will when they are mad. It attracted the attention of several in the room, and they looked towards me when he charged me with robbing the company.

"I had no friend with me and was all alone. I was humiliated, and it affected me very seriously. The people in the office gazed at me, and there were several ladies in there.

"The defendant is worth, I suppose, two million dollars. Its (4) road starts at Norfolk and runs through various conties to Washington, N. C. It has steamboats and ferry connections. I had written to Superintendent King that I was coming to see him at that time, and I went at the time stated, and he said that he expected me. I can not measure my damages in dollars and cents. My pride was hurt pretty badly. It is terrible for a man to be charged with robbery."

Upon cross-examination witness says:

"I commenced to merchandise in 1888 in copartnership with Mr. Berry. My first year's business was five thousand dollars, and it is about the same now. The mercantile business has fallen off. Mr. W. W. King is now dead. He died the same year this talk took place. He looked very healthy, but some time after that had a serious attack of heart failure.

"He spoke the words in a very abrupt and insulting manner."

The defendant moved for judgment of nonsuit. The motion was allowed and the plaintiff appealed.

Aydlett & Ehringhaus, for the plaintiff.

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

HOKE, J. There is some authority for the position that corporations can not in any case be held civilly liable for slander. And it has also been held, and is so stated in several of the text-books, that they are only so responsible when it affirmatively appears that they *expressly*

authorize the very words which form the basis of the charge. The first position does not rest on any very satisfactory reason and has been generally rejected; and the second, we think, can only be received with much qualification.

It is now well established that private corporations under certain circumstances will be held liable for torts both negligent and
(5) malicious on the part of their servants, agents and employees. The doctrine is stated in Jaggard on Torts, p. 167, sec. 58, as follows: "Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice or was beyond the scope of corporate authority, constitutes no defense to their liability;" and this statement is in accord with well-considered decisions in this and other jurisdictions. *Hussey v. R. R.*, 98 N. C., 34; *Jackson v. Tel. Co.*, 139 N. C., 347; *R. R. v. Quigley*, 62 U. S., 202; *Bank v. Graham*, 100 U. S., 699; *Palmeri v. R. R.*, 133 N. Y., 261.

According to the varying facts of different cases the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company, and sometimes the facts present an additional element and involve some independent duty which the corporation may owe directly to third persons, the injured or complaining party. This distinction will be found suggested and approved in 1 Jaggard on Torts, p. 257, sec. 85:

"*Course of Employment:* Another conception of the master's liability rests on the proposition that in certain cases the liability arises, not from relationship of the master and servant exclusively, but also from the duty owed to plaintiff by defendant in the particular case in issue. In dealing with cases in which the question of the liability of the master for the tort of his servant is raised, reference should be had not alone to the relationship of the master and servant, but also to the relationship between the master and the third person complaining of injury. It would seem that the scope of authority test considers too exclusively the form of relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be *in personam* or in the nature of the
(6) right *in personam*, as where a passenger complains of the torts of a carrier's servants, or a customer of the torts of a proprietor's servant."

Hale on Torts, at p. 147, gives the same distinction. It will be noted that the instances given by both of these authors, under the second class, are where the conduct complained of on the part of the employee in the course of his employment was in breach of some duty which the em-

ployer owed directly to the passenger in the one case and the customer in the other. They had been invited upon the premises and were there by invitation and under circumstances which gave them the right to considerate and courteous treatment; and, in the case of the carrier this obligation was further enforced and could be made to rest on the duty arising to the public by reason of its *quasi*-public character, growing out of its chartered privileges, as in *Daniel v. R. R.*, 117 N. C., 592.

In the case at bar, however, there is no responsibility attaching by reason of the breach of any special duty owed to the plaintiff by reason of his placing or by reason of the special circumstances of the case. The plaintiff was not a passenger, nor was he in the office by any invitation of the company, general or special. On the contrary, he had gone to the office to see King, the superintendent, of his own motion and for his own advantage—the men were at arm's length considering a business proposition affecting the plaintiff's interest.

The case, then, is one where responsibility must attach, if at all, simply and exclusively by reason of the relationship which King bore to the company and the power given him to select and employ the plaintiff as one of the company's agents. In cases of this character the responsibility of a corporation for slander or other malicious torts, by its agents and employees in the course of their employment, depends in its last analysis on whether the acts complained of were authorized or ratified by the company. The test of responsibility established (7) by the better considered authorities being, "whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it." When such authority is express, the matter is usually free from difficulty; but the authority may be implied, and on a given state of facts admitted or established, frequently is conclusively implied, and responsibility imputed as a matter of law.

In other cases, where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized.

And, again, the absence of authority may be so clear that it becomes the duty of the Judge to determine the matter, as he did in this instance.

In Wood on Master and Servant may be found a very extensive and satisfactory discussion of this question. In sec. 279, p. 535, the author says:

"The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the

employment the master can be said to have *authorized* the act; for if he did not, either in fact or in law, he can not be made chargeable for its consequences, because not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

And, again, the same author, in sec. 307, says:

"The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the
(8) master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders."

Applying these principles to the facts before us we are of opinion that the ruling of the Judge below was clearly correct. As stated, the plaintiff was voluntarily in the office of King (the superintendent) to look after business in his own interest, and the company owed him no independent duty. Granting that King had power to select and employ the plaintiff as agent of the company, when he told the plaintiff that the company did not wish to employ him he had filled the measure of his duty; and when King went further, whether from bad temper or malice or from righteous indignation, and proceeded to insult and defame the plaintiff, he was entirely beyond any authority given him either expressly or which could be fairly implied from the nature of his employment or the duties incident to it; and for such conduct, therefore, King, as an individual, and not the company, is responsible.

The general principles here applied will be found very fully and clearly discussed in two recent opinions by this Court delivered by *Mr. Justice Walker: Daniel v. R. R.*, 136 N. C., 517, and *Jackson v. Tel. Co., supra.* And our disposition of this case is sustained by well-considered decisions of the Federal Court in *Text-Book Co. v. Heartt,* 136 Fed. Rep., 129, and *Gas Light Co. v. Lansden,* 172 U. S., 534.

There is nothing in *Hussey v. R. R., supra,* that in any way militates against our present decision. That was a case in which the complaint charged that defendant company had maliciously slandered the
(9) plaintiff. There was a demurrer, which admitted that the defendant had uttered the words, and the decision simply held, as

we have here, that a corporation could under given circumstances be held responsible for the malicious torts of its agents. The question of when or under what circumstances the acts of the agent will be imputed to the company was in no way involved.

There was no error in directing a nonsuit, and the judgment below is Affirmed.

Cited: Roberts v. R. R., 143 N. C., 179; *Stewart v. Lumber Co.*, 146 N. C., 51, 75, 115; *Powell v. Fiber Co.*, 150 N. C., 14; *Wright v. R. R.*, 151 N. C., 534; *Marlowe v. Bland*, 154 N. C., 142; *Dover v. Mfg Co.*, 157 N. C., 327, 328; *Bucken v. R. R., Ib.*, 447; *Seward v. R. R.*, 159 N. C., 258.

BREWSTER v. ELIZABETH CITY.

(Filed 11 September, 1906).

Municipal Corporations—Defective Streets—Notice—Negligence—Proximate Cause—Question for Jury.

1. In an action for damages for injuries alleged to have been sustained from a defective bridge, the Court properly refused to give plaintiff's special instructions, "If the plank was placed upon the stringer as testified, and if you believe that they, or one or more of them, were loose upon the same and had remained loose for six or twelve months or more, or the bridge was not safe and the defendant corporation was negligent in not discharging its duty, and the presumption arises that it had notice of the same, it would be your duty to answer the first issue 'Yes,'" in that it assumes that the plaintiff was injured (an allegation which is denied in the pleadings), and that the negligence of the defendant's officers caused the injury.
2. In an action for damages for injuries alleged to have been sustained from a defective bridge, the Court properly refused to give plaintiff's special instruction, "If you believe all the evidence in this case, you should find that the bridge was not safe; that the defendant was negligent in not keeping it in a safe condition; and it would be your duty to answer the first issue 'Yes,'" in that it assumes as a matter of law that the alleged negligence was the proximate cause of the injury and that the officers of defendant had constructive notice of the defective condition of the bridge.
3. In order to constitute actionable negligence, the defendant must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. The two must concur and be proved by the plaintiff by the clear weight of the evidence.
4. Where there is no evidence that the officers of a municipality had knowledge of the defective condition of a bridge, other than that which may be inferred from the length of time it had continued, it is not for the Court to draw such inference, but it is peculiarly a matter for the jury, to be determined upon all the facts and circumstances in evidence.

BREWSTER *v.* ELIZABETH CITY.

ACTION by Matilda Brewster against the corporation of Eliza-
(10) beth City for damages for personal injury, heard by *Shaw, J.*, and a jury, at November Term, 1905, of PASQUOTANK.

The following issue, with others, was submitted: 1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

From a judgment for the defendant, the plaintiff appealed.

Aydlett & Ehringhaus for the plaintiff.

Sawyer & Sawyer, C. E. Thompson and *R. W. Turner* for the defendant.

BROWN, J. This cause was formerly before this Court, and a new trial ordered because of error in the charge upon the second issue, relating to contributory negligence. The facts of the case are set out in the opinion, *Brewster v. Elizabeth City,* 137 N. C., 392. On the recent trial the jury found the issue of negligence against the plaintiff. Plaintiff excepted to the refusal of the Court to give the following instructions upon the first issue: (1) "That if the plank was placed upon the stringer as testified, and if you believe that they, or one or more of them, were loose upon the same and had remained loose for six or twelve months or more, or the bridge was not safe, and the defendant corporation was negligent in not discharging its duty, and the presumption arises that
(11) it had notice of the same, it would be your duty to answer the first issue 'Yes'." (2) "If you believe all the evidence in this case you should find that the bridge was not safe; that the defendant was negligent in not keeping it in a safe condition; and it would be your duty to answer the first issue 'Yes'."

The vice in the first instruction is twofold: it assumes that the plaintiff was injured (an allegation which is denied in the pleadings) and that the negligence of the defendant's officers caused the injury. The vice in the second instruction consists in assuming as matter of law that the alleged negligence was the proximate cause of the injury, and that the officers of defendant had constructive notice of the defective condition of the bridge.

In order to constitute *actionable* negligence, the defendant must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. The two must concur and be proved by the plaintiff by the clear weight of the evidence. A failure to establish proximate cause, although negligence be proved, is fatal. It is not every negligent act, no matter how gross or flagrant, that can be the subject of an action, but only such negligent acts as immediately cause an injury. This is elementary.

The plaintiff also assumes that defendant's officers had constructive notice of the defective condition of the bridge in that the plank was not nailed down. The evidence showed it had once been secured in its place by nails. There is no evidence that the officers had knowledge of the defect other than that which may be inferred from the length of time it had continued. It is not for the Court to draw such inference. It is peculiarly a matter for the jury, to be determined upon all the facts and circumstances in evidence. This was so held in *Fitzgerald v. Concord,* 140 N. C., 114, in the following language: "On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and (12) it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, the nature of the defect, etc."

Instead of the testimony of Weeks, the street commissioner, proving actual knowledge of the defects, as plaintiff contends, it somewhat tends to prove the contrary. He had the bridge put down a year before the accident and nailed the plank down. He passed over the bridge frequently. There is nothing in his evidence which would justify the Court in holding that, if taken to be true, the defendant's officers or Weeks himself had knowledge of the defective condition of the bridge at the time of the unfortunate injury to plaintiff.

We have examined the charge of the Judge below with care, and think that it presents every feature of the case to the jury fairly, clearly, and correctly, in accord with well-settled principles.

As there are no exceptions to the evidence, we find

No Error.

Cited: Bailey v. Winston, 157 N. C., 259.

THOMPSON v. SILVERTHORNE.

(Filed 11 September, 1906).

Tenants in Common—Personalty—Actions by Cotenants to Recover Possession—Partition—Injunction—Receiver.

1. One tenant in common, or joint owner of personal property, cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property, except when the property is destroyed, carried beyond the limits of the State, or when, being of a perishable nature, such a disposition of it is made as to prevent the other from recovering it; and it is not sufficent to show that defendant forcibly took the property from his cotenant's possession.

2. If, pending a proceeding for partition of personalty, the defendant threatens the destruction or removal of the property, the Court, on application, might enjoin him, or appoint a receiver.

ACTION by L. F. Thompson against David Silverthorne, heard
(13) by *Shaw, J.*, and a jury, at the October Term, 1905, of BEAUFORT, upon appeal from a justice of the peace.

From a judgment of nonsuit, the plaintiff appealed.

W. C. Rodman for the plaintiff.
Small & MacLean for the defendant.

CONNOR, J. Plaintiff sued for possession of certain logs described in his complaint. After the testimony was in, counsel stated to the Court that he would contend that he had by his testimony proven that the person under whom plaintiff claimed and defendant were tenants in common of the lands from which the logs were cut, and also tenants in common of the logs in controversy; that defendant took them by force from his possession. His Honor intimated that if plaintiff established such state of facts he would instruct the jury that he was not entitled to recover; whereupon plaintiff excepted, and submitted to a judgment of nonsuit and appealed. The sole question presented upon the appeal is whether his Honor was correct in the instruction which he proposed to give the jury. Plaintiff concedes the well-established principle that one tenant in common, or joint owner of personal property, can not maintain an action against the other tenant or owner to recover the exclusive possession of the property. *Grim v. Wicker,* 80 N. C., 343; *Strauss v. Crawford,* 89 N. C., 149. He calls attention to the exceptions to the general rule, and contends that he brings himself within one of them, for that defendant forcibly took the logs from his possession, and he is entitled to be restored to his original status. *Mr. Justice Ashe* in *Grim v. Wicker, supra,* thus states the exceptions to the general
(14) principle: "The only exceptions to this principle are when the property is destroyed, carried beyond the limits of the State, or when, being of a perishable nature, such a disposition of it is made as to prevent the other from recovering it," citing *Lucas v. Wasson,* 14 N. C., 398, in which it is said: "It is not sufficient to show that defendant took forcible possession of the chattel and carried it away." The principle was applied in *Shearin v. Riggsbee,* 97 N. C., 216. We do not think the language used by the Court in that case conflicts with the authorities cited. The right of the plaintiff upon the facts relied upon was to have partition. If, pending the proceeding for that pur-

pose, the defendant threatened the destruction or removal of the property, the Court would, upon application, have enjoined him, or, if necessary, appointed a receiver. We concur with the ruling of his Honor.

The judgment of the nonsuit must be

Affirmed.

LANIER v. INSURANCE COMPANY.

(Filed 11 September, 1906.)

Insurance—Surrender of Policy—Burden of Proof—Proofs of Loss—Evidence—Continuances.

1. The refusal of a motion for a continuance is a matter in the sound discretion of the trial Judge, and is not reviewable, except, possibly, in a case of gross abuse of the discretionary power.
2. In an action on a policy of insurance issued by defendant upon the life of plaintiff's husband for her benefit, where the evidence shows that the policy was duly issued, that all premiums were promptly paid, that plaintiff kept it in her trunk, from which it mysteriously disappeared a short time prior to her husband's death, and was found later in defendant's possession, the Court was correct in instructing the jury upon the evidence, if believed, to find for the plaintiff.
3. Where a policy of insurance mysteriously disappeared from the possession of the beneficiary a short time prior to the insured's death, and was later found in the company's possession, and the latter alleged that the insured surrendered it, the burden was not upon the beneficiary to show that its possession was obtained by unlawful or fraudulent means, but the burden was upon the defendant to show how it came into possession of the policy.
4. The general rule is, that the beneficiary of an ordinary life-policy has a vested interest and acquires the entire property interest in the contract the moment the policy is executed and delivered.
5. Filing proofs of loss with defendant was unnecessary where defendant expressly denied the existence of any contract of insurance at the death of the insured, and so wrote plaintiff in response to her application for blank proofs of loss, and declined to send them.

ACTION by Mary E. Lanier against The Eastern Life Insurance Company of America, heard by *Neal, J.*, and a jury, at the (15) April Term, 1906, of BEAUFORT.

This was an action to recover on a policy of insurance issued by defendant company (now called the Conservative Mutual Life Insurance Company) upon the life of John A. Lanier, for the benefit of and payable to Mary E. Lanier, his wife. The Court submitted the following issue: "Is defendant indebted to plaintiff, Mary E. Lanier, now Daniels; and if so, in what amount? Answer: Yes; nine hundred and

eight-two dollars and eighty-four cents ($982.84), and interest from 23 September, 1904."

From a judgment for the plaintiff, the defendant appealed.

Nicholson & Daniel and *Small & MacLean* for the plaintiff.
Ward & Grimes and *Bragaw & Harding* for the defendant.

BROWN, J. 1. The defendant moved upon affidavit for a continuance, which was refused. The Court set the trial for the "following Thursday," and defendant excepted. It has been repeatedly ruled that this is a matter within the sound discretion of the Superior Court, and is not reviewable. The public interests require that it should remain so. It is possible that a case of such gross abuse of discretionary power upon the part of a trial Judge might be presented that this Court would review it, but the affidavits in the record disclose nothing of that sort in this case.

(16)

2. The question raised by the many exceptions of the defendant may all be considered under the contention presented by the 12th, viz.: "Upon all the evidence plaintiff is not entitled to recover." It is admitted in the answer that the defendant insured plaintiff's former husband, John A. Lanier, in the sum of $1,000, payable to plaintiff. It is in evidence that the plaintiff paid promptly all premiums up to death of insured on 27 June, 1904.

The plaintiff testified: "When I received the policy I put it in my trunk, and it stayed there until I missed it. I missed it about one and a half months before he died. When I missed it he was sick. He never recovered from that illness." There was also evidence to the effect that during the last illness of insured the general manager of defendant came to plaintiff's residence and asked her to surrender the policy and receipts for premiums, asserting that they were of no value to plaintiff, and that she refused to surrender them. There was evidence tending to prove that shortly after the death of insured the policy of insurance was found in the defendant's possession and that the general manager wrote the plaintiff that her husband had no insurance in force at his death and that "the policy of insurance carried by Mr. Lanier had been surrendered and concelled on 30 April, 1904."

The defendant offered no evidence, and tendered the following issue, contending that before plaintiff can recover she must establish by affirmative proof the facts stated therein: "Did the defendant fraudulently and by improper and unlawful means obtain from the plaintiff and from the assured the possession of the policy of insurance declared on, without the consent of the assured, from John A. Lanier?"

The defendant bases its contention upon the following clauses in the policy: "The insured may at any time during his life- (17) time, by deed of substitution or assignment, revoke the nomination of the beneficiary named herein and substitute another beneficiary, or may assign this polciy, provided that copies of such deed are given the company at its home office in duplicate, one copy to be retained by the company and one to be attached to the policy with the endorsement of the company."

We think his Honor was was correct in instructing the jury upon the evidence offered, if believed, to find for the plaintiff. The burden was not upon the plaintiff to establish the facts set out in the issue tendered by the defendant. The evidence showed that the policy was duly issued; that the premiums were promptly paid; that plaintiff kept it in her trunk and repeatedly refused to surrender it to defendant's agents, who during the last illness of the insured endeavored to induce plaintiff to do so. The defendant sets up in its answer, as a further defense, "that subsequent to the issuing of the said policy, the said John A. Lanier agreed to deliver and surrender the said policy to the defendant and to cancel the same upon return of the premiums paid thereon; that pursuant to the said agreement the said John A. Lanier received the said premiums from the Eastern Life Insurance Company of America and delivered the policy to the said company and agreed that the said policy should be cancelled; that the said policy was cancelled by the said company, and thereupon became void."

The evidence tends to prove that at the time defendant's agents called upon plaintiff and requested her to surrender the policy and told her it was worthless, her husband was on his death-bed, and that he never left it alive, and that then the policy was safely locked up in plaintiff's trunk. How it came into defendant's possession is a mystery which the defendant, not the plaintiff, is called upon to explain. The facts were peculiarly within the knowledge of the defendant's (18) officers and agents. As plaintiff was ignorant of them, how could she explain them? She made out a *prima facie* case when she proved the issuance of the policy for her benefit, the possession of it by her, the removal of it without her knowledge, the payment of the premiums, and the death of the insured. Filing proofs of loss with defendant was unnecessary, as defendant expressly denied the existence of any contract of insurance at death of insured, and so wrote plaintiff in response to her application for blank proofs of loss, and declined to send them.

The general rule is, that the beneficiary of an ordinary life-policy

has a vested interest and acquires the entire property interest in the contract the moment the policy is executed and delivered. Bacon on Benefit Societies and Life Insurance, sec. 292; May Insurance (3 Ed.), sec. 399; *Bank v. Hume,* 128 U. S., 195; *Millard v. Brayton,* 52 L. R. A., at p. 119.

The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiary, and create direct legal relations between them. *Hooker v. Sugg,* 102 N. C., 115; *Simmons v. Biggs,* 99 N. C., 236.

Under the terms of the policy sued on, plaintiff had such an interest as entitled her to recover upon the death of the insured if the premiums had been paid and the policy was otherwise in force, unless the defendant company could show it had been lawfully surrendered by her consent, or that the insured had duly and legally exercised the power reserved in the clause quoted, entitled "Change of Beneficiary."

There is not one scintilla of evidence that Lanier at any time during his lifetime, by deed of substitution or assignment, revoked the nomination of plaintiff as his beneficiary and substituted another in her place. There is no evidence that Lanier assigned the policy
(19) to any one, or that he knew how or when it left the possession of plaintiff. To successfully resist a recovery upon such ground the burden of proof is on defendant to show a strict compliance by the insured with the provisions of such clause in the policy before the rights of the plaintiff could be divested without her consent. No evidence having been offered upon the part of defendant, the instruction given by the Court was justified.

Upon an examination of the entire record we find

No error.

Cited: Cromartie v. R. R., 156 N. C., 100.

NEWSOME v. BUNCH.

(Filed 11 September, 1906.)

Habeas Corpus—Custody of Child—Abandonment—Findings of Fact.

In a *habeas corpus* proceeding where the respondents averred that the petitioner, the father, abandoned the child to them eight years ago, at the death of its mother, when it was five months old, and then left the State, and there was evidence to this effect, and the Court did not make any finding as to this controverted fact, nor did it determine whether the interest and welfare of the child will or will not be materially prejudiced by its restoration to the petitioner, but upon certain findings concluded, as matter of law, that there had been no abandonment, *it was error* to order the child delivered to the petitioner, without passing upon the above matters.

HABEAS CORPUS proceeding for the custody of a child, by A. K. Newsome, petitioner, against Q. T. Bunch and his wife, heard by *Ward, J.*, on 3 January, 1906, at Elizabeth City, N. C. From a judgment ordering the child to be delivered to the petitioner, the respondents appealed.

N. Y. Gulley and *W. S. Privott* for the petitioner.
W. M. Bond for the respondents.

WALKER, J. The petitioner is the father of the child, Roy (20) Clarence Newsome, and alleges that he is entitled to his custody, and that the respondents unlawfully withhold the child and have refused to surrender him to the petitioner. The respondents aver that the petitioner abondoned the child to them about eight years ago, at the death of its mother, when it was five months old, and then left the State. The Judge found certain facts and concluded, as matter of law, that there had been no abandonment. He thereupon ordered the child to be delivered to the plaintiff, and the respondents excepted and appealed.

There was evidence to the effect that when the child was five months old the petitioner left the home of the respondents, with whom the child was living, and removed to Ohio, having told them, at the time of his departure, that if the child should die, to bury it, but not to send him any word. The Court did not make any finding as to this controverted fact, nor did it determine whether the interest and welfare of the child will or will not be materially prejudiced by its restoration to the petitioner. We think that both matters should be passed upon. It is true, this is *a habeas corpus* proceeding, but the provisions of sec. 180 and

181 of The Revisal bear so directly upon the question involved that the rights of the parties can be better determined and the proceeding more speedily disposed of by a finding below upon both matters. Indeed, such a finding would seem to be essential to a final disposition of the case here, for if we should hold that there had been an abandonment and reverse the ruling of the Judge, the case would have to be remanded for a finding upon the other question, and it would thus be decided in fragments.

We do not intimate any opinion upon the question of abandonment, but will decide as to that when all the material facts are before us.

(21) The Judge may find the additional facts upon the evidence already taken, or he may hear additional testimony, as he may see fit.

The cause is retained, and this opinion will be certified to the Court below to the end that the Judge who tried the case may proceed in accordance therewith. His findings when filed in the office of the Clerk of the Superior Court of Chowan County will be certified by the latter to this Court.

Remanded for additional findings.

SMITH v. RAILROAD.

(Filed 11 September, 1906.)

Exceptions and Objections—Briefs—Argument of Counsel.

1. Under Rule 34 of this Court, exceptions appearing in the record, but not stated in the appellant's brief, are "taken as abandoned."
2. Objection to the comments of counsel is a matter peculiarly within the discretion of the trial Judge, and his action is not reviewable unless there is a gross abuse of the discretion and it appears reasonably probable that the appellant suffered prejudice thereby.

ACTION by W. E. Smith, trustee, against Atlantic Coast Line Railroad Company, heard by *Long, J.*, and a jury, at the November Term, 1905, of HALIFAX. From a judgment for the plaintiff, the defendant appealed.

E. L. Travis, Claude Kitchin and *W. E. Daniel* for the plaintiff.
Day, Bell & Dunn and *Murray Allen* for the defendant.

CLARK, C. J. There are several exceptions in the record, but the only one stated in the appellant's brief is that which was taken to

comments of counsel. The others are therefore "taken as abandoned." Rule 34, 140 N. C., 666.

Objection to the comments of counsel is a matter peculiarly within the discretion of the trial Judge, and his action is not (22) reviewable unless there is gross abuse of the discretion and it appears reasonably probable that the appellant suffered prejudice thereby.

In the present case there was merely "cross-firing with small shot," as was said by the Court in *S. v. Underwood,* 77 N. C., 502. It is not probable that any real injury was done, and we cannot hold that the Judge erred in refusing to interpose. The jury may have been amused or entertained, or otherwise; but crediting them with being men of ordinary intelligence, their verdict was based on the evidence without any effect from this "by-play."

No error.

GEROCK v. TELEGRAPH COMPANY.

(Filed 11 September, 1906.)

Telegrams—Mental Anguish—Evidence.

1. Where the *feme* plaintiff telegraphed her husband, "Sick with grippe—not dangerous. Want you to come," and there was evidence that by reason of the defendant's negligent delay in the delivery of the telegram, her husband was delayed two days in reaching her bedside, by reason of which delay she underwent great mental anxiety, the Court erred in dismissing the action on a demurrer to the evidence.
2. On a demurrer to the evidence, the evidence of the plaintiff must be taken as true, and with the most favorable inferences the jury would be authorized to draw from it in his favor.

CONNOR and BROWN, JJ., dissenting.

ACTION by India B. Gerock and M. O. Gerock, her husband, against Western Union Telegraph Company, heard by *Shaw, J.,* and a jury, at the May Term, 1906, of BERTIE. From a judgment of nonsuit, the plaintiff appealed. (23)

St. Leon Scull for the plaintiff.

Winston & Matthews, F. H. Busbee & Son and *George Cowper* for the defendant.

CLARK, C. J. The *feme* plaintiff telegraphed her husband: "Sick with grippe—not dangerous. Want you to come." There is evidence

that by reason of the defendant's negligent delay in the delivery of the telegram her husband was delayed two days in reaching her bedside, by reason of which delay she underwent great mental anxiety and sufferring. The Court dismissed the action on a demurrer to the evidence.

The defendant contends that, though this was a message concerning illness, the words "not dangerous" gave the company notice that it was not urgent, and it could take its leisure in delivering it, without any responsibility for the delay. But the words "not dangerous" could by no reasonable construction be taken as meaning that grippe was not dangerous. The message on its face meant that the wife's condition was not dangerous at the time of sending the dispatch, but the nature of the disease and the fact that the information was sent by the more expensive and speedy medium of a telegram, instead of by letter, were enough to show apprehension and that the husband's presence was needed. Indeed, the message expressly adds: "Want you to come." The fact that the husband did not come promptly after such message from his sick wife, and the lack of the comfort of his society and care in her illness, may well have caused her mental anguish; and if such delay was due to the negligence of the defendant, who offers its services to the public for the speedy transmission of messages and received pay to transmit this message quickly, then what would be just compensation for the mental anguish caused by its negligence or whether any compensation should be given the plaintiff beyond the cost of
(24) the message, is a matter for the jury to determine, subject to the supervisory power of the trial Court to set the verdict aside if excessive. This has been too often held, and the underlying public policy which requires the enforcement of damages for neglect in the delivery of messages concerning sickness or death, has been too often stated by this Court to require repetition.

It is not contended by the defendant that there was no evidence of negligent delay in the delivery of the message. The message was delivered to the defendants' agent at Ahoskie, N. C., about noon on 2 February, and it was agreed that it was received at its destination, Maysville, N. C., at 4:27 P. M., that day. It was sent "Care of Charles F. Gerock" (the brother of the sendee), who testified that his shop was in Maysville, in 150 to 200 yards of the defendant's office and in full sight of it; that he was at his shop all that day, except for five or ten minutes, when he went to the postoffice, until 5:30 P. M., when he left for home, three miles out in the country; that he did not receive the dispatch that afternoon, nor until next day about 10 A. M., when it was handed him in a sealed envelope in the street, without any

intimation that it concerned sickness or was important; that had he received it before 5:30 P. M., on 2 February he would have given it to his brother that night, and even if he had been informed when it was handed him next day that it was of a serious nature, he would have sent it out to his brother at once; that not knowing this, he did not deliver the telegram till he got home that night about 7 o'clock.

M. O. Gerock, the sendee, testified that if he had received the telegram, 7 P. M. on 2 February, when his brother got home (as he would if the dispatch received at Maysville at 4:27 P. M. had been delivered to his brother before he left there at 5:30), the weather was good, and he would have driven to New Bern, have taken the train and have gotten home Friday at 4:41 P. M., 3 February; that not getting it until 7 P. M. on 3 February, when it was then snowing, he (25) could not drive to New Bern, but had to wait till the train passed next day at Maysville, and did not get home till 5 P. M. on Sunday—two days later than he would have done had the telegram been delivered on the afternoon of 2 February, as it should have been. The *feme* plaintiff testified that after sending the telegram to her husband that she had grippe and wanted him to come, she expected him certainly on Friday afternoon, and that his delay to come till Sunday afternoon caused her great anxiety and mental suffering, causing also a nervous chill.

It is not necessary to set out the evidence in full. On a demurrer to the evidence, the evidence of the plaintiff must be taken as true, and with the most favorable inferences the jury would be authorized to draw from it in his favor. It is clear from this evidence, taken as true, that the *feme* plaintiff sent a telegram to her husband that she was ill with grippe, and stating that she wanted him to come home; that there was such negligent delay in the delivery of this telegram that it caused the husband to get home two days later than he would have done if the telegram had been delivered within the time it should have been, with reasonable diligence, and that by reason of such delay the *feme* plaintiff suffered great mental anguish.

It may be that upon the coming in of the defendant's evidence the jury may draw a totally different inference as to the truth of the occurrence; but upon the uncontradicted evidence for the plaintiff the Court could not hold, as a proposition of law, that the plaintiff has not suffered any legal wrong. The negligent delay and the mental suffering are in evidence, and the wifely solicitude in calming her husband's anxiety by stating that she was not then dangerously ill, did not authorize the defendant to deliver the telegram at its leisure, nor

does it negative the evidence of the mental suffering of the *feme*
(26) plaintiff, as the natural consequence of her husband being unaccountably (to her) delayed two whole days after she had a right to expect him, in response to her summoning him home by telegram to her sick bedside, and her being deprived of the comfort of his society and care in time of illness.

New Trial.

CONNOR and BROWN, JJ., dissenting.

Cited: Helms v. Tel. Co., 143 N. C., 394; *Hocutt v. Tel. Co.*, 147 N. C., 190.

SMITH v. LUMBER COMPANY.

(Filed 11 September, 1906.)

Master and Servant—Contracts—Payable by Instalments—Discharge of Servant—Remedies—Damages—Judgments—Estoppels—Evidence—Harmless Error—Summons, when Issued.

1. A summons is issued when the Clerk delivers it to the Sheriff to be served, and where there is no intermediary, but the process is delivered by the Clerk himself to the officer, the notation of the officer on it as to the date of its receipt by him must be the controlling evidence as to when it was issued.
2. Where the plaintiff was employed by the defendant for four months at $75 per month, and was paid the wages for the first month and was then discharged without cause, a judgment obtained for the second installment upon a summons issued after the second and third instalments were due is a bar to an action for the recovery of the third instalment, but is not a bar as to the fourth instalment, which was not due at the time of the institution of the former suit.
3. When the contract is entire and the services are to be paid for by instalments at stated intervals, the servant or employee who is wrongfully discharged has the election of four remedies:
   (*a*) He may treat the contract as rescinded by the breach and sue immediately on a *quantum meruit* for the services performed, but in this case he can recover only for the time he actually served
   (*b*) He may sue at once for the breach, in which case he can recover only his damages to the time of bringing suit.
   (*c*) He may treat the contract as existing and sue at each period of payment for the salary then due.
   (*d*) He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment.

4. A prayer to charge the jury that "It was the duty of the plaintiff to seek employment during the months he said he was employed by the defendant after the discharge, and if he simply did nothing and did not try to get other employment, he cannot recover anything of the defendant," was properly refused, as the duty of the employee to seek other employment could be considered only in diminution of damages.

5. Where in considering an exception to the exclusion of certain evidence (which in this case was cumulative), this Court is convinced that substantial justice has been done and that the evidence, if it had been admitted, would not have changed the result, a new trial will not be granted.

ACTION by John T. Smith against Cashie and Chowan Railroad and Lumber Company, heard by *Shaw, J.*, and a jury, at (27) the May Term, 1906, of BERTIE, upon appeal from a justice of the peace.

The plaintiff sued for $150. He alleged that on 5 February, 1904, the defendant employed him for four months at $75 per month to inspect and buy lumber, and his service began on that day. The defendant paid the wages for the first month and then discharged the plaintiff without cause, its superintendent stating that they did not intend to buy any more lumber. The plaintiff tried to get other employment, but failed, and earned but a few dollars during the last three months. He sued for the second installment of his wages and recovered judgment 6 May, before a magistrate, for $75. The summons in the case was dated 4 May, 1904, and was received by the sheriff on 5 May, as appears by his entry on the process and by other evidence. There was no inconsistent evidence as to when it was issued. (28)

The defendant contended and introduced evidence to show that the hiring was for one month only, for which the plaintiff was paid. Its superintendent testified by a deposition that the plaintiff was hired not for four months, but for one month, and that he claimed but one month's salary when they settled, "and he went out of the office apparently satisfied." On objection by the plaintiff the words above quoted were excluded by the Court, and the defendant excepted. There was other evidence not necessary to be stated. The issues with the answers thereto, were as follows:

1. Did the defendant hire the plaintiff for the term of four months at $75 per month? Yes.

2. Did the defendant unlawfully discharge the plaintiff from its employment after the first month? Yes.

3. Is the defendant indebted to the plaintiff; if so, in what sum? $150 and no interest.

4. Was the cause of action, or any part thereof, heretofore adjudged in the record (which is) pleaded as an estoppel in this cause? No.

The defendant's counsel requested the following instruction:

1. If the jury believe the evidence, this cause has been adjudicated, and they will answer the last issue "Yes."

2. When the plaintiff sued for and collected his one month's wages under his judgment, he was by that estopped to sue for the balance, because his contract was entire and not divisible, and suing for less than the amount of the whole claim was in law an adjudication of what was due him in full.

3. It was the duty of the plaintiff to seek employment during the months he said he was employed by the defendant after the discharge, and if he simply did nothing and did not try to get other employment, he cannot recover anything of the defendant.

The instructions were refused, and the defendant duly ex-
(29) cepted.

It appears in the case that the Court stated the contentions of the parties and charged the jury fully upon the issues; the only part of the charge sent to this Court, and stated to be the only material part, being as follows:

"As to the first issue, the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the employment was for four months, and if the plaintiff has so satisfied the jury, you will answer the first issue 'Yes'; otherwise, 'No.'

"2. If you answer the first issue 'No,' that will end the case, and you need not answer the other issues.

"3. If you answer the first issue 'Yes,' you will then consider the second issue as to whether the defendant unlawfully discharged the plaintiff.

"4. The burden of the second issue is upon the plaintiff to show by the greater weight of the evidence that he was discharged by the defendant; and if you find that he was discharged, the law puts the burden of showing cause for the discharge upon the defendant. There is no evidence before you tending to show cause for the discharge, and you will consider this in making up your verdict upon the second issue. (The defendant excepted only to the instruction that there was no evidence before the jury tending to show cause for the discharge.)

"5. If the jury believe the evidence, they will answer the fourth issue 'No.'"

The defendant excepted.

Judgment was entered upon the verdict, and the defendant appealed.

Day, Bell & Dunn, J. B. Martin and *Murray Allen* for the plaintiff.
St. Leon Scull and *Winston & Matthews* for the defendant.

WALKER, J., after stating the case: When this case was be- (30) fore us at the last term (140 N. C., 375), it appeared by admission of the parties that the plaintiff had brought suit before the magistrate after 10 June, 1904, and at a time when the last instalment had fallen due; and it was then contended with much force that having sued for one of the instalments, when all were due, and recovered judgment, the plaintiff could not sue and recover for any other instalment, because, to prevent unnecessary and oppressive litigation, the law construes the former adjudication to be a full satisfaction and a complete bar. The position, whether intrinsically correct or not, seems to be sustained by high authority. *Jarrett v. Self,* 90 N. C., 478; *Kearns v. Heitman,* 140 N. C., 332; *McPhail v. Johnson,* 109 N. C., 571; 2 Pearsons Cont., 646; Freeman Judgments, sec. 240; *Ref. Dutch Church v. Brown,* 54 Barb., 191; 24 Am. and Eng. Enc. Law (2 Ed.), p. 791, and note 1. It now appears from the testimony that the suit before him was actually commenced on 5 May, and the defendant contends that having recovered judgment, if for but the amount of one instalment, the plaintiff cannot again sue for the other instalment which was then due, upon the principle just mentioned, and that the judgment should be reduced by the amount of one instalment, or $75. So that we must now decide the question.

The summons in the suit before the justice of the peace was dated 4 May and was received by the Sheriff for service 5 May. A civil action is commenced when the summons is issued, and the presumption when nothing else appears is that the summons passed from the control of the Clerk and was delivered to the Sheriff, and therefore issued, at the time when the Sheriff received it, and this is generally determined by the entry on the process of the date it was received by the Sheriff, he being required by statute to make such an entry. Revisal, sec. 433. As it has been material again to consider this matter, it is well at this time to correct any misapprehension that may have re- (31) sulted from the use, in *Houston v. Thornton,* 122 N. C., at p. 375, of the following expression: "The presumption that it (the summons) was issued when it bears date is not rebutted by the bare fact of the date of the Sheriff's endorsement of its receipt by him," citing *Currie v. Hawkins,* 118 N. C., 593. The Court had reference to the special facts of the case then being decided as well as to those of the case cited, for, in both, it appeared that the Clerk had given

the process to a third person for the purpose of being delivered to the Sheriff, and this fact sustained the presumption, which was not therefore overcome by the Sheriff's entry. Judicial expressions should always be construed with reference to the context. As said in *Webster v. Sharpe,* 116 N. C., 466, a summons is issued when the Clerk delivers it to the Sheriff to be served. See also *Houston v. Thornton, supra.* This being so, at least where there is no intermediary, but the process is delivered by the Clerk himself to the officer, the notation of the officer on it as to the date of its receipt by him must be the controlling evidence as to when it was issued.

In this case the suit was commenced on 5 May, as the Sheriff received the summons from the Clerk on that day. The plaintiffs term of service began on 5 February and the third month expired on 4 May, so that the salary of the third month was due immediately on the expiration of that day, and suit could, therefore, have been brought for the same on the fifth day of that month. "Where wages are by express stipulation payable at stated periods during the term, the wages for any period are due and payable immediately on the completion thereof." 20 Am. and Eng. Enc. (2 Ed.), 21; *White v. Atkins,* 8 Cush., 367-371; *Harris v. Blen,* 16 Me., 175; *Green v. Robertson,* 64 Cal., 75. As one full month's work had been performed, one full month's pay was then due and demandable. The plaintiff, therefore, could have recovered the amount of both the second and third
(32) instalments in the suit brought on 5 May, and is consequently barred from the recovery of either one of them in this action, under the principle settled by the authorities above cited.

The defendant also contended that the plaintiff could not sue on the successive instalments as they fell due, but must sue on a *quantum meruit* or for damages for the breach of the contract, and that his recovery for the one instalment was a complete satisfaction of all damages arising from the breach of the contract, as his recovery in either of the other two forms of action would have been. We do not assent to this proposition in its entirety. Numerous and well-considered authorities hold, in accordance with what we considered the correct principle and the better reason, that when the contract is entire and the services are to be paid for by instalments at stated intervals, the servant or employee who is wrongfully discharged has the election of four remedies: 1. He may treat the contract as rescinded by the breach, and sue immediately on a *quantum meruit* for the services performed; but in this case he can recover only for the time he actually served. 2. He may sue at once for the breach, in which case he can

recover only his damages to the time of bringing suit. 3. He may treat the contract as existing and sue at each period of payment for the salary then due. (We do not consider the right to proper deduction in this case, as it is not now presented.) 4. He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment. This rule as thus stated is supported by the great weight of authority: 14 A. and E. Enc. (1 Ed.), 797; 20 A. and E. Enc. (2 Ed.), 36, *et seq.;* and it is clearly recognized and adopted by this Court in *Markham v. Markham,* 110 N. C., 356. The difficulty in establishing the right to sue upon the (33) contract for the whole amount of the wages originated in the doctrine of "constructive service." The law, in theory at least, required that the servant wrongfully dismissed before the expiration of his term must keep himself in readiness at all times to perform the required service, and an averment that he had done so was necessary in an action on the contract for a breach. By a fiction of the law his constant readiness to perform was considered equivalent to actual service, so as to enable him to recover the full amount of the wages, the same as if the service had been actually performed, and it was so construed by the courts. But this principle was inconsistent with the rule as to the measure of damages, which permitted the master to show in diminution of the servant's recovery for wages that the latter either obtained or could have obtained other employment, inasmuch as to be always strictly ready he must be always idle. The two requirements of the law could not reasonably and logically coexist, and for this reason the doctrine of constructive service, first asserted by *Lord Ellenborough* in *Gandell v. Pontigney,* 4 Camp., 375, was repudiated in later cases and the servant's remedy was restricted to either a *quantum meruit* (if he elected to rescind the contract) or an action for the damages resulting from the breach, and his right to an action for the wages, treatment the contract as constructively performed, was denied. *Goodman v. Pecock,* 15 Q. B., 74; *Cutter v. Powell,* 2 Smiths L. C. (9 Ed.), 1245; 20 A. and E. Enc. (2 Ed.), 40. This Court recognized the doctrine of constructive service in *Hendrickson v. Anderson,* 50 N. C., 246, and *Brinkley v. Swicegood,* 65 N. C., 626, to the extent of expressly asserting the right of the servant to recover the full amount of the wages for the unexpired portion of the term, provided his action is

brought after the end of the term, even though there had been
(34) no actual service during that time.

Costigan v. R. R., 2 Denio, 609, is cited and approved in *Hendrickson v. Anderson,* and in that case the doctrine is thus stated: "Where one contracts to employ another for a certain time at a specified compensation and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time." The Court also there holds that the said amount may of course be diminished by showing that the servant has during the same period engaged in other business. This rule for the measure of the damages accruing for a wrongful dismissal is surely the equitable and, we think, the correct one, whatever may be the true principle upon which it should be held to rest. If the doctrine of constructive service is illogical, in view of the right of the master to have the damages diminished by showing that the servant engaged in other business, and consequently was not always ready to perform the service, it does not follow that the rule itself as to the damages is not a sound one, for other cogent reasons may and have been assigned in its support. As the master has, by his wrong in breaking the contract, prevented the servant from completing the work for which he had stipulated, the measure of the servant's damages would be the amount which he will actually sustain in consequence of the defendant's default; and that is the amount of the wages he would have earned had the contract been fulfilled. Laying down the rule in *Hendrickson v. Anderson, supra,* this Court said: "It would seem to be a dictate of reason that if one party to a contract be injured by the breach of it by the other, he ought to be put in the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vin-
(35) dictive damages. The true rule, then, is to give him neither more nor less than the damages which he has actually sustained; and so we find the authorities to be." The Court then holds, as we have shown, that the damages are the full amount of wages for the whole time, less the amount received or which could have been realized from other employment. The right to full damages, measured by the wage-rate, arises from the master's breach, and his wrongful act in preventing the servant from performing the service. He will not be permitted to take advantage of his own wrong and to allege, in his defense and to defeat a clear right, a non-performance by the servant which has proceeded from his own unlawful act, especially when he at

the same time insists that the servant should have obtained other employment in order to reduce the damages.

We have held that a party to a broken contract, who is unable to fulfill it by reason of the wrongful act of the other party, may recover for profits lost as well as gains prevented, if they are reasonably certain, such as those to be received from outstanding contracts for the sale of goods at a fixed price. *Machine Co. v. Tobacco Co.*, 141 N. C., 284; *Johnson v. R. R.*, 140 N. C., 574. And yet, in that class of cases, the service contracted for was not fully performed. So here, the employee, by no fault of his own, loses his wages, which are fixed by the contract, and their amount should be the true measure of his damages under the ordinary rule obtaining in the case of other contracts. He could not recover these damages before the expiration of his term because of the other rule, that the master is entitled to diminish them by the amount he may or could have received from other employment, which cannot be determined until the full period is at an end. Before that time the amount would be speculative. But at the end of the term, there is no sound reason why he should not be entitled *prima facie* to the full amount of wages, unless we make his condition worse than it would have been if the contract had not been broken by (36) the master. It would be an aggravation of the latter's wrong if we hold that he may profit by it, and it would further present the temptation to break such contracts. Every dictate of reason and right requires that the rule should stand, even if the original reason assigned for it must fail. We may discard the reason as illogical, but not the rule, which is necessary to do justice and to promote fair dealing. The doctrine, as we have stated it, has been accepted by this Court, as the authorities we have cited show, and we believe that it is sustained by the best-considered cases in other jurisdictions. In 20 A. and E. Enc. (2 Ed.), 37, it is said: "Where the action is brought subsequent to the expiration of the term of employment, the decisions are practically unanimous to the effect that the measure of damages is *prima facie* the wages for the unexpired portion of the term, this amount to be diminished by such sums as the servant has earned, or might have earned by a reasonable effort to obtain other employment in the same line of business." *Wilkinson v. Black*, 80 Ala., 329; *McMullen v. Dickinson Co.*, 27 L. R. A., 409; Hale on Damages, 67. Numerous cases are collected in the notes to be found in 20 A. and E. Enc. (2 Ed.), 37, and we refer to them without any particular enumeration here.

In *Pierce v. R. R.*, 173 U. S., 1, the Court, applying the rule that, in an action for breach of contract the amount which would have been

received if the contract had been kept is the measure of damages, if it is broken, held that the servant is entitled to receive the full amount of wages, subject to proper deductions, even when the suit was brought for the breach prior to the expiration of the full period of service. When there is a breach of the contract by the master a liability arises out of his implied undertaking to indemnify the servant against all loss resulting from his wrong, and this indemnity may accrue (37) to the servant by instalments and is continuing in its nature. 27 L. R. A., 409. The fact that the plaintiff sued and recovered judgment for the second instalment is no bar to this suit as to the one remaining, or the last instalment, for the latter was not then due, and that judgment settled nothing except as to the second and third months' wages, which were then due and unpaid. It would be strange indeed if the plaintiff could be barred by that judgment when at the time it was obtained he could not have sued for the last instalment. The law is the other way. It has been so expressly decided. *Armfield v. Nash,* 31 Mass., 361; *Isaacs v. Davies,* 68 Ga., 169; *La Courseir v. Russell,* 82 Wis., 265; *Strauss v. Meerteif,* 64 Ala., 299. The principle results from the right to sue as the instalments become due. *Markham v. Markham, supra.* This disposes of the first and second prayers for instructions.

The instruction requested in the third prayer was properly refused, as the duty of the employee to seek other employment could be considered only in diminution of damages. He might not have been able to get employment, if he had made proper effort, or not as good wages. "A recovery, of course, cannot be entirely defeated by showing that the servant obtained or could have obtained other employment; but it is always competent for the master to show these facts in mitigation of damages, the burden of proof in all cases being upon him." 20 A. and E. Enc. (2 Ed.), 37. Plaintiff was entitled at least to nominal damages for the breach. *Ib.,* note 3.

Assuming the evidence ruled out by the Court to be competent, we do not think its exclusion was anything more than harmless error. No substantial wrong has been done to the defendant. The witness Pennington had already testified that the plaintiff contended only for one month's salary; and if this is so, he must necessarily have been satisfied when he received it; so that the statement, that he ap- (38) peared to be satisfied, was merely cumulative and added no more weight to the testimony than it already had. *Woolen v. Outlaw,* 113 N. C., 281. Besides, we are convinced that substanial justice has been done and that the evidence, if it had been admitted,

would not have changed the result. *Conly v. Coffin,* 15 N. C., 563; *Whitford v. New Bern,* 111 N. C., 273.

The other exceptions are without merit, and perhaps need no special consideration. We will add, though, that upon careful examination we have not been able to find any evidence tending to show good ground for the discharge; and, as to the form of the summons, treated as a complaint, if the evidence did not correspond with it, there was only a variance, an objection to which cannot be raised here for the first time. But the form of the summons was sufficient and there was no substantial variance.

The Court committed an error in its charge to the jury upon the fourth issue, as the suit before the Justice constituted a bar to the recovery of the third instalment of wages, which under the erroneous instruction was included in the verdict and became afterwards a part of the judgment. There must be a new trial as to the fourth issue, unless the plaintiff thinks he will be unable to show a state of facts different from those which now appear in respect to the actual time of issuing the summons in the former suit, and agrees before the opinion is certified to the Court below to remit the amount of the third instalment, in which case the judgment will be reduced accordingly, and, as thus modified, it will be affirmed and so certified.

New Trial.

Cited: Ivey v. Cotton Mills, 143 N. C., 198; *Emry v. Chappell,* 148 N. C., 330; *S. c.,* 148 N. C., 335; *Currier v. Lumber Co.,* 150 N. C., 694; *Farris v. R. R.,* 151 N. C., 492.

LILES v. LUMBER COMPANY. (39)

(Filed 11 September, 1906.)

Lumber Roads—Fellow-Servant Act—Defective Couplers—Orders—Negligence—Contributory Negligence—Continuing Negligence—Proximate Cause—Instructions—Corroborating Testimony—Exceptions and Objections—Briefs.

1. The provisions of the Fellow-Servant Act, Rev., sec. 2646, apply to corporations operating railroads for the purpose of moving logs.
2. Where an employee of a lumber road, acting under the order of the general superintendent, was injured in coupling defective cars of which he had no notice until it was too late to escape, there was no error in refusing a motion of nonsuit.
3. The defendant's contention that, failing to examine the coupler and ascertain its defective condition before obeying the order of the general superintendent was not only negligence, but, as a matter of law, the the proximate cause of the injury can not be sustained.

4. An instruction that if when the plaintiff attempted to couple the cars and was injured, great danger in doing so was manifest to him, he would be guilty of contributory negligence, though he was told to make the coupling by defendant's superintendent, but if he reasonably believed there was no danger and did only what a prudent man would have done under similar cirsumstances, then he was not guilty of contributory negligence: *Held*, there was no error of which the defendant could complain.

5. In an action by an employee of a lumber road for an injury alleged to have been sustained from a defective coupler the use of a defective coupler was a violation of a positive duty, and in connection with an express order of the superintendent to make the coupling was continuing negligence, and the *causa causans* of the injury.

6. Where the evidence was conflicting as to whether the plaintiff, in going between the cars to make the coupling, was disobeying orders, the Court properly submitted this question to the jury.

7. The fact that an assistant of defendant's superintendent, in a general instruction, told plaintiff not to couple cars would not relieve plaintiff of the duty of obeying express order given by the superintendent.

8. In construing an instruction given by the trial Judge, the entire charge will be examined and language excepted to read in connection with the context.

9. Where several witnesses testified to certain facts which the trial Judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, under Rule 27 of this Court an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class.

ACTION by J. H. Liles against Fosburg Lumber Company,
(40) heard by *Webb, J.*, and a jury, at the November Term, 1904, of HALIFAX.

This is an action for the recovery of damges for personal injuries sustained by plaintiff while in the defendant's employment. It is admitted that defendant corporation was, at the time of the accident, "operating its railroad in carrying logs for mill purposes." Plaintiff testified that he was employed by defendant to oil cars, number cars, and change switches. That he was working under the direction of Mr. Ferrall, who was general superintendent, employed plaintiff, managed and directed all the work. At the time of injury plaintiff had been in defendant's employment twelve or fourteen days, was inexperienced in railroad work. Log-train No. 1 was coming in; plaintiff had been oiling the car; Ferrall told him to put the load on the sidetrack—there were three other loaded cars there. When the train came in plain-

tiff changed the switch and started back; Ferrall said that there was no pin in that car, to get one out of the rear car and put it in there. As he was trying to do so, he got mashed. Ferrall told plaintiff to get the pin out of the rear car and come and put it in the one which was backing up. That he tried to do so, but was hurt before he could put it in. Was in the act of putting it in, the car was moving back, the logs extended beyond the end of the car. The brace that held up the draw-heads was broken, and one was dropped down, (41) leaving it so that the other draw-head would pass until it struck the pin. They lapped so that one would run into and strike the pin, and that caused the cars to come together. The logs were not loaded even; some extended further over end of car than others, "two feet, or something like that." Plaintiff did not notice whether they were properly loaded until after he was injured. He says: "The time the car was up there, it was so soon on me that I did not have time to get out. I attempted to get back, but did not have time to do so before it was on me. I saw that the coupling was broken after I got in, but too late for me to get out. I do not know whether Mr. Ferrall knew of the condition of the coupling before the injury. He was present when I went in, looking at me; told me to get a pin and make the coupling. They were flat cars. Mr. Ferrall never said anything to me about coupling cars until the day I was hurt. I was hurt because the draw-head being dropped down let it come about two inches further than it would (otherwise) have done."

Plaintiff was asked: "If you had looked at these logs as they were loaded when you first went to the car, to couple it, could not you have told that they were improperly loaded?" "I did not notice particularly." "I ask if you had looked." "If I had looked I reckon I could have seen it." "If you had looked at the logs you could have told that they were improperly loaded?" "If I had any experience. I could not have told, because I did not have any experience in coupling."

There was evidence on behalf of defendant contradicting plaintiff's statement that he was ordered by Mr. Ferrall to make the coupling. There was evidence that plaintiff made statements both corroborating and contradicting his testimony. No exceptions appear in the record in regard to the testimony respecting the extent of the injury or measure of damages. The defendant submitted a number of prayers for special instructions. The exceptions to the ruling of the Court are set out in the opinion. There was judgment for the plain- (42) tiff, upon the verdict, to which defendant excepted and appealed.

S. G. Daniel, E. L. Travis, J. H. Kerr and *Claude Kitchin* for the plaintiff.

Day & Bell, Murray Allen and *B. G. Green* for the defendant.

CONNOR, J., after stating the case: While defendant noted several exceptions to ruling of his Honor upon the admission of testimony, they are not noted or urged in the brief, and, under the rule of this Court, are treated as abandoned. Rule 4, 140 N. C., 666.

The first exception insisted upon is pointed to the refusal of the Court to charge the jury that, upon all of the evidence, the plaintiff is not entitled to recover. This instruction assumes that the jury should find that the transaction occurred in the manner testified to by plaintiff. Defendant contends that the testimony construed in the light most favorable to plaintiff shows, as matter of law, contributory negligence. The defendant overlooks the decision of the Court at the last term in *Hemphill v. Lumber Co.*, 141 N. C., 487, in which it is held that the provisions of Revisal, sec. 2646, apply to corporations operating railroads for the purpose of moving logs. The relative rights and liabilities of the parties to this action are governed by the statute, as construed by the Court, in a line of cases beginnig with *Greenlee v. R. R.*, 122 N. C., 977. In *Elmore v. R. R.*, 132 N. C., 865, the question was considered and, following *Mason v. R. R.*, 111 N. C., 482, it was said that when an employee, acting under the order of the conductor, was injured in coupling defective cars of which he had no notice until it was too late to escape, it was error to withdraw the case from jury. There was evidence on the part of plaintiff that
(43) the coupling was defective, and that such defect was the proximate cause of the injury; that he was ordered by the general superintendent to make the coupling. The defendant's contention that failing to examine the coupler and ascertain its defective condition before obeying the order was not only negligence, but, as matter of law, or legal inference, the proximate cause of the injury, cannot be sustained. If it had appeared that he knew of such defect, and that the chances of being injured in obeying the order were greater than in doing so safely, and that, with such knowledge, he took the chances, under the ruling of this Court in *Elmore's case, supra,* he could not recover. The use of a defective coupler was a violation of a positive duty, a constant menace to employees, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the *causa causans* of the injury. The principle upon which *Greenlee's case* and a number of others are based has been

repeatedly anounced and uniformly applied by this Court. His Honor correctly declined to give the instruction requested. In this connection he charged the jury:

"It was the duty of the plaintiff to have acted as a prudent man would have acted under similar circumstances, taking into consideration all the conditions and circumstances at the time. If, at the time the plaintiff attempted to couple the cars and was injured, great danger in doing so was manifest to him, but, notwithstanding such manifest danger, he did attempt to couple the cars and in doing so was injured, then the Court charges you he was guilty of contributory negligence, notwithstanding you may find that he was told to do so by the witness Ferrall, the defendant's agent and manager. If you find that at the time the plaintiff went in between the cars to make the coupling, or attempted to make it, he reasonably believed that there was no danger in doing so, and did only what a prudent man would have done under similar circumstances if he was coupling cars, then the Court charges that he was not guilty of contributory negligence, and (44) you should answer the second issue 'No,' that is, the issue of contributory negligence—provided you find from the greater weight of the evidence that he was ordered to make the coupling by the defendant."

There was no error in this instruction of which the defendant can complain.

We adhere to the conclusion reached by us in *Hemphill's case, supra,* that roads operated for hauling logs come within the beneficent provisions of Revisal, 2646. The statute is remedial, being for the protection of employees on railroads from injury by reason of defective machinery, ways or appliances. We think that the evils intended to be remedied, and the protection extended, as well as the language of the statute, include all corporations owning or operating railroads. The question is so fully discussed and the authorities cited by *Clark, C. J.,* in *Hemphill's case, supra,* that it is unnecessary to do more than refer to the opinion therein. For the same reason the defendant's eighth exception cannot be sustained.

The twelfth exception is directed to the following instruction given to the jury: "That if the jury shall find from the evidence that the defendant's car was equipped with a broken draw-head, so that the draw-heads of the two cars passed each other instead of meeting when they were brought together for coupling and permitted the cars to come so close together as to crush a person coupling them, that would be negligence; and if they find from the evidence that the

defendant so loaded its logs on said cars that the ends projected so far over the ends of the cars that when they were brought together to be coupled the ends of the logs on the two meeting cars came so close together as to crush a person coupling the cars, that would be negligence—provided these defects were known to the defendant, or could have been known by reasonable care and diligence. If you find (45) from the evidence that the plaintiff, in obedience to the order of Ferrall, the superintendent of the defendant company, undertook to couple said cars, and on account of the broken condition of the draw-head and the negligent manner in which the logs were loaded, was caught and crushed between them and injured, you will answer the first issue, 'Yes.'"

Defendant says that there is no evidence that the defect in the draw-head alone would have caused the injury. Plaintiff said: "I was hurt because the draw-head, being dropped down, let it come two inches further than it would have done." The plaintiff simply meant to say, as we contrue his testimony, that the extension of the logs would not have injured him if the coupler had not been broken as described by him. This is perfectly consistent with the conditions as he described them. Two negligent acts may so operate as to become jointly the proximate cause of the injury.

Defendant says that there was evidence that plaintiff was told not to couple cars; and if the jury believed this, the plaintiff, in going between the cars to make the coupling, was disobeying orders, and that in such case defendant owed him no duty, citing *Setwart v. Carpet Co.*, 138 N. C., 60. His Honor clearly recognized this to be the law, and made the defendant's liability depend upon whether plaintiff attempted to couple the cars in obedience to the order of the superintendent.

W. T. Liles, an assitant of Ferrall, says that when he put plaintiff to work he instructed him not to couple cars. Plaintiff denies this. It therefore became a question for the jury. If Liles did, in a general instruction, tell plaintiff not to couple the cars, it would not relieve him of the duty of obeying an express order given by the general superintendent, the superior of both. In several parts of the charge, which is very full, his Honor instructed the jury that they must find that plaintiff attempted to make the coupling in obedience to Fer- (46) rall's order before they could answer the first issue in the affirmative. At one time his Honor says: "Did the plaintiff go in there without being ordered by Ferrall? Did he go in there of his own volition? If he did, you will answer the first 'No.'" In another portion of his charge, after presenting certain phases of the case to

which there is no objection, he concluded: "If plaintiff undertook to couple said cars because he was so ordered by said superintendent, and was injured as alleged, he is entitled to recover, and you will answer the first issue 'Yes.'"

Defendant excepted to the words "he is entitled to recover." It is too well settled to require or justify the citation of authority that in construing an instruction given by the trial Judge, the entire charge will be examined and language excepted to read in conection with the context. If we were required to disassociate the language excepted to, we would be compelled to sustain the exception. It is elementary that such an instruction, standing alone, would be error; but it would do violence to all fair rules of construction and attribute to the jury a degree of ignorance rendering them unfit for the important duties imposed upon them by the law, to suppose that they did not understand that the Judge was referring only to the first issue, as he expressly stated. In that connection and at that time no reference whatever had been made to the question of contributory negligence. While we do not commend the use of the expression, we cannot find in it, as used by his Honor, reversible error.

After stating an hypothesis which if found to be true, his Honor told the jury they should answer the first issue in the negative, he said: "But if you find from the greater weight of the evidence that Ferrall told this man to go in and make this coupling, why then you will consider the second issue, 'Was the plaintiff guilty of contributory negligence?' That means, gentlemen, was his negligence the proximate cause of his injury?"

To this language defendant excepts. The criticism is that (47) the language makes the defendant's liability depend entirely upon the question whether defendant's superintendent ordered the plaintiff to make the coupling, regardless of all other questions. Very much testimony had been introduced tending to, and if believed, clearly contradicting plaintiff in that respect. Ferrall denied that he had given such order. Several witnesses had sworn that plaintiff had made contradictory statements. Dr. Picot and others had testified to corroboratory statements. It is evident that upon the first issue this question was the principal fact in controversy. Before using the language excepted to, his Honor had fully stated the contentions of the parties and the essential elements upon the existence of which the answer to the first issue depended. His Honor again stated the basis of plaintiff's claim in language to which there was an exception which was abandoned in this Court. We can not think that the jury could have mis-

understood his Honor or been misled by his language. The exception does not present the question decided in *Tillett v. R. R.*, 115 N. C., 662; *Williams v. Haid,* 118 N. C., 481. In those cases separate and distinct propositions of law, one of which was erroneous, were laid down by the Court.

Plaintiff introduced Dr. Picot to prove declarations made by him after the injury, in regard to the manner in which it occurred. He also introduced his father and another witness who were present and heard other declarations.

At the time all of this class of testimony was admitted his Honor stated that it was competent only for the purpose of corroboration. When he charged the jury, reciting Dr. Picot's testimony, he repeated that it was to be considered only for that purpose, but failed to do so in reciting the testimony of the other witnesses.

The exception is disposed of by Rule 27, 140 N. C., 662: "When testimony is admitted, not as substantive evidence, but in corrob-
(48) oration or contradiction, and that fact is stated by the Court, when it is admitted, it will not be ground for exception that the Judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instructions."

Defendant suggests that after stating to the jury that Dr. Picot's evidence was to be considered only as corroborative, and failing to repeat the same in connection with the testimony of the other witnesses, was calculated to impress the jury with the belief that they could consider such testimony as substantive evidence. We can not think so. If such impression was made on the mind of counsel at the time, he should have requested the Court to say to the jury that the same rule applied to all of the testimony of that class. We do not doubt that his Honor would have promptly done so. The exception can not be sustained.

The record contains a number of exceptions to his Honor's charge, all of which, except those discussed herein, were abandoned.

We have examined the entire charge and find no error of which defendant can complain. As his Honor repeatedly told the jury, the principal controversy in respect to the facts was whether the plaintiff was ordered by the defendant's superintendent to make the coupling. That question was fairly submitted, and upon the instructions given the jury they found for the plaintiff.

No Error.

Cited: Twiddy v. Lumber Co., 154 N. C., 240; *Speight v. R. R.,* 161 N. C., 85.

BANKS v. LUMBER COMPANY.

(Filed 18 September, 1906.)

Deeds—Contracts—Construction—Evidence—Custom.

1. The construction of a written contract, when its terms are unambiguous, is a matter for the Court.
2. A deed conveying all "the pine timber at and above the size of twelve inches in diameter *at the base* when cut now standing or growing" on certain land, includes all trees measuring twelve inches in diameter *at the ground* at the time of actual cutting.
3. Where a deed conveyed all the trees measuring twelve inches in diameter at the base when cut, evidence merely that it was customary in that section to cut timber two feet above the ground, was properly excluded.

ACTION by J. B. Banks and others against Blades Lumber (49) Company, heard by *Long, J.*, and a jury, at the Spring Term, 1906, of JONES.

The deed under which the defendant claims conveys all "the pine lumber of every description at and above the size of twelve inches in diameter *at the base* when cut, now standing or growing, or which may be during the ensuing term of 15 years, lying, standing, or growing" on the tract described. The complaint avers that the defendant has cut timber on said tract "less than 12 inches in diameter at the base," and asks damages for the value of such timber.

The plaintiffs offered to prove a custom in that section to cut timber two feet from the ground. This was properly ruled out as irrelevant. It had no bearing on the controversy, which does not concern the height at which the trees were cut, but the size of those cut. The plaintiff then offered to prove that the defendant had cut pine timber on said land "less than twelve inches in diameter at about two feet from the ground," though it was that diameter at the ground. On objection, this was excluded. The Court intimated that it would in- (50) struct the jury "that the plaintiffs could not recover the value of any timber cut by the defendant measuring 12 inches in diameter at the base when cut, and that the jury should find the base of timber to be at the ground," and the plaintiffs took a nonsuit and appealed.

T. D. Warren, Simmons & Ward and *M. de W. Stevenson* for the plaintiffs.

No counsel for the defendant.

CLARK, C. J., after stating the case: The construction of a written contract, when its terms are unambiguous, is a matter for the Court. This contract specifies clearly the diameter and the point of the tree at which the diameter should be measured. In some of the cases which have come before this Court the contract has stipulated "not less than 14 inches in diameter 24 inches above the ground," as in *Lumber Co. v. Hines,* 126 N. C., 255; or "12 inches in diameter on the stump," *Hardison v. Lumber Co.,* 136 N. C., 173, and *Warren v. Short,* 119 N. C., 39; or timber that will "square one foot," *Whitted v. Smith,* 47 N. C., 36; and it may be that there have been others with a stipulation, like this, for the measurement to be taken "at the base." This is a matter of contract between the parties.

His Honor was correct in holding that "at the base" meant "at the ground." Webster defines "Base—that on which something is supported, as the base of a column, the base of a mountain," *i. e.,* at the foot of the column, at the foot of the mountain. The contract specifies timber "now standing or growing," *i. e.,* trees; and the base of a tree is "at the foot" of the tree. If the parties intended that the measurement should be taken "at the stump" or "24 inches above the
(51) ground," they have not so contracted. The contract being for measurement at the base it can not be contradicted by parol.

Certainly, evidence merely that it was customary in that section to cut timber two feet above the ground could not have that effect, for it was not shown nor offered to be shown that such cutting was usually under contracts stipulating for measurement "at the base," and that when cut under such contracts the "diameter at the base" was by general custom understood and taken to be twelve inches in diameter two feet above the ground. His Honor, therefore, properly held that "12 inches in diameter at the base" meant "at the ground." If this enabled the defendant to cut trees that might measure less than twelve inches in diameter two feet above the ground, it is because the plaintiff so contracted.

In *Hardison v. Lumber Co.,* 136 N. C., 173, we held that the natural meaning of the words "12 inches in diameter" applied to standing trees and would be "from outside to outside, bark included," in the absence of a general custom giving the words a different meaning. So, here, the natural meaning of "12 inches in diameter at the base" is "at the ground," and there was no evidence offered of a general custom that when those words used in a contract, "at the base" meant "two feet above the ground."

The words "when cut" only extends the time of the measurement,

which would otherwise refer to the diameter of the trees at the date of the contract, to the time of the actual cuting. *Hardison v. Lumber Co., supra,* and cases there cited. If the meaning of the contract was "12 in. diameter at the base of the log" when cut, then all the timber above the lowest cut would belong to the landowner if the upper cuts were less than 12 in. diameter at the big end.

No Error.

HOKE, J., dissenting.

Cited: Bridgers v. Ormond, 153 N. C., 114.

FOOT v. RAILROAD.

(Filed 18 September, 1906.)

Negligence—Wilful and Wanton—Issues—Inconsistent Verdict.

1. In an action for personal injuries, where the jury in answer to the first issue found that the plaintiff was injured by the negligence of the defendant, and in answer to the second issue, that said negligence was wanton and wilful, there is no contradiction in the issues or verdict.
2. Negligence may be defined as the failure to exercise the proper degree of care in the performance of some legal duty which one owes another, and causing unintended damage. The breach of duty may be wilful, and yet it may be negligent.

ACTION by Joseph Foot and wife against Seaboard Air Line (52) Railway, heard by *Shaw, J.,* and a jury, at the March Term, 1906, of HALIFAX.

Under the charge of the Court the jury rendered the following verdict upon the issues submitted:

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

2. If so, was the negligence wanton and wilful, as alleged in the complaint? Yes.

3. Was the release set out in the answer procured by undue influence, as alleged in the complaint? Yes.

4. What damage, if any, is the plaintiff Maria Foot entitled to recover? $500.

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

Claude Kitchin, W. E. Daniel and *E. L. Travis* for the plaintiffs.
Day & Bell and *Murray Allen* for the defendant.

HOKE, J. The only exception urged upon our attention or insisted upon by the appellant is that the verdict of the jury on the first
(53) and second issues is contradictory or inconsistent to such a degree that no judgment can be entered thereon, and a new trial must be awarded, to the end that the rights of the parties may be properly determined—the position being that the answer to the first issue establishes a negligent, and, to the second, a wilful, actionable wrong, and that the two can not coexist. The position may be sound under certain circumstances, but we do not think the facts bring the present case within the principle. It will be noted that both issues are addressed to the question of negligence, and the same negligence: 1. Was the plaintiff Maria Foot injured by the negligence of the defendant? and, 2. If so, was said negligence wanton and wilful?

In answer to the first the jury found that there was a negligent act of the defendant causing the injury, and in answer to the second, they fixed the character of the negligence, the issue having been evidently framed to enable the jury to say whether the wrongful act of the defendant was one which permitted the recovery of punitive damages; but both issues determine that the injury of the plaintiff was caused by the defendant's negligence, and there is therefore no contradiction in the issues or the verdict.

While the term "willful negligence" may not be strictly accurate—and many cases hold that willfulness repels or is inconsistent with the idea of negligence—it will be found that this is not necessarily or entirely true. All of the definitions of negligence contain the idea of inadvertence as one of its features, and inadvertence and willfulness are as a rule antagonized; but some of these definitions are inadequate or partially wrong, because they give this idea of inadvertence an erroneous placing. For the purposes of this discussion negligence may be defined as "the failure to exercise the proper degree of care in the performance of some legal duty which one owes another and causing unintended damage." The breach of duty can be and frequently is
(54) intentional and willful, and yet the act may be negligent; and it is only when there has been designed injury caused, or an intended damage done, that the idea of negligence is eliminated. Sherman & Redfield on Neg., secs. 3 and 4. Accordingly, we find that the term "willful and wanton negligence' is coming to be not infrequently used both in the decisions and text-books. 1 Thompson Com. on Neg.,

sec. 21; 2 Thompson, sec. 1626; *R. R. v. Bryan,* 107 Ind., 51; *Express Co. v. Brown,* 67 Miss., 261.

When the willfulness is referred to the breach of duty instead of the injury caused or damage done, the term is not improper; certainly, where the verdict of the jury on both issues fixes the act as negligent, the term "willful" does not establish such a necessary contradiction or inconsistency as requires or permits a new trial of the cause.

In this case the evidence tends to show that the breach of duty on the part of the defendant's agent or employee may have been, and very likely was, willful and intentional; but no one would conclude that these employees designed or intended to cause the injury or damage which followed. The verdict in *Brendle's case,* 125 N. C., 474, was construed and by fair interpretation was properly construed as establishing an intentional injury.

There is no error, and the judgment below is

Affirmed.

Cited: Stewart v. Lumber Co., 146 N. C., 51, 61, 68, 77, 102; *Jones v. R. R.,* 150 N. C., 481.

LANE v. INSURANCE COMPANY.

(Filed 18 September, 1906.)

Insurance—Rights of Delinquent Members—Reinstatement.

1. Where the plaintiff had forfeited his policy of life insurance in defendant's company by nonpayment of dues, and the policy provided that "Delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurances that they were in good health," and the plaintiff's application for reinstatement was accompanied by a certificate of his continued good health, but the officers declined to approve his application, giving reasons therefor: *Held,* the plaintiff cannot maintain this action for damages for the cancellation of his policy and the refusal to reinstate him, in the absence of any showing that the action of the officers was fraudulent or arbitrary.
2. A provision in a policy of life insurance that "Delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurances that they are in continued good health," is valid, and the approval required is not a mere ministerial act, but involves the exercise of judgment and discretion.

ACTION by W. B. Lane against Fidelity Mutual Life Insur- (55) ance Company, heard by *Jones, J.,* and a jury, at the October Term, 1905, of CRAVEN.

The plaintiff sued for the recovery of $2,000, alleged to be the damages sustained by the cancellation of his policy, and the defendant's refusal to reinstate him. He had taken a policy in the defendant company for $3,000 upon his life for the benefit of his wife, and failed to remit his annual dues which were payable 24 July, 1901. The policy provides as follows: "In the event of a failure to pay either dues or assessments the day on which they shall become due, then in either case this certificate of membership and policy of insurance shall be *ispo facto* null and void, and of no effect whatever." The policy having been forfeited or having become void, as plaintiff admitted, by non-payment of dues, he applied for reinstatement as a policy-
(56) holder and member of the company, under Art. IX of sec. 7 of the company's by-laws, which is as follows: "Delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurances that they are in good health." It is declared in the policy that the by-laws are made a part of the contract to the same extent as if they had been inserted therein, and the rights and obligations of the respective parties are to be determined with reference thereto.

The plaintiff's application for reinstatement was accompanied by a certificate of his continued good health. The president of the company and the manager of its Reinstatement Department wrote to the plaintiff and his agent, T. G. Hyman, that the company would not reinstate him, the president in his letter stating his reasons for thus exercising his judgment against the granting or "approving" the application. Among other reasons given was the advanced age of the applicant, he being then about 68 years old, and it is suggested that it would not conduce to his interest nor that of the company for him to be readmitted as a member, because at his age his insurability on the mutual plan had ceased and his only proper course would be to seek some plan by which he could combine insurance with investment.

The Court charged the jury that under the agreement the plaintiff had a right to be reinstated if he made application, and further, that if the jury should find from the evidence he did apply for reinstatement and furnished evidence of his good health, and the defendant refused to reinstate him, the first issue should be answered "Yes." Defendant excepted.

The statute of limitations was pleaded, and in support of the plea it was shown that the defendant had domesticated under Laws 1899, ch. 62. Plaintiff's right of action accrued on or before 20 August, 1901. He commenced suit against the defendant by issuing a

summons 15 January, 1902, which was served 16 January, 1902, (57) but no pleading of any sort was ever filed in the case. The plaintiff was permitted to testify, over the defendant's objection, that the said suit was brought upon the cause of action declared on in this suit.

The Court instructed the jury upon the second issue, as to the statute of limitations, that the action brought by the plaintiff 15 January, 1902, arrested the operation of the statute, and that plaintiff had one year within which to bring a new action after the nonsuit in that case which was entered 23 November, 1903, that the summons in this case was issued 11 November, 1904, or eleven days before the one year expired, and if the jury find that to be the case they will answer the second issue "Yes."

The issues submitted and the answers thereto were as follows:

1. Did the defendant wrongfully refuse to reinstate the plaintiff's policy? Ans.: Yes.

2. Did the plaintiff's alleged cause of action accrue within three years before the bringing of this action? Ans.: Yes.

The damages were left to be settled by agreement of the counsel, and were afterwards fixed at two thousand dollars.

The defendant, at the close of plaintiff's testimony and again at the close of all the testimony, moved for judgment as of nonsuit under the statute. The motion was overruled, and it excepted. The defendant also moved for a new trial upon exceptions filed to the rulings of the Court. Motion overruled, and the defendant again excepted. Judgment was entered on the verdict, and the defendant appealed.

W. D. McIver and *O. H. Guion* for the plaintiff.
Hinsdale & Son and *W. W. Clark* for the defendant.

WALKER, J., after stating the case: It is conceded that the plaintiff, under the terms of the contract of insurance, had forfeited his policy and consequently his membership, by the nonpayment of (58) his annual dues. He had no right to be restored to his former relation without the consent of the defendant, and then only upon the terms and conditions prescribed by it. There is a provision in this policy by which the plaintiff could be reinstated as a member and policyholder, but the condition precedent was imposed that his application for reinstatement shall first be approved by the president and medical director of the company, and that then he shall give reasonable assurance that he is still in good health.

It seems clear to us that the approval required in the case is something more than a mere ministerial act and involves the exercise of judgment and discretion. *State v. Smith,* 23 Mont., 44. The word "approve" is "to regard or pronounce as good; think or judge well of; admit the propriety or excellence of; be pleased with; commend." Webster's Intern. Dict.; 1 Words and Phrases, Jud. Def., 475. In the absence, certainly, of any showing that the approval of the officers has been fraudulently withheld and that their denial of the application is purely arbitrary, we do not see why their refusal to reinstate the plaintiff is not fatal to his right of recovery in this action. We are not called upon in this case to say under what circumstances, if any, we would decide that the action of the officers designated to pass upon the application of a delinquent member could be investigated, with a view to ascertain whether they have exercised their judgment properly or have unreasonably deprived him of any right to which he is entitled under the terms of his contract and the by-laws of the company. Where there is no suggestion of fraud or other legal wrong there can be no valid reason why the applicant should be permitted to attack the soundness of their judgment or the justness of their conclusion. We must hold it to be right, and unassailable in any such manner, because the parties have solemnly agreed that the matter shall be
(59) decided in that way, and we have no power to change their contract; and, besides, the power lodged with those officers is consistent with the purposes of the organization, and its exercise is necessary for the protection of the rights of other members and is not otherwise at all inconsistent with reason and justice. A provision for approval by officers most likely to know the facts is one which would naturally be suggested to those engaged in the prudent management of the affairs of the association as essential to conserve the interests of all parties concerned. The validity of such a clause in policies of this kind has been sustained by numerous authorities, and there are none, we believe, to the contrary. 2 Joyce on Ins., sec. 1276; 2 Bacon Ben. Soc., sec. 385c; *Butler v. Grand Lodge,* 146 Cal., 172; *Saerwin v. Jamon,* 65 N. Y., Suppl., 501; *Coniff v. Jamour, Ib.,* 317; *Brun v. Supreme Council,* 15 Col. App., 538; *McLaughlin v. Supreme Council,* 184 Mass., 298.

As the policy had been forfeited and plaintiff's connection with the defendant had been severed by his own default, he had no right to be readmitted to membership, but his reinstatement was then dependent upon the mere favor of the company, which could be extended to him subject to such terms as it deemed necessary for its protection. The

very question was decided in *Harrington v. Keystone Assn.*, 190 Pa., 77, in which it appeared that the executive committee was "empowered" to reinstate a delinquent member. The Court there said: "Conceding, for the purpose of argument, that her application was in time, and that she complied or was ready and willing to fully comply with all the terms and conditions of the by-laws above quoted, it does not follow that the committee was bound to reinstate her to membership in the association. While the by-laws empowered them to grant her request they were not bound nor could they be compelled to do so. It neither clothed her with any legal or equitable right, nor did it impose any duty or obligation on the association that would enable her, as a delinquent member, to maintain this action." (60)

While it may not be necessary for us to go to the extent the Court did in that case, we yet think our case is stronger than that one so far as the discretionary nature of the power is concerned. In *Lovick v. Life Assn.*, 110 N. C., 93 (cited and relied on by the plaintiff's counsel), the policy provided that the delinquent should have the "opportunity for reinstatement on similar conditions," the context showing clearly that the term "similar conditions" had reference to the payment of past-due premiums, assessments, and other indebtedness. By opportunity we mean "fit or convenient time; suitable occasion; time or place favorable for executing the purpose or doing the thing in question." Webster Int. Dict. It was, therefore, properly held in *Lovick's case* that if the plaintiff seasonably tendered the back dues, he was entitled to reinstatement, and, being thus entitled, he could recover the premiums paid, if the company refused to reinstate him. There was nothing in the policy then being construed which required the approval of the company or any of its officers as a condition precedent to the reinstatement or the exercise of any discretion or judgment.

The Court charged in this case that if the plaintiff applied for reinstatement and was refused after he had furnished proof of his good health, the first issue should be answered "Yes." In this there was error. The instruction excludes altogether from the consideration of the jury the question of approval by the president and medical director, and makes the recovery depend entirely upon the application and proof of good health, contrary to the very terms of the policy, and without any reference to the other valid provisions of the by-laws. This of itself entitles the defendant to a new trial. But as there was no evidence to warrant a verdict for the plaintiff, the Court should have granted the defendants motion to nonsuit, and dismissed the action, and there was error in refusing to do so. It is not neces- (61)

sary now to discuss the interesting question presented by the defendant's exception in regard to the statute of limitations, in view of the decision we have already made, that there has been no revival of the policy.

Error.

Cited: Page v. Junior Order, 153 N. C., 409.

EVANS v. FREEMAN.

(Filed 18 September, 1906.)

Contracts—Collateral Agreements—Parol Evidence—Negotiable Instruments—Endorsements.

1. The rule that when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it, applies only when the entire contract has been reduced to writing; and where a part has been written and the other part left in parol, it is competent to establish the latter by oral evidence, provided it does not conflict with what has been written.
2. In an action on a note, by which the maker promised to pay the sum of $50, being the purchase money for the right to sell a stock-feeder, it was competent to show that it was a part of the agreement at the time the note was given that it should be paid out of the proceeds of the sales of the stock-feeder.
3. An endorsement of "All the right, title, and interest" of the payee of a note does not in any way affect its negotiability, and the endorsee is deemed *prima facie* to be a holder in due course if he has possesison of the note under such endorsement.

ACTION by J. D. Evans against S. B. Freeman, heard by *Shaw, J.,* and a jury, at the May Term, 1906, of BERTIE.

Plaintiff sued upon a bond, dated 6 June, 1899, by which the defendant promised to pay to David A. Askew on 15 November, 1900, the sum of $50, being the purchase money for the right to sell
(62) an automatic stock-feeder in Hertford County. The bond was transferred to the plaintiff by the following endorsement: "For value received I herewith transfer and assign all my right, title and interest in and to the within note to J. D. Evans, 1 July, 1899. D. A. Askew."

Defendant resisted payment of the bond on the following grounds:

1. That Evans was not the owner of the note, and the endorsement to him was a mere subterfuge and sham to evade certain equities of the defendant against the note.

2. That Evans took said note, if at all, after the same had become due, and he was, therefore, fixed with knowledge of defendant's equities against said note.

3. When said note was given it was upon the express agreement and consideration that the payment thereof was to be made out of the proceeds of the sales of the patent right for which it was given; if there were no such sales there was to be no payment; and that if Evans owned the note he took it after maturity, and therefore with notice.

4. The defendant has paid thereon the sum of $19.50.

Before this Court it was further contended that the endorsement was of such a nature as to destroy the negotiability of the note and to subject it in the hands of the plaintiff, the holder, to all equities and defenses of the defendant, who was the maker; while the plaintiff insisted that the endorsement protected him against the defense set up, as to the mode of payment, because he purchased the note for value and without notice, and it was endorsed to him before it was due. There was evidence tending to show that the note was sold and endorsed to the plaintiff by Askew before its maturity, and also evidence to the contrary, that is, that the bond was seen in the possession of the payee without any endorsement, when it was overdue.

The defendant proposed to show by his own testimony that it was a part of the agreement at the time the note was given that it should be paid out of the proceeds of the sales of the stock- (63)
feeder. The Court refused to admit the evidence, and the defendant excepted.

The defendant's counsel requested the Court to charge the jury as follows: "The transfer on the back of the note is not such an endorsement as raises any presumption in favor of the holder of the note, and one who took it with such an endorsement holds it subject to the condition on which it was held by the original payee as to offsets and equities." The Court refused to give the instruction, and the defendant excepted.

The Court then charged the jury as follows: "1. The holder of a note means the endorsee of the note who is in possession of it. 2. If you believe the evidence you will find that the plaintiff is the holder of the note in controversy; and if you find this to be true, then there is a presumption that the plaintiff is a holder in due course, as every holder of a note is deemed *prima facie* a holder in due course. 3. If you find from the evidence that the plaintiff is a holder in due course, then the burden is on the defendant to rebut the presumption that it was endorsed before maturity. 4. If the note was transferred after maturity,

then the same defenses are open to the defendant against Evans as he would have against Askew; this note is payable in money, and the defendant could not show that it was to be paid in anything else against Askew, and of course not against Evans."

Exception was duly taken to each of the instructions so given by the Court.

The Court submitted the following issue to the jury: "Is the defendant indebted to the plaintiff, and if so, in what amount?" The jury answered: "Yes; in the sum of $50 and interest from the date of the note."

Judgment was entered on the verdict and the defendant appealed.

A. P. Godwin for the plaintiff.
Winston & Matthews for the defendant.

(64) WALKER, J., after stating the case: The Court erred in refusing to admit the testimony of the plaintiff in regard to the defense as to how the note should be paid. It is very true that, when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it; and this is so, although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best, and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all the provisions by which they intended or are willing to be bound. *Terry v. R. R.*, 91 N. C., 236. But this rule applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. In Clark on Contracts (2 Ed.), at p. 85, the principle is thus clearly and concisely stated: "Where a contract does not fall within the statute the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written can not be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." In such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other

fendant contended that the plaintiff was not a holder in due course, because by the terms of the endorsement he was put on notice of any and all equities and defenses of the maker as against the payee, Askew, the reason being that only the right and title of the payee was transferred and the endorsee acquired no better title under such an endorsement than his endorser himself had, but, *ex vi termini,* only his right and title, which were subject to the defense set up in this action.

There was at one time very strong and convincing authority for such a position, *Aniba v. Yeomans,* 39 Mich., 171, and there was much also said against it, 1 Daniel Neg. Inst. (5 Ed.), sec. 688c. But we think the controversy has finally been settled by the "Negotiable Instruments Law" as recently adopted, Rev., ch. 54.

Ours is a qualified endorsement, under Rev., sec. 2187, and while the endorser is constituted a mere assignor of the title to the instrument, it is provided that such an endorsement shall not impair its negotiability. A qualified endorsement may, by the express terms of that section, be made by adding to the endorser's signature the words "without recourse," or any words of similar import. It has been settled in commercial law that a transfer by endorsement of the "right and title" of the payee or an endorser to a negotiable note is equivalent to an endorsement "without recourse," and words such as were used in
(67) this case are, therefore, in their meaning or "import" similar to such an endorsement, and this is their reasonable interpretation. 1 Daniel, *supra,* secs. 700 and 700a; Norton on Bills and Notes (3 Ed.), 120; *Hailey v. Falconer,* 32 Ala., 536; *Rice v. Stearns,* 3 Mass., 225; Randolph Com. Paper (2 Ed.), secs. 721, 722, 1008; *Goddard v. Lyman,* 14 Pick., 268; *Borden v. Clark,* 26 Mich., 410; Eaton & Gilbert on Commercial Paper, sec. 61.

However the law may have been, it is now true, as it appears from the statute and the authorities just cited, that such an endorsement does not in law discredit the paper or even bring it under suspicion, nor does it in any degree affect its negotiability. The endorsee is supposed to take it on the credit of the other parties to the instrument, Rev., sec. 2187, though the endorser may still be liable on certain warranties specified in the statute. Rev., sec. 2214.

This conclusion we believe to be in accord with the intention of the Legislature in enacting the "Negotiable Instruments Law," as the leading purpose was to afford as much protection to the holders of commercial paper as is consistent with a just regard for the rights of other interested parties, and, by freeing its transfer of unnecessary fetters,

to promote its easy circulation and to give it greater currency as a medium of exchange.

Our decision on this part of the case is confined to the particular evidence rejected, and does not extend to any other offer of proof made by the defendant.

If the defendant is able to show that the note was endorsed to the plaintiff after its maturity, or that the latter is not in fact a purchaser for value and without notice, his defense will be available to him; but the burden to establish either of those facts is upon the defendant, as the plaintiff is deemed *prima facie* to be a holder in due course if he has possession of the note under the endorsement.

New Trial.

Cited: Typewriter Co. v. Hardware Co., 143 N. C., 100; *Ivy v. Cotton Mills, Ib.*, 194; *Aden v. Doub*, 146 N. C., 12; *Brown v. Hobbs*, 147 N. C. 76; *Basnight v. Jobbing Co.*, 148 N. C., 357; *Rivenbark v. Teachey*, 150 N. C., 292; *Woodson v. Beck*, 151 N. C., 146, 148; *Bank v. Hatcher, Ib.*, 362; *Willis v. Construction Co.*, 152 N. C., 103; *Myers v. Petty*, 153 N. C., 468; *Kernodle v. Williams, Ib.*, 477, 479, 485; *Anderson v. Corporation*, 155 N. C., 134; *Martin v. Mask*, 158 N. C., 444; *Mfg. Co. v. Mfg. Co.*, 161 N. C., 434; *Carson v. Ins. Co., Ib.*, 447; *Pierce v. Cobb, Ib.*, 304.

(68)

VASSOR v. RAILROAD.

(Filed 18 September, 1906.)

Railroads—Freight Trains—Authority of Freight Conductors—Employees—Passengers—Burden of Proof—Passes.

1. A railroad company, in the exercise of its right to classify its trains, may operate trains exclusively for carrying freight, and when it has done so, no person has a right to demand that he be carried upon such trains as a passenger.
2. Before a person can enter upon a freight train and acquire the rights of a passenger, he must show some contract made with some servant or agent of the corporation authorized, by express grant or necessary implication growing out of the nature of the employment, to make such contract.
3. A conductor in charge of defendant's freight train upon which plaintiff was injured had no authority to establish any contractual relation between plaintiff and the defendant corporation either as passenger or servant, and impose any duty upon defendant, the breach of which, followed by injury, gave a cause of action.

4. A conductor of a freight train has no authority, save in case of an emergency, to employ servants to assist in operating his train, and the burden is not upon the railroad to show that he had no such authority.

5. In an action for personal injuries, the fact that several months after the injury the defendant issued to the plaintiff a pass, describing him as an injured employee, does not tend to show any ratification of the attempted employment by the freight conductor.

CLARK, C. J., dissenting.

ACTION by Jack Vassor against Atlantic Coast Line Railroad Company, heard by *Shaw, J.*, and a jury, at the Spring Term, 1906, of NORTHAMPTON.

Action for personal injury sustained by plaintiff while on defendant's freight train. The plaintiff testified that on 26 May, 1902, he boarded defendant's local freight, running from Rocky Mount to Richmond, at Garysburg, N. C. He then described the circumstances under which he went upon the train. "As I was going to Richmond I asked
(69) the conductor on the train if I could come back with him the next day on his train. Captain Moody had charge of the train going to Richmond. He said, 'Yes.' I was to help unload freight and load freight. I went to Richmond to take another man's run. He told me he would give me his place for ten days. He was a brakeman. I was expecting to get his place that night and come back next day. Did not get it, as he decided not to give it to me. I got on train between Richmond and Manchester after it started. I did not see conductor that day. Could not say he was on that day. It was the same train that I went to Richmond on, known as No. 90. Captain Moody was conductor on train that blew me up. The train stopped in Manchester yards, when I got on. William Savage was there. I got on flat-car not loaded, next to car loaded, with barrels. Box-car behind us. The conductor did not know whether I was on train or not. I saw engineer, fireman and first brakeman when I got on train day I was hurt, but did not speak to any one except Savage. The train was local freight; passed Garysburg every day coming and going. I could see it. Same train Mr. Gwaltney was engineer on. He saw me on the train. Two of the brakemen saw me, but did not speak to but one of them. He told me to get on and help unload barrels at next station, Clopton. The brakemen unloaded the car. The engine exploded not more than ten minutes after I got on the car."

There was testimony in regard to the extent of injury and value of services. Plaintiff offered to introduce pass issued by defendant 16 September, 1902, to plaintiff as an "injured employee" from Richmond to Garysburg.

Upon defendant's objection, it was excluded. Plaintiff excepted. Upon the conclusion of plaintiff's evidence defendant moved for judgment of nonsuit. Motion allowed, and plaintiff appealed.

Peebles & Harris for the plaintiff.
Day & Bell, T. W. Mason and *Murray Allen* for the defendant.

CONNOR, J., after stating the case: The correctness of his Honor's ruling depends upon whether the defendant sustained (70) any contractual relation to the plaintiff from which a duty arose to him. The testimony presents no question of public duty or duty to the public as discussed in *McNeill v. R. R.*, 135 N. C., 682, and other cases in which persons were permitted to go upon passenger trains or mixed trains on which passengers were taken.

It is too well settled to call for the citation of authority that a railroad company has the right to classify its trains and assign to them such service as is reasonable. That in the exercise of this right it may operate trains exclusively for carrying freight; and that when it has done so no person has a right to demand that he be carried upon such trains as a passenger. It is equally well settled that before a person can enter upon such a train and acquire the rights of a passenger he must show some contract made with some servant or agent of the corporation authorized to make such contract. Such authority may be shown either by express grant or necessary implication growing out of the nature or character of the employment. In view of these general and well-settled principles the question arises, whether the conductor, Moody, in charge of the freight train upon which plaintiff was injured had any authority to establish any contractual relation between plaintiff and the defendant corporation, either as passenger or servant, and impose any duty upon defendant, the breach of which, followed by injury, gave a cause of action.

The plaintiff insists that by the permission granted him to go upon the train to Richmond and return he became a passenger, or, if he is in error in this, he was by the agreement with the conductor made the employee or servant of the corporation. For the purpose of disposing of this appeal it is not important or even necessary (71) to discuss the question whether he became a passenger or an employee, because if he was, at the time of the injury, either, his right to go to the jury on the question of negligence would be the same. We are of the opinion that he was neither a passenger nor an employee.

Assuming, for the purpose of the discussion, that the conductor undertook to employ plaintiff, and that such employment extended to

the return trip, the question of power is presented. Elliott in his work on Railroads, says: "The authority of the conductor ordinarily extends to the control of the movement of his train and to the immediate direction of the movement of the employees engaged in operating the train. * * * His authority does not, ordinarily, extend to making contracts on behalf of the company, but there may be cases of urgent emergency when he may make a contract for the company. He is to administer the rules of the company rather than make contracts for it. * * * The conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties." Elliott on Railroads, 302. In *Eaton v. R. R.*, 57 N. Y., 382, it is said: "It is fallacy to argue that a conductor is a general agent for this purpose, assuming that his power would, as a rule, place him under the class of general agents; he only holds that position for *the management of a freight train.* The fact that the same word, 'conductor,' is used to designate servants in two kinds of business, which the defendant has made perfectly distinct, tends to confusion. There is no real analogy between the duties of a conductor of a passenger train and those of the manager of a strict freight train. A different class of men would naturally be employed in the two cases. The
(72) defendant has a right to assign specific duties to the one distinct from those performed by the other. It is a familiar rule in such a case that an agent cannot increase his power by his own acts; they must always be included in the acts or conduct of the principal. No act of a conductor of a freight train will bind the company as to carrying passengers, unless the principal in some way assents to it." In the same case it is said: "The employment of brakemen is no part of the ordinary duty of a conductor. The company gave him no power to make any arrangement of the kind. * * * It is not one of those cases where he has an apparent authority, including the act in question, but owing to a secret fact does not have it in the particular case." In Baldwin on Railroads, 248, it is said: "While he may at times have occasion to make or construe, or even vary contracts of the company, that is not his chief office. He holds, however, a somewhat analogous position to that of a shipmaster. The owners of the railroad have put him in charge of the persons and property on board his cars. In case of emergency, when prompt action, if any, must be taken to protect the interests confided to his care, his ordinary powers would become greatly enlarged." In *Files v. Boston & Albany R. R.*, 149 Mass.,

204, it is said: "In the case at bar the conductor had no general authority, so far as shown, to take passengers on the locomotive engine, or any special authority to take the plaintiff. The conductor was not only in charge of a freight train, but on a road intended solely for the transportation of freight. The locomotive engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risks of so doing, whether he did so by the license or on the invitation of the conductor. It was not within the the apparent scope of the freight conductor's authority to permit persons to ride on his freight train, far less on the locomotive (73) engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight agent and a conductor were known by the plaintiff to have ridden on the locomotive engine, make the defendant responsible for accidents which occurred thereby." To the same effect are *Smith v. R. R.*, 124 Ind., 395; *Gardner v. R. R.*, 51 Conn., 143. In *R. R. v. Black*, 87 Texas, 160, the question was discussed at length, and it was said: "If the conductor of a freight train, made up of cars suitable only for carrying freight, can, without authority of the railway company expressly or tacitly given, receive passengers upon such train and bind the railway for the risk of transportation, a conductor of a passenger train may with equal propriety load the coaches of his train with cotton or grain, and make the company liable as a common carrier of freight."

The distinction between the powers and rights of the conductor of a freight train and of a passenger train are clearly pointed out in the opinion in this case. It is, however, suggested that the burden would be upon the defendant to show that the conductor had no authority to make the contract of service. The authorities are to the contrary. In *Eaton v. R. R., supra,* it is said: "There is nothing in the business of a conductor which would lead to the conclusion that he had authority to make contracts with persons to act as brakemen. His apparent duties are to carry forward a train after it is organized. The business of organizing it is, in its nature, wholly distinct. It is, in fact, committed to a train despatcher. Under such circumstances there is no act on the part of the defendant by which he can be estopped from showing the conductor's real authority any more than a commercial house would be if one its travelers, in the course of a journey, assumed to hire a clerk to do business for his employers at home." (74)

In *Purple v. R. R.*, 144 Fed Rep., 123, same case, 57, L. R. A.,

700, *Sanborn, C. J.*, says: "In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand-car or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there and is a trespasser."

In *Cooper v. R. R.*, 136 Ind., 366, *Howard, C. J.*, said: "While the the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of the appellant. * * * No custom, rule or regulation of the appellee company is shown by which the appellant might pay his way by working on the train, assisting the brakeman or other employee. * * * At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to receive him. Any dangers to which he might become exposed were wholly at his own risk. The company would be liable only for wilful injury to him."

In *Powers v. R. R.*, 153 Mass., 188, in an opinion of *Mr. Justice Devens*, it is said: "It was held in *Wilton v. R. R.*, 107 Mass., 108, that the invitation there given by the defendant's servant to the plaintiff to ride on the horse-car which the servant was driving was within the general scope of his employment, and even if it was contrary to the instructions of the driver, she was not a trespasser. In the case at bar the plaintiff was not on a passenger train, and he was riding in the caboose of a freight train, in a place which he could not have failed to know was not intended or adapted for the use of passengers, but solely for the accommodation of the defendant's employees engaged in managing the train. Even if, therefore, the plaintiff had an invitation from the conductor of the freight train, he could not have supposed that the conductor was acting within the general scope of his employment, or that, independently of any rules of the corporation, the conductor had any authority to extend such an invitation. The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains, or to accept them as passengers."

(75)

In *Eaton's case, supra, Dwight, C. J.*, speaking of a contention similar to that of plaintiff's, says: "The contention of the plaintiff must go to the length of maintaining that the company was bound by the act of the conductor to take the plaintiff into is service * * * The conductor's authority to carry can only be incidental to his power

to make a valid engagment for the plaintiff's service. The admission of such a doctrine would subvert familiar rules of the law of agency." We have been unable to discover any authority in which it is held that a conductor of a freight train has any power, save in case of an emergency, to employ servants to assist him in operating his train.

We do not deem it necessary to consider the liability of the defendant if there had been wanton or wilful injury, there being no evidence of either. It is said that the case should have gone to the jury. This suggestion is based upon the theory that there was evidence of a contractual liability imposing upon the defendant the measure of duty prescribed for either a passenger or an employee. As we have seen, neither relation existed. There was, therefore, no question to be submitted to the jury. The plaintiff having failed to lay the basis upon which any such duty arose, there was no inference to be drawn from the testimony by the jury. The effect of the agreement made between plaintiff and conductor was for the Court. There is no uncertainty as to its terms or legal signification. As was said in *Eaton's case,* (76) *supra,* "The solution of the questions at issue is not to be sought in the rules of law appertaining to common carriers. It must be obtained from the principles of the law of agency. The true inquiry is, whether the conductor, as an agent of the defendant, had the power to take the plaintiff upon the train in such a way as to bind the defendant as a carrier to him as a passenger"—and, we may add, "or an employee." The answer to this question being in the negative, and there being no evidence of wanton or wilful injury, his Honor correctly directed judgment of nonsuit. We find no error in the ruling of his Honor excluding the pass. The fact that several months after the injury the defendant issued to the plaintiff a pass from Richmond to Garysburg, describing him as an injured employee, does not tend to show any ratification of the attempted employment by the conductor. The exception cannot be sustained.

No Error.

HOKE, J., concurring: I concur in the disposition made of this case, for the reason that it affirmatively appears from the testimony that the plaintiff at the time he was injured was neither a passenger nor employee of the company, and the facts disclose no breach of duty on the part of the defendant.

I do not assent to the position maintained in the principal opinion, as I understand it, that when a conductor of a freight train employs an ordinary hand to assist him in its operation, and the hand while

so engaged in the company's work is injured by the company's negligence, that a presumption exists that the employment is without authority and the burden is on the injured employee to show the contrary. A conductor of a fright train is necessarily given very extended authority over a train under his control while being operated on the road away from the general offices of the company, and frequently without present means of communication with them. He has under
(77) such circumstances the general right to employ a hand whenever it becomes neecssary in the proper management of his train, and he must from the nature of the case be given very large discretion in determining when such necessity exists.

There are so many and various cases where the power may arise that I think when a conductor does employ a hand who engages in the company's work, there should be a presumption that he is acting within the scope of his authority till the contrary is made to appear; and at times such authority will be implied as a matter of law.

The decisions cited in the principal opinion are chiefly cases where the question was on the authority existing in the conductor of a freight train to confer on an injured party the position of passenger on his train, and the power of such conductor to employ help in the operation of his own train was in no way involved. While not directly in point, I think the position here contended for finds support in two well-considered decisions: *Sloan v. R. R.*, 62 Iowa, 736; *R. R. v. Propst*, 83 Ala., 525. In the first case, and on this question, *Seevers, J.*, for the Court, says: "It is said that the plaintiff was not an employee of the receiver, but an intermeddler, and therefore he cannot recover. The undisputed facts are that one Voorhees was a brakeman in the employ of the receiver, and he desired to have a rest for a week or more, and the plaintiff took his place on the train with the knowledge and consent of the conductor, on 1 July, and continued to perform the duties of brakeman until the sixth day of said month, when he was ordered by the conductor to perform the duty in discharging which he was injured. The conductor testified that to properly manage the train two brakemen were required, and that there was but one other on the train besides the plaintiff. This evidence is not controverted. It does not clearly appear that the receiver or any of
(78) his employees, other than those on the train, had knowledge that the plaintiff was acting as brakeman. An intermeddler is a person who officiously intrudes into a business to which he has no right. The distinction between an intermeddler and a trespasser is

not in any case very great. Under the circumstances of this case, if the plaintiff was an intermeddler, he was a trespasser. But, as he was on the train, and discharged the duties of brakeman for six days with the knowledge and consent of the conductor, he was not either. The train, when passing between stations and distant from any other officer, is in charge of the conductor, and he has authority to eject such persons therefrom. So far from so doing, the conductor availed himself of the services of the plaintiff and required him to perform duties which were necessary and essential to the safe operation of the train. The regular brakeman was absent, and it is immaterial whether with or without cause. The conductor consented that the plaintiff should perform his duties. We think, when the regular brakeman is absent and the proper and safe management of the train so requires, the conductor has the authority to supply the place of the absent brakeman, and for the time such person is an employee of the condutcor's principal. Of necessity, it seems to us, the conductor must have such authority."

In the second case, *Stone, C. J.,* for the Court, says: "The conductor testified that he had no authority from the superintendent or from the defendant to engage or utilize the services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency, there must be discretion and authority somewhere to supply the place of disabled or missing servants, and no one could exercise this power so well or so prudently as the conductor in charge of the train.
We will therefore treat the plaintiff as the lawfully employed (79) servant of the company."

In am of opinion that when the conductor of a freight train employs an ordinary hand to assist in the operation of his train, the presumption should be that his act is rightful till the contrary is made to appear. And in many instances such hiring being within the scope of his apparent authority, will conclusively bind the company so far as third persons are concerned, who act without notice.

CLARK, C. J., dissenting: Stephen Vassor, the plaintiff's minor son, was injured by the explosion of the engine on defendant's train, whereby he "lost both feet, one leg being cut off below and the other above the knee, one of his legs being broken in three places; his arm was cut and two holes knocked in his head." These injuries being caused by an explosion, there is a presumption of negligence, which

always arises when the injury is caused by a collision, derailment, or explosion. In such cases, the doctrine of *res ipsa loquitur* applies. The only question, therefore, which arises on this motion to nonsuit is whether the relation of the injured party to the defendant was such that, taking the plaintiff's evidence to be true and in the aspect most favorable to him, was the defendant liable to plaintiff for the injury caused by its negligence, when it was a wanton or willful act?

The evidence of the injured boy is that, with permission of the conductor of the freight train, he went to Richmond to take the place of a hand working for the defendant; that not getting the place, he started home the next day on the same train. He testified: "The conductor said 'Yes' when I asked him if I could come back with him. I was to help unload freight and load freight. We had some barrels to unload at Clopton, and me and two brakemen got aboard second car so we could unload them quickly when train got there. The engine exploded not more than ten minutes after I got on the car. The
(80) engineer and fireman saw me after I got on the train. They were looking at me when I got on." This evidence must be taken to be true, with the most favorable inference to be drawn from it. The injured boy was certainly not a trespasser. He was on the car by the express permission of the conductor, the supreme representative of the company on that train. He was there with the tacit consent of the engineer and fireman, and was there under an agreement that he was to help load and unload freight. It is immaterial whether he was passenger or employee. The defendant owed him the duty not only to refrain from willfully and wantonly injuring him, as in the case of a trespasser, but not to injure him by its negligence. This was the ruling laid down in the rehearing of *McNeill v. R. R.*, 135 N. C., 718. The plaintiff's pass, it is there said, "had expired, if it had ever legally existed." The conductor permitted him to travel in violation of a statute without any payment of fare or promise to pay; the injury was not caused by any willful or wanton act, yet the defendant was held liable. Here the conductor also permitted the injured party to ride free, but not illegally nor without pay. The explosion occurred in Virginia, where it is not shown that free passage was prohibited; besides, the boy, who was so badly injured by the defendant's negligence, was not riding really free, but was either by agreement paying his way by loading and unloading freight or was an employee receiving pay for his work by getting transportation. Besides, when the injured man was discharged from the hospital, the defendant's superintendent gave him a pass home, styling him "an injured employee." This was

a declaration against interest and was erroneously excluded. It should have been submitted to the jury together with the other evidence.

Cited: Bailey v. R. R., 149 N. C., 173; *Dover v. Mfg. Co.*, 157 N. C., 327.

WILLIAMSON v. BRYAN.

(Filed 18 September, 1906.)

(81)

Ejectment—Issues—Admissions—Title Out of State.

1. It is the duty of the trial Judge to submit such issues as are necessary to settle the material controversies arising upon the pleadings, and in the absence of such issues or equivalent admissions of record sufficiently to reasonably justify a judgment rendered thereon, this Court will order a new trial.
2. Where, under the pleadings in an action to recover possession of land, the sole controversy relates to the allegation of a boundary line between the lands of the plaintiff and the defendant, the plaintiff claiming on the west side of that line and the defendant on the east side of it, an issue as to the location of this boundary line is responsive to the allegations of the pleadings, and, taken in connection with the admissions, was sufficient to justify the judgment.
3. In an action to recover possession of land, it was unnecessary for the plaintiff to show title out of the State, where the answer admitted that the plaintiff owned all the lands on one side of a well established boundary line and the defendant all on the other side.

ACTION by D. H. Williamson against J. H. Bryan to recover possession of land, heard by *Jones, J.*, and a jury, at the No- (82) vember Term, 1905, of PITT.

From the judgment rendered, the defendant appealed.

L. I. Moore and *Skinner & Whedbee* for the plaintiff.
Jarvis & Blow for the defendant.

BROWN, J. The principal contention made by the defendant is to alleged error of the Court in the submission of issues to the jury. The defendant tendered the following issue: "Is the plaintiff the owner and entitled to the possession of the narrow strip of land described in the third paragraph of his complaint?" The Court refused to submit such issue and submitted the following: 1. Which is the true line dividing plaintiff's and defendant's lands from the cypress at A and B, as indicated on the map? Ans: The middle line. 2. Is (83) the plaintiff the owner and entitled to the possession of any

lands on the west side of the true line? Ans.: Yes; plaintiff owns all land on the west side of the true line.

The defendant contends that the issues submitted by his Honor are not responsive to the allegations contained in the pleadings and are not sufficient to justify a judgment for the plaintiff. For this position defendant relies upon the case of *Tucker v. Satterthwaite,* 120 N. C., 118. It is well settled that it is the duty of the trial Judge to submit such issues as are necessary to settle the material controversies arising upon the pleadings, and that, in the absence of such issues or *equivalent admissions of record* sufficient to reasonably justify a judgment rendered thereon, this Court will order a new trial. The pleadings in the case at bar are quite different from those in the case cited. In this case the answer of the defendant is not simply a denial of the plaintiff's title and right to possession of the land in controversy, but it undertakes to set out in a measure the title to the land and to specify and particularize the controversy between plaintiff and the defendant.

In the first allegation of the answer the defendant admits that the plaintiff is the *owner* and entitled to the possession of most of the lands described in the complaint, but he denies that the plaintiff is the owner or entitled to the possession of that part of the land which is described in the third allegation of the complaint if it shall be found that the boundaries set out in the first allegation cover the said strip of lands so described in the third allegation. The defendant further says that more than thirty years ago there was a well-established line owned and recognized by the owners of the *lands belonging to the plaintiff and the defendant,* which was well marked and defined and which formed the boundary-line between the lands described in the plaintiff's complaint and the adjoining land now owned by the defendant. The
(84) answer further alleges that the defendant and those under whom he claims held and worked up to this boundary-line, and that the defendant and those under whom he claims have had possession up to such well-recognized boundary-line, and that they have held up to and recognized the said boundary-line and had possession of the said strip of land, which the defendant claims is on his side of the line, for more than twenty years, etc. It will be observed that the defendant claims nothing, either by way of title or possession, beyond the boundary-line, which he claims was established and recognized by the owners of the lands on both sides more than thirty years ago.

We think that under the pleadings in this case, the sole controversy relates to the allegation of a boundary-line between the lands of the plaintiff and the defendant, the plaintiff claiming on the west side and

of that line and the defendant on the east side of it. The form of the first issue is directly responsive to the allegations of the complaint and the answer and, taken in connection with the admission set out in the pleadings, was amply sufficient to justify the judgment of the Court.

It is contended that the plaintiff has failed to show title out of the State. This was unnecessary, because the answer admits that the plaintiff owns all the lands on one side of the well-established boundary-line and the defendant all on the other side. This admission rendered it unnecessary to prove title out of the State to any of the lands, and made it only necessary to determine the exact location of this boundary-line, which the jury has located according to the contention of the plaintiff. Nevertheless, under the second issue, his Honor did submit to the jury with appropriate instructions the various phases of the case as presented by the evidence relating to adverse possession of the strip of land in controversy, which issue was also found for the plaintiff. But in the view we take of it this was unnecessary, because, under the admissions contained in the answer (85) the controversy between the parties was determined when the jury located the true line between the lands of these adjoining owners; and this finding, coupled with the admissions in the pleadings, is sufficient to sustain the judgment. However, we have examined the evidence, the charge of the Court and the exceptions relating to the second issue, and we find that under that issue the question of adverse possession, etc., was fully submitted to the jury with proper instructions, and we think the exceptions are without merit.

No Error.

Cited: Eames v. Armstrong, 142 N. C., 514; *Elks v. Hemby,* 160 N. C., 23.

PITTINGER, EX-PARTE.

(Filed 18 September, 1906.)

Partition—Value—Consent Decree—Endorser—Surety—Subrogation.

1. Where a decree of confirmation in a partition proceeding of land recited that certain personalty of G was sold with the land with the understanding that if it became necessary for the receiver of G to sell said personalty to pay the debts of G, that the purchaser should be credited with the *value* of said personalty, the purchaser is entitled to be credited with the actual cash value of said personalty at the date when it was sold for cash by the receiver, and neither the price it brought

when sold for cash by the receiver for $350 nor the price it brought when resold for $10,200 by the Court and paid for in the greatly depreciated papers of G, is the criterion of its value.

2. Where, in a partition proceeding for land, it appears that a recital as to certain personalty was inserted in the decree of confirmation "by consent of all parties," and one of the tenants in common has taken benefit under the degree by receiving part of the purchase-money, and is now moving in the cause to collect the remainder, she is bound by the recital in the decree.

3. An endorser or surety who pays the indebtedness is subrogated to the rights of the creditor as against the property of the debtor.

PETITION for partition by Mrs. Lucy W. Pittinger and hus-
(86) band and Mrs. M. F. Harrison and husband, *ex-parte,* of a certain tract of land known as Medoc Vineyard. An order for sale was made and David Bell appointed commissioner to make the sale. The land was purchased by Mrs. M. F. Harrison, at the price of thirty thousand dollars. She paid one-fifth of the purchase-money in cash and has paid the notes due 1 May, 1903, and 1 May, 1904, and has failed to pay a note for $4,800 maturing 1 May, 1905, and also note in like sum due 1 May, 1906. There is also another note for a like sum due 1 May, 1907. All these notes bear six per cent interest from date thereof.

This is a motion in the cause heard by the Clerk of the Superior Court of HALIFAX, made on behalf of Mrs. Lucy W. Pittinger for a resale of the land to pay the unpaid purchase-money. The Clerk denied the motion, and Mrs. Pittinger appealed to the Judge. The matter was heard by *Shaw, J.,* at chambers, at Halifax, on 8 June, 1906, who affirmed the order of the Clerk. From the judgment of his Honor, Mrs. Pittinger appealed to the Supreme Court.

Shepher & Shepherd, Mason & Worrell and *George C. Green* for the appellant.

Travis, Daniel and *Kitchin* for the appellee.

BROWN, J. The ground upon which Mrs. Harrison resists payment of the purchase-money is based upon certain statements in the report of the commissioner and in the decree of confirmation. The report of the commissioner states: "And the cooperage was to go to the purchaser of said lands, with the understanding that if it should become necessary for said cooperage to be sold by the receivers to pay the debts of C. W. Garrett & Co., then and in that event the purchaser of said lands should be credited on the purchase price for the *value* of said cooperage."

There is nothing in the original decree of sale authorizing such action of the commissioner, but in the decree of confirma- (87) tion of 11 June, 1902, appears the following clause: "And the cooperage now in the cellar at said vineyard, *by consent of all parties,* was sold with said lands, with the understanding that if it should become necessary for the receiver of C. W. Garrett & Co., A. S. Harrison, to sell said cooperage to pay the debts of the said C. W. Garrett & Co., then and in that event the *value* of said cooperage should be deducted from the purchase price of said lands and property."

If the cooperage was the property of C. W. Garrett & Co., no reason is given as to why it was sold with the land. If it was the property of Mrs. Pittinger and Mrs. Harrison, the record discloses no reason why it should have thus been practically dedicated to the payment of Garrett & Co.'s debts, as neither tenant in common was a member of that firm.

Mrs. Pittinger has not asked to have the report of sale and decree of confirmation set aside. On the contrary, she has received her share of so much of the purchase-money as has been paid and is moving in the cause and under such decree to collect her share of the remainder. It therefore requires no citation of authority to show that in pressing her motion to collect the unpaid punchase-money Mrs. Pittinger is bound by the action of the commissioner and the recital in the decree of confirmation that it was done by her consent. If the action of the commissioner was unauthorized and the decree of confirmation made without her knowledge and consent, Mrs. Pittinger should have taken proper steps to have the sale and decree set aside. But she has taken benefit under it by receiving part of the purchase-money, and is now moving in the cause to collect the remainder.

The cooperage referred to consisted of about 100 empty casks, 15 fermenting tanks, pipes, etc. It appears that the cooperage was taken by the receiver of Garrett & Co., and sold to pay the debts of that insolvent firm. In her affidavit Mrs. Harrison places the value (88) of the cooperage at $5,000. At the receiver's sale it brought $350. It was resold by order Court and bid off by Paul Garrett at the price of $10,200.

A schedule of the creditors of C. W. Garrett & Co. is set out in the record. The name of Paul Garrett does not appear among the number, but the receiver reports that Paul Garrett owns all the indebtedness except $86.62. What he paid for it does not appear. But the record shows that said debts were worth much less than their face value. The price bid by Paul Garrett was not paid in money, but by this

insolvent paper, which he had evidently bought up for the purpose and probably at large discount.

Mrs. Harrison claims the right to have the $10,200 credited on the purchase-money notes. Mrs. Pittinger replies that Mrs. Harrison is endorser upon some of the notes of C. W. Garrett & Co., and that she should be required to pay these before the cooperage money can be so applied. This cannot avail Mrs. Pittinger, because the cooperage is regarded in the decree and was sold as the property of C. W. Garrett & Co., and if Mrs. Harrison as endorser or surety had paid the notes she would be subrogated to the rights of the creditors as against the property of C. W. Garrett & Co. But we think it would be rank injustice, and neither within the letter nor spirit of the langauge of the decree, to hold Mrs. Pittinger bound by the sum which Paul Garrett saw fit to bid for the cooperage when he knew he could pay for it in the greatly depreciated paper of C. W. Garrett & Co. That sale is no more a criterion of its value than the first sale when it was sold for cash and brought only $350.

We are of the opinion that Mrs. Pittinger, under the terms of the decree, is responsible for one-half of the actual cash value of the cooperage at the date when it was sold by the receiver, and no more.

(89) This cause is therefore remanded to the Superior Court of Halifax County with leave to Mrs. Pittinger, upon ten days' notice to Mrs. Harrison or to her attorneys, to move at chambers before the resident Judge of the Second Judicial District, at a time and place therein, or before the Judge holding the courts of said district, that his Honor find the fact as to what was the actual cash value of such cooperage, and that his Honor certify said finding to the Clerk of the Superior Court of Halifax County to the end that the half of the purchase-money belonging to Mrs. Pittinger be credited with one-half of such cash value as of the date when said cooperage was sold by the receiver and the sale thereof confirmed. Whatever sum may then remain due Mrs. Pittinger upon the notes due 1 May, 1905, and 1 May, 1906, now past due, Mrs. Harrison shall be required to pay, or, in default thereof, the proper order of sale shall be entered by the Clerk of the Superior Court of Halifax County.

The order of the Clerk and Judge is reversed, and the cause remanded to be proceeded with in accordance with this opinion.

Reversed and remanded.

CRADDOCK v. BARNES.

(Filed 25 September, 1906.)

Practice—Special Instruction, When Submitted—Escrow—Delivery—Conditions.

1. Where, at the close of the testimony, the Court at once adjourned until the next day, and at the opening of the Court the next morning the appellant tendered in writing certain special instructions, *it was error* in the presiding Judge to refuse to consider them.
2. Revisal, sec. 538, provides that counsel shall reduce their prayers for special instructions to writing, without prescribing any specified limit as to the time when they shall be presented to the Court, and the words in sec. 536, that a request to put the charge in writing must be made "at or before the close of the evidence," should not be read into sec. 538.
3. The time within which special instructions should be requested must be left to the sound discretion of the presiding Judge, and this Court will be slow to review or interfere with the exercise of that discretion; but he should so order his discretion as to afford counsel a reasonable time to prepare and present their prayers.
4. After the argument commences, counsel will not be permitted to file requests for special instructions without leave of the Court.
5. The title of the grantee under a deed in escrow is a legal and not an equitable one, and especially so if the deed was rightfully delivered to him.
6. An escrow is effective as a deed when the grantor relinquishes the possession and control of it by delivery to the depositary, and it passes the title to the grantee when the condition is fully performed, without the necessity of a second delivery by the depositary; and it may, by a fiction of law, have relation back to the date of its original execution, or deposit, when necessary for the purpose of doing justice or of effectuating the intention of the parties.
7. The grantor in an escrow cannot add any condition not existing when the deed was placed in escrow, nor can he refuse to accept a tender of compliance with the true condition and thereby defeat the grantee's right to the deed, or prevent transmutation of possession and title.

PROCEEDING for partition by H. D. Craddock against Priscilla Barnes, heard by *Shaw, J.*, and a jury, at the Fall Term, (90) 1905, of WASHINGTON, upon issues transferred from the Clerk.

There was evidence for the plaintiff to the effect that the defendant agreed to sell and convey to him a one-half undivided interest in a tract of land for $300, and that in addition to the payment of this sum the plaintiff agreed to give the defendant "a ten-dollar dress and one-half of the pine trees on the land and build a wire fence on her part of the land." That defendant signed and sealed a deed for the one-half interest to the plaintff and delivered the same to D. E.

Woodley upon condition that when the purchase-money, that
(91) is, the $300, was paid to him (Woodley) he should then deliver the deed to the plaintiff. There was a provision for the application of a part of the money so paid to certain claims and the payment of the balance to the defendant. Plaintiff paid the money to Woodley and the latter tendered the balance, after reserving enough for the outstanding claims, to the defendant, who refused to receive it and directed him not to part with the deed; but, disregarding her instruction, he did afterwards, and under the advice of the plaintiff's counsel, deliver the deed to the plaintiff.

The defendant testified that the balance of the $300, after paying the claims, was to be paid to her before the deed was delivered to the plaintiff. Also, that all the stipulations as to the purchase-money, the dress, the trees and the wire fence were to be fully performed before delivery.

It is stated that at the close of the testimony "the Court at once adjourned" until the next day, and at the opening of the Court the next morning, and as soon as the Judge took his seat on the bench, the plaintiff's counsel tendered in writing certain instructions which he asked to be given to the jury. The Judge endorsed on them the following, "Handed up too late," and refused to give or consider any of them. Plaintiff excepted.

The Court charged the jury as to the law, to which there was no exception; but the charge was not sent up. Upon the issues submitted the jury returned a verdict for the defendant, and to the judgment thereon the plaintiff excepted and appealed.

W. J. Leary for the plaintiff.

W. M. Bond and *H. S. Ward* for the defendant.

WALKER, J., after stating the case: The exception of the plaintiff is well taken. It was stated in the argument before us that the
(92) ruling of the Court was based upon the assumption that a prayer for special instructions must be submitted "at or before the close of the evidence," under Rev. secs. 536 and 538 (Code, secs. 414 and 415). This was erroneous. Section 536 requires that a request to put the charge in writing shall be made at or before the close of the evidence, and sec. 538 simply provides that counsel shall reduce their prayers for special instructions to writing, without prescribing any specified limit as to the time when they shall be presented to the Court. The two sections relate to subjects of a different kind and have no such necessary connection with each other, nor are they so correlated

as to require that they should be construed together and that the words of sec. 536, namely, "at or before the close of the evidence," should be read into sec. 538.

There was good reason for the requirement that a request to have the charge written should be made "at or before the close of the evidence," which does not apply to the provision of sec. 538 in regard to special instructions. The Judge should have full time to prepare and write out his general instructions, and due notice was therefore demanded, as he cannot well wait until the argument is concluded and the time has arrived for delivering his charge to the jury. But not so much time is required for the consideration of special instructions, already prepared and written. The omission to fix any definite time for filing the request for special instructions in sec. 538, while such a provision, as to the request for a written charge, is found in sec. 536, is cogent proof that the Legislature did not intend that the request for special instructions should be made "at or before the close of the evidence;" and we are not at liberty to insert in that section language not to be found there and which will materially change its meaning.

The time within which instruction should be requested must be left to the sound discretion of the Court, as in the case of (93) many other matters of mere practice or procedure, and we will be slow to review or interfere with the exercise of that discretion; but the presiding Judge should, and we are sure he always will, so order his discretion as to afford counsel a reasonable time to prepare and present their prayers. Counsel should perform this duty to their clients seasonably and with a proper regard for the right of the trial Judge to require that he should have reasonably sufficient time to write his charge and to consider the prayers for special instructions; and what time is required by each must be determined by the nature and exigencies of each case.

The Judge must wait until the evidence is closed in order that he may understand the case and prepare his charge, and, likewise, counsel cannot formulate their requests for instructions unless and until they are possessed of the facts or have sufficient knowledge of the case, as finally developed, for that purpose. The last piece of evidence may change the whole aspect of the matter, and counsel therefore cannot well anticipate what will happen, and prepare special prayers before the conclusion of the testimony or until they have had reasonable time thereafter to do so. If they attempt to do so they may find at last that all their work has been in vain. It follows that both Judge and counsel must have adequate time to perform their respective func-

tions after the moment when they can first intelligently do so, subject to the discretion of the Court as to how much time is required, which discretion should, of course, be fairly exercised.

We have ruled that if a party desires more specific instructions than those given by the Court in its general charge, he must ask for them. How can this be done if he is prohibited by statute from making a request for special instructions after the close of the evidence and without any discretion in the Judge to extend the time, or
(94) any right to consider them at that stage; for how can he know, in advance of the close of the evidence, what principles of law will be applicable, so as to embody them in specific instructions for the guidance of the Court in preparing its charge? At any stage of the trial the Judge should, necessarily, have the discretion to permit special prayers to be handed up, in order that his instructions to the jury may be made amply sufficient to cover every phase of the case. *Willey v. R. R.*, 96 N. C., 408. The reason of the thing and the very nature and circumstances of trials alike preclude any other construction of sec. 538 than that we have indicated.

The learned Judge was misled, we have no doubt, as to his power to extend the time, by the statement in several of the cases (which are collected in Clark's Code (3 Ed.), sec. 415, and note), to the effect that special prayers must be submitted "at or before the close of the evidence." This Court in using that expression had in mind the language of sec. 536 of the Revisal, formerly sec. 414 of The Code, and was not advertent to the fact that the same words were not used in sec. 538, formerly sec. 415 of The Code. It appears clearly from the facts of those cases, that in none of them was it necessary to decide that the time for presenting special instructions was "at or before the close of the evidence," and did not extend to the opening of the argument. In each of them, we believe, the request for special instructions was made unreasonably late in the trial, after the argument had been begun and long after the close of the evidence, and when it was impossible for the Judge to give them proper consideration.

But however all this may be, we hold in the case at bar that no opportunity was given counsel to submit his prayer. The Court adjourned "at once" at the close of the evidence, and the request for instructions was made at the earliest moment of the next day.
(95) The plaintiff's counsel was not directed to file them during the recess, so that unless he was in time, we must hold that counsel should prepare their requests for special instructions within the very

instant of time that may sometimes elapse between the close of the evidence and the beginning of the discussion before the jury, and this would be mentally and physically impossible. We have not been endowed with faculties that will move with the celerity required for such a purpose. But we think that if the words of sec. 536, "at or before the close of the evidence," had been inserted in sec. 538, they would mean at some time not later than the beginning of the argument by counsel to the jury. The expression refers rather to the stage of the trial than to the particular moment of time when the evidence is closed. This is the reasonable view, and under this construction of the statute there was error in the ruling below. It is usually the case that the argument follows immediately upon the close of the evidence; but if a recess intervenes, we do not see why the Judge may not require the prayers to be filed with him during the recess, provided sufficient time be allowed for doing so. We can only say generally that his discretion should be exercised fairly and, perhaps, under the circumstances, liberally, with a view to a full hearing and the trial of cases on their legal merits.

It is not our purpose to disturb any rule of practice or any settled construction of the statute, and we do not think that we have done so. Our desire, though, is so to interpret the law as to preserve a due proportion in the allotment of time between Court and counsel, with respect to this matter, as will execute the true intention of the Legislature, as we preceive it to be, and conduce to the fair and intelligent trial of cases. Reasonable time is what counsel are entitled to have, but, as to what this time shall be will depend very much upon the circumstances of each case, the determination of the question must needs be subject to the sound legal discretion of the Court, which will not be revised here, except in those instances where this Court (96) will ordinarily review the exercise of judicial discretion. After the argument commences, counsel will not be permitted to file requests for special instructions without the leave of the Court.

It was suggested that the plaintiff had proved only an equitable title and had not pleaded it. We do not think so. His title under the deed in escrow was a legal one, and especially so if the deed was rightfully delivered to him. It was also argued, though not in the brief, that the prayers were immaterial. We have not set them out in the case, because it will suffice to say that we do not concur with counsel, but on the contrary, we hold that at least some of them are germane to the matter in controversy.

Before taking leave of the case it may be well to refer to the general

question involved in it. Some courts hold that an escrow does not take effect as a fully executed deed until there has been a rightful delivery to the grantee; but the logical position approved in a number of authorities is that it is effective as a deed when the grantor relinquishes the possession and control of it by delivery to the depositary, and it passes the title to the grantee when the condition is fully performed, without the necessity of a second delivery by the depositary; and it may, by a fiction of the law have relation back to the date of its original execution, or deposit, when necessary for the purpose of doing justice or of effectuating the intention of the parties. 16 Cyc., 588; 11 Am. and Eng. Enc. Law (2 Ed.), pp. 336 to 349; and this we take to be the settled doctrine of this Court. *Hall v. Harris,* 40 N. C., 303; *Roe v. Lovick,* 43 N. C., 88; *Kirk v. Turner,* 16 N. C., 14; *Baldwin v. Maultsby,* 27 N. C., 505; *Newlin v. Osborne,* 49 N. C., 157; *Frank v. Heiner,* 117 N. C., 79; *Robbins v. Rascoe,* 120 N. C., 79.

In *Hall v. Harris, Pearson, J.,* thus states the true rule,
(97) which he says is deduced from the best authorities: "We are satisfied from principle and from a consideration of the authorities that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition which is afterwards complied with, the paper becomes a deed by the act of parting with possession and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time."

It is therefore the performance of the condtion and not the second delivery that gives it vitality as a deed sufficient to pass the title. When the condition is complied with, the depositary holds the deed for the grantee, the same as if it had been originally delivered to him as the latter's agent, in which case the grantee would of course get the title, and could by proper action compel an actual delivery by the depositary. *Steamboat Co. v. Moragne,* 91 Ala., 610; 11 Am. and Eng. Enc. Law (2 Ed.), p. 345; *Bank v. Evans,* 15 N. J. Law, 155; *Hughes v. Thistlewood,* 40 Kansas, 232; 16 Cyc., 588, and note; *Baum's Appeal,* 113 Pa. St., 58. It was accordingly adjudged in *Perriman's case,* 5 Coke, 84, that if a writing having the form of a deed is delivered as an escrow and the condition be afterwards performed, it takes effect by force of the first delivery and without any new delivery. So in *Wymark's case,* 5 Coke, 75, it was held that when the condition is performed the deed is effectual, and where the grantor got the deed back into his possession, the grantee was permittd to plead the matter

specially without showing the deed. *Steamboat Co. v. Moragne, supra.* And conversely, if the grantor gets possession of the deed before the condition is performed, it is of no force and he can make no beneficial use of it. In either case, the party has acted in his own wrong and can avail nothing by attempting to take advantage of it. (98) Sheppard's Touchstone (6 Ed.), 57 and 59; *Jackson v. Catlin,* 2 Johnson, 248; *Archer v. Whalen,* 1 Wend., 179.

But in this case the deed was actually delivered by the depositary to the grantee, so that the only question is, Was the delivery rightfully made? If the condition was that, when the sum of $300 had been paid the deed should be delivered, and it was paid or duly tendered by the grantee or his agent and the tender rejected, the condition was performed and the delivery of the deed by Woodley was rightful; but if the condition was that additional stipulations were to be performed before delivery, and they were not complied with, or tender of performance of them not made and refused, then it was wrongful, and the inquiry should be addressed to that matter. The defendant could not add any condition not existing when the deed was placed in escrow, nor could she refuse to accept a tender of compliance with the true condition and thereby defeat the plaintiff's right to the deed or prevent transmutation of possession and title. 11 Am. and Eng. Enc. Law (2 Ed.), 345; *Baum's Appeal, supra.* If the condition was restricted to the payment of $300, and did not include the performance of other stipulations, which were merely a part of the consideration, the plaintiff's failure to perform the latter would not affect his title to the land or his right to the deed.

The Court should have received and considered the plaintiff's request for special instructions, and in refusing to do so there was error.

New Trial.

CLARK, C. J., concurring: The practice has been too long and too well settled to be now questioned that "prayers for instructions must be asked at the close of the evidence. They can be asked afterwards only by leave of the Court." *Powell v. R. R.,* 68 N. C., 395; (99) *Davis v. Council,* 92 N. C., 725; *S. v. Rowe,* 98 N. C., 629; *Taylor v. Plummer,* 105 N. C., 56; *Marsh v. Richardson,* 106 N. C., 548; *Grubbs v. Ins. Co.,* 108 N. C., 472; *Posey v. Patton,* 109 N. C., 455; *Blackburn v. Fair, Ib.,* 465; *Merrill v. Whitmire,* 110 N. C., 367; *Ward v. Railroad,* 112 N. C., 168; *Luttrell v. Martin, Ib.,* 594; *Marshall v. Stine, Ib.,* 697; *Shober v. Wheeler,* 113 N. C., 370; *S. v. Hairston,* 121 N. C., 579; and there are a great many others. Independent even of

any statute, this requirement is too fair and necessary to prevent the Judge being taken unawares by skillfully drawn prayers, or unskillful ones, handed up to him too late to be thoroughly considered. He ought to have the same time for considering prayers offered under Code, sec. 415, Rev. 538, as in preparing his written charge when requested under Code, sec. 414, Rev. 536, *i. e.,* the whole time taken by counsel in argument.

I do not understand the opinion in this case to call in question this long-settled and commendable practice, but merely to hold that when the Court takes a recess immediately at the close of the evidence, the prayers will be offered in time if asked before argument begins after the reassembling of the Court. This is a reasonable construction and is the only matter directly before us upon the exception in this case for refusal of the prayers offered by the appellant.

Cited: Sutton v. Davis, 143 N. C., 485; *Moseley v. Johnson,* 144 N. C., 273; *Metal Co. v. R. R.,* 145 N. C., 297; *Biggs v. Gurganus,* 152 N. C., 176; *Pritchett v. R. R.,* 157 N. C., 101; *Board of Education v. Development Co.,* 159 N. C., 164; *Holder v. Lumber Co.,* 161 N. C., 178.

WOODARD v. MILLING COMPANY.

(Filed 25 September, 1906.)

Appearance, General and Special—Agreement of Counsel—Practice.

1. Where, prior to the return day, counsel for plaintiff and defendant agreed that the case should be heard before the justice on a certain date, such agreement does not amount to a general appearance for the defendant or waive any rights which could have been exercised had he appeared on the return day.
2. The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than form; and where the record shows that the appearance was made for the prupose of dismissing the action, it is a special appearance.
3. Where defendant's motion to dismiss an action before the justice was overruled, his counsel could then proceed with the trial, and did not thereby abandon the right to have the justice's ruling reviewed by the Superior Court.

(100) ACTION by Woodard & Woodard against Tri-State Milling Company, heard by *Jones, J.,* at the April Term, 1906, of EDGECOMBE, upon appeal from a justice of the peace.

The following are the findings of the Superior Court:

1. That summons was duly issued by the justice of the peace on 22 March, 1904, returnable on 25 March, 1904, and the same was returned on the return day thereof by the constable with the endorsement: "Defendant not to be found in the county."

2. There was no affidavit sufficient to order the publication of the service of the summons, nor was there any order directing the publication of the summons, nor is there any record showing there was a publication of the summons and warrant of attachment in the papers.

3. I find that the defendant's attorney by correspondence agreed with the plaintiff's attorney that the matter should be continued from 23 April, 1904, and come up for hearing on 13 May, 1904, (101) at Whitakers, N. C. (See Exhibit B.)

4. That at the beginning of the trial on 13 May, 1904, W. O. Howard, attorney for the defendant, moved to dismiss the action for irregularities in the proceedings, which motion was overruled and the cause proceeded with. (Exhibit A.)

5. There was no personal service, nor was there service by publication; but it was admitted that there was attempted service by publication returnable 23 April, 1904.

From the judgment dismissing the action the plaintiffs appealed.

G. M. T. Fountain for the plaintiffs.
W. O. Howard for the defendant.

BROWN, J. The counsel for plaintiffs admits the correctness of his Honor's ruling, unless, as he contends, the defendant's counsel entered a general appearance before the justice of the peace. Prior to the return day of 23 April, it appears that counsel for plaintiffs and defendant, both of whom reside in Tarboro, some little distance from the office of the justice of the peace, agreed that the case should be heard before the justice on 13 May instead of 23 April. This agreement was made, doubtless, for mutual convenience, and we see nothing in it to indicate that counsel for defendant intended to enter a general appearance or to waive any right which could have been exercised had he appeared on 23 April. In the language of *Mr. Justice Walker* in *Bullard v. Edwards,* 140 N. C., 647, "We would not give so strained and technical a construction to his application for a continuance as to exclude therefrom the idea that the plaintiff intended that the whole matter and not merely the trial upon the merits should be continued for hearing to a more convenient time." Again: "We hold that he could do on 2 February precisely what he could have done (102)

on 26 January, and further, that he did not intend to waive any of his rights," p. 648. That case seems to be very much in point.

Agreements similar to the one made in this case are frequently made outside of Court between counsel for their mutual convenience, and it cannot be supposed that either intended thereby to waive any legal right his client possessed.

When the counsel for defendant appeared before the justice on 13 May he did not enter a general appearance. "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than form." *Scott v. Life Association,* 137 N. C., 518. Where the record shows that the appearance was made for the purpose of dismissing the action, it is a special appearance. *Scott v. Life Association, supra.* The character of the appearance is to be determined by what the attorney actually did when he appeared in Court, at the call of the case. 3 Cyc., pp. 502, 509. The first act of the attorney before he entered any appearance was to move to dismiss the action for irregularities in the proceedings. This conduct showed no purpose to enter a general appearance, but was in fact a special appearance itself for a special purpose. The motion being overruled, the attorney was warranted then in proceeding with the trial, and did not thereby abandon the right to have the justice's ruling reviewed by the Superior Court.

Affirmed.

(103)

DUFFY v. INSURANCE COMPANY.

(Filed 25 September, 1906.)

Insurance—By-Laws—Notice of Assessments—Burden of Proof—Evidence.

1. A by-law of an assessment insurance company providing that notice may be given members of assessments by mailing, properly addressed, is valid and binding upon the members.
2. When the duty is imposed upon the company to mail the notice of assessments, in order to sustain a forfeiture it must show affirmatively that the notice was mailed, properly addressed, within the time fixed.
3. The by-laws of such association when assented to by the members, as provided in the charter, constitute the measure of duty and libaility of the parties, provided they are reasonable and not in violation of any principle of public law.
4. Whether a by-law is reasonable is a question of law for the Court.
5. A by-law of an assessment insurance company, providing that the certificate of the treasurer or bookkeeper shall be taken as conclusive evidence of the fact of mailing the notice of the assessment, is unreasonable and invalid.

6. In an action for the wrongful cancellation of an insurance policy, where the policy contained a provision that mailing the notice, properly addressed, shall be sufficient notice of assessments, it was competent for the plaintiff to testify that he never received any notice of the assessment for the failure to pay which the policy was cancelled.

ACTION by Charles Duffy, Jr., against the Fidelity Mutual Life Insurance Company, heard by *Jones, J.*, and a jury, at the October Term, 1905, of CRAVEN.

This action is prosecuted by plaintiff for the alleged wrongful cancellation of a policy of insurance by defendant, plaintiff claiming as damages the premiums paid and interest thereon. Defendant admitted the cancellation and justified by alleging that plaintiff having failed to pay premium when due, the policy, by its terms, became void.

The controversy arises upon the question whether the notice of the assessment was given to plaintiff according to the terms (104) of the policy and by-laws of the association. The two issues material to be considered in disposing of this appeal, are:

1. Was a notice of assessment of 1 July, 1903, which was payable 31 July, 1903, duly directed to the plaintiff at New Bern, North Carolina, which address appeared at the time on the books of the company, deposited on 1 July, 1903, postage prepaid, in the post-offie in Philadelphia? Answer: No.

2. Was the notice of 1 July, 1903, assessment received by plaintiff at his address in New Bern, N. C.? Answer: No.

It was in evidence that at the date of the policy, 12 April, 1883, and by its terms the assessments were due and payable to Joel Kinsey, trustee, at New Bern, N. C.; that payments were made to said trustee until some time prior to 1 July, 1903, when the by-law was so amended that the assessment became payable to the company in Philadelphia. That after the change in the by-law, plaintiff made several payments of assessments by sending same to Philadelphia.

Defendant introduced Art. V, sec. 9, of the by-laws, as amended, as follows: "A printed or written notice directed to the address of a member, as it appears at the time on the books of the association, and deposited in the office at Philadelphia, shall be deemed a legal and sufficient notice of mortuary calls and dues. A certificate made by the treasurer or bookkeeper showing such facts shall be taken and accepted as conclusive evidence of the mailing of such notice."

Defendant thereupon introduced a certificate made by O. C. Bosbyshell, treasurer, stating that on 1 July, 1903, a notice of assessment, directed to the plaintiff, was deposited in the post-office of the city Philadelphia, enclosed in an envelope postage prepaid, etc., concluding:

"And this certificate the treasurer of said company, in conformity with the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct (105) transcript of the records of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk," etc. Following this certificate is the affidavit of S. E. Haines, clerk, who states that he has charge of the preparation and mailing of notices for premiums upon policies issued by defendant. That on 7 July, 1903, he deposited the notices referred to in certain sheets attached, addressed to the persons named, etc. This affidavit bears date 1 July, 1903, and attached thereto is a sheet showing notice of assessment mailed to plaintiff at New Bern, N. C. There is no controversy regarding the amount of the assessment.

Plaintiff was asked the following question: "Did you ever receive any notice or demand for the payment of assessment for 1 July, 1903?" Defendant objected; objection overruled. Defendant excepted. Answer: "I have never received a notice for July, 1903."

The defendant requested certain special instructions, which are set out in the opinion. The jury answered both issues in the negative. From a judgment upon the verdict, the defendant appealed.

W. D. McIver and *O. H. Guion* for the plaintiff.
Hinsdale & Son and *W. W. Clark* for the defendant.

CONNOR, J., after stating the case: In the view which we take of this appeal, several of the questions presented by the exceptions and argued in the brief become immaterial.

The inquiry to which the first issue is directed lies at the threshold of the controversy. The answer to that question, in our opinion, is decisive of the case. The authorities cited by the learned counsel for defendant fully sustain the validity of the contract contained in the policy, declaring that by mailing the notice, properly addressed, to the plaintiff, the defendant discharges its duty in that respect. (106) The authorities are practically uniform in holding that a by-law of an assessment insurance company providing that notice may be given members of assessments by mailing, properly addressed. is valid and binding upon the members. *Yoe v. Mutual Ben. Assn.*, 63 Md., 86; *Epstein v. Mutl. Aid Ben. Assn.*, 28 La. Ann., 938; Niblack Ben. Soc., sec. 260.

It is equally well settled that the by-laws of such association when assented to by the member, as provided in the charter, constitute the

measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. There was evidence proper for the consideration of the jury tending to show that Dr. Duffy knew of the change in the by-law by which the assessment became payable in Philadelphia. The authorities are uniformly to the effect that when the duty is imposed upon the company to mail the notice, in order to sustain a forfeiture it must show affirmatively that the notice was mailed, properly addressed, within the time fixed. "The giving of the notice is a condition precedent, and good standing is not lost by a failure to pay an assessment of which no notice was given through the fault or misconduct of a supreme lodge, or society, or its officers." Niblack on Ben. Soc., sec. 257. In the absence of any contract, or by-law, to the contrary, actual notice must be shown, not only mailing, but the receipt of the notice. But, as we have seen, the parties here have contracted that mailing shall be taken as notice.

The defendant seeks to show conclusively by the certificate of the treasurer that the notice was mailed, and excepts to the testimony of plaintiff that it was not received. For the purpose of sustaining this exception the defendant relies upon the by-law declaring that such certificate shall be taken as conclusive evidence of the fact of mailing. This contention presents the question whether the by-law so providing is valid. There can be no question that a corporation may make reasonable by-laws not inconsistent with its charter. "In its (107) operation between the corporation and its members, a by-law, in order to be valid, must not be unreasonable, oppressive or extortionate." 10 Cyc., 357; *Allnutt v. Sub. High Court,* 62 Mich., 110. Whether a by-law is reasonable is a question of law for the Court. *Ib.,* 358.

A diligent investigation by the learned and industrious counsel for both parties, and ourselves, fails to discover any authority or discussion of the exact question presented by this appeal. The numerous cases sustaining contracts by which the parties agree to submit questions arising between them to arbitration, or to the estimate of one or more persons chosen in advance, give us but little aid in the solution of this question.

"By-laws restricting the right to sue in the courts are generally void." 10 Cyc., 361.

While the by-law relied upon by defendant does not in express terms undertake to deprive the plaintiff of his right, in common with all other citizens, to sue in the courts for redress of his grievance, the practical effect of the right claimed to close the door to inquiry in re-

spect to the controverted fact is to keep the promise to the ear and break it to the heart. If one of the officers of the corporation may, by an *ex-parte* unsworn certificate, conclusively close an inquiry into the fact, it would be an idle thing to go into court and impanel a jury, only to be told that no evidence will be heard by them.

While courts will, and should, cautiously exercise the power of declaring contracts, solemnly made by parties, void as being unreasonable, they should at the same time carefully scrutinize contracts the purpose and effect of which is to prevent the citizen from having his rights passed upon and enforced by the courts of the State, by the means and methods which experience has shown to be best adapted (108) to that purpose. It would seem that to sustain a by-law making such certificate presumptive evidence is as far as the court should go in that direction.

Without attributing to the officer any corrupt motive, we cannot fail to recognize the truth, taught by experience, that those whose duty requires the daily mailing of large numbers of letters cannot retain any personal memory of the particular letters mailed, and are compelled to rely upon the record made by them at the time. Such record should have, and always does have, great weight in establishing the fact recorded. It has never been held that such records made by persons engaged in private business are conclusive evidence of such facts. Based upon reasons of public policy, certain public records import absolute verity, and may not be contradicted; but such reasons do not extend to private entries. The rules of evidence are relaxed to the extent of permitting them to be introduced as entries, within well-defined limitations. *Ins. Co. v. Railroad,* 138 N. C., 42; Greenleaf Ev., sec. 120. To go beyond this and allow private corporations, by means of by-laws, to make acts of their own officers conclusive evidence, is, so far as our researches inform us, without precedent, and we think would be an unreasonable and dangerous innovation upon common right.

It will be observed that the by-law does not require the certificate of the treasurer to state a fact within his own knowledge; he is not required to certify that *he* mailed the notice or that he saw some other person do so; but may, as in this case he undertook to do, rely upon the statement of an office boy or any other servant or employee of the company. Certainly, to permit such certificate to have the conclusive effect claimed would put every member of the defendant company in the absolute power of the corporation.

It is said that there is a presumption, founded upon expe-

rience, that a letter duly posted, prepaid and properly ad- (109) dressed, reaches its destination. The jury have found upon the second issue that Dr. Duffy never received the notice. It appears from the mailing-sheet that other notices mailed at the same time were received. The only reasonable explanation of this condition of the matter is that the notice was not mailed. The burden of proof was on the defendant to show the mailing.

There is another view of the question upon which we think the testimony was competent. If a by-law of this character were valid, it should certainly be construed strictly and the certificate be required to comply with its terms. After stating the facts in regard to the mailing, the treasurer proceeds to say: "This certificate is made by me, the treasurer of said company, in conformity with the provisions of the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct transcript of the record of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk, and one of the sheets referred to therein." It is thus made apparent that he is relying upon the affidavit of Mr. Haines, which is attached to this certificate. His statement, therefore, is based upon hearsay, and we are thus invited to make a second departure from well-settled rules of evidence. To do so would further endanger the rights of the members of the association.

We have carefully examined the numerous cases cited by counsel for the defendent, and, as conceded by them, they do not decide the question presented upon this record. The recognition by the courts, of contracts to submit questions to arbitration, is based upon a principle not applicable to this case.

We are of opinion that his Honor committed no error in admitting the testimony of Dr. Duffy. The jury having found the fact against the defendant's contention, upon the first issue, it is unnecessary to consider the other question discussed in the brief. The by- (110) law relied upon is unreasonable and invalid. Upon an examination of the entire record we find

No Error.

TYNER v. BARNES.

(Filed 25 September, 1906.)

Fraud—Evidence—Purchaser for Value—Registration Act—Appeal and Error.

1. In an action against two defendants to set aside a deed of trust for fraud, where a conversation with one of the defendants, tending to show fraud on the part of both was introduced without objection, and there was no motion to strike it out nor to request that the same be confined in its effect to the issue as to fraud on the part of the declarant, an objection to the validity of the trial on this ground is not open to the other defendant.
2. In an action to set aside a deed of trust for fraud, where there was evidence tending to show that the deed of trust was not for the purpose of securing a *bona fide* debt, but that the whole transaction was a colorable arrangement to secure a feigned debt with the design and purpose to deprive the plaintiff of his security, a motion of nonsuit was properly denied.
3. Where the jury found that the defendant, whose deed of trust was registered prior to the plaintiff's deed older in date, was not a purchaser for value, but a volunteer, it is not required to defeat the defendant's claim that there should have been any actual fraud on his part.
4. Our registration act, Revisal, sec. 980, for lack of timely registration only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail.

ACTION by G. W. Tyner against Joseph Barnes and others, heard by *Shaw, J.*, and a jury, at the January Term, 1906, of NORTHAMPTON.

There was evidence tending to show that on 22 January, (111) 1900, the plaintiff sold and conveyed to Joseph Barnes a tract of land in Northampton County, and Joseph Barnes at the same time executed to the plaintiff a mortgage to secure the purchase-money. The plaintiff failed at the time to have the mortgage recorded; that on 12 January, 1901, Joseph Barnes executed to the defendant D. C. Barnes, trustee, a deed of trust on the same tract of land, the deed purporting to secure a stated indebtedness of $75 to the defendant W. S. Ricks, and the deed was duly recorded shortly after its execution and before the registration of the mortgage executed to the plaintiff. When the alleged debt to Ricks matured, according to the provisions of his deed, the trustee advertised the land, when the plaintiff instituted the present action and obtained a restraining order, which was continued to the hearing, and filed his complaint alleging that the transaction between Barnes and Ricks was a fraudulent contrivance entered into for the purpose of cheating and defrauding the plaintiff of his debt and security, and, as a matter of fact, there was no money

or valuable consideration for the alleged indebtedness secured by the deed of trust, but said deed of trust was executed and taken on the part of Joseph and D. C. Barnes and W. S. Ricks with intent to cheat and defraud the plaintiff.

The defendant denied each and all of these allegations, and alleged that the debt was *bona fide* and the deed executed in good faith.

There were four issues responded to by the jury, and the verdict established: (1) That the deed was executed by Barnes with intent to cheat and defraud the plaintiff. (2) That the defendant Ricks procured the execution and registration of the deed with like intent. (3) That the defendant Ricks advanced no money to Joseph Barnes before receiving said deed. (4) Joseph Barnes had never tendered the plaintiff his debt. On the verdict there was judgment for the plaintiff, and the defendant excepted and appealed.

B. B. Winborne for the plaintiff.
Peebles & Harris and *Mason & Worrell* for the defendants.

HOKE, J., after stating the case: The only objection to the validity of this trial, urged upon our attention by the appel- (112) lant, was to a certain portion of the plaintiff's testimony in which he gave a conversation between the plaintiff and Joseph Barnes, as follows: "Barnes told me that Ricks had said to him that he (Ricks) had found out the plaintiff's mortgage was not recorded, and that if Barnes would give him a mortgage he (Ricks) would cut the plaintiff out of his money." The objection being that this was a declaration of Barnes, not in the presence of Ricks and after Barnes had executed the deed of trust securing the alleged indebtedness to Ricks.

The objection is not well taken. The evidence was certainly competent against Barnes, the declarant; and, besides, no objection or exception to the testimony appears anywhere in the record or case on appeal. It was not objected to when offered; there is no motion to strike it out, and no request that the same be confined in its effect to the issue as to fraud on the part of Barnes. The objection, therefore, is not open to the defendant. *Bridgers v. Bridgers,* 69 N. C., 454; *S. v. Ballard,* 79 N. C., 627; *McKinnon v. Morrison,* 104 N. C., 363.

We find in the record another exception to the refusal of the Judge to dismiss the cause as on motion of nonsuit on the ground that there is no evidence to show fraud sufficient for the consideration of the jury, and this objection cannot be sustained. Without going into a detailed statement of the testimony, we are of opinion that there is evidence

tending to show that this deed of trust was not for the real purpose of securing a *bona fide* debt, but that the whole transaction was a colorable arrangement to secure a feigned or pretended debt with the design and purpose to deprive the plaintiff of his security.

Apart from this, the jury in response to the third issue have (113) found that Ricks advanced no money to Barnes as a consideration for the note and deed of trust. The issue is not framed with the scope or precision that is desirable, but, taken in connection with the pleadings and the testimony, the verdict on the third issue was evidently intended to mean, and by fair intendment could only mean, that Ricks was not a purchaser for value, but a volunteer. If this is true, it is not required to defeat his claim that there should have been any actual fraud on his part, and any error on that question would be harmless. Our registration act, Revisal, sec. 980, for lack of timely registration only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. There is no error, and the judgment below is

Affirmed.

BUNN v. BRASWELL.

(Filed 25 September, 1906.)

Consent Judgment—Mortgagor and Mortgagee—Conditional Sale—Statute of Limitations—Petition to Rehear—Assignment of Errors.

1. The language of the consent decree that a final judgment rendered in 1888 by default for land is "so far modified as to declare that the defendant has an equity to redeem the land," coupled with the admitted fact of defendant's prior possession, is strong evidence that the relation of mortgagor and mortgagee existed prior to 1888, and that the decree itself creates by its very terms this relation, and that it does not constitute a conditional sale.
2. Where the mortgagor and those claiming under him have been in continuous possession since the consent decree in 1889, the plaintiff must show some payment or other fact that will bar the running of the statute of limitations.
3. It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the Court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the Court in its opinion is erroneous."

PETITION by the palintiff to rehear this cause, which was decided at the Fall Term, 1905, and reported in 139 N. C., 135.

F. S. Spruill for the petitioner.
Austin & Grantham in opposition.

BROWN, J. The petition to rehear this case assigns two errors in the opinion of the Court: 1. For that the Court in its (114) application of the law to the facts of the case inadvertently added to the facts which were agreed upon in the lower Court and upon which the Court's judgment was hypothecated, a finding of facts not in the record and not actually existing, viz., that the relation of mortgagor and mortgagee subsisted between the plaintiff and the defendant at the time of the institution of the action in ejectment in 1888.

2. For that, granting the correctness of every legal propostion laid down by the Court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the Court in its opinion is erroneous.

As to the first allegation, the learned counsel for the plaintiff are themselves inadvertently inaccurate. In the well-considered opinion delivered for the Court by *Mr. Justice Connor* no finding of facts is made and none "added to the facts which were agreed upon in the lower Court." It will be observed upon reading the opinion that the writer was reciting only the contentions of the defendant when he stated that the declaration in the decree of 1889 "that the defendant has an equity to redeem the land shows clearly that the relation of mortgagor and mortgagee at that time and theretofore existed between the parties, and not that he was by the judgment given such equity; that the judgment was a recognition of the existence thereof." (115)

Upon a re-examination of the consent decree, we think there is much upon its face to support the defendant's argument. N. W. Boddie had in 1888 recovered a final judgment by default for the land. Why set it aside by consent and substitute in its place such an instrument as the decree of 1889? It is not likely that Boddie would take such a method of selling to Braswell a tract of land which the latter had never theretofore had any interest in. Couple the language of the consent decree with the admitted fact of Braswell's prior possession, and the inference is very strong that the relation of mortgagor and mortgagee existed between the parties prior to 1888. Why use the words "that said judgment (of 1888) is so far modified as to declare that the defendant has an equity to redeem the land?" Where did the defendant get his equity of redemption which the decree says he had at that time? The plaintiff's counsel say that the decree does not confer any such equity and that the defendant never had it before. This argu-

ment is at variance with the plain language of the decree. The plaintiff contends that the decree is a contract to buy the land by the defendant. the word "redeem" does not mean to "buy." It means to "buy back," "to liberate an estate by paying the debt for which it stood as security," "to repurchase in a literal sense." Black Law Dict., 1008. It therefore follows that the defendant could not have an equity to redeem the land unless he previously owned it. This argument is not based upon any agreed facts, but upon the context of the decree itself. If the decree was intended to constitute a conditional sale of land which the defendant did not previously own, then the words we have quoted are very much out of place. "The right of redemption is an inseparable incident to a mortgage; while in the case of a conditional sale the rights of the vendor are those expressly reserved to him by the (116) agreement, and those only." Thomas on Mort. (2 Ed.), sec. 32.

We do not deem it necessary to consider the second ground of error in the petition to rehear. It is a broadside fired at the judgment of the Court and points out no material point overlooked and no material fact that escaped the Court's attention, and cites no new authority that is antagonistic to the conclusions reached by the Court, viz., first, that the language of the decree is strong evidence that the relation of mortgagor and mortgagee existed prior thereto, and, second, that the decree itself creates by its very terms the relation of mortgagor and mortgagee. *Wilcox v. Morris,* 5 N. C., 117. It therefore follows that the mortgagor, and those claiming under him, being continuously in possession since the decree, the plaintiff must show some payment or other fact that will bar the running of the statute of limitations.

Petition Dismissed.

GRIFFIN, EX-PARTE.

(Filed 25 September, 1906.)

Deeds—Advancements—Presumption—Parol Evidence—Recitals—Consideration.

1. The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an "equality of partition" among their children; hence, a gift of property or money is *prima facie* an advancement; but this presumption may be rebutted.
2. Parol evidence is competent to rebut the presumption as to an advancement arising upon the face of a deed and to show the real intention of the parent.

3. The presumption of an advancement raised upon the words in a deed, "in consideration of a gift," is not rebutted in the absence of evidence that some substantial consideration passed and that it was not in fact a gift nor intended as an advancement.
4. Where a father conveyed to his daughter four acres of land in consideration of $25, the receipt of which was acknowledged, and the further consideration that she pay to her father one-half the crops for ten years, provided he should live ten years, and there was evidence that she paid the $25 and delivered one-half the crops as stipulated, and there was no evidence in regard to the value of the land, the presumption arises that the conveyance was a sale, and not a gift or advancement.
5. A recital in a deed that the consideration was paid, in the absence of any testimony to the contrary, would control, and the status of the parties be the same as if the payment of the recited consideration was proven.

SPECIAL PROCEEDING by Della Griffin and others, *ex-parte,* heard on appeal from the Clerk of NASH, by *Jones, J.,* by con- (117) sent, at chambers, at Wilson, N. C., on 26 February, 1906.

From the judgment rendered the petitioner, Henrietta Robbins, appealed.

F. A. Woodard, Battle & Cooley and *R. T. Barnhill* for Henrietta Robbins.

T. T. Thorne for Mahala Farmer.

CONNOR, J. This is a special proceeding for the purpose of having partition of the lands which descended to petitioners as the heirs at law of their father and grandfather, John J. Sharp, deceased.

The only question presented on the appeal of petitioner Henrietta Robbins for our decision relates to the exception to his Honor's ruling upon the claim made by the other petitioners in regard to advancements alleged to have been made to her.

It appears from the record that the ancestor of the petitioners on 31 March, 1883, "in consideration of a gift to Henrietta Lancaster," since married to petitioner Robbins, conveyed to her for life and then to her children a small parcel of land, the value of which is not shown.

There was evidence tending to show the circumstances under which the deed was executed which we do not deem necessary to (118) set forth. *Pearson, C. J.,* says: "The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an 'equality of partition' among their children; hence, a gift of property or money is *prima facie* an advancement, that is, property or money paid in anticipation of distribution of his estate;

but surely this presumption may be rebutted," etc. *James v. James,* 76 N. C., 331 (the word "not" is omitted in the quotation from the language of the deed, both in the headnote and in the opinion. This is manifest; otherwise the conclusion is a *non sequitur*). In *Harper v. Harper,* 92 N. C., 300, the principle announced in *James v. James* is approved, and it is further said that parol evidence is competent to rebut the presumption arising upon the face of the deed and shows the real intention of the parent; that the introduction of such testimony does not contravene the rule prohibiting the contradiction by parol of a recited consideration, but may be heard for the purpose of showing the intention of the parent. These cases are followed in *Kiger v. Terry,* 119 N. C., 456.

The question is not whether the presumption raised upon the recited consideration may be rebutted, by showing merely a valuable consideration understood in its technical sense, but whether some substantial consideration passed, and that it was not in fact a gift nor intended as an advancement. Considered from this point of view, we do not think the testimony, accepting it as true, rebutted the presumption raised upon the words "in consideration of a gift." The exception in respect to the deed of March, 1886, cannot be sustained.

On 24 March, 1905, Mr. Sharp executed a deed conveying to Mrs. Robbins four acres of land "for and in consideration of twenty-five dollars to him paid by the said Henrietta Robbins, the receipt of
(119) which is hereby acknowledged, * * * and the further consideration, that the said Henrietta Robbins pay to the said John J. Sharp for the term of ten years from the date of said deed, providing the said J. J. Sharp shall live ten years from the date of said deed, one-half of all the fruits and crops that shall be raised on said lands."

There was uncontradicted testimony that she paid the recited consideration of $25 and delivered one-half the crops made during the year 1905. Mr. Sharp died during the fall of that year. There was no evidence in regard to the value of this land. Adopting the same principle invoked in regard to the other deed, the presumption arises that the conveyance of March, 1905, was a sale and not a gift, and there is therefore no presumption that it was an advancement. We find nothing in the testimony tending to rebut this presumption. The appellee says that the testimony of Mrs. Robbins that she paid $25 for the land conveyed 24 March, 1905, is incompetent by reason of sec. 590 of The Code (Rev., sec. 1631). The record shows no exception to its introduction. If, however, it had been excluded, the recital that the

consideration was paid, in the absence of any testimony to the contrary, would control and the status of the parties be the same.

We think the Clerk ruled correctly that the value of this land was not to be charged to Mrs. Robins as an advancement, hence the exception to his Honor's ruling in that respect must be sustained. As the parties have agreed upon a method of ascertaining the value of the land for which the appellant must account, the judgment must be so modified that when the amount is fixed she will be charged therewith, and further proceedings had in accordance with the rights of the parties and the practice of the Court. Each party will pay her own cost in this Court. The judgment is

Modified and Affirmed.

Cited: Thompson v. Smith, 160 N. C., 258.

---

(120)

RUFFIN v. RAILROAD.

(Filed 25 September, 1906.)

Contributory Negligence—Issues—Harmless Error—Instructions—Continuing Negligence — Negligence — Question for Jury — Railroads — Station Platforms—Reversal of Train—Damages Recoverable.

1. While it is the better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the Court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had been given the benefit of such testimony, with its application.
2. The expression, "he cannot recover," should not be used in an instruction; but the instruction should conclude in directing the jury to answer the issue accordingly as they find.
3. An instruction that if the jury find that on the night of the alleged injury the plaintiff was under the influence of liquor, and that was the cause of his failure to get off on the right side of the train, and thereby *directly* contributed to his own hurt, the plaintiff would be guilty of contributory negligence, and they would answer the first issue "No," is not prejudicial to the defendant in the use of the word "directly" instead of "proximately."
4. An instruction that the defendant's failure to have sufficient lights upon their wharf, upon which passengers are invited to alight, would constitute continuing negligence, it is continued during the landing and delivering passengers; and if they should find that the failure of defendant to keep such lights was the proximate cause of the plaintiff's injury, and he would not have been injured if there had been

sufficient light to enable him to pass safely over the pier, provided he used reasonable care and diligence, they would answer the issue "Yes," is not prejudicial to the defendant by the use of the words "continuing negligence," taken in connection with the context.

5. A prayer, in which the Court is asked to instruct the jury that if they find certain facts grouped therein there was no negligence, is objectionable, unless all the material elements of the case be included, because it excludes from the jury the duty of drawing such reasonable inferences as the testimony would justify.

6. Since the decision in *Russell v. Railroad*, 118 N. C., 1098, this Court has uniformly treated negligence as a question of fact for the jury, with certain exceptions.

7. A railroad company must provide safe exits and reasonably safe platforms or facilities for entering and leaving cars.

8. When a railroad company makes a provision only on one side of its track for passengers to leave its cars, and it is dangerous to leave on the other side, it is a question for the jury whether it is negligence for the company not to have provided some means to prevent passengers from leaving on the wrong side, or to notify them not to do so.

9. The reversal of a train in the night is well calculated and usually does confuse passengers, and it would be but common prudence to notify them thereof.

10. Where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts; and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body or mind which are the immediate and necessary consequences of the injuries.

ACTION by Thomas Ruffin against Atlantic and North Caro-
(121) lina Railroad Company, heard by *Long, J.*, and a jury, at the January Term, 1906, of CARTERET.

This action is prosecuted by plaintiff for the purpose of recovering damages for personal injuries sustained by him while a passenger upon defendant's train. Defendant denied negligence, and for further answer alleged that the injury was "caused by the negligence of plaintiff in that on the night in question he was under the influence of liquor and thereby contributed to his own hurt, and that plaintiff failed to act as a prudent man in alighting from said train." Defendant tendered an issue directed to plaintiff's alleged contributory negligence, which his Honor declined to submit, and defendant excepted. His Honor submitted the following issue: "Was plaintiff injured by defendant's negligence, as alleged?" together with an inquiry as to damages.

There was evidence tending to show that plaintiff went upon
(122) defendant's train at New Bern, as a passenger, for the purpose of going to Morehead City, thence by boat to Beaufort. He

boarded the train at New Bern on the north side of the car. Before reaching Morehead the train was turned around upon a "Y," thereby backing into Morehead. The custom, up to a short time before the day of the injury, had been to pull into the depot. This was known to plaintiff, but he had no notice of the change. Defendant maintained a pier at Morehead, running into and over the waters of Bogue Sound. Passengers left the train on said pier, taking a boat to Beaufort. There was, upon the pier, an elevated platform between two railroad tracks; the platform was built for the accommodation of passengers, with approaches leading to and from it. On either side of the platform were trestles used exclusively for trains other than passenger. The spaces between the cross-ties on the trestles were open. There was no evidence of negligence in the construction of the platform. There was evidence tending to show that there were lights on the platform side of the train, but none on the ocean or south side. When the train backed upon the pier plaintiff left the car on that side, and after making one or two steps, fell between the cross-ties and was injured. He did not know that the train had been turned around. He knew of the conditions on the pier at Morehead. There was no railing on the platform, or on the car, to prevent passengers alighting on the ocean side, nor was he warned not to get off on that side. There was evidence that plaintiff "was under the influence of liquor; not very much." The evidence was conflicting in regard to plaintiff being directed to get off on "platform side." There was evidence that the same condition on pier had existed for many years. The evidence regarding sufficiency of lights was conflicting. There were no lights on ocean side; pessengers were not expected to leave the train on that side.

There were exceptions to his Honor's ruling upon the admission of testimony and instructions given and refused, which (123) are set out in the opinion. There was a verdict for the plaintiff. Judgment and appeal by the defendant.

D. L. Ward and M. DeW. Stevenson for the plaintiff.
C. L. Abernathy for the defendant.

CONNOR, J., after stating the case: The defendant insists that his Honor committed error in refusing to submit to the jury an issue in regard to plaintiff's alleged contributory negligence. It was held in *Scott v. R. R.*, 96 N. C., 482, that when the Court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence, and it was apparent that defendant had, in that way, been given the benefit of such testimony, with its application, an

omission to submit the issue was not reversible error. Since the decision of that case the statute was enacted requiring defendant to specially plead such negligence and thereby assume the burden of showing it. Revisal, sec. 483. While we think it the better practice, and suggest that the issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, be submitted, we adhere to what is said upon the subject in *Wilson v. Cotton Mills,* 140 N. C., 52, and the cases therein cited.

Both sides submitted prayers for special instructions, several of which his Honor gave. Among others, he instructed them as follows: "1. If you should find that the defendant company ran its train upon the 'Y,' about a mile from its station at Morehead City, and reversed its engine and cars and backed its train into Morehead City and to its terminal at its pier, but informed the plaintiff that it had reversed its cars aforesaid, this of itself would not make the defendant negligent. 2. If you find from the evidence that the defendant company ran its cars upon the 'Y,' about a mile from its station at Morehead City, and reversed its engine and cars and backed its train into Morehead City and
(124) to its terminal at its pier without informing the plaintiff that it had reversed its cars, and you still further find that the plaintiff in alighting from said train on the night of the alleged injury failed to exercise the ordinary care of a prudent person in like circumstances in alighting from said car, and did not look nor take notice of any danger, then plaintiff could not recover. It was the duty of the plaintiff to have acted the part of a prudent person in getting on and off the train, and if he did not act like a prudent person, then he cannot recover, if such failure if found by you was the cause of his injury." There can be no just criticism of the propositions involved in these instructions. The expression, "he cannot recover," should not be used. The instruction should conclude in directing the jury to answer the issue accordingly as they find. They clearly present the debated questions involved both plaintiff's and defendant's conduct.

He further charged: "3. If you find from the evidence that on the night of the alleged injury the plaintiff was under the influence of liquor, and that was the cause of his faliure to get off on the right side of the train, and he thereby *directly* contributed to his own hurt, the plaintiff would be guilty of contributory negligence, and you would answer the first issue 'No.' Even if the defendant were guilty of negligence and the plaintiff was under the influence of liquor and intoxicated and thereby contributed *directly* to his hurt, then the plainitff cannot recover."

Defendant excepts to the use of the word "directly" by his Honor, in-

sisting that it is not synonymous with "proximately." Our attention is called to several decisions in which it is held that the terms are not synonymous. We can well understand that, in some cases, the testimony may be such as to present the distinction urged by counsel, but in the connection in which it is used by his Honor we cannot think that the jury could have been misled to defendant's prejudice. It occurs to us that plaintiff would have better cause to complain in this respect than defendant. (125)

His Honor further instructed the jury: "4. It was the duty of the plaintiff in alighting from the cars on the night in question to look and see if he were getting off on the right or wrong side, and if he didn't use the ordinary care of a prudent man, and failed to look before alighting from the car, he could not recover if his injury is due to such lack of care, if you find that he did not use ordinary care. 5. The defendants are only required to keep that portion of their platform safe that is used exclusively for the accommodation of passengers; also, they are required to keep in a safe condition the approaches leading to said platform; that is to say, the way used by passengers in going to and from said platform must be reasonable safe. 6. It is the duty of the defendants to keep their pier in such condition as to make it safe for the public to use it; that if the plaintiff was a passenger and had a right to be on the wharf, and exercised reasonable care and diligence, and was injured solely from a defect in the wharf, he is entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use and exposure of the wharf reasonably required; that it was the duty of the defendants to take such a degree of care of their pier that those who had a lawful right to go there could do so without incurring danger to their persons, provided they exercise ordinary care and diligence."

While the sixth instruction does not appear to be called for by the testimony, there can be no exception to the general propositions contained in it, and we do not see how the defendant could have been prejudiced thereby. The instruction in regard to the duty of defendant to keep lights upon their wharf, upon which passengers are invited to alight, is clearly correct. His Honor told the jury that their failure to have a sufficient light, if they found that there was such failure, would constitute continuing negligence, if it continued during the landing and delivering of passengers; and if they should (126) find that the failure of defendant to keep such lights, if it did so fail, was the proximate cause of the plaintiff's injury, and he would

not have been injured if there had been sufficient lights to enable him to pass safely over the pier, provided he used reasonable care and diligence, they would answer the issue "Yes." The defendant criticises this instruction because his Honor used the words "continuing negligence." The criticism is based upon a misconception of the sense in which the term is used. In *Greenlee v. R. R.*, 122 N. C., 977, and the line of cases in which the doctrine of "continuing negligence" is applied, the negligence of the defendant in failing to supply automatic couplers is declared to be the *causa causans* of the injury, thereby excluding the defense of contributory negligence. The basis of the doctrine and its limitations are pointed out by *Mr. Justice Hoke* in *Hicks v. Manufacturing Co.*, 138 N. C., 331. His Honor expressly excluded any such principle in this case, by telling the jury that the failure to keep sufficient lights would entitle the plaintiff to a verdict, provided such failure was the proximate cause of the injury. His language clearly shows that he used the term in its ordinary sense, that is, that such negligence, although continuing, was actionable only when it became the proximate cause of the injury. We do not think that any harm could have come to defendant by the use of this language, taken in connection with the context.

His Honor carefully excluded any suggestion that the failure to have sufficient lights relieved the plaintiff of the duty to exercise due care in alighting from the train.

Defendant presented several prayers in which the Court was asked to instruct the jury that if they found certain facts grouped therein there was no negligence. This form of instruction, unless all the material elements of the case be included, is objectionable, because it excludes from the jury the duty of drawing such reasonable in-
(127) ferences as the testimony would justify. In those jurisdictions in which negligence is treated as a question of law, the facts alone being for the jury, this is a proper form of instruction. It was so held in this Court until the decision of *Hinshaw v. R. R.*, 118 N. C., 1047, and *Russell v. R. R., Ib.*, 1098. In *Emry v. R. R.*, 109 N. C., 589, this doctrine was recognized and adhered to as the law. The opinion of *Merrimon, C. J.*, clearly announces and sustains the principle that negligence is a question of law. The case was decided by a divided Court.

In *Russell's case, supra, Mr. Justice Avery,* writing for a unanimous Court, overrules *Emery's case* and adopts the rule followed by the Federal courts and a large majority of the State courts, which treat, with certain exceptions which he states, negligence as a question of fact for

the jury. These cases have been uniformly adhered to by this Court in a number of decisions. In *Turner v. Lumber Co.*, 119 N. C., 387 (400), it is said: "The Court may submit issues of negligence with the instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man." *McCracken v. Smathers, Ib.*, 617. There are a large number of illustrative cases in our reports. When it is sought to apply the exception to the rule, the facts being undisputed or found by the jury, and being susceptible of but one reasonable inference, as in *Neal v. R. R.*, 126 N. C., 634, and *Bessent v. R. R.*, 132 N. C., 934, the Court may either take the case from the jury and decide it as a question of law, or instruct the jury that if the facts are found which exclude any other inference, to answer the issue accordingly.

In this case his Honor could not properly have given the instruction, for several reasons. The testimony was not, in all respects, uncontradicted, and the facts grouped in defendant's prayers did not include the several phases of the case.

The real question presented in this case is whether, upon defendant's own testimony in regard to the construction of the (128) tracks upon the pier, the reversal of the train on the "Y" and the danger of passengers alighting from the train on the ocean side, there was not sufficient evidence of negligence to carry the case to the jury under the rule of the conduct of the prudent man. We are of the opinion that his Honor properly submitted the case to the jury.

The measure of duty imposed upon the carrier is thus stated in the latest work on the subject: "It must provide safe exists and reasonably safe platforms or facilities for entering and leaving cars." Moore on Carriers, 612. "A railway company has not discharged its whole duty to the passenger when it has provided a safe exist from its cars, while at the same time there exists another way which is not safe, and which is in such general use by its passengers as to induce the belief that it is permitted in part at least for that purpose. Hence, when a railroad company makes provisions only on one side of its track for passengers to leave its cars, and it is dangerous to leave on the other side, it is a question for the jury whether it is negligence for the company not to have provided some means to prevent passengers from leaving on the wrong side or to notify them not to do so." Fetter, Carriers, p. 153. This statement of the law, which we approve, clearly carried the case to the jury, and we think that in the light of all of the testimony they came to a correct conclusion.

Experience teaches us that the reversal of a train in the night is

well calculated and usually does confuse passengers, and it would be but common prudence to notify them thereof. Again, when one side of a car, at the depot, is a dangerous place to alight, the company should have a porter, or some employee, to notify passengers not to do so, or to use the simple contrivance of a gate on that side to be closed to the exit of passengers. Some such means to prevent injury is but common prudence and should be used by carriers.

(129) The defendant insists that to permit a recovery in this case would "impose upon railroads great expense to protect their passengers and require them to deal with grown people as with children." We cannot perceive any heavy or unreasonable burden imposed by the rule of diligence prescribed by the law. The safety of passengers should be the first consideration of all who engage in the business of common carriers.

His Honor instructed the jury in regard to the measure of damages to which plaintiff would be entitled, as follows: "Where the plaintiff has been injured by the negligent conduct of the defendant he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts, and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body or mind which are the immediate and necessary consequences of the injuries; but in this case, as the plaintiff has not introduced evidence to show what he paid for nursing and medical attention, or what his services for loss of time were worth, you will only consider such damages, if any, as he is entitled to recover for actual suffering of body and mind which are the immediate and necessary consequences of injuries sustained, if you find by the greater weight of the evidence he was injured by the negligent conduct of the defendant." To this defendant excepts, because his Honor stated that he gave the instruction as laid down in *Wallace v. R. R.*, 104 N. C., 449, and did not apply the law to the facts. We think the instruction correct and not open to the criticism made by the exception. We have examined the entire record and find

No Error.

Cited: Brown v. R. R., 147 N. C., 138; *Wagner v. R. R., Ib.*, 329; *Kearney v. R. R.*, 158 N. C., 527, 543.

ARRINGTON v. ARRINGTON.

(Filed 25 September, 1906.)

Reinstatement of Case—Practice.

A motion to reinstate a case upon the docket was properly denied, where it appears that all matters in controversy were decided in an opinion by this Court at February Term, 1894, and the case was remanded in order that judgment might be entered in accordance with the opinion of the Court, and there was nothing presented which discloses a necessity for reinstating the case.

ACTION by Pattie D. B. Arrington against J. P. and B. L. Arrington, heard by *Ward, J.*, at the May Term, 1906, of the (130) Superior Court of VANCE upon motion by plaintiff to reinstate the cause upon the civil issue docket. From an order denying the motion, the plaintiff appealed.

The plaintiff filed a manuscript brief.

PER CURIAM. We gather from the manuscript argument filed in this Court by the plaintiff, in person, that her object in desiring a reinstatement of the cause is to reopen the same and have another reference. The case came before this Court at February Term, 1894 (114 N. C., 151), and upon exceptions to the report of the referee. In an elaborate opinion by *Shepherd, C. J.*, all the matters in controversy were decided and "the case remanded in order that judgment may be entered in accordance with the opinion of this Court." The record of the case since then is not before us, but we assume as a matter of course that such final judgments have long since been entered.

There was nothing presented to *Judge Ward,* or in the papers sent here on this appeal from his order, which discloses a necessity for a further reference or for reinstating the case on the docket of the Superior Court. The order of his Honor in the Superior Court is

Affirmed.

(131)

IVES v. RAILROAD.

(Filed 25 September, 1906.)

Statute of Frauds—Growing Trees—Contract for Cord-wood—Challenges to Jurors—Damages for Breach of Contract—Evidence—Acts of Agent—Scope of Employment—Special Instructions.

1. Growing trees are a part of the realty, and a contract to sell or convey them or any interest in or concerning them must be reduced to writing.
2. A contract, by which the plaintiff agreed to cut for the defendant and deliver along its right-of-way a stipulated number of cords of wood, a part of which was to be cut from the plaintiff's land and the balance from the defendant's land, is not within the statute of frauds.
3. The defendant is not in a position to except to the ruling of the Court sustaining the plaintiff's objection to a juror where it had not exhausted its peremptory challenges, and, so far as appears, the jury chosen to try the case constituted a panel entirely acceptable to both parties.
4. In an action to recover damages for breach of a contract, evidence that plaintiff borrowed money to enable him to fulfill this contract was competent upon the issue as to the plaintiff's ability and readiness to perform his part of the agreement.
5. In an action for damages growing out of defendant's breach of a contract with plaintiff, evidence of what defendant's president and agent, specially deputed to make the contract and to see to its execution, had said and done in course of his employment was competent.
6. If a party desires more definite instructions, he must make a special request for them.

ACTION by B. W. Ives against Atlantic and North Carolina Railroad Company, heard by *Long, J.*, at the May Term, 1906, of CRAVEN.

The action was brought to recover damages for breach of an oral contract between the parties by which the plaintiff agreed to cut
(132) for the defendant and deliver along its right-of-way fifteen thousand cords of wood, three thousand cords of which were to be cut from the plaintiff's land and the balance from the land of the defendant. For the three thousand cords the defendant agreed to pay $2 per cord and for the remainder $1.75 per cord; the defendant, as to the latter, being allowed a deduction on the price of twenty-five cents per cord for what is called "stumpage," that is, for the trees furnished by it or cut on its land. Plaintiff cut 5,090 cords, for which he was paid, and he cut and was ready to deliver 5,184 cords, and has cut and delivered 748 cords, for which he was not paid, making 10,986 cords, and leaving uncut 4,014 cords. There were 1,140 of the 5,090 cords which were not delivered on the right-of-way, because it was already

full of other wood and there was no room for it. This was hauled by plaintiff to his tramway and was ready for delivery, when defendant directed that it should be inspected and paid for. Six hundred cords of it was afterwards delivered on the right-of-way. The plaintiff alleged that he had been prevented from complying fully with his part of the contract by the wrongful acts of the defendant, although he was at all times ready, able and willing to do so; and there was evidence tending to support the allegation. There was evidence tending to show that the plaintiff had not complied in all respects with the contract on his part. It was also in evidence that there had been no breach of the contract by the defendant, until after the road was leased, the former president of the defendant company stating that he would have carried out the contract fully had he been continued in office. The defendant pleaded a counter-claim consisting of $1,193 paid to the plaintiff for the 1,140 cords of wood cut from its land, which it alleged had not been delivered on the right-of-way and which had become worthless, and $285 for stumpage and $413.40 for quarters erected for the plaintiff's hands at his request, making in all $2,691.40; and there was some evidence to sustain the demand.

The plaintiff objected to a juror, N. H. Russell, upon the ground that he was now in the employ of the lessee of the (133) defendant and had formerly been in its employ, the said lessee being responsible under its contract with the defendant for any recovery against the defendant. The objection was sustained, and the defendant excepted. The plaintiff was permitted to prove by one J. A. Meadows, over the defendant's objection, that he had advanced $13,000 to the plaintiff to enable him to carry out this contract, and that the defendant still owed him $7,300 on the debt. This evidence was introduced solely for the purpose of showing that the plaintiff was ready and able to perform his part of the contract. Many other exceptions were taken by the defendant to the rulings and to the charge of the Court, but it is not necessary to make any special reference to them here, as they are noticed in the opinion. The issues, with the answers thereto, were as follows:

"1. Did the defendant contract with the plaintiff, as alleged in the complaint? Ans.: Yes.

"2. Did defendant fail to perform said contract on its part, as alleged in the complaint? Ans.: Yes.

"3. What sum, if any, is the plaintiff entitled to recover of defendant on account of said alleged breach? Ans.: $8,106.90.

"4. Did the plaintiff carry out and perform said contract on his part? Ans.: Yes.

"5. What sum, if any, is the defendant entitled to recover of the plaintiff on account of his failure to perform his contract, as alleged by defendant? Ans.: Nothing."

Judgment was entered upon the verdict, and the defendant appealed.

D. L. Ward and *W. W. Clark* for the plaintiff.

W. C. Munroe, P. M. Pearsall, A. D. Ward and *O. H. Guion* for the defendant.

WALKER, J., after stating the case: It may now be taken as (134) settled that growing trees are a part of the realty, and a contract to sell or convey them or any interest in or concerning them must be reduced to writing. They are *fructus naturales,* and being rooted in the soil are by nature as much annexed to the freehold as any permanent fixture can be. *Scorell v. Boxall,* 1 Younge & Jervis, 396; *Carrington v. Roots,* 2 M. & W., 254; *Rodwell v. Phillips,* 9 M. & W., 501; *Evans v. Roberts,* 5 B. & C., 829. The course of judicial decision in England upon this subject, from the time of the *dictum* of *Treby, C. J.,* in Anon., 1 Lord Raymond, 182, to the latest period, will be found well stated in Reed on the Statute of Frauds, secs. 707, 711. We have adopted the rule as given in the cases above cited, and a contract for the sale of standing timber has always been considered by us as within the meaning and intent of the statute. *Brittain v. McKay,* 23 N. C., 265; *Mizell v. Burnett,* 49 N. C., 249; *Moring v. Ward,* 50 N. C., 272; *Flynt v. Conrad,* 61 N. C., 190; *Green v. R. R.,* 73 N. C., 524; *Mizzell v. Ruffin,* 118 N. C., 69. The question was directly presented and decided in *Drake v. Howell,* 133 N. C., 162, and *Hawkins v. Lumber Co.,* 139 N. C., 160. But the contract of the parties to this action was not one for the sale of standing trees, but, in the one case, for the sale and delivery of cordwood, and, in the other, for the conversion of trees growing on the defendant's land into cordwood and the delivery of the same on the defendant's right-of-way. It was not contemplated by the parties that there should be a transfer of any title to or interest in the trees as they stood upon the land; and this is essential to bring the agreement within the purview of the statute. 29 Am. and Eng. Enc. (2 Ed.), 880.

In *Washburn v. Burrows,* 1 W. H. & G. (Exch.), 115, *Rolfe, B.,* for the Court, said that where the vendor, who is the owner of the soil, sells what is growing on the land, whether natural produce (*prima*

vestura), such as timber, grass, herbage or apples, or the annual fruits of industry (*fructus industriales*), as corn, pulse, or the (135) like, on the terms that he (the vendor) is to cut or sever them from the land and then deliver them to the purchaser, the latter acquires thereby no interest in the soil, "which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

It was ruled in the leading case of *Smith v. Surman,* 9 B. & C., 561, that where the owner of land agreed with another to cut timber from his own land and deliver the trees, when cut down or severed from the freehold, to the latter for a stipulated price, the statute did not apply; and the particular agreement, in that case, being construed to have the said effect in law, was therefore held not to be within the statute. And the converse of the proposition is equally true, that where one contracts with another to cut timber from his land and deliver it to him when cut or severed, the statute has no application. It has been so expressly decided. *Killmore v. Howlett,* 48 N. Y., 569; *Forbes v. Hamilton,* 2 Tyler, 356; *Scales v. Wiley,* 68 Vt., 39; *Green v. Armstrong,* 1 Denio, 550; *Boyce v. Washburn,* 4 Hun., 792; 2 Reed on Statute of Frauds, sec. 711. The courts properly said in the cases cited that to give the statute the construction contended for would be to destroy the right of recovery of almost every laborer at harvesting or mowing, which generally and almost universally rests on a parol contract, and, further, that it would make a writing indispensable to the validity of a contract by the owner of a peat-bed or a sand-bank to deliver even a load from it; and, we may add, it would jeopardize the rights of every woodman who for hire fells trees in the forest. The construction is utterly inadmissible.

It has been said in some cases, following a *dictum* of *Littledale, J.,* in *Smith v. Surman, supra,* that if the trees are sold by the vendor, who is the owner of the land upon which they are standing, to the vendee, with a stipulation that they must be cut and removed at (136) once, or within a reasonable time, the trees will be regarded as chattels, and the contracts will therefore not be within the statute: and this because of the shortness of the time given for cutting and removing them. *Marshall v. Green,* L. R., I. C. P. Div., 35. This distinction is scholastic, if not arbitrary. It partakes more of formalism than it does of sound logic and cogent argument. We would not cite this class of decisions in support of our ruling in this case, as we cannot assent to the reasoning and conclusion of the courts in them. While they may seem to be in point, they really are not, as there the trees

themselves, as standing timber, were sold to the vendee. Here they were not. The question as to whether the statute applies should not be determined by the mere accident that time is given to sever the trees or other growth, but by the nature of the thing, as being or not being a part of the freehold. This is the better reason and ground for decision, and it was so considered by *Lord Ellenborough* in *Crosby v. Wadsworth,* 6 East, 602, wherein the Court held an agreement, that the plaintiff should enter the defendants' land and cut and carry away a crop of grass, to be for an interest in land, because "conferring an exclusive right to the vesture of the soil during a limited time;" and to the same effect is *Scorell v. Boxall* and *Killmore v. Howlett,* already cited by us, and numerous other cases decided by courts of high authority. 28 A. and E. Enc. (2 Ed.), 540, and note 6; 29 *Ib.,* 889, and note 5, where the authorities are collected. At any rate, the cases which hold that as the time fixed for cutting and removal shows whether or not it was intended that the trees or other growth should receive further nutrition from the soil, it should control in the decision of the question, are at variance with the reason assigned by this Court for its ruling that contracts for the sale of standing trees are within the statute.

What is the law, in this respect, with regard to the fruits of in-
(137) dustry (*fructus industriales*), is not now before us. *Flynt v. Conrad, supra.* Our opinion is therefore against what appears to be the main contention of the defendant, that the contract is void because it was not in writing; for this is a contract not for the sale of trees, but merely for the cutting of them into cordwood. It is simply a contract for employment and not for any interest in the article upon which the labor is to be bestowed. This is the practical view and accords with the intention of the parties.

The defendant is not in a position to except to the ruling of the Court sustaining the objection to the juror. It had not exhausted its peremptory challenges, and, so far as appears, the jury chosen to try the case constituted a panel entirely acceptable to both parties. The purposes of justice and the ends of the law are equally attained when a fair and impartial trial has been secured to the complaining party. The right of challenge confers not a right to select, but a right only to reject. This is so in theory and it should be so in practice. *S. v. Gooch,* 94 N. C., 987; *S. v. Hensley,* 94 N. C., 1021; *S. v. Jones,* 97 N. C., 469; *S. v. Freeman,* 100 N. C., 429; *S. v. Pritchett,* 106 N. C., 667; *S. v. Brogden,* 111 N. C., 656; *S. v. McDowell,* 123 N. C., 764. If an unobjectionable jury was secured, how does it concern the defendant that a juror was improperly rejected, if such was the case, which we need

not decide? The question in the form here presented was decided against the defendant's contention in *S. v. Arthur,* 13 N. C., 217.

The testimony of the witness J. A. Meadows was competent and also relevant to the issues being tried. The fact that he loaned the plaintiff money to enable him to fulfill his contract was surely some evidence bearing upon the issue as to the plaintiff's ability and readiness to perform his part of the agreement. Some of this money he had already used and a balance of $7,300 still remained with which he expected to complete the work. We are at a loss to know why this testimony was not relevant. The fact, if it be one, that (138) its effect would be to make Meadows the real plaintiff, is not any legal objection to it.

The defendant objected to evidence of the conversation between plaintiff, Bryan and Carlyle, as to the delivery of the 1,140 cords, in which Bryan agreed that he need not deliver it on the right-of-way and ordered that it should be paid for as it then stood. This is not the declaration, after the fact, of an agent, but merely the relation of what Bryan, as chief executive officer of the defendant—that is, its president, and, too, its agent, specially deputed to make the contract and to see to its proper execution—had said and done in the course of his employment. It was a part of the very transaction involved in this dispute, and a statement made by Bryan while acting for the defendant, and *dum fervet opus. Smith v. R. R.,* 68 N. C., 107, and the other like cases do not therefore apply.

The defendant's counsel further contend that as the plaintiff had delivered only 600 of the 1,140 cord cords on the right-of-way, leaving 540 undelivered, and as he had delivered only one other lot of 748 cords (exclusive of the 5,090 cords), making 1,348 cords so delivered, and as the defendant paid for 1,140 cords, the plaintiff is entitled to recover only the difference, or the value of 248 cords. The Court charged the jury fully with reference to this matter, and told them that the value of the 248 cords was the measure of the plaintiff's recovery, "if they should find the facts to be according to the defendant's contention."

The Court, we think, went to the extreme limit in favor of the defendant. The defendant's prayer excluded entirely from the consideration of the jury the evidence introduced by the plaintiff to show that the defendant had waived a delivery on the right-of-way and that it had in several respects deliberately broken the contract. The jury have found as a fact from the evidence that there was no (139)

valid reason for refusing to receive the entire lot of wood and providing a proper place for its storage.

We were told on the argument, and it is so stated in one of the briefs, though it does not appear in the record, that after the lease was made the defendants no longer needed the wood, as the engines were changed from wood to coal burners. This, if it be true, was of course no excuse for the breach, nor does it clearly appear that there was any other good reason for refusing to receive the wood or for breaking the contract in any other respect, the former president of the defendant company having testified that the wood would have been accepted and paid for and the contract carried out if he had continued in office, and the jury having adopted the plaintiff's version of the facts. We refer to these matters to show that in submitting the case to the jury, the Court has given the defendant the benefit of every possible contention in respect to them, and this is true with reference to all the questions involved.

The other exceptions of the defendant are numerous, but they are not of such a nature as to require any extended discussion of them. They relate, in one form or another, to the refusal of the Court to give more explicit instructions and to explain the relative rights and obligations of the parties under the contract. It has been so repeatedly held by this Court, that if a party desires more definite instructions he must make a special request for them, that the citation of authority to support the rule is hardly required. *Simmons v. Davenport,* 140 N. C., 407. But it must not be inferred that we think the critisism of the charge is warranted, for we are not of that opinion. The instuctions were clear and comprehensive, embracing every possible phase of the case which was material and should have been submitted to the jury. We do not doubt that the jury, which the parties appear (140) to have regarded as fair and intelligent, got a perfect understanding of the facts and the law as explained by his Honor.

We have discussed the exceptions chiefly relied on in the argument before us. The others are, we think, without merit. The case has been fairly and correctly tried and the defendant must abide by the result.

No Error.

Cited: S. v. Bohanon, 142 N. C., 697; *Medlin v. Simpson,* 144 N. C., 399; *Midyette v. Grubbs,* 145 N. C., 88; *Biggers v. Matthews,* 147 N. C., 301; *Walker v. Cooper,* 159 N. C., 539.

CARD v. FINCH.

(Filed 25 September, 1906.)

Void Judgments—Purchaser at Judicial Sale—Recitals in Decree—Persons Not Parties or Privies—Doctrine of Representation—Laches—Ejectment—Betterments—Rents, How Applied.

1. A judgment, rendered by a court against a citizen, affecting his vested rights in an action or proceeding to which he is not a party, is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court.
2. All that a purchaser at a judicial sale is required to know is that the Court had jurisdiction of the subject matter and the person.
3. Where in a proceeding to sell land to make assets, the owners of the land, subject to dower, were not named in the petition or summons, a recital in the decree that "the defendants were duly served" had no possible reference to the owners, nor can they in any way be affected by such proceeding.
4. Persons who are not parties or privies, and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment.
5. The doctrine of appearance by representation has never been applied to the divesting of a vested remainder, or in any case where those who would be entitled in remainder are *in esse* and may be brought before the Court in *propria persona.*
6. If a judgment is void, the parties are not called upon to ask favors of the Court. They declare upon their legal title, and no time, other than that prescribed by the statute of limitations, can bar them.
7. In an action of ejectment where the defendants purchased the land at a sale by the administrator as commissioner in a proceeding to make assets, to which plaintiffs, who were the owners of the land, were not parties, the plaintiffs are entitled to recover the land, subject to the right of the defendants to have repaid the amount which they expended, for which the land was liable.
8. The judgment, directing that the annual instalments of rent be first applied to the payment of the permanent improvements and then to the interest on the debt and the taxes paid by the defendants and interest, and then in reduction of the principal, and that the balance due be declared to be a lien upon the land, was correct.

ACTION by A. H. Card and others against J. H. Finch and (140) wife, heard by *Webb, J.,* and a jury, at the October Term, 1905, of the Superior Court of FRANKLIN.

This was an action of ejectment, brought by the plaintiffs, Georgiana Card and Gertie and Willie Duke, minors, represented by their next friend, against J. H. Finch and wife, for the possession of a tract of land in Franklin County, described in the pleadings and proof. Plaintiffs, who are the daughter and grandchildren, respectively, of one Peter F. Debnam, claim under the will of said Debnam, which will was duly probated and recorded on 10 October, 1870, the said Georgiana Card

and Elizabeth Duke, mother of the minor plaintiffs, being the devisees in remainder under the said will. The defendants claim title under a sale of the lands of said Peter F. Debnam to make assets to pay his debts; deed by a commissioner of the Court under said proceedings and mesne conveyances; hence, both parties claim under a common source of title. It was admitted that said Peter F. Debnam died seized and possessed of the tract of land in question in 1870, devising the same to his wife, Mary A. Debnam, for life, with remainder to plaintiffs, and appointing said Mary A. Debnam executrix. It was also admitted that said Mary A. Debnam renounced her right to qualify as executrix (142) and dissented from the will and had her dower duly allotted to her in said lands, and that E. W. Timberlake was appointed administrator *c. t. a.* upon said estate, and qualified in due form in 1884.

In October, 1884, said E. W. Timberlake, administrator *c. t. a.* of said Peter F. Debnam, brought a special proceeding against the widow, Mary A. Debnam, and the heirs at law of said Peter F. Debnam, who were named in the petition and summons, said heirs at law being the children of a first marriage, while the plaintiffs were the children of a second marriage with said Mary A. Debnam. From the petition and summons in this special proceeding it appears that plaintiffs were not named in the petition or summons, and the record does not disclose that summons was ever served upon them, or any one representing them. Said Georgiana Card and Elizabeth Duke were then adults and married.

It appears in said special proceeding, from the decree of the Court ordering the sale, that "Service of process was duly made, and defendants having failed to appear, answer, or demur, etc., * * * that the facts set out in the verified complaint * * * are true, to-wit: That Peter F. Debnam is dead, without leaving sufficient personal property to satisfy his debts and costs of administration, and that his outstanding debts are more than the value of his real estate, etc. It is ordered that E. W. Timberlake is hereby appointed a commissioner to sell the lands described in the complaint, subject to the dower of said Mary A. Debnam," etc. It also appears that the sale was made, regularly reported, and confirmed, the Court finding that the land brought a fair and reasonable price. It further appears from the final account of the said administrator that the proceeds of said sale were applied to the payment of the debts and costs of administration of said estate, and were insufficient to discharge the same.

The cause came on for hearing before *Judge Webb,* who, upon (143) the foregoing facts and records, instructed the jury to find for their verdict that plaintiffs were entitled to recover the land, "sub-

ject to defendant's equities to be hereafter adjusted." To this instruction defendants excepted. His Honor, upon the coming in of the verdict, rendered judgment declaring plaintiffs' right to recover the land and ordered a reference to T. W. Bickett, Esq., to ascertain the amount of the debts paid by the administrator, the taxes and value of the betterments, defendants having filed a petition to be allowed same. To this judgment defendants excepted.

Upon the coming in of the report of the referee no exceptions were filed, and it was duly confirmed, *Judge Jones* rendering judgment upon said report, directing that a sufficient number of the annually accruing instalments of rent, beginning 1 January, 1886, that being the time at which defendants had possession, be applied to the payment of the sum found to be due for permanent improvements before any application of rents be made to the debts, interest, and taxes. That after paying from the instalments of rent first accruing the permanent improvements, the rents be applied annually as they accrue to the interest on the debt and the taxes paid by defendants and interest, and then in reduction of the principal. It was ascertained by a calculation, that the sum of $297.61 remained due, which was declared to be a lien upon the land, and directions were given by which its payment would be enforced. To the mode of applying the rents, defendants duly excepted, and from the final judgment appealed.

F. S. Spruill for the plaintiffs.
W. H. Ruffin for the defendants.

CONNOR, J., after stating the case: The question which lies at the threshold of this appeal is whether, as to the plaintiffs, the proceeding instituted by Judge Timberlake, administrator of P. F. (144) Debnam, and the judgments and decrees rendered therein, are absolutely void and subject to collateral attack, or whether they are merely voidable, subject to attack only by a direct proceeding for that purpose. If the proceeding and judgment are void *quoad* the plaintiffs, many of the interesting questions raised by the defendants and argued in the brief do not arise, because it is elementary learning that no right or title can be acquired under or by virtue of a void proceeding or judgment. We have given the brief and argument of the learned counsel for defendants a careful examination and consideration. By reason of an accident for which he was in nowise responsible, we were not favored with an oral argument. The general principles underlying the case and upon which the rights of the parties depend are well settled and elementary. They are clearly and forcibly stated in the briefs. Whatever

difficulty may be found in disposing of the appeal consists in the application of such principles and reviewing the authorities cited and relied upon by defendants' counsel. We think that upon such examination the difficulties suggested are more apparent than real.

It is an elementary proposition of public law that no man shall be deprived of his life, liberty or property except by the law of the land, or, sometimes expressed, due process of law, which is defined to be the judgment of a court of competent jurisdiction after an opportunity to be heard is given the parties.

It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court. We think that no case can be found in the courts of this country, State or Federal, in which this principle is questioned. Certainly in this jurisdiction it is fundamental. *Reade, J.,* in *Doyle v.* (145) *Brown,* 72 N. C., 393, says: "When a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceeding to vacate it. And the reason is that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered." To the same effect is *Condry v. Cheshire,* 88 N. C., 375. *Smith, C. J.,* in *Lyon v. Lowe, ib.,* 478 (on page 482), says: "It is the clear right of every person to be heard before any action is invoked and had before a judicial tribunal, affecting his rights of person or property. If no opportunity has been offered, and such prejudicial action has been taken, * * * the Court will at once, when judicially informed of the error, correct it: not because injustice is done in the particular case, but because it may have been done, and the inflexible maxim, *audi alteram partem,* will be maintained. In such case the Court does not investigate the merits of the matter in dispute, but sets aside the judgment and reopens the otherwise concluded matter," etc. *Shepherd, J.,* in *Harrison v. Harrison,* 106 N. C., 282, says: "We can not hesitate in affirming the judgment of his Honor declaring the proceedings void. However anxious the Court has been to uphold irregular decrees in favor of innocent purchasers, we can find no decisions which authorize judicial sanction to any proceeding in which there has been no service of process of any kind upon the parties interested. Such proceedings, under the Bill of Rights, as well as upon every conceivable principle of natural justice,

must be declared utterly void and of no effect." Many other cases might be cited to the same effect, if necessary.

The learned counsel for defendants does not controvert this elementary principle. He calls to our attention several cases in which it is held, as in the cases cited by us, that if there be a recital in the (146) record or a return on the summons showing service, the proceeding is not void, but only voidable. It is also true that in several cases the courts use the expression that a purchaser at a judicial sale is not called upon to do more than see that the decree authorizes the sale. It must be conceded that expressions may be found which, unless the facts in the case are examined, are calculated to mislead. It will be found, upon a careful reading of the cases, that the underlying principle is, as stated by *Mr. Justice Avery* in *Dickens v. Long,* 112 N. C., 311: "All that the purchaser in such case is required to know is that the Court had jurisdiction of the subject matter and the person."

We have carefully examined the cases cited by defendants' counsel, and find that they uniformly so state the law. In *Herbin v. Wagoner,* 118 N. C., 656, it is said: "The question is now presented whether the plaintiffs, who were parties to the action in which the mistake occurred, or the defendant, who was not a party for value and without notice, shall bear the loss," etc. In *Barcello v. Hapgood,* 118 N. C., 712, it is said: "The sale was not only made under an order of court having general jurisdiction both of the parties and the subject matter," etc. This language is cited and approved in *Smith v. Huffman,* 132 N. C., 60; *England v. Garner,* 90 N. C., 197; *Carraway v. Lassiter,* 139 N. C., 145. In all of these and many other cases, in which the Court discusses the effect of irregularities, the principle is recognized that the Court must have jurisdiction of the person and the subject matter, or the judgment will be void.

The defendant cites a line of cases in which it is held that if the decrees, etc., recite that the parties are before the Court, such recitals will support the judgment and protect it against collateral attack. Such was the case of *Harrison v. Harrison, supra.* In this appeal the names of the defendants in the proceeding to sell the land appear and are described as the widow and heirs at law of the decedent. (147) The summons also contains the names of the heirs at law who are made parties defendant. The recitals, therefore, in the order of sale and other decrees, that service of process was duly made "on the defendants," are correct and speak the truth.

This case is distinguished from *Harrison v. Harrison, supra,* in which the names of the proper parties appeared in the summons and the decree

recited that *they* had been duly served; whereas in *Timberlake, admr., v. Debnam* the plaintiffs herein, who were the owners of the land, subject to the dower, were not named in the petition or summons. The recital that the "defendants were duly served," therefore, had no possible reference to these plaintiffs. We are unable to perceive how, by any possible construction, they can be affected by such or any other recitals in a proceeding with which they had not the most remote connection. The administrator simply made the wrong persons parties to the proceeding. In a proceeding against the persons named in the petition, who, with the exception of the widow, had no possible interest in the land, he sold the plaintiff's property.

The proposition, simplified and stripped of all extraneous matter, comes to this: In a proceeding against A, a judgment is rendered directing the sale of B's property. The administrator simply thought that the land belonged to his testator's heirs at law, whereas it belonged to his devisees; and the purchaser made the same mistake. It is not easy to perceive how the devisees can be affected by this mistake, however honestly made. The defendants say, however this may be, the sale was rightful. That the devisor owed the debts and his land was liable for their payment. That the land brought a fair price, and the proceeds have been properly applied, hence the right result has been reached by a wrong route. The answer to this suggestion is found in the language of this Court in *Lynn v. Lowe, supra.*

(148) There are a class of cases to be found in our reports in which infants were brought into Court through guardians and guardians *ad litem,* wherein judgments have been sustained. They rest upon entirely different principles, and are not applicable here. *Mathews v. Joyce,* 85 N. C., 258; *Sutton v. Schonwald,* 86 N. C., 198; *England v. Garner,* 90 N. C., 197. These cases are all based upon the fact that the infants were parties, or that they were represented by guardians. Defendants cite *Perry v. Adams,* 98 N. C., 167. The case is, so far as the principles involved are concerned, strikingly similar to this. The course pursued by his Honor in disposing of this controversy is fully sustained by the decision rendered in *Perry v. Adams.* The plaintiffs recover the land subject to the right of the purchaser to have repaid the amount which he had expended, for which the land was liable. The doctrine and the reason upon which it is based are well stated by *Mr. Justice Merrimon* in that case. We could add nothing of value to what is there said. In *Stancill v. Gay,* 92 N. C., 461, the judgment was irregular, and not void. There it was said that unless it appeared that the party moving to set it aside was prejudiced by the irregularity,

the Court would not interfere. This principle can never be invoked in dealing with a *void* judgment. In *Everett v. Newton,* 118 N. C., 919, the recitals were held to bind *the parties to the action.* It is elementary that only parties and privies are affected by recitals in deeds or records. *Highsmith v. Whitehurst,* 120 N. C., 123, did not involve the principles applicable to this case.

To the suggestion that the plaintiffs' remedy was a motion to vacate the judgment, the reply is, that, as said by *Reade, J.,* in *Doyle v. Brown, supra,* the record shows upon its face that the owners of the land were not parties. The judgment can not be set aside by the parties to the record. It is, as to them, regular and correct. Persons who are not parties or privies and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment. They have no status in Court. No wrong has been done them *by the* (149) *Court.*

In *Morris v. House,* 125 N. C., 550, the records as construed by the Court showed that the heirs were parties. *Douglas, J.,* filed a very strong dissenting opinion, which was concurred in by *Mr. Justice Montgomery.* The decision does not militate against the general principles by which this Court has been governed. In *Harris v. Brown,* 123 N. C., 419, the proceeding was *ex parte;* the parties were before the Court.

We have examined every case cited by defendants and find no conflict with the conclusion reached by us. The defendants suggest that the widow, life tenant, being a party, those in succession are bound by the judgment, upon the doctrine of representation. It is true that the courts have uniformly held that where there are contingent limitations, or bare possibilities, and all of the persons who may, upon possible contingencies, become entitled, are not *in esse,* they may be bound by decrees made when the owners of the land are parties. This doctrine has well defined limitations which exclude its application to the plaintiffs. It originated in necessity—to prevent titles being encumbered for unreasonable periods and the sacrifice of the interests of one or more generations. It is also sustained upon the ground that a bare possibility is not a vested right. It has never been applied to the divesting of a vested remainder, or in any case where those who would be entitled in remainder are *in esse* and may be brought before the Court in *propria persona.* In such cases there is no necessity for resorting to the doctrine of representation. *Sessante ratione legis cessat et ipsa lex.* The doctrine of appearance by representation is discussed in *Springs v. Scott,* 132 N. C., 548.

Again, the widow having dissented from the will, did not own as a

devise any life estate or any other estate which was affected by the sale. Her dower was not involved.

We do not perceive how, in any aspect of the case, the plain-
(150) tiffs are affected by the proceeding for the sale of the land. It is said that they are guilty of laches in waiting so long before seeking to recover the land, and should for that reason be denied relief. It will be observed by an examination of the cases cited, that it is only when upon the face of the record the parties appear to be in court, or when the prayer for relief is founded upon some irregularity in the proceedings, or the equitable power of the Court is invoked, that the Court has refused to interfere by reason of long unreasonable delay. *Harrison v. Hargrove,* 109 N. C., 346, and 120 N. C., 96.

If the judgment, as in this case is void, the parties are not called upon to ask favors of the Court. They declare upon their legal title, and no time, other than that prescribed by statute of limitations, can bar them.

We have considered the case from every point of view presented by the learned counsel for defendants. There is no escape from the fatal fact that the plaintiffs had in the special proceeding no day in court, and that nothing done in the case can affect their rights. Such equities as attached to the legal title, by reason of the sale and the disposition of the proceeds, the melioration by defendants and payment of taxes, have been carefully guarded and adjusted by an intelligent referee.

We have examined the contention in regard to the method of applying the rents and see no valid objection thereto. It is proper to treat the annual profits as payments, and it is the well settled rule to apply payments first to the discharge of interest and then to the extinguishment of the principal. The rents do not bear interest, but are used to discharge interest.

Upon an examination of the entire record, we find

No Error.

Cited: Smathers v. Sprouse, 144 N. C., 638; *Flowers v. King,* 145 N. C., 235; *Rich v. Morisey,* 149 N. C., 50; *Hobbs v. Cashwell,* 152 N. C., 187; *Hughes v. Pritchard,* 153 N. C., 144; *Holt v. Ziglar,* 159 N. C., 277.

BURTON v. BELVIN.

(Filed 25 September, 1906.)

Agreement Not to Institute Bastardy Proceedings—Consideration.

1. An action for damages for breach of defendant's promise to support plaintiff if she would not institute bastardy proceedings against him is not a bastardy proceeding; and a demurrer on that ground and that a justice of the peace had exclusive original jurisdiction, was properly overruled.
2. Bastardy proceedings are civil, not criminal, in their nature, and an agreement not to resort to, or to discontinue such proceeding is a good consideration for a pecuniary settlement or compromise.
3. A contract, in consideration of past cohabitation, to support the mother and children is in the nature of reparation, and is neither void nor immoral, even though the illegal cohabitation continues, if there is no stipulation for future cohabitation.

ACTION by Lucy Burton against N. J. Belvin, heard by *Ward,* (151) *J.,* at the May Term, 1906, of VANCE.

From a judgment overruling a demurrer, the defendant appealed.

T. T. Hicks and *T. M. Pittman* for the plaintiff.

A. C. Zollicoffer and *Henry T. Powell* for the defendant.

CLARK, C. J. The complaint alleges that the defendant, who is a married man, seduced the plaintiff when she was fourteen years of age, and has begotten three children by her; that during such cohabitation, in response to her repeated requests for assistance for herself and children, she then being again with child by him and disclosing her purpose to appeal to the bastardy law if refused, the defendant promised that if she would not institute such proceeding he would provide her "with money and necessaries for the support of herself and children, begotten by him, and for the expenses of her sickness and lying in, and for her maintenance when she was unable to work. These promises he continued to make and renew from time to time to the plaintiff, (152) and to her father for her, and by means of his said promises, all of which were based upon their relations and the results thereof, and without stipulation or reference to any future cohabitation, she was induced to refrain from making application to the Court under the provisions of the bastardy law or to bring any action against him." The complaint further alleges that the defendant has broken his oft repeated and solemn promises and removed to Virginia, leaving her, and his children by her, destitute and unprovided for, and asks for the recovery of

damages sustained from the breach of the defendant's promises. The defendant demurred, on the ground:

"1. That this is a proceeding in bastardy, and a justice of the peace has exclusive original jurisdiction." This is not a bastardy proceeding, but it is an action for damages from a breach of promise made upon good and valid consideration. Bastardy proceeding would not be a feasible remedy, for the defendant has removed from the State. Besides, the plaintiff sues for breach of a promise and asks damages beyond the jurisdiction of a justice of the peace.

"2. That the action being based upon a promise not to institute bastardy proceedings is illegal and void and against public policy." Bastardy proceedings are civil, not criminal, in their nature (*S. v. Liles,* 134 N. C., 735), and an agreement not to resort to or to discontinue such proceeding is 'a good consideration for a pecuniary settlement or compromise.' 9 Cyc., 510.

"3. That the alleged cause of action is based upon an immoral and illegal contract, and is therefore void as against public policy." It is true that a contract for future cohabitation is immoral and void, as against public policy. But a contract in consideration of past cohabitation to support the mother and children is in the nature of reparation, as far as it goes, and to be commended. It is neither void (153) nor immoral, even though the illegal cohabitation continues, if there is no stipulation for future cohabitation. *Brown v. Kinsey,* 81 N. C., 245, and cases there cited.

It would be infinitely more to the credit of the defendant that he should provide for the victim of his lust and the innocent children of whom he has become the father, and should keep them from suffering and from becoming a charge upon the taxpayers, than that he should remove to another State, leaving her and his children in destitution, and, when sued for breach of his promise, should plead his own immorality and violation of law as a defense.

The defendant was under a natural obligation to support his illegitimate offspring (*Kimbrough v. Davis,* 16 N. C., 74), and maintain the plaintiff in her sickness, which he had caused. This obligation the law not only recognizes, but enforces it in bastardy proceedings. It can not be immoral for the defendant to promise to do his natural and legal duty by the plaintiff and his illegitimate offspring. He presents a very sorry spectacle in pleading to be released from liability on the ground that such promise is immoral and against public policy. He has been immoral, but not in promising to provide for the support of his victim and his children. It is in furtherance of, not against, public policy that pro-

vision for them should be made by him and the burden not be cast upon the taxpayers. *Brown v. Kinsey, supra,* is exactly in point. *Corbett v. Clute,* 137 N. C., 546, which holds that a bond given as consideration for the suppression of a criminal prosecution is null and void, has no application. The execution of public justice can not be stayed by the payment of money or by any private arrangement. But bastardy proceedings are not in the enforcement of punishment. It is a *quasi* civil remedy for the sole purpose of providing support for the woman and child and to save the taxpayers from that expense. *S. v. Liles,* 134 N. C., 735. The judgment overruling the demurrer is

Affirmed.

ANDERSON v. WILKINS.

(Filed 25 September, 1906.)

Judicial Sales—Contingent—Interests—Curative and Validating Acts—Retrospective Effect—Constitutional Law—Virtual Representation.

1. Laws 1905, ch. 93 (Rev., sec. 1591), by which all parties not *in esse* who may take property, in expectancy or upon a contingency, under limitations in deeds or wills, are bound by any proceedings theretofore had for the sale thereof, in which all persons in being who would have taken such property, if the contingency had then happened, have been properly made parties, it being expressly provided that the act shall not affect any vested right or estate, is a valid exercise of legislative power.
2. The general rule, subject, however, to some exceptions, is that the Legislature may validate retrospectively any proceeding which might have been authorized in advance, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise not have incurred.

ACTION by W. P. Anderson and wife against R. S. Wilkins, (154) heard by *Long, J.,* at the September Term, 1906, of the Superior Court of WILSON.

The following are the facts found by the Judge: The plaintiffs contracted to sell to the defendant a lot in Wilson for $1,000, and tendered a deed for it, but the defendant refused to pay the purchase money, alleging that the title is defective. The lot is a part of a larger parcel of land in the same town which was devised to the *feme* plaintiff (formerly Lucy Whitehead) by her father, H. G. Whitehead. He had four other children, Robert B., H. G., William B., and James S. Whitehead, all of whom survived him. Before 31 August, 1896, the *feme* plaintiff had intermarried with her co-plaintiff and on said date they had living one

child, Mary Gray Anderson, who is still living. Prior to said date H. G. Whitehead, Jr., had intermarried with Nolia G. Whitehead and on that date they had living one child, Dorothy Whitehead, and since
(155) said date there has been born of said marriage another child, Nolia G. Whitehead, both of said children being still alive. At the said time, neither Robert B. Whitehead, William B. Whitehead, nor James S. Whitehead was married, and William B. and James S. Whitehead were minors, F. W. Barnes being their regularly appointed guardian.

On 31 August, 1906, the plaintiffs in this case and their daughter, Mary Gray Anderson, and H. G. Whitehead, Jr., and his wife, Nolia G. Whitehead (the infant being represented by a next friend duly appointed by the Court), instituted a special proceeding before the Clerk against Robert, W. B., and James S. Whitehead, for a sale of the land, the minors being represented by their guardian. This proceeding was regular in form, and the Court decreed that a sale be made of the land devised to the *feme* plaintiff, Lucy W. Anderson, by her father, discharged of the limitations imposed by the will; and this judgment was afterwards regularly approved by the Judge of the Superior Court. At all stages of this proceeding the respective parties were represented by counsel. All persons in being who would have taken under the will, if the contingency hereinafter mentioned had then happened, were duly made parties to that proceeding. Since the coming of age of all the children of H. G. Whitehead, Sr., they have executed, pursuant to the said judgment, a mutual deed of exchange and release, each thereby releasing any and all present or future interest which he or she had in and to the property of the other.

The defendant admits that H. G. Whitehead, Sr., at the time of his death, which occurred prior to 31 August, 1896, had a good and indefeasible title to said lot, and that by the deed which the plaintiffs have tendered he will acquire a good title, unless the same is rendered defective or unsound by the following clause in the will of the said Whitehead, which extends to and qualifies all the devises made to his
(156) children by that instrument: "Item 24. It is my further will that if either of my children herein named should die, leaving no child living at his or her death, then and in that case I will that the land devised herein to such child so dying shall descend to his or her surviving brothers and sisters, and to the issue of such as may be dead, such issue representing their parents."

The case was submitted to the Court below upon an agreement that the Judge should find the facts and enter judgment thereon according

to his opinion of the law. The Court concluded that, under section 1591 of The Revisal, and the judgment of the Clerk as approved by the Judge, the plaintiffs can convey a good and perfect title; and having entered judgment accordingly against the defendant, he appealed.

F. A. Woodard and *Connor & Connor* for the plaintiff.
John E. Woodard for the defendant.

WALKER, J., after stating the case: We need only consider the question raised as to the validity of the Act of 1905, ch. 93 (Rev., sec. 1591), by which all parties not *in esse* who may take property, in expectancy or upon a contingency, under limitations in deeds or wills, are bound by any proceedings theretofore had for the sale thereof, in which all persons in being who would have taken such property, if the contingency had then happened, have been properly made parties, it being expressly provided that the act shall not affect any vested right or estate. It is not questioned that the proceeding under examination was regularly conducted in all its stages or that the title which the defendant will acquire under the deed tendered by the plaintiff will be undoubtedly a good and perfect one, if that act is a valid exercise of legislative power.

The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior (157) statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. Cooley on Const. Lim. (7 Ed.), p. 531. The general rule, therefore, is that the Legislature may validate retrospectively any proceeding which might have been authorized in advance, even though its act, it has been said, may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise not have incurred. 6 Am. and Eng. Enc. (2 Ed.), 940. There are, of course, exceptions to this rule, but this case is not within any of them.

In regard to the validity of retroactive legislation, so far as it may affect only expectant or contingent interests, we think the law is well settled that the power thus to deal with such interests resides in the Legislature. *Justice Woodbury* stated the rule with great clearness, and what he said has been accepted by the courts and law writers as an au-

thoritative utterance and as declaring the true doctrine upon the subject. Laws enacted for the betterment of judicial procedure and the unfettering of estates so as to bring them into market for sale, can not be regarded as opposed to fundamental maxims, "unless (as he says) they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State necessitates amendments or repeals of such laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee." *Merrill v. Sherburne,* 1 N. H., 213; Cooley (7 Ed.), p. 511. *Chancellor Kent,* in speaking of retroactive
(158) statutes, says substantially that while such statutes affecting and changing vested rights are very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void, yet that this doctrine is not understood to apply to remedial statutes, which may be of a retroactive nature, provided they do not impair contracts, or disturb absolutely vested rights, and only go to confirm rights already existing, and proceed in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights. 1 Kent Com., 445; Cooley, *supra.*

So long as the interest remains contingent only, the Legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties. If this be so, the nature of estates and their enjoyment must, to a certain extent, and indirectly, be subject to legislative control and modification in order to promote the public welfare. Smith on Statutory and Const. Constr., 412. In this country, estates in tail have very generally been turned into estates in fee simple by statutes the validity of which is not disputed. *De Mill v. Lockwood,* 3 Blatchford, 56; *Lane v. Davis,* 2 N. C., 277; *Minge v. Gilmour, ibid.,* 279. Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not, therefore, open to objection from him, and as no other person in these cases has any vested right, either in possession or expectancy, to be affected by such a change, the expectation of the heir presumptive, which is at best but a contingent interest, must be subject to the same control as in other cases. Cooley (7 Ed.), 512. It has also been held that the Legislature has the power by special act to
(159) confirm a conveyance in fee simple of a tenant in tail (*Comstock*

v. Gay, 51 Conn., 45), although, perhaps, this could not have been done if the possibility of issue had become extinct and where the estate of the tenant had ceased to be one of inheritance and a reversionary interest had become vested. 1 Washburn R. P., 81-84, and notes.

Numerous cases can be cited in which such power has been held to belong to the Legislature, where the interest to be affected is only contingent, or at least not vested. *Kearney v. Taylor,* 15 How., 494; *Randall v. Krieger,* 23 Wall., 137; 6 Am. and Eng. Enc. (2 Ed.), 957, where the authorities are collected. An illustration of the application of this settled principle is to be found in the decisions of this Court, in which statutes validating certain judicial acts and proceedings have been upheld. *Howerton v. Sexton,* 90 N. C., 581; *Carter v. Rountree,* 109 N. C., 29; *Bass v. Navigation Co.,* 111 N. C., 439; *Barrett v. Barrett,* 120 N. C., 127. See, also, *Bank v. Bank,* 22 Wall., 276. But it seems useless to pursue this line of thought any further, in view of the recent decision in *Springs v. Scott,* 132 N. C., 548, where *Mr. Justice Connor,* speaking for the Court in a learned and exhaustive discussion of a similar question, as to the validity of chapter 99, Laws 1903 (Rev., sec. 1590), in respect to its retrospective operation upon the will considered in that case and the estates that are created thereby, demonstrates by reason and authority that the act is valid, even when allowed to reach back and affect estates already created by will, so far, though, only as it is permitted to apply to interests not yet vested. If the Act of 1903 can be thus sustained, we do not see why judicial proceedings, conducted in substantial conformity to its requirements, may not with equal reason be validated by the Act of 1905. The cases are to be distinguished from those where the power has been denied, by the fact that the estate to be affected have not yet become vested so as to be brought under the protection of the Constitution, or of any principles of natural right or justice as expressed in the maxim *jura naturæ sunt im-* (160) *mutabilia,* and which are said to be paramount or *leges legum,* without any express constitutional sanction. Coke Litt., sec. 212. The decision in *Springs v. Scott* was approved in *Hodges v. Lipscomb,* 133 N. C., 199, a case in which it appeared that the will was made prior to the passage of the Act of 1903 (128 N. C., 57). It was there held that the Act of 1903 operated retrospectively, so as to apply to contingent interests created by a will which had already taken effect by the death of the testator.

If the judicial act of taking the probate of a deed which renders the latter void as to a married woman because of a defect in the privy examination, can be made valid by subsequent legislation, it would seem that a

proceeding to sell land for the purpose of reinvestment, which the Court finds will inure to the benefit of all parties interested, should be subject to legislative action in order to correct errors of procedure, especially when vested rights are not impaired. A closer analogy may be found in those statutes which have been passed to validate judicial proceedings for the sale of land, in which infants who were interested parties had not been personally served with process, though their interests were represented by a guardian *ad litem*. In those cases, notwithstanding the law required personal service both upon the infant and the guardian *ad litem*, this Court held such statutes to be a valid exercise of the legislative power. Those cases and this one have this feature in common, that the doctrine of virtual representation applies to each, but the reason in favor of a proceeding like the one we have under consideration is stronger than in the other case, as in the former the only interest which can be affected has not vested and is not likely to vest, while in the latter the infants had vested interests which might be prejudiced by upholding the legislation. When we refer to the principle of "virtual representation" we do not mean to imply that the proceeding to sell this (161) land could be sustained without the aid of the Act of 1905, as being within the rule laid down in *Ex parte Dodd*, 62 N. C., 97, and fully explained and elucidated by *Mr. Justice Connor* in *Springs v. Scott, supra*. Mrs. Anderson, by virtue of the devise, took a fee which is determinable upon her dying without children (*Whitfield v. Garris*, 134 N. C., 24), and not merely a life estate with remainder by implication or construction of law to her children, as was the case with the devisee in *Hauser v. Craft*, 134 N. C., 319. We have not, therefore, the precise facts which were presented in *Ex parte Dodd* or in *Springs v. Scott*. Whether this case is substantially within the principle of those decisions, and the former proceeding to sell the land can, for that reason, and upon the ground of virtual representation, be declared valid, we need not decide or even consider, as this case can well be disposed of on the other ground, namely, that any defect in the proceeding is cured by the statute.

There was no error in the opinion and judgment of the Court.

Affirmed.

CONNOR, J., did not sit in the hearing of this appeal.

Cited: McAfee v. Green, 143 N. C., 418; *Penland v. Barnard*, 146 N. C., 381; *Richardson v. Richardson*, 150 N. C., 551; *Smith v. Miller*, 151 N. C., 627; *Elkins v. Siegler*, 154 N. C., 375; *Swindell v. Smaw*, 156 N. C., 3; *Stephens v. Hicks, Ib.*, 244.

SAWYER v. LUMBER CO.

(Filed 2 October, 1906.)

Charge in Writing—Exceptions and Objections—Recapitulation of Evidence.

1. Where the defendant at the close of the evidence requested the Court "to put the charge to the jury in writing and in part to charge the jury as follows," and the whole charge on the law was not put in writing, this entitles the defendant to a new trial.
2. Rev., sec. 536, does not require the recapitulation of evidence to be in writing.
3. An exception to the failure of the Judge to put his charge in writing, when asked "at or before the close of the evidence," is taken in time if first set out in appellant's "case on appeal."

ACTION by J. L. Sawyer against Roanoke Railroad and Lumber (162) Company, heard by *Neal, J.*, and a jury, at the February Term, 1906, of BEAUFORT. From a judgment for the plaintiff, the defendant appealed.

Nicholson & Daniel, Ward & Grimes, and *H. C. Bragaw* for the plaintiff.

Small & McLean and *Murray Allen* for the defendant.

CLARK, C. J. The defendant at the close of the evidence, and before the argument began, requested the Court "to put its charge to the jury in writing, and in part to charge the jury as follows"—here follows seventeen paragraphs of special instructions asked. The whole charge on the law was not put in writing, and this entitles the defendant to a new trial, Rev., sec. 536, though this section does not require the recapitulation of evidence to be in writing. *Jenkins v. Railroad,* 110 N. C., 438; *Bank v. Sumner,* 119 N. C., 591. This exception, like all other exceptions to defects or errors in the charge, is taken in time if first set out in the appellant's "case on appeal." *Drake v. Connelly,* 107 N. C., 463. It is like a failure to charge on a specific (163) point when specially requested in writing, which is deemed excepted to, provided the exception is set out in the case on appeal. *S. v. Blankenship,* 117 N. C., 808; *Taylor v. Plummer,* 105 N. C., 58; *McKinnon v. Morrison,* 104 N. C., 363.

This is not like *Phillips v. R. R.,* 130 N. C., 582, where the request to the Court was "to charge the jury in writing and as follows," which was held to be simply a request to give the written prayers which followed. Here the request is explicit to "charge the jury in writing" *and*

as "part of its charge" to give the instructions specifically added. It is but just to the learned Judge who tried this case to add that he states that through inadvertence, in the haste of the trial, he did not observe that the prayer was to put his charge in writing, as well as to give the prayers subjoined. But as the statute gives a party a right to have the whole charge, as to the law, put in writing if asked "at or before the close of the evidence," we must direct a

New Trial.

Cited: Metal Co. v. R. R., 145 N. C., 298.

HANCOCK v. TELEGRAPH COMPANY.

(Filed 2 October, 1906.)

Telegraphs—Evidence—Damages—Laws of Sister State—Instructions.

1. In an action to recover damages for negligent delay in the delivery of a telegram, announcing the death of plaintiff's brother, and that plaintiff would arrive with the corpse at a certain station the next day, the Court erred in admitting testimony that the employees of the railroad company, with whom defendant had no connection, left the body of the deceased on the platform in the rain.
2. A telegraph company is only responsible for such damages as were reasonably in contemplation of the parties as the natural result of the failure of duty on the part of the company.
3. Where all defendant's witnesses gave it as their opinion that under the laws of Maryland juries are not permitted to consider mental anguish as an element of damage unless it grows out of a physical injury, the Court cannot instruct the jury that if they believe the evidence of these witnesses the plaintiff can only recover the charge for the telegram; but he should charge if they found the law of Maryland to be as testified to by the witnesses, the plaintiff can only recover the charge of the telegram.
4. In finding what is the law of Maryland the jury should consider not only the veracity of witnesses who testify to their legal opinions, but their reputation, character, learning in the law and standing in the legal profession, and determine for themselves how much weight the jury is willing to give to their opinions.

ACTION by H. S. Hancock against Western Union Telegraph (164) Company, to recover damages for negligent delay in the delivery of a telegram, heard by *Long, J.*, and a jury, at May Term, 1906, of CRAVEN. From a judgment for the plaintiff, the defendant appealed.

W. D. McIver and *O. H. Guion* for the plaintiff.
F. H. Busbee & Son and *W. W. Clark* for the defendant.

BROWN, J. This case was before this Court at Spring Term, 1905, and is reported in 137 N. C., 498. The facts are fully set out in the opinion there reported, and it is unnecessary to repeat them.

On the last trial the Court, over defendant's exception, permitted the plaintiff to testify as follows: "The trainmen took the corpse from the baggage-car and set it down on the platform in the rain. I put the widow in the station, and then ran down and asked them please not to set the body of my dead brother down in the rain. The body was out on the platform, and I ran and asked them not to set it there in the rain; but the train was moving off," etc.

In the admission of this testimony and the refusal to withdraw its consideration from the jury, we think there was error. The contract for the transmission of the telegram was made on Saturday, July 11, and it can hardly be supposed to have been within the (165) reasonable contemplation of the contracting parties that there would be a rain on Monday morning and that the employees of the railroad company, with whom defendant had no connection whatsoever, might leave the body of the deceased on the platform in the rain. The duty to remove the body and put it in a suitable place did not devolve upon the defendant, but upon the employees of the railroad company, and the defendant is not to be held responsible for their neglect.

It has always been held in this State that the telegraph company is only responsible for such damages as were "reasonably in contemplation of the parties as the natural result of the failure of duty on the part of the defendant." *Kennon v. Tel. Co.*, 126 N. C., 232. The case of *Telegraph Co. v. Turner*, from Texas, reported in 78 S. W., 362, and cited with approval in *Telegraph Co. v. McNairy*, 78 S. W., 969, fully sustains the defendant's contention as to the inadmissibility of such evidence. See, also *Telegraph Co. v. Mellon* (Tenn.), 33 S. W., 725, and *Telegraph Co. v. Stiles* (Tex.), 34 S. W., 438. In the latter case the Court, speaking of the probable consequences of admitting such testimony, says: "The admission of such testimony would awaken in the jury a sympathy for the distressed sister, and although it might be unconsciously done, would induce them to increase the amount of damages. If the evidence is not to influence the verdict, why should it be admitted at all? The jury has the right, and it is their duty, to consider all the evidence admitted by the Court. But the telegraph company cannot be held liable for all damages which may arise from

a failure to comply with its contract, no matter how great or real such damages may be. It can only be held for such as it should have anticipated from the knowledge it had and that which the law imputes to it as the probable result of a failure to deliver the message." See, also, Joyce on Electricity, sec. 819; *R. R. v. Levy*, 59 Tex., 542.

As this case is to be tried again, it is well to notice another
(166) of defendant's exceptions in order to prevent possible error on the next tial, and thus save time, labor and expense.

The defendant requested his Honor to instruct the jury: "If you believe the evidence of the witnesses, Judge Bryan, Attorney-General Bryan, and Mr. Cross, you will assess the plaintiff's damages at 25 cents, and this will be your answer to the second issue." As this request or a similar one is likely to be again proffered, it is well to notice it. The Court decided in this case that if, under the laws of Maryland, "damages on account of mental anguish, not connected with or growing out of a *physical injury* to the plaintiff's person, could not be awarded, then the plaintiff in this action can only recover the cost of the telegram and costs." 137 N. C., 499-500. It is true that the witnesses named were all who testified for the defendant as to what in their opinion was the law of Maryland on that subject, and the defendant had the right to have the Court call attention to their evidence. Each of said witnesses gave it as his opinion that, under the law of Maryland, juries are not permitted to consider mental anguish as an element of damage unless it grows out of a physical injury. It therefore follows that if the jury should find as a fact that the law of Maryland is as stated by defendant's witnesses, then the plaintiff, under our former decision in this case, can recover only 25 cents—the charge for the telegram—and costs, for the plaintiff does not pretend to have suffered any physical injury. We think, however, that this prayer for instruction may be interpreted to refer only to a belief in the veracity and truthfulness of the witnesses. These witnesses were not testifying to a fact, in the usual significance of that word. They were giving their opinion under oath as to what the law of Maryland was upon a certain matter. The jury may fully believe in the truthfulness of such witnesses and in the sincerity of their opinions, and yet have no confidence in their
(167) knowledge, learning and ability as lawyers. In finding what is the law of Maryland the jury should consider not only the varacity of witnesses who testfy to their legal opinions, but their reputation, character, learning in the law and standing in the legal profession, and determine for themselves how much weight the jury is willing to give to their opinoions. These are matters within the province

of the jury, concerning which the Judge cannot express an opinion. We think, therefore, the language of the prayer for instruction is ambiguous, and probably deprived the jury of the right to consider what weight they should give to the legal opinions of the witnesses offered by the defendant. The Court could only say to the jury that under the former decision of this Court, if they found the law of Maryland to be as testified to by defendant's witnesess, viz., that mental suffering can only be considered as an element of damage when it flows from physical injury, and there being no physical injury in this case, the plaintiff can only recover the charge for the telegram and costs of the action.

New Trial.

Cited: Helms v. Tel. Co., 143 N. C., 394; *Miller v. R. R.,* 154 N. C., 443; *Alexander v. Tel. Co.,* 158 N. C. 482.

(168)

BENNETT v. BEST.

(Filed 2 October, 1906.)

Usury—Evidence—Intent—Transaction with Deceased—Declarations of Personal Representatives of Creditor.

1. The mere fact that the amount received by the debtor is less than the apparent principal of the debt, and treating the amount thus received as the true principal would render the transaction usurious, will not alone constitute proof of usury.

2. In order to establish usury, the jury must be satisfied by a clear preponderance of proof, not only that the debtor has paid more than the legal rate of interest, but that the creditor at the time he received it knew it was usury, and that there was in the mind of the lender a a wrongful intent and purpose to take more than the lawful rate for the use of his money.

3. In order to prove usury, it is competent to prove the facts and circumstances connected with the matter, the amounts actually paid, amounts actually due, and the calculations made.

4. In an action to foreclose a mortgage, where the defendant pleads as a defense usury, the testimony of a witness as to a transaction with plaintiff's intestate is not incompetent under sec. 590 of The Code (Rev., sec. 1631), in that the witness is a son of the defendants and resides on the mortgaged land without payment of rent.

5. In an action to foreclose a mortgage, in order to establish the defense of usury, it is competent for the defendant to prove any declaration made by the plaintiff, who is the personal representative of the deceased creditor, tending to prove that usurious interest was paid.

ACTION for the foreclosure of a mortgage by R. D. Bennett, executor of E. J. Bennett, against W. R. Best and wife, heard by *Webb, J.,* and a jury, at the February Term, 1906, of DUPLIN.

Defendants set up as a defense usury in the note secured by the mortgage. Issues were submitted to the jury and answered as follows: "1. Has plaintiff or plaintiff's intestate charged, taken, reserved, or received from the defendant knowingly, interest at a greater rate than 8 per cent. per annum on the debt sued upon in this action? An-
(169) swer: No.

"2. Did Francis C. Best sign note sued on as surety? Answer: Yes.

"3. Is the action barred by the statute of limitations as to defendant Francis C. Best? Answer: No.

"4. Are defendants indebted to plaintiff; if so, what amount? Answer: Three hundred and fifty dollars ($350), with interest at 8 per cent. from date of note, less credit on back of note."

From the judgment rendered, defendants appealed.

Carlton & Williams for the plaintiff.

Kerr & Gavin and *F. R. Cooper* for the defendants.

BROWN, J., after stating the case: We agree with the learned counsel for the plaintiff that the mere fact that the amount received by the debtor is less than the apparent principal of the debt, and that treating the amount thus received as the true principal would render the transaction usurious, will not alone constitute proof of usury. *Jones v. Gibson,* 113 Ga., 32; *Tallman v. Sprague,* 18 N. Y. Sup., 207. In order to establish usury, the jury must be satisfied by a clear preponderance of proof, not only that the debtor has paid more than the legal rate of interest, but that the creditor at the time he received it knew it was usury, and that there was in the mind of the lender a wrongful intent and purpose to take more than lawful rate for the use of his money.

As a step in the order of their proof the defendants should be permitted to prove the facts and circumstances connected with the matter, the amounts actually paid, amounts actually due and the calculations made. In this case defendants contend that they originally borrowed, on 21 November, 1883, $175 from plaintiff's intestate and secured same by mortgage on certain lands; that on 6 January, 1886, after crediting payments, a renewal note was taken for $206.25, and that on 22 March, 1892, another renewal note was taken for $350, which is the note

sued on. The complaint sets out the payments which plaintiff (170) admits have been paid on this note.

Defendants contend that they received no other consideration whatever for the $350 except the original $175, and that if all payments are credited and only 8 per cent. interest calculated, there is only $82.64 due. It is, of course, incumbent on defendants to satisfy the jury of the truth of such allegation before the question of intent is reached. In the course of the trial the defendants' counsel asked several questions of witness R. C. Best, which were excluded by the Court, and exceptions noted. We will notice only a few:

"Q. Who, if anybody, acted as agent for Miss E. J. Bennett in taking the note and mortgage sued on in this action, and in calculating interest or parts of the principal, and in taking renewals on the note or notes during the time after the loan of the money claimed in the complaint?"

"Q. State if you were present at any time when R. D. Bennett, the plaintiff in this action, made any calculation of interest or caused any calculation of interest to be made by any other person for him on the note sued on in this action."

"Q. Did you at any time hear any calculation made or see any calculation made by the plaintiff and defendant or either of them about the note and debt sued on in this action?"

Defendants' counsel also asked witness Oats questions which were excluded, and exceptions duly noted:

"Q. State any conversation or any transaction you may have seen or heard between the plaintiff and the defendant W. R. Best, relative to the note sued on in this action."

"Q. State whether or not you have had any conversation with R. D. Bennett, since he became administrator of E. J. Bennett, relative to the note or debt described in this action."

The objection to the testimony of R. C. Best is to his competency as a witness under sec. 590 of The Code (Rev., sec. 1631), in that he is a son of the defendants and resides on the mortgaged land (171) without payment of rent. He has no legal interest in the land and therefore no legal interest in the event of the action. *Bunn v. Todd,* 107 N. C., 266. The fact that he is the son of defendants and that they permit him to reside on their land, while it may go to his credibility, does not affect his competency as a witness to testify to a transaction with plaintiff's intestate. *Sutton v. Walters,* 118 N. C., 495. These questions, however, point rather to transactions with the plaintiff himself and do not come within the purview of the statute.

Any declaration plaintiff made germane to the matter at issue is competent against him.

We see no objections to the form of the questions asked witness Oats and to his competency as a witness to answer them if he can. The record does not state what defendant expected to prove by the witness. We can only surmise as to that from the tenor of the questions.

The plaintiff, R. D. Bennett, is the personal representative of the deceased creditor. If he has made any declaration to the witness tending to prove that usurious interest was paid, it is competent for defendant to prove it.

New Trial.

Cited: Doster v. English, 152 N. C., 341; *Elks v. Hemby,* 160 N. C., 22; *Owens v. Wright,* 161 N. C., 141.

(172)

BECTON v. DUNN.

(Filed 2 October, 1906.)

Judgments, Erroneous—How Corrected—Motion to Set Aside—Appeal—Docketing.

1. A motion made by a defendant at May Term, 1906, of the Superior Court to set aside a judgment rendered at November Term, 1905, for errors noted during the progress of the trial, was properly denied where it appears that the trial and judgment were in all respects regular, and the exceptions noted tend only to show that the judgment was erroneous.
2. An erroneous judgment can only be corrected by appeal, and this may be lost by failing to docket as required by law.

ACTION by A. F. Becton against C. F. Dunn, heard by *Allen, J.,* at the May Term, 1906, of LENOIR.

This was a motion at May Term, 1906, to set aside a judgment entered in favor of the plaintiff and against the defendant at November Term, 1905. The motion was denied, and the defendant excepted and appealed.

Loftin & Varser for the plaintiff.

No counsel for the defendant.

HOKE, J. This cause was before the Court at Spring Term, 1905, on an appeal by defendant from a refusal of the Judge below to set

aside a judgment by default rendered against defendant, and the decision, reported in 137 N. C. 559, directed that the judgment against defendant be set aside as having been entered contrary to the course and practice of the Court. This decision having been certified down, the judgment was set aside as therein ordered, and at November Term, 1905, the cause was tried before his Honor, *W. R. Allen, Judge,* and a jury, and on issues determinative of the controversy, verdict was rendered in favor of plaintiff and against defendant, and judgment was then and there entered in accordance with the verdict. Defend- (173) ant took an appeal from this judgment; and the case on appeal having been duly settled by the Judge who tried the case, same was docketed for hearing in this Court at Spring Term, 1906. The case and record, having been docketed by defendant too late, under Rule 17, the appeal was dismissed and judgment to that effect duly entered. Later in the term defendant applied to the Court to have his appeal reinstated, and the motion was denied. Defendant then appeared in the Court below, and after notice given, at May Term, 1906, made the present motion to set aside the judgment against him for errors noted during the progress of the trial at November Term, 1905. His motion was denied, and the present appeal was taken.

The trial verdict, and judgment entered in this cause in favor of plaintiff and against defendant at November Term, 1905, were in all respects regular and according to the course and practice of the Court, and we find no error which gives the defendant any just ground of complaint. And if it were otherwise—if the errors claimed by defendant in fact existed—he is not entitled to have them considered or passed upon in this proceeding. The trial and judgment were in all respects regular; defendant was present throughout the hearing, maintaining his defense; and the exceptions noted and insisted on by him, tending, as they do, only to show that the judgment was erroneous, such judgment could only be corrected by appeal; and this he has lost by failing to docket as required by law. *May v. Lumber Co.,* 119 N. C., 96. There is no merit in this appeal, and the judgment below is

Affirmed.

part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing. (65)

The competency of such evidence for the purpose of establishing the other and unwritten part of the contract, or even of showing a collateral agreement made contemporaneously with the execution of the writing, has been thoroughly settled by the decisions of this Court. Indeed, it seems to us that the very question we are now considering has been passed upon by this Court several times. Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars. In support of the proposition, as thus stated, we may refer specially to the comparatively recent decisions in *Woodfin v. Sluder,* 61 N. C., 200; *Kerchner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57, and *Penniman v. Alexander,* 111 N. C., 427 (reaffirmed 115 N. C., 555), which cases seem to be directly in point and to fully answer the objections made by the plaintiff's counsel in his able and skillful argument. Numerous other cases have been decided by this Court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time. The other terms of the contract may generally thus be shown where it appears that the writing embraces some, but not all, of the terms. *Twiddy v. Sanderson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 368; *Daughtry v. Boothe,* 49 N. C., 87; *Perry v. Hill,* 68 N. C., 417; *Willis v. White,* 73 N. C., 484; *Perry v. R. R., supra; Cumming v. Barber,* 99 N. C., 332.

This Court refused to apply the principle in *Ray v. Blackwell,* 94 N. C., 10, and *Moffitt v. Maness,* 102 N. C., 457, because the oral evidence tended to contradict or vary the written part of (66) the contract and not merely to add other consistent terms. The question was somewhat discussed, with special reference to our own decisions, in *Cobb v. Clegg,* 137 N. C., 153.

The Court, therefore, erred in excluding the evidence and in withdrawing this defense from the consideration of the jury by its fourth instruction. The charge in other respects appears to be correct.

There is one other matter which requires some attention. The de-

(174)

GROCERY COMPANY v. BAG COMPANY.

(Filed 2 October, 1906.)

Action, How Commenced—Personal Service—Publication—Construction of Statutes—Stare Decisis—Contracts—Right to Rescind.

1. A civil action shall be commenced by issuing a summons, except in cases where the defendant is not within reach of the process of the Court and cannot be personally served, when it shall be commenced by the filing of the affidavit, to be followed by publication. *McClure v. Fellows*, 131 N. C., 509, overruled.
2. It is not permissible to construe a statute composed of several sections by the words of any one section, but all those relating to the same subject must be taken and considered together in order to ascertain the meaning and scope of any one of them, and each must be restricted in its application or qualified by the language of any other when the purpose so to do is apparent.
3. The rule of *stare decisis* does not forbid that we should disregard a former decision upon a matter of procedure, if it can be done without substantial injury being suffered by litigants who may have relied upon the precedent so established; and if such injury is not likely to result, the Court will not be governed by the former decision.
4. If the purchaser fails to pay for goods already delivered, and further evinces a purpose either not to pay for future deliveries or not to abide by the terms of the existing agreement, but to insist upon new or different terms, whether in respect to price or to any other material stipulation, the vendor may rescind and maintain an action to recover for the goods delivered, and consequently he is not liable for any breach if he has otherwise performed his part of the contract.

ACTION by Peters Grocery Company against Collins Bag Company, heard by *Ward, J.*, and a jury, at the June (Special) Term, 1906, of EDGECOMBE.

The suit was commenced before a justice of the peace, first by a summons dated 31 December, 1904, returnable 3 January, 1905, on which there was no return, and then by publication dated
(175) 16 January, 1905, and returnable the 16th day of the next month. There was no evidence that the summons was ever actually issued by the justice. The defendant relied on the fact that no summons had been issued and upon sundry alleged defects in the mode of publication in support of a motion to dismiss the action which it submitted after entering a special appearance for the purpose.

Plaintiff sued for $172.50, alleged to be due as damages for failing to ship to them a certain number of peanut bags as by contract of 30 April, 1904, the defendant was required to do.

It appears that on 30 April, 1904, the defendant agreed to sell to the plaintiff 10,000 to 15,000 peanut bags of a specified description at a

price named, the price to stand if the market advanced; but if the market declined, the defendant had the option to furnish the bags at the lowest price or to cancel the contract. There was a memorandum at the foot of this agreement calling for the shipment of 1,000 cotton sheets. It was shown that this memorandum was made by defendant's traveling salesman, and the order for the sheets purports on its face to have been made by telephone. On the same day the salesman consolidated the two orders into one, which was signed by the plaintiff and addressed to the defendant. It was in the usual form of an order for goods, showing quantity, description and price of the bags and sheets or burlaps, but not fixing the day of payment or time of credit. All the directions in the memorandum as to time and method of shipment and dating of bills refer indiscriminately to the bags and sheets, as if they had been ordered at the same time. The sheets were deliverable in August, 1904, and the bags from October, 1904, to March, 1905.

On 11 June, 1904, the plaintiff by letter advised the defendant that the goods had been offered to them at lower prices, and asking if they "would meet them." This letter contained an itemized statement of the articles, with the reduced price for each, and opposite these articles the following: "All delivered 10 days net." Defendant (176) replied, 14 June, 1904, that it would meet the prices named. The subsequent correspondence shows that the cotton sheets were shipped by the defendant according to the contract, and the plaintiff failed to pay for the same, its draft, which was sent to the defendant, having been afterwards presented and then returned by the collecting bank as unpaid, plaintiff all the time insisting that it was entitled to terms materially different from those contained in the contract of 30 April, as modified by the letters of 11 and 14 June. As the plaintiff failed to pay for the sheets, and insisted on being allowed terms different from those in the contract, the defendant refused to ship the peanut bags. This was on 2 December, 1904, when the purchase price had been long overdue.

On 19 September, 1904, the plaintiff wrote the defendant that they were entitled to 60 days credit on the bags and $8 discount on their draft. On the same day the defendant wrote to the plaintiff that the business had proved to be so unsatisfactory, as it had made so many threats and so often insisted on new terms, that they preferred to cancel the contract, and then requested payment of the draft sent for goods already purchased and shipped. Acknowledging receipt of this letter, plaintiff on the 20th replied that it was willing to relieve defendant of the contract, as it could do as well elsewhere, but before considering

itself as released the defendant must wait for a letter to that effect. Then comes the following passage: "We also desire to call your attention (to the fact) that there are no terms specified in the contract of 30 April; therefore, we will expect the same terms that we have been getting from John T. Bailey and other parties, which is 30 days." The draft for the sheets having been returned by the bank, and the plaintiff still insisting on terms which, as contended by the defendant, were not embraced by the contract, the defendant on 2 December, 1904, wrote to the plaintiff rescinding the agreement and in that and
(177) subsequent letters declined to ship the bags.

The Court charged the jury that if they found the facts to be as disclosed by the evidence, they should answer "No" to the issue, "Is the defendant indebted to the plaintiff, and if so, in what amount?" The jury answered the issue accordingly. Judgment was entered for the defendant, and the plaintiff appealed.

W. O. Howard for the plaintiff.
G. M. T. Fountain for the defendant.

WALKER, J., after stating the case: An important question is distinctly presented in this case, namely, whether the issuance of a summons is necessary before the procedure by publication, when the defendant is a nonresident of the State.

There appears from the decisions of this Court to have been some diversity of opinion upon this question, and it being of the first moment that it should be settled, as it affects the integrity of judical proceedings, we have given it the most careful consideration and have reached a conclusion entirely satisfactory to ourselves after thoroughly examining the several statutory provisions relating to the matter and weighing the reasons advanced on either side by those who have discussed it.

Attachment, other than the common-low writ which issued out of the common pleas upon the non-appearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. 4 Cyc., 396, 397; 1 Sinn. on Attachment, secs. 1 and 2. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor.

Under our former statutes, when the defendant was a non-
(178) resident, it issued either in the form of an original or a judical attachment and without any notice until there had been a levy

or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Rev. Code, ch. 7, secs. 12 and 13. By sec. 12 it was provided that "No judicial process shall be issued against the estate of any person residing without the limits of the State, unless the same be grounded on an original attachment, or unless the leading process of the suit has been executed on the person of the defendant when within the State." This was the method of proceeding against non-residents until the adoption of the Code system. The remedy then became ancillary to the principal suit for the recovery of the debt. But there was no essential change in the procedure by which the defendant was brought before the Court and compelled to appear and submit his person to its jurisdiction, or lose his property as the penalty for his default, or so much thereof as was necessary to satisfy the paintiff's demand. The very nature of the case, as shown by the fact of non-residence, made it clearly futile to attempt to serve him personally. As he was presumed to have a constant regard for his property and always to keep a watchful eye upon it, the law-makers at once concluded that the most effective and the speediest way of compelling his appearance was by seizing it; and at the same time this method had the further advantage of protecting his creditor. But in order that the cardinal principle of our judicial system should not be even seemingly violated, it was required that in the original action, instead of the idle and useless ceremony of issuing a summons for a man who it was well known could not be found, publication in such manner as would be likely to give notice of the action should be made; and such is the meaning and clear intent of the statute as plainly manifested by its words. It is true that civil actions are commenced by issuing a summons, but this refers to cases where the defendant, being within the jurisdiction of the Court, can be served personally, and the method of making such service (179) is specially provided for in Rev., secs. 429 to 442.

It is not permissible to construe a statute composed of several sections by the words of any one section, but all those relating to the same subject must be taken and considered together in order to ascertain the meaning and scope of any one of them, and each must be restricted in its application or qualified by the language of any other when the purpose so to do is apparent. This is a rule of construction which has for its basis a practical reason. The Rev., secs. 429 and 430, provides that a civil action shall be commenced by summons to be issued to the Sheriff and personally served by him on the defendant; but where this cannot be done, the person to be served being beyond the jurisdiction

of the Court, sec. 442 provides that if it is made to appear by affidavit to the satisfaction of the Court that, after due diligence, the defendant cannot be found within the State, an order shall be made for publication. By the evidence to satisfy the Court was meant not the sheriff's return on the summons; for if it had been the statute would have been so worded; and let us ask here, How could the fact that the defendant could not be found in the State—for that is the requisite condition of publication—be determined only by the return of the sheriff that he cannot be found in his county, when there are now in the State ninety-seven counties in all? It was intended that it should appear only in the way pointed out in the statute, that is, by affidavit. The affidavit is made the initial step in the case, and the order of publication based upon it is the leading process.

The meaning is, therefore, that a civil action shall be commenced by issuing a summons, except in cases where the defendant is not within reach of the process of the Court and cannot be personally served, when it shall be commenced by the filing of the affidavit, to be followed by publication.

(180) We have mentioned the provisions of the Revised Code upon this subject, for the purpose of showing that this distinction between the two cases was clearly marked therein, and specially will this appear when reference is made to ch. 7, sec. 14, already quoted.

This construction brings the different sections of the law in regard to commencing actions into harmony, precludes any suggestion that the Legislature requires to be done a vain and useless thing, and executes its intention according to the letter and spirit of what it has said. We are quite sure that it has the sanction of the profession.

But it is urged that the law has been otherwise declared in *McClure v. Fellows,* 131 N. C., 509; and that is true. Besides not being satisfied with the reasoning in that case, as contained in either the leading or the concurring opinions, we may remark that the case itself was in direct conflict with the decision of the Court in *Best v. Mortgage Co.,* 128 N. C., 351, though that case is not cited by the Justice who spoke for the Court. The opinion by the present Chief Justice, filed in that case, was well considered, and it, together with his dissenting opinion in *McClure v. Fellows,* presents convincing reasons and an unanswerable argument in favor of the interpretation now given to the statute. It may be well to add that the conclusion reached by the Court in *Best v. Mortgage Co.,* and by the dissenting Judge in *McClure v. Fellows,* is thoroughy well supported by the numerous authorities cited therein.

The fundamental error of the Court in *McClure v. Fellows* is the assumption that a summons must be issued in all cases without regard to the residence of the defendant; and this resulted from taking a restricted view of sec. 209 of The Code, as isolated from other parts of the statute relating to the same matter, and looking more to the form than to the substance. Besides, the fact assumed was the one to be established, and its existence the very subject of the inquiry.

In *McClure v. Fellows* the Court mainly relied upon *Marsh v. Williams,* 63 N. C., 371, and *Webster v. Sharpe,* 116 N. C., (181) 466, and also, it is said in the dissenting opinion, upon *Houston v. Thornton,* 122 N. C., 365. None of these cases is an authority for the construction adopted by the Court in *McClure v. Fellows.* In *Marsh v. Williams* the defendant was in the county, and the language of *Judge Dick* is used with reference to that fact, as clearly appears in the case. Of course, a summons was necessary under such circumstances. There was no publication there. *Webster v. Sharpe* was an action for slander. The statute of limitations was pleaded and the question was *when* the summons was to be considered as issued, and the suit commenced; and the Court decided it was issued, not when it was signed and then held by the Clerk, but when it was delivered to the sheriff or to some one for him and passed out of the control of the Clerk. That is all. The defendant had been personally served with the summons. So that the point was not in that case. The same may be said of *Houston v. Thornton.* The statute of limitations was there pleaded, the defendant was personally served, and the only question was as to when the summons is deemed in law to have been issued. *Smith v. Lumber Co.,* at this term.

The first case which directly involved the point was *Best v. Mortgage Co.,* and that must be considered as the only precedent at the time *McClure v. Fellows* was decided. The opinion of the Court in the *Best case* was unanimous. It therefore had all the force and authority of a controlling decision, if the doctrine, *stare decisis et non quieta movere,* which means that we should adhere to decided cases and not disturb matters established, is to stand for anything. That case settled a principle which, as will hereafter appear, became substantially a rule of property, as a failure to issue a summons was held not to affect the title to any property sold under any final process issued in the case, and *McClure v. Fellows* changed that rule so as to in- (182) validate any such sale. The decision was, therefore, within the protection of the doctrine of *stare decisis,* and for that reason, if for no other, it should not have been reversed.

It cannot be successfully argued that the *Best case* only decided that a "return of the summons not served" is not a prerequisite to publication, for it is distinctly held that the first step is the making an affidavit, which is the initial paper to be filed, without any reference to the issuing of a summons.

The rule of *stare decisis,* or, in other words, what is sometimes called the doctrine of precedents, does not forbid that we should disregard a former decision upon a matter of procedure, if it can be done without substantial injury being suffered by litigants who may have relied upon the precedent so established; and if such is not likely to be the result, the Court will not be governed by the former decision. 26 Am. and Eng. Enc. (2 Ed.), 163. Many may have acted upon the construction placed upon the statute in *Best v. Mortgage Co.,* even before that case was decided, and certainly it must have controlled the conduct of many since. Any title depending upon such a proceeding, that is, one where no summons has issued, would be utterly destroyed by the decision in *McClure v. Fellows,* while no title can be impared by disapproving that case, as, if the principle therein stated has been followed and a summons has been issued, no harm can possibly have been done, for *utile per inutile non vitiatur.*

Upon full consideration, therefore, all of us being of the opinion that the statute was correctly interpreted in *Best v. Mortgage Co.,* we overrule *McClure v. Fellows* and reinstate the former case in its position and authority as a binding precedent in this Court.

The defendant's objection to the publication based on the fact that a summons had not issued cannot be sustained. There are many other objections to the publication, more or less serious in their nature,
(183) which have been urged by defendant's counsel, but they need not be considered.

The remaining question is somewhat difficult, owing to the lack of uniformity in the decisions as regards one phase of it. But we think this difficulty may be avoided by placing our decisions upon a ground quite peculiar to this case. When a contract is in all respects entire, we find little trouble in determining what are the rights of the parties with reference to its enforcement or the recovery of damages, where there has been a breach by either of them. But the law relating to a contract requiring several things to be done, whether treated as separate and distinct promises or not, is somewhat unsettled, in respect to the right of one party who has broken it, as to one of its parts, to recover against the other who, on account of that breach by him, has refused to perform the remaining part of it. Upon this subject we are given the following

rules for our guidance: "Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach. A promise may be independent in the following ways: 1. It may be absolute, that is, wholly unconditional upon performance by the other party; but promises, each of which forms the whole consideration of the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear. 2. Its performance may be divisible, that is, the promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure; but this rule does not apply (*a*) where the circumstances show an intent to break the contract; (*b*) where such partial breach is made a discharge by the terms of the contract. 2. It may be subsidiary, that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence." Clark on Contracts (1 Ed.), (184) 652. It appears, therefore, and the learned author so states, though more fully, in another part of his valuable treatise (p. 660), that the courts are fairly well agreed upon this propostion: Although the performance, to a certain extent, is divisible, yet if the default in one item of a continuous contract is accompanied with an announcement of intention by the party thus in default not to perform it upon the agreed terms, the other party may treat the contract as being at an end. And he may likewise do so if it appears that the failure to perform is deliberate and intentional, and not the result of mere inadvertence or inability to perform. 9 Cyc., 649; *Stephenson v. Cady,* 117 Mass., 6; *Withers v. Reynolds,* 2 B. & Ad., 822; *Bloomer v. Bernstein,* L. R., 9 C. P., 588; *Bartholomew v. Barwick,* 109 E. C. L., 711; *Armstrong v. Coal Co.,* 48 Minn., 113; *Blackburn v. Reilly,* 47 N. J. Law, 290.

It seems to be the clear result of the decisions that if the purchaser fails to pay for goods already delivered, and further evinces a purpose either not to pay for future deliveries or not to abide by the terms of the existing agreement, but to instist upon new or different terms, whether in respect to price or to any other material stipulation, the vendor may rescind and maintain an action to recover for the goods delivered; and consequently he is not liable in damages for any breach if he has otherwise performed his part of the contract.

We do not hesitate to hold that the contract of the parties was formed by their correspondence and is contained in the agreement of 30 April,

1904, as modified by the plaintiff's letter of 11 June, 1904 (which reduced the price and allowed a credit of 10 days), and defendant's reply thereto on 14 June, 1904. The original contract did not allow any longer credit. The plaintiff had been notified before 20 September that its dealings had not been satisfactory, and that very day it insisted on having a credit in the future of 30 days to pay for
(185) goods, assigning as the reason that it was getting the same terms from others, when the contract made no provision for selling on the same terms as others, but defendant thereby simply agreed to sell at the prices specified, even if the market advanced and if it declined, or the plaintiff could purchase at lower prices, to sell at those prices or cancel the contract. That is all. There was not the slightest suggestion in the agreement that the terms of sale should, in any other respect, be in the least controlled by what others might thereafter offer to do.

Without commenting upon the other parts of the correspondence, we find in the letter of 20 September a distinct avowal by the plaintiff that the future dealings between the parties must be subject to terms and restrictions not expressed in the agreement. This was certainly equivalent to an announcement by the plaintiff of an intention to perform the contract, not upon the agreed terms, but upon its own terms; and as it had no right to impose any such condition or to interpolate any such stipulation, it was in law a repudiation of the contract as the parties had made it. There are other clear indications in the correspondence before and after the letter of 20 September was written that the plaintiff intended at least to embarrass the defendant in its effort to complete the deliveries; and if the inference cannot be drawn from the letter of 20 September, alone, and we think it can, it is surely deducible from all the correspondence, that the plaintiff deliberately and intentionally refused to comply further with the contract; and its refusal to carry it out, except upon terms other than those expressed in it, and to which they could not compel the defendant to submit, and which the latter rejected, was in itself virtually a refusal to perform it. When the plaintiff thus declined to go on with the contract, the defendant had the right then and there to rescind, as it did.

Where parties have made an agreement for themselves, the
(186) courts will not substitute another for it. The law requires that parties shall perform their contracts as they make them; and if they fail to do so, they must abide the consequences.

We have not inquired whether, as the plaintiff failed to pay for deliveries already made, the defendant was required to go on at the

hazard of future loss or at the risk of having to litigate with the plaintiff the disputed matters between them, even if the contract may be regarded as a divisible one. Many authorities of great weight are cited by the defendant's counsel in his brief to show that the seller is under no obligation to proceed in the fulfilment of the contract, but may treat the same as abandoned by the other party and stop delivery, if the latter has defaulted on a payment, the seller being then entitled to sue and recover for the goods received and kept by the buyer. *Curtis v. Gibney,* 59 Md., 131; *Reybold v. Vorhees,* 30 Pa. St., 116; *K. S. Co. v. Inman,* 134 N. Y., 92; *McGrath v. Gegner,* 77 Md., 331, and other cases above cited. The plaintiff's counsel contest the principle as thus stated, and cite *Wooten v. Walters,* 110 N. C., 251, as holding the contrary. Which is right in this conflict of views, we need not consider, as we decide the case upon another ground.

If the contract was rescinded, nothing that supervened can have the effect to restore it without the consent of the defendant. *Reybold v. Vorhees, supra.* As the evidence consisted of letters and was plain and direct, leaving nothing to inference, we are of the opinion that the instruction of the Court to the jury was correct.

No Error.

Cited: Currie v. Mining Co., 157 N. C., 218.

BANK v. FLOYD.

(Filed 2 October, 1906.)

Banks and Banking—Out-of-Town Collections—Agency—Selection of Sub-Agents—Drawee—Correspondents—Liability—Custom—Contracts.

1. Where a paper is deposited with a bank for collection which is payable at another place, it shall be presumed to have been intended between the depositor and the bank that it was to be transmitted to the place of residence of the promisor, drawee or payer.
2. Where a bank received for collection a paper on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank, and it is not liable for the errors or misconduct of the sub-agent to which it forwarded the paper, provided it exercised due care in the selection.
3. It is negligence in a bank having a draft or check for collection to send it directly to the drawee, and this is true though the drawee is the only bank at the place of payment.

4. A custom by which a bank, having a check upon its own correspondent in good standing, intrusts it with the collection, is unreasonable and invalid, and if the bank adopts that mode it takes upon itself the risk of the consequences.
5. A contract, that out-of-town items are remitted at owner's risk until the bank receives full actual payment, does not relieve the bank from its own negligence, but only from the negligence or misconduct of its sub-agents properly selected.
6. Where the defendant bank received for collection a check drawn on its correspondent bank, to which it forwarded it, and upon receipt of the check by the correspondent it was immediately canceled and the amount charged to the drawer, who had funds sufficient to meet it, and the correspondent on that day had in its vaults an amount sufficient to have paid the check, and the correspondent failed a week later, not having remitted the proceeds: *Held*, the defendant bank is liable.

ACTION by Bank of Rocky Mount against W. J. Floyd, Murchison National Band, and others, heard by *Jones, J.*, and a jury, at the April Term, 1906, of EDGECOMBE. From a judgment against the Murchison National Bank, it appealed.

Gilliam & Bassett for the plaintiff.
E. K. Bryan for the Murchison Bank.
Battle & Cooley for W. J. Floyd.
F. S. Spruill for W. H. Griffin.

CONNOR, J. This action is prosecuted by plaintiff bank (188) against the Murchison National Bank and the other defendants for the recovery of $1,059, being the amount of a check drawn by Griffin & Aiken on the Merchants and Farmers Bank of Dunn. In the view which we take of the case much of the testimony becomes immaterial. The plaintiff set forth several causes of action against the different defendants. The facts material to the discussion and decision of the case, in regard to which there is but little, if any, controversy, are:

Griffin & Aiken on 27 January, 1904, gave to defendant Floyd, in payment of a note held by his wife, their check on the Merchants and Farmers Bank of Dunn for $1,059. On 29 January, 1904, Floyd deposited the check for collection in the plaintiff bank, and by an arrangement made with said bank the amount was credited to him, to be charged back if the check was not paid. Floyd drew several checks against the credit. On the same day the plaintiff bank forwarded the check for collection to defendant Murchison Bank, its correspondent at Wilmington, N. C. It was received on 30 January, 1904, and on

same day forwarded, for collection, to its correspondent, the Merchants and Farmers Bank of Dunn, N. C. The check was received by the bank at Dunn on 1 February, 1904; was marked "Paid," and charged to Griffin & Aiken, the drawers, who had funds to their credit in excess of the amount of the check.

On 2 February, 1904, the Murchison National Bank wrote plaintiff: "We have not been able to get any returns. Hope to get something by Monday." On 2 February, 1904, the Merchants and Farmers Bank had in its vaults an amount of currency in excess of the check. On 9 February, 1904, the Merchants and Farmers Bank closed (189) its doors and went into liquidation. The proceeds of the check were never remitted by the bank at Dunn to defendant, the Murchison National Bank.

On 10 February the Murchison Bank wired the plaintiff bank: "Merchants and Farmers Bank, Dunn, reported closed. Check mentioned was taken, subject final actual payment. Have used every effort to collect. We do not assume any responsibility. We notified you on 6th that is was unpaid.' Plaintiff bank wired: "Telegram. All liability on us will fall on you and Dunn Bank. Notify it." The introduction of this telegram was objected to, and exception duly noted to its admission. While we think it competent, its admission was entirely harmless. It did not in any respect change the status of the parties.

The Murchison Bank on 9 February wired the plaintiff that it had no returns from Dunn and had sent a man there, advising that plaintiff's customer send some one there.

Mr. Tillery, cashier of plaintiff bank testified: "The Murchison National Bank notified us of the receipt of the cash item of $1,059, and they had on it the same, or in substance the same, as our credit-card had relative to our side collections. The usual credit-card customary among banks relative to collections of papers outside of the town in which the bank is located is to receive them with the understanding and agreement that the bank so receiving shall not be liable until it receives actual final payment, and the credit-card which acknowledged the receipt of the check of $1,059 had printed on it the following: 'Items outside of Wilmington are remitted at owner's risk until we receive full actual payment.' And this is the usual custom among banks relative to out-of-town collections. I do not know which route the mail goes from Wilmington to Dunn. I think it goes by Goldsboro. Goldsboro is between Rocky Mount and Wilmington. We do not take Sunday mail out of the postoffice until Monday."

(190) The Murchison Bank, at and about the time of this transaction, sent other collections to the Dunn Bank. There was much testimony in regard to the transactions between the Dunn Bank and the Murchison Bank between 1 February and 10 February, 1904, which is immaterial in the view which we take of the case. The defendant Murchison Bank tendered a number of issues directed to the several aspects of the controversy, which are eliminated from this discussion. We carefully examined them and find that several relate to matters in regard to which there is no controversy. The others are immaterial. The issues submitted by his Honor cover the material questions in controversy. The answers to them establish the essential facts herein stated. The 12th and 13th issues are as follows: "Was the Murchison Bank guilty of negligence in the discharge of any duty it owed in connection with the collection of said check of $1,059? Ans.: Yes." "If the Murchison Bank was guilty of negligence in the collection of said check, what loss was sustained thereby? Ans.: $1,059, with interest at 6 per cent. from 6 February, 1904." Issues were submitted in regard to the conduct of the plaintiff bank and its liability to the owner of the check. The answers to these issues exonerated it from liability. This view renders it unnecessary to discuss the correctness of the instructions given.

The first question presented for our consideration is the duty of the plaintiff and the Murchison Bank to the owner, in dealing with the check. While there is a diversity of opinion and the decisions of the courts are not uniform upon the subject, this Court, in *Bank v. Bank,* 75 N. C., 534, approved and adopted the following rule of conduct: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank, or other agent, at the place of pay-
(191) ment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill or promissory note has his residence in another place it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor"—or, we may add, drawee or payer. In an opinion expressed with his usual force and clearness, *Bynum, J.,* says: "This decision is consonant with notions of justice." This case has been recognized as controlling in this State, and we think is sustained by the weight of authority in other courts and the reason of the thing.

Mr. Morse in his work on Banks and Banking, Vol. I, sec. 235, thus

states the law: "When the paper is payable in some other place than that in which the bank is located, its duty is (1) to forward the bill, or note or check, in proper season, to a sub-agent selected with due care; (2) to send to such agent any instructions bearing upon its duty that may have been received from its depositor, and (3) to make inquiry with due diligence if notice of the arrival of the paper does not come to it within such time as it might reasonably be expected." He further says: "If a bank fails to do its duty in the matter of collection with reasonable skill and care, it is liable for the damage resulting to any party interested in the paper, whether his name appears on the paper or not." Sec. 252.

It is conceded that there is much diversity of opinion and decision in respect to the liability of the receiving bank for the default of its sub-agent, and the courts of the several jurisdictions, holding variant views, proceed upon entirely distinct and opposite constructions of the implied powers conferred upon the bank first receiving the collection. "If a bank receive a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank; and, if the bank selects a competent (192) and reliable agent and gives proper instructions, its responsibilities cease." *Bank v. Bank,* 71 Mo. App., 451. The two rules are stated by Mr. Morse and the cases classified with a discussion of the reason upon which they rest. *Ib.,* 272-287.

As we have seen, this Court has adopted the Massachusetts rule, which is based upon the following satisfactory reason: "The employment of a sub-agent is justifiable, because this manner of conducting business is the usual and known custom, and in a business which requires or justifies the delegation of an agent's authority to a sub-agent, who is not his own servant, the original agent is not liable for the errors or misconduct of the sub-agent, if he has exercised due care in the selection." Measured by this standard there can be no doubt in regard to the conduct of the plaintiff bank in sending the check to defendant Murchison Bank, its standing and fitness to discharge the duty being conceded. His Honor would have been justified in so instructing the jury. Measured by the same rule, the Murchison Bank would have been in the strict line of its duty in sending its collection to its correspondent in Dunn but for the fact that the Dunn Bank was the drawee of the check.

This brings us to the pivotal question in the case: Is the drawee or payee of a bill, note or check a suitable agent to which such paper should be sent for collection? This question has never been decided

by this Court, hence we must seek for an answer upon the reason of the thing, the general principles underlying the law of agency, and adjudged cases in other jurisdictions. By accepting the collection from the plaintiff bank the Murchison National Bank became, in respect to Floyd's interest, his agent; but as the amount had been credited to him, the plaintiff was entitled to the proceeds. In this view of the case it is not material whether the bank of Rocky Mount was the proper party plaintiff, as all of the persons interested were be-
(193) fore the Court and their relative rights and duties presented for adjustment. The Missouri Court of Appeals in *Bank v. Bank, supra,* in answering the question presented here, says: "It was negligence to place a collection, which as a matter of business required prompt attention, in the hands of the debtor to collect from himself. The evidence here discloses the impropriety of the transaction. The defendant sent the check to Burr Oak, where it arrived on the 9th. If it had sent it to some one other than the debtor, it would undoubtedly have been paid, since the bank continued to do business and meet its obligations on the 9th and 10th." Morse on Banks, sec. 236, says: "The debtor cannot be the disinterested agent of the creditor to collect the debt, and it cannot be considered reasonable care to select an agent known to be interested against the principal to put the latter into the hands of its adversary; surely, it is not due care in one holding a promissory note for collection to send it to the debtor, trusting him to pay, delay or destroy the evidence of debt as his conscience permits. If this would not be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?" citing *Bank v. Bank,* 117 Ill., 100; 57 Am. Rep., 855. To the same effect are all of the authorities to which we have been cited and which we find in our investigation.

The law is well stated in *Ger. Natl. Bank v. Burns,* 12 Col., 539, in which it is said: "Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by businesslike prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed there is the temptation to delay. * * *

The fact that the L. Bank was a correspondent of the defendant
(194) to a limited extent, does not alter the rule. * * * As a matter of law, such method of doing business cannot be upheld. It violates every rule of diligence." In *Bank v. Goodman,* 109 Pa. St.,

428, it is said: "Such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment." *Auten, Receiver, v. Bank,* 47 L. R. A., 329; I Dan. Neg. Inst., 328. In *Farley Natl. Bank v. Pollak,* 2 L. R. A., (N. S.), 194, the same principle is announced, and in the note it is said: "The American cases are almost unanimous in support of the doctrine that it is negligence in a bank having a draft or check for collection to send it directly to the drawee." The annotator gives a long list of authorities sustaining this proposition. The defendant Murchison National Bank, however, insists that it has shown that the custom or usage prevails by which a bank, having a check upon its own correspondent in good standing, may intrust it with the collection. The same point has been frequently made, and almost uniformly met with the declaration that such custom, if shown to exist, is invalid.

In this connection it is said by the Court of Appeals of Missouri, in *Bank v. Bank, supra:* "It was said to be customary for banks to transmit collections to their correspondent, even though such correspondent was the debtor. To this we answer that it is not a reasonable custom, and therefore must fail of recognition by the courts. We concede it may be and perhaps is, in many instances, the most convenient mode for the bank intrusted with the collection. But if the bank adopts that mode it takes upon itself the risk of the consequences."

In *Min. S. and Door Co. v. National Bank,* 44 L. R. A., 507, the Court says: "We can not agree with counsel that the usage and custom here relied upon as a defense to the claim that the defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment, as a general usage and custom, will not justify (195) negligence. It may be admitted that such a course is frequently adopted; but it must be at the risk of the sender, who transmits the evidence upon which the right to demand payment depends to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable and invalid." In *Farley Natl. Bank v. Pollak, supra, Simpson, J., says:* "A custom must be reasonable, and the best-considered cases hold, not only that the bank or party who is to pay the paper is not the proper person to whom the paper should be sent for collection, but also that a custom to that effect is unreasonable and bad." The same rule is laid down in the notes and a number of cases cited to sustain it. Morse on Banks, sec. 236.

The defendant says, however this may be, the check was received for collection pursuant to an express contract that "items outside of Wilmington are remitted at owner's risk until we receive full actual pay-

ment." This language was brought to the attention of the plaintiff bank, and we may assume entered into the contract under which defendant received the paper for collection. We can not suppose that it was intended to be understood as releasing the defendant from the consequences of its own negligence. The extent to which it will be permitted to exonerate defendant bank is that it shall not be responsible for the negligence or misconduct of its sub-agents properly selected. If given its literal meaning, no liability whatever in respect to the collection of the check would attach to it. This construction would relieve it from the duty of using due care in the selection of a sub-agent. If such is the proper construction of the language, and if, thereby, it is relieved from the responsibility for its own negligence, we should not hesitate to hold it unreasonable and invalid.

(196) An agreement to relieve an agent or fiduciary of all responsibility for its own negligence or misconduct is unreasonable and can not be sustained. This is elementary learning as applied to common carriers. 6 Cyc., 392. It would seem equally so when it is sought to relieve a person or corporation from all responsibility for a breach of its contractual duty by negligence or otherwise. Doubtless, in view of the fact that many courts hold that the receiving bank sending a collection on a distant point to its correspondent at the place of payment is responsible for the negligence or misconduct of such sub-agent, the defendant bank, wishing to restrict its liability in this respect, placed upon its stationery the language in question. While, as we have seen in this State, no such liability attached, we can see no reason why, in those States where the law is otherwise, a contract to this effect would not be valid. It is simply an agreement that the receiving bank shall have the power to select the proper agent to collect the check at the place of payment and that such sub-agent shall thereby become the agent of the owner of the check.

But when it is sought to relieve itself of all liability for negligence in the selection of such agent quite a different question arises. Whatever may be the proper construction of the language, we do not think that the defendant Murchison Bank was authorized, in violation of a well-settled rule of law, to send the check to the drawee; and if by reason of doing so, loss has been sustained, it must be held responsible therefor. It appears that upon the receipt of the check by the Dunn Bank on 2 February, 1904, the cashier of said bank immediately canceled the same and charged the amount to the drawer, who had funds sufficient to meet it. It further appears that on that day the Dunn Bank had in its vaults an amount sufficient to have paid the check. The defendant, however,

contends that as the Dunn Bank was insolvent the status of the parties was in no respect changed; that it was "a mere playing with figures," and cites *Bank v. Davis,* 114 N. C., 343.

It was clearly the duty of the Dunn Bank upon presentation of the check to pay it and to remit the proceeds. Its customer had (197) funds for that purpose and the bank had funds to meet this customer's check. There is no suggestion that on 2 February the Dunn Bank anticipated an immediate closing. The testimony is all to the contrary. It can not be doubted, therefore, that it was a good payment of the check. If the check had been sent to some other person and presented on 2 February, there is no suggestion that it would not have been paid. The temptation to the Dunn Bank to retain the money instead of immediately remitting, as was its duty, is a danger which the law guards against by prohibiting the sending of the check for collection to the drawee bank. It therefore seems clear that the failure of the plaintiff bank to receive the proceeds of the check was due to the breach of duty on the part of the Murchison Bank in sending it to the Dunn Bank. In other words, that such breach of duty was the proximate cause of the loss.

There are a large number of exceptions to his Honor's rulings in the admission of testimony, and the instructions given and declined. The scope of the action, as set forth in the complaint, comprehends a number of questions affecting the rights and liabilities of the several defendants, which were properly discussed in the brief. We are of the opinion that, eliminating every other phase of the case, the right of the plaintiff to recover of the defendant Murchison Bank rests upon facts found by the jury, being largely upon undisputed testimony.

We do not think it necessary to discuss or decide the other questions; they are not so related to the facts upon which the conclusion is based as to affect the result. The entire testimony, and the result of the action in sending the check to the drawee bank, although entirely unexpected, strongly illustrates the wisdom of the law which declares that the party whose duty it is to pay is not the proper party to assume the duty of collecting. The testimony shows diligence on the part of the (198) officers of the Murchison Bank to secure its customers after the discovery of the trouble, but this can not relieve it of liability for the original breach of legal duty. It has been held that if the drawee be the only bank at the place of payment, an exception to the general rule is made. This holding is not in harmony with the best thought on the subject or the principle underlying the law of agency. While the convenience of persons and corporations engaged in particular lines of bus-

iness, and the general custom recognized and acted upon, are properly given consideration in the construction of contracts and fixing rules of duty and liability, elementary principles of law founded upon the wisdom and experience of the ages should not be violated.

Upon a consideration of the whole record we find

No Error.

HUDSON v. RAILROAD.

(Filed 2 October, 1906.)

Railroads — Negligence — "Kicking" Cars — Accident — Contributory Negligence—Damages.

1. In an action for damages for the negligent killing of plaintiff's intestate, where the defendant cut loose a car on a spur track on a down grade, where, by its own momentum, it crashed into five other cars, stationary and two of them scotched, on the yard of an oil mill, and with sufficient force to drive them against a bumping-post, causing the death of the intestate, an employee of the mill, who was on the track at the time, and the defendant had no one in a position to give warning nor to exercise any control over the detached car, the Court did not err in refusing to hold that the killing was an excusable accident or that the intestate was guilty of contributory negligence.
2. In order that a party may be liable for negligence, it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

(199) ACTION by Ned Hudson, administrator of James Hudson, against Atlantic Coast Line Railroad Company, heard by *Ward, J.*, and a jury, at the June Special Term, 1906, of EDGECOMBE.

This was an action to recover damages for alleged negligent killing of the plaintiff's intestate. The evidence on behalf of the plaintiff was as follows:

The defendant had constructed two tracks into the yard of the Edgecombe County Oil Mills for the receipt and delivery of freight of the mills. One of these tracks was along the side of the cotton-seed warehouse, so that the contents of the car on the track could be unloaded into the warehouse, the other track being placed some distance to the left of the first track as you entered the yard of the mills. At the end of the first track, and from 3 to 11 inches from one of the buildings of the mills, the defendant had placed a butting or bumping post to stop its

cars. The distance between the mill building and this butting-post was 3 inches at the bottom and 11 inches at the top, and the rail of the track for several feet approaching the butting-post was raised at a very considerable angle, so that it would require force for a car to be shoved back to within 18 inches of the post; and between the butting-post and the mill building there were old iron and other débris, so that one could not pass between the mill building and the butting-post. The distance from the butting-post to the rear end of the coupler of a car placed so that the door of the car would be opposite the door of the cotton-seed warehouse is 27 inches. The distance from the butting-post to the western line of the Southern Oil Company's property, over which the first track is laid, is 108 feet 6 inches. The distance from the butting-post to the switch of the railroad company is 371 feet 11 (200) inches. Just beyond the western line of the property of the Edgecombe County Oil Mills is the main street of the town of Tarboro and a plank sidewalk, over and across which the track is laid. This street and sidewalk were greatly traveled by the general public.

James Hudson, the intestate of the plaintiff, was in the employment of the Edgcombe County Oil Mills, and was a reliable young man earning 85 cents per day; he worked in a huller-room, the door of which opened to the left and about 12 feet from the butting-post.

The evening before the accident the defendant's servants with the shifting engine placed two cars of cotton seed of the mills on the track next to its seed warehouse, the doors of the cars being opposite the doors of the seed warehouse, to be unloaded the following morning. These cars were detached from the engine and scotched to prevent them from moving. Three other cars of the F. S. Royster Guano Company were, without the knowledge or consent of the Edgecombe County Oil Mills, and for the convenience of the defendant company, temporarily placed on this track beyond the two cars loaded with seed, as described, and within the yard of the mills. The day after the two cars of seed had been placed, as described, for the mills, and while two employees of the mills were in the cars unloading the same, the defendant took another loaded car belonging to the Royster Guano Company from still another track, brought it to the switch, and, while the same was in motion, cut it loose from its engine and it rolled down this track across the public plankway and the main street of the town and into the yard of the Edgecombe County Oil Mills, with such violence that it ran into the three cars already stationed there, and caused then to run back and into the two cars placed for the mills and opposite its seed warehouse, while the cars were being unloaded, and caused them to roll back into

(201) the bumping or butting post. When this car was cut loose from the engine, no signal was given to the employees of the mills or to the public that it was coming. No one was on this car that was turned loose. The men on the two cars unloading seed felt a slight jar and the cars moved back about 18 inches. The witness heard someone "holler" and went out and saw James Hudson, the intestate, standing and leaning against the bumper-post with his arms on it. He was "hollering" and badly mashed—mashed sidewise, and died the next day. The cars then rolled back from the post. No one saw Hudson go between the cars and the butting-post.

The grade from the switch to the scales, some 50 feet within the yard of the Edgecombe County Oil Mills, is down grade, and from the scales to the butting-post up grade. A loaded car cut loose at the switch will run back and run into the butting-post. There was a fence on the northern and northwestern side of the property of the mills and a great deal of wood was piled along this fence, and there were tanks and other obstructions, so that one coming out of the huller-room by the side of the butting-post could not see an engine or cars at the switch. The cars standing on the track also obstructed his view.

At the close of the evidence there was a motion for non-suit, which was overruled, and the defendant excepted, and in apt time the defendant requested the Court to instruct the jury as follows:

1. That in law, upon the evidence the injury to James Hudson was an accident, the defendant not being required by law to foresee that a person would pass between the coupling-head and the butting-post, in so short a space as about 20 inches, and you will answer the issue as to defendant's negligence, "No."

2. There being no disputed facts, what is contributory negligence is a question of law, and the Court instructs you that if you believe (202) the evidence the plaintiff's intestate was guilty of contributory negligence, and you will answer the issue as to contributory negligence, "Yes.'

3. That if you find from the evidence the fact to be that James Hudson exposed himself to danger in going between the bumper-post and the end of the car, the space being 18 or 20 inches, then in law he would be guilty of contributory negligence, and you will answer the issue as to contributory negligence, "Yes."

The Court declined to instruct the jury as requested, and the defendant excepted. Verdict for the plaintiff. Defendant moved for a new trial for errors on the part of the Court: (1) in refusing the motion to dismiss as on judgment of nonsuit, and (2) for failing to instruct the

jury as requested. Motion overruled, and defendant excepted and appealed from the judgment rendered.

No counsel for the plaintiff.
John L. Bridgers for the defendant.

HOKE, J., after stating the case: There were two objections urged upon our attention by counsel for the appellant: first, that on the entire testimony, if believed, the Judge should have held the killing of the intestate to have been an excusable accident; second, that on such testimony, as a matter of law the intestate was guilty of contributory negligence, barring a recovery. In our opinion, neither position can be sustained. We have held in *Ray v. R. R.*, 141 N. C., 84, that it is negligence to back a train into a railroad yard where passengers are rightfully moving about, without warning and without having some one in a position to observe conditions and to signal the engineer or warn others in cases of impending peril. This being a correct position, *a fortiori* it would be negligence under the conditions existing here.

The evidence shows that the defendant company, moving cars (203) for its own convenience on a spur-track, cut loose a car on a down grade where by its own momentum it crashed into five other cars, stationary and two of them scotched, on the yard of the Edgecombe County Oil Mills, and with sufficient force to drive these cars from their position and against the bumping-post, causing the death of the intestate, an employee of the mills, who was standing on the track at the time. The defendant had no one in a position to ascertain and note conditions in the yard where the employees of the mills were accustomed and had a right to be, and no one was in a position to exercise any control over the detached car, even if the peril had been noted.

We agree with the Judge below that the undisputed testimony establishes a negligent act causing damage on the part of the defendant, and very certain it is that the Judge could not have held, as requested by defendant, that as a matter of law the defendant was in no way culpable. The reason assigned by the defendant for this contention is not well considered: "That the defendant was not required to foresee that a person would pass between the coupling-head and the butting-post in so short a space as about 20 inches." When one is guilty of a negligent act causing damage—negligent because some damage was likely to result—he can not be excused because the damage in the particular case was more serious than he anticipated or different from what he had reason to expect. The doctrine is that "consequences which follow in

unbroken sequence without an intervening efficient cause from the original wrong are natural, and for such consequences the original wrongdoer must be held responsible, even though he could not have foreseen the particular result, provided that in the exercise of ordinary care he might have forseen that some injury would likely follow from his negligence." 16 A. and E. Enc. (1 Ed.), 438.

(204) This was substantially held in *Drum v. Miller,* 135 N. C., 204. In that case a school-teacher threw a pencil at a pupil, which struck and injured the pupil's eye; and the Judge below on request of defendant instructed the jury: "Unless you find from the evidence that a reasonably prudent man might reasonably or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the pencil, you will answer the first issue, 'No'." The jury answered the issue "No"; and on appeal, *Walker, J.,* for the Court, said: "It is not necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man in the exercise of ordinary care to foresee that harmful results will follow its commission. The doctrine is thus expressed and many authorities cited to support it in 21 A. and E. Enc. (2 Ed.), 487: 'In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have expected.' It is not essential, therefore, in a case like this, in order that the negligence of a

(205) party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the parties sought to

be charged with liability for the negligence should have foreseen by the exercises of ordinary care that some mischief would be done."

In *Christianson v. R. R.,* 67 Minn., 94, it was held: "That where an act is negligent the person committing it is liable for any injury proximately resulting from it, although he could not reasonably have anticipated that the injury would result in the form and way in which it did in fact happen." And *Mitchell, J.,* in delivering the opinion of the Court, said: "It is laid down in many cases and by some text-writers that in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated." Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this Court, but never, we think, where the precise point now under consideration was involved.

The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of *Hadley v. Baxendale,* 9 Exch., 341. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of negligence with that of proximate cause. What a man may reasonably anticipate is important, and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the (206) act would not be negligent at all; but if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is, that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening cause from the original negligent act, are natural and proximate; and for such consequences the original wrong-doer is responsible, even though he could not have foreseen the particular results which did follow. 1 Bevan Neg., 97; *Hill v. Winsor,* 118 Mass., 251; *Smith v. R. R.,* L. R., 6 C. P., 14. These and other decisions of like import from courts of the highest authority show that the

position contended for by the defendant in its prayer for instructions on the first issue cannot be sustained.

The jury have found under proper instructions that the defendant was guilty of negligence causing damage; negligent as stated, because it permitted, without any control, a car to run on a down grade into the mill yard where it was likely to and did hurt one of the employees of the mills; and it cannot be excused becaused the employee, being in an unexpected and unusual position, received a greater injury than the defendant had reason to anticipate.

The position of the defendant on the question of contributory negligence is likewise untenable. The intestate, an employee of the mills, was at work in a room the door of which opened in 12 feet of the place where the killing occurred. He had gone there, no doubt, for his own personal convenience, and the existing conditions gave little or no indication that his temporary position would be one of peril. The cars in the (207) mill yard were stationary and scotched, and other employees were at work in them at the time, unloading cotton seed. The circumstances did not require the intestate to anticipate that the defendant company, in disregard of its duty, would recklessly turn a car loose on a down grade, which would run into the yard, drive the stationary cars from their position and crush out his life.

The charge of the Court, in leaving it to the jury to determine the question under the rule of ordinary care of a prudent man, was as favorable as the defendant had a right to expect. To hold, as requested by the defendant, that the intestate was guilty of contributory negligence as a matter of law, would have been clearly erroneous. We find no error to the prejudice of the defendant, and the judgment below is

Affirmed.

Cited: Jones v. R. R., 142 N. C., 213; *Knott v. R. R., Ib.*, 242; *Bird v. Leather Co.*, 143 N. C., 288; *Horne v. Power Co.*, 144 N. C., 382; *Sawyer v. R. R.*, 145 N. C., 28; *Beck v. R. R.*, 146 N. C., 458; *Dermid v. R. R.*, 148 N. C., 197; *Bordeaux v. R. R.*, 150 N. C., 532; *Hunter v. R. R.*, 152 N. C., 689; *Beal v. Fiber Co.*, 154 N. C., 157; *Ward v. R. R.*, 161 N. C., 184.

JONES v. RAILROAD.

(Filed October 2, 1906.)

Railroads—Negligence—Lawful Act—Rule of Prudent Man.

1. Where, in an action to recover damages for the alleged negligent killing of plaintiff's intestate, the intestate was sitting on a box on the platform of a passenger car and the conductor as he came out on the platform moved like he was going to step around intestate, and just at the time intestate got up from the box the conductor signaled the engineer ahead to put the flat-car on a side-track, and about the same time intestate went to step across to the flat-car, the car suddenly pulled loose and intestate fell between the cars and was killed, a judgment of nonsuit was proper, there being no evidence that intestate was called upon, in the discharge of any duty, to go on the flat-car or that the conductor could have foreseen that he would do so—it being conceded that the act of directing the flat-car to be cut loose was proper to be done and that there was no negligence in the means employed.
2. Where an act causing injury is in itself lawful, liability depends not upon the particular consequences or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act.

ACTION by Thad. Jones, Jr., administrator of W. C. Brook, against East Carolina Railway Company, heard by *Webb, J.,* and (208) a jury, at the February Term, 1906, of DUPLIN.

This action is prosecuted to recover damages sustained by plantiff by reason of the death of his intestate, alleged to have been caused by the negligence of defendant. Upon the conclusion of the plaintiff's testimony defendant demurred and moved for judgment of nonsuit. Motion allowed. Appeal by plaintiff.

Stevens, Beasley & Weeks and *Rountree & Carr* for the plaintiff.
John L. Bridgers for the defendant.

CONNOR, J., after stating the facts: Plaintiff alleged that, prior to and on day of the accident, his intestate was employed by defendant as section-master. That he was directed to board the train at Fountain, with certain section-hands under his charge, and enter the passenger car, to which a flat-car was attached, and go to Toddy and other stations on the road for the purpose of loading certain flat-cars with iron, etc. That while sitting on the platform of the passenger car the defendant's conductor negligently and without notice or warning to his intestate caused the said flat-car to be detached from said passenger car, at which time

his intestate was walking from the rear end of said passenger car to the flat-car, and by reason of such negligence said intestate fell between the cars and was killed. Defendant admitted the employment, and the direction given to enter the passenger car for the purpose alleged, and denied that its conductor was guilty of negligence, etc.

The testimony showed that the passenger car was divided into
(209) three compartments. The rear one was for the accommodation of white passengers, the middle for colored, and the front end for baggage. There was sufficient room in the compartment for whites to permit plaintiff's intestate to ride therein. There was no railing around this end of the platform. It was used for loading trunks, etc.

The plaintiff sets forth the testimony relied upon to sustain the charge of negligence as follows: "As the train was approaching Toddy station, Mr. Stamper, the conductor, came out on the platform and moved like he was going to step around Willie Brock. Mr. Brock got off the box on which he was sitting and started to step across from the passenger car to the flat-car, where I and some of the laborers were; they pulled ahead, that is, the engine went on to place the flat-cars on the sidetrack. At this time the train was running at a good rate of speed—eight or ten miles an hour—and the train slacked up and butted together so that Frank Dancy could cut the flat-cars loose from the passenger car, for the purpose of putting the flat-cars on the sidetrack. Just at the time that Willie Brock got up from the box Mr. Stamper signed the engineer ahead, and about the same time Mr. Brock went to make a step, the car suddenly pulled aloose and Mr. Brock stepped and fell between them, and the passenger coach, which was still running at the rate of eight or ten miles an hour, ran over him. Frank Dancy was a colored man, and he was a brakeman on the train and he was working for the railroad at that time. I saw the signal given to go ahead when the cars were cut loose. The conductor threw up his hand for the engineer to go ahead. As soon as this was done, Mr. Brock fell through. Mr. Brock had gotten up from the box and was walking around to make his step when the signal was given. I do not think Mr. Brock saw Mr. Stamper give the signal. I was about two and one-half feet from the
end of the flat-car when I saw the signal given by Conductor
(210) Stamper for the engineer to pull ahead. I was four or five feet from the conductor when he signaled the engineer to go ahead. The conductor said nothing to me. Mr. Brock was standing 'kinder' with his back to the conductor when the signal was given. I heard the conductor say nothing. I reckon the conductor saw us on the platform. He came out on the platform."

Before proceeding to discuss the main question involved in the plaintiff's appeal, it will be well to understand clearly the position of the parties at the moment the conductor signaled the engineer. The plaintiff's intestate was sitting on a box on the platform of the passenger car. The conductor as he came out on the platform "moved like he was going to step around Brock." "Just at the time Brock got up from the box the conductor signed the engineer ahead and about the same time Brock went to make a step, the car suddenly pulled aloose and Brock fell between them." We need not consider Brock's conduct in attempting to cross the space between the cars in discussing the question of the conductor's negligence, which lies at the threshold of the case. We attach no importance to the fact that Brock was on the platform instead of inside the car, nor to the fact there was no railing around the platform. Neither of these conditions are proximately related to the injury.

The pivotal question is, What duty did the conductor owe to Brock in the light of the conditions as they existed and as he saw them, in ordering the cars to be cut loose? There is no evidence tending to show that Brock was called upon, in the discharge of any duty in the course of his employment, to go upon the flat-car, or that there was any circumstance suggesting to the mind of the conductor that he would do so. So far as the evidence shows, the movement of Brock was the result of an instantaneous mental operation of which the conductor had no suggestion and no reason to anticipate. We assume, in this connection, that Brock did not see the conductor "sign the engineer." (211) Adopting the definition of negligence given by *Baron Alderson,* 25 L. J. Ex., 212, which is practically accurate, as "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," the question arises, What duty did the conductor owe the plaintiff's intestate at the time of and in regard to directing the flat-car to be cut loose? It is conceded that the act itself was proper to be done and that there was no negligence in the means employed for doing it. There is no suggestion that there was any breach of duty in either respect. It is said that the act was the proximate cause of the injury, or that if the cars had not been cut loose at that moment the plaintiffs intestate would not have been injured. This must, for the purpose of this decision, be conceded.

The case then comes to this: The conductor was doing a lawful act in a lawful way, and, by reason thereof, the intestate was injured. What, if any, element is wanting to give plaintiff a complete cause of

action? Defendant says that there is no evidence from which a reasonable man could have foreseen the result from the act. The plaintiff denies this and insists that the question should have been submitted to the jury. It is upon the answer to this contention that the legal liability of the defendant depends. If one, in a lawful manner, does what he has a right to do, and he can, or should by the exercise of reasonable care, forsee that his act will inflict injury upon another, he should either desist or, at least, give the other warning so that he may avoid the injury. It will at once occur to the mind that this proposition is not strictly, and without limitation, accurate. It is sufficiently so for the purpose of this discussion. It is difficult, if not practically impossible, to lay down general propositions upon so evasive and com-
(212) plex a subject which are not open to qualification.

Applied to such cases as the one before us, the language of *Sir Fred. Pollock* is applicable: "The substance of the wrong itself is failure to act with due foresight. * * * Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men go about to guard themselves against every risk to themselves or others which might by ingenious conjecture be considered as possible, human affairs could not be carried on at all. The reasonable man then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety in events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability." Pollock on Torts, 39-40.

In *Drum v. Miller,* 135 N. C., 204, *Mr. Justice Walker,* in a well-considered opinion, discussing the several phases of the question involved herein, says: "There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful, or is, at least, a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends not upon the particular consequences or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act." The same principle is well stated

by *Mr. Justice Hoke* in *Ramsbottom v. R. R.*, 138 N. C., 38: "The plaintiff is required to show * * * first, that there has been a failure to exercise proper care in the performance of a legal (213) duty which the defendant owed to the plaintiff under the circumstances in which they were placed, * * * and second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have forseen that such a result was probable under all the facts as they existed."

Barrows on Neg., 10, quoting the language of *Channell, B.*, in *Smith v. R. R.*, L. R., 6 C. P., 21, says: "Where there is no direct evidence of negligence, the question of what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not." He further says: "It must be kept in mind that a breach of duty is essential to a recovery in an action for negligence. Harm may result directly from a non-negligent act; there may be *damnum* without *injuria*. A person, in a careful and prudent manner, attempts to separate two dogs which are fighting, and accidentally injures plaintiff. Here the defendant's act was unquestionably the proximate cause of the injury; but it is equally unquestionable that no one in defendant's position could have forseen the possibility of injury resulting to any one, and, if he used the proper degree of care to separate the dogs, there can be no liability." Barrows, 12. Many cases are cited illustrating the principle, but, as the author well says, it is difficult to classify them. *Hudson v. R. R., ante* 198, is an illustration of the rule; there the act of "kicking the cars" was negligent and the defendant is responsible for the injury which proximately flowed from the negligent act, although he did not and could not have foreseen the particular injury.

In the case which we are considering we do not find any evidence, and by this we mean any fact or reasonable inference (214) to be drawn from the facts, tending to show that the conductor could, under the existing conditions, have foreseen that plaintiff's intestate would step on the flat-car. That was the only duty which he owed him, and there being no breach in that respect, his Honor properly rendered judgment of nonsuit. Of course, as is illustrated by the ingenious argument of plaintiff's counsel, it is not impossible to speculate or form conjectures raising inferences remote and improbable that the conductor may, by the most careful analytical process, have suspected that plaintiff's intestate would step on the flat-car. This is not the standard

by which to measure his conduct. The law consists of practical, workable rules, based upon observation and experience, not scholastic speculation. As was said by a philosophical writer upon another subject, courts must cease to be pedantic and endeavor to be practical. *Ins. Co. v. R. R.*, 138 N. C., 42.

We have not considered the question of contributory negligence for manifest reasons. Plaintiff relied upon the case of *Whisenhant v. R. R.*, 137 N. C., 349. That case is distinguished from this in that there the train was approaching and near to the station at which the plaintiff, with the other hands, usually alighted, and the engineer gave a sudden jerk whereby plaintiff was injured. Here, the car was some distance from the depot and running at eight or ten miles an hour. In *Whisenhant's case, supra, Clark, C. J.*, says: "The engineer, instead of stopping as usual at that point in response to a signal from the conductor, suddenly put on steam, which caused a sudden and violent jerk, which threw the plaintiff on the track," etc. The distinction between the cases is manifest. The judgment of nonsuit must be

Affirmed.

Cited: Knott v. R. R., 142 N. C., 242.

---

(215)

PEACOCK v. BARNES.

(Filed 2 October, 1906.)

Deeds—Mistake—When Cause of Action Accrues—Evidence—Statute of Limitations—Subrogation.

1. In an action to recover an overcharge by reason of a mistake in a commissioner's deed, the cause of action will not be deemed to have accrued with the delivery of the deed, from the mere fact that the deed contains an accurate description of the land by metes and bounds.
2. Under Rev., sec. 395, subsec. 9, the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary care.
3. In an action to recover an overcharge paid under a mistake as to the number of acres of land sold by a commissioner, in determining the date the statute begins to run, the jury should consider the assurance of the commissioner as to the quantity of land, and how far the same should have been accepted and relied upon, the personal knowledge the purchaser may have had of the land, the opportunity to inform himself, the character of the boundary, the extent of the deficit, etc.

4. Where the plaintiff's claim rests upon the proposition that there was a deficit of land, and his right arises, not from the discharge of a specific lien, but because purchase-money paid by him under a mistake has been used to satisfy the indebtedness of the testator, it is not a case where a purchaser of land, having paid off an existing encumbrance, may, under certain circumstances, be subrogated to the rights of the person whose lien or encumbrance he has discharged.

ACTION by J. W. Peacock against Ida Barnes and others, heard by *Jones, J.*, and a jury, at the February Term, 1906, of WILSON.

There was evidence to show that Harriss Winstead, late of Wilson County, died seized and possessed of several tracts of land, same being encumbered by liens and mortgages to secure an indebtedness of about $4,500; under proceedings duly instituted, a portion of this land was sold by order of Court for the sum of $6,000, and the proceeds, to the extent required, were applied to the payment and satis- (216) faction of the liens and mortgages referred to; and a surplus, after paying costs and charge of administration, was turned over to two of the devisees under the will of the said Harriss Winstead. A portion of the land of the said Harriss Winstead was not sold, and the same is now owned and possessed by some of his devisees and heirs at law. At the sale referred to, lot No. 5 was sold by the acre and was represented by the commissioner to contain 416 acres, and same was bought by plaintiff, J. W. Peacock, for $11.10 per acre, and the purchase-price at that rate, to-wit, $4,616.60, was paid to commissioner by said purchaser, and a deed of conveyance executed and delivered to him in which the said land was accurately described by metes and bounds. Afterwards, and more than three years from the delievery of this deed, plaintiff discovered there was a shortage of more than 96 acres in said tract, and about six months after such discovery plaintiff instituted this action against the legal and personal representatives of Harriss Winstead, deceased, and the commissioner who sold the land, seeking to recover for amount of this shortage at the purchase-price per acre. The sale occurred in November, 1899, and was reported to the next term of the Court, presumably in December, 1899.

Plaintiff put in evidence: Deed from Peacock to Thomas Williams, bearing date 16 January, 1903, with testimony to the effect that he did not discover this shortage till at or near the time of this sale; also the summons in this present action, bearing date 17 January, 1903; also report of Dawes, commissioner, showing that he applied the purchase-money received from plaintiff for Lot No. 5 to the discharge of the mortgage indebtedness on that land.

Defendant offered in evidence the deed from John D. Dawes, com-

missioner, to J. W. Peacock for this land, accurately describing same by metes and bounds, and dated 8 January, 1900. On the issue
(217) as to the statute of limitations, the Court charged the jury that if plaintiff, J. W. Peacock, did not discover the error in the acreage until 16 January, 1903, the date of the deed to Thomas Williams, they should answer the issue, "No."

Defendant excepted. There was verdict for plaintiff for the amount claimed, and from a judgment on the verdict the defendant appealed.

F. A. Woodard and *Pou & Finch* for the plaintiff.
Connor & Connor for the defendant.

HOKE, J., after stating the case: On a former appeal in this cause, 139 N. C., 196, we have held that the plaintiff had a good cause of action, and this appeal presents the question whether the cause of action is barred by the statute of limitations. The statute applicable, Rev. 1905, sec. 395, subsec. 9, bars an action of this character, actions for recovery on account of fraud or mistake in three years, and provides that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting said fraud or mistake.

The defendant contends that on the facts of this case the cause of action should be deemed to have accrued on the delivery of the deed; and for the reason that as the deed contained an accurate description of the land by metes and bounds, the exact quantity could have been readily ascertained by a simple calculation. But we do not think this position can be sustained. There may be facts and attending circumstances from which the jury might fix this as the date when the statute begins to run; but we do not think it follows from the mere fact that the deed, on its face, contains an accurate description of the land by metes and bounds. In *Stubbs v. Motz,* 113 N. C., 458, the Court has held that the limitation for actions of this class is three years from the date
(218) of the discovery, and not from the date of the mistake; and there are or may be many facts pertinent to this queston of discovery, besides the description of the land appearing on the face of the deed. Nor do we hold with plaintiff, that the statute begins to run from the actual discovery of the mistake, absolutely and regardless of any negligence or laches by the party aggrieved. This view was substantially adopted in the charge of the Court below, and we think it puts an erroneous and too narrow a construction upon the statute. A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his care-

lessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake or some essentiial facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence. The question does not seem to have been directly presented or passed upon in this Court, but in *Day v. Day,* 84 N. C., 412, decided intimation is given that the construction of the statute here adopted is the correct one, and like intimation is given in *Meader v. Norton,* 11 Wallace, 442. This, too, has been the principle adopted in jurisdictions where, before the enactment of such a statute, courts of equity, in cases of fraudulent concealment by defendant, interfered to prevent the operation of the statute of limitations except from the discovery. The time fixed being that when discovery was or should have been made by the exercise of ordinary diligence. And since the enactment of the statute incorporating this equitable principle as a feature of positive law, (219) decisions in other jurisdictions have put the same construction upon it. 19 A. and E. Enc. Law (2 Ed.), p. 257; *Township v. French,* 40 Iowa, 601; *Shain v. Sresovich,* 104 Cal., 402.

In this case *Harrison, J.,* for the Court, said: "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine or inactive and afterwards allege a want of knowledge that arose by reason of his own laches or negligence." Citing *Wood v. Carpenter,* 101 U. S., 135, and *Ware v. Galveston,* 146 U. S., 115.

In a well-considered note to Pomeroy's Equity Jurisprudence, 3 Ed., sec. 917, note 2, the doctrine is stated as follows: "This can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by any reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based. In *Rolfe v. Gregory,* 4 De Gex, J. & S., 576, *Lord Westbury* said: 'As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by

anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.' In *Vane v. Vane,* L. R., 8 ch., 383, *James, L. J.,* said that *the statute* will not begin to run 'until the fraud is first discovered, or might with reasonable diligence have been discovered.' "

It will be noted that many of these authorities concern questions of fraud, but the section of the statute here considered applies equally to actions for relief on the ground of fraud or mistake; and in
(220) determining the time when the statute begins to run, the authorities, as a rule, pertinent to the one class of actions will be controlling as to the other. In the case before us there may be many facts to be considered in determining the proper date: The assurance of the commissioner as to the quantity of land, and how far the same should have been accepted and relied upon, the personal knowledge the purchaser may have had of the land, the opportunity to inform himself, the character of the boundary, the extent of the deficit, etc. And the cause should be submitted to the jury with a charge embodying the principle that plaintiff's cause of action is barred in three years from the time the mistake was discovered by plaintiff, or could have been discovered by the exercise of ordinary diligence.

The plaintiff calls our attention to the fact that the mortgage indebtedness, paid off by the proceeds of the land, was not barred at the time of the sale, nor at the instituton of this action; and we are asked to hold that, as plaintiff is subrogated to the right of creditors, the claim, as a matter of law, is therefore not barred. This principle may be correct where the same applies, and might be efficient to enable plaintiff to enforce his claim against the land relieved by his money, provided he has a claim. In order, however, to insist upon the right of subrogation, the plaintiff must first establish a valid claim, and if this has been lost by his own laches since his right arose, the position insisted upon will not avail him. As a matter of fact, however, this is not a case where a purchaser of land, having paid off an existing encumbrance, may, under certain circumstances, be subrogated to the rights of the person whose lien or encumbrance he has discharged. Here, there was no lien, so far as this purchase-money now sued for is concerned. Plaintiff's claim rests on the proposition that there was a deficit of land, and his right arises, not from the discharge of a specific lien, but because pur-
(221) chase-money paid by him under a mistake has been used to satisfy the indebtedness of the testator. He would seem, therefore, to have a demand of *indebitatus assumpsit* against the estate of the testator to be enforced unless the same is barred by the statute as indicated.

Again, a number of cases have been presented for our consideration where a plaintiff has been allowed to recover after a much longer period had elapsed before suit entered. But in these cases, the additional time had passed when the purchaser was in the possession and enjoyment of the property, and no right to assert his demand arose to him until such possession was interrupted by an adverse claim.

There is error which entitles defendant to a new trial, and it is so ordered.

New Trial.

CONNOR, J., did not sit on the hearing of the appeal.

Cited: Modlin v. R. R., 145 N. C., 227; *Sinclair v. Teal*, 156 N. C., 460, 461; *Pelletier v. Cooperage Co.*, 158 N. C., 407.

SHACKELFORD v. MORRILL.

(Filed 9 October, 1906.)

Mortgage Without Joinder of Wife—When Valid—Sale Under Mortgage—Contingent Right of Dower.

1. A second mortgage executed by the husband, without the joinder of his wife, on his land, is not void because of the embarassed condition of the husband, manifested by the fact that the first or purchase-money mortgage had not been paid, where there are no docketed judgment liens on the land and no homestead had been set apart, although its value is less than one thousand dollars.
2. Where the husband's land is to be sold under a first and second mortgage, and the wife joined in the execution of the first mortgage only, it is proper for the Court to protect the contingent right of dower of the wife in case the land sells for more than sufficient to pay the first mortgage and costs.

ACTION by Green Shackleford and wife against L. V. Morrill, heard by *Long, J.*, at the May Term, 1906, of GREENE upon an (222) agreed state of facts, the substance of which appears in the opinion of the Court. From a judgment for the defendant the plaintiffs appealed.

Galloway & Albritton for the plaintiffs.
Aycock & Daniels for the defendant.

BROWN, J. Plaintiff and wife executed a mortgage for the purchase-

money of the land described in the complaint, concerning which there is no dispute. The deed for the land was made to the husband. Afterwards, the husband, without the joinder of his wife, executed a second mortgage for a loan of money to the defendant. It is contended that the second mortgage is void without the joinder of the wife, because of the embarrassed financial condition of the husband, manifested by the fact that the first or purchase-money mortgage had not been fully paid. This position is untenable, it being admitted that there are no docketed judgment liens on the land and that no homestead had been set apart, although its value is less than one thousand dollars. The land belonged to the husband and he had the right to execute the second mortgage without the joinder of his wife. This is settled in this State. *Scott v. Lane,* 109 N. C., 154; *Gatewood v. Tomlinson,* 113 N. C., 312; *Hughes v. Hodges,* 102 N. C., 236; *Joyner v. Sugg,* 132 N. C., 591. If the land were to be sold under the second mortgage alone, it would be sold subject to the wife's right of dower, and the purchaser would acquire a good title except as to the contingent right of dower. He would acquire the husband's title and the right of present possession, but if the wife survived the husband she could enforce her right of dower against the land.

The land, however, is to be sold under both mortgages, the first of which is not only given for the purchase-money, but in the exe-
(223) cution of which the wife joined. The purchaser, upon confirmation of sale, will acquire an indefeasible title as against both husband and wife. It was, therefore, proper for the Court to take into consideration and protect the contingent interest of the wife in case the lands sells for more than sufficient to pay the first mortgage and costs.

Affirmed.

EDGERTON v. GAMES.

(Filed 9 October, 1906.)

Recovery of Personal Property—Venue—Removal.

Where a complaint sets out three different causes of action, one of which is for the recovery of personal property, the Court properly granted the defendant's motion to remove the cause to the county in which such property is situated.

ACTION by G. L. Edgerton and another against Charlie Games, heard by *Council, J.,* at the April Term, 1906, of WAYNE, on a motion by the defendant to remove the cause to Johnston County for trial. From the order of removal the plaintiffs appealed.

W. C. Munroe for the plaintiff.
Dortch & Barham and *J. A. Wellons* for the defendant.

CLARK, C. J. The complaint alleges that the defendant procured a horse from the plaintiff in Goldsboro on an agreement that if the plaintiffs would let him take the horse to his home in Johnston County to see if he would plow, and if he liked the horse he would bring him back the following Monday and would give plaintiffs in exchange a horse which he left with them and $80; that the defendant has not returned the horse, and has refused on demand to give him up, and that the defendant obtained the possession of the horse by false and fraudulent representations, with the fraudulent intent to defraud plaintiffs, and asks for judgment for $80, for a decree that the horse of de- (224) fendant left in their possession be decreed their property; that it be adjudged that they have a lien upon the horse defendant has for $80, and that he be sold to pay the same; that they recover possession of their horse in possession of defendant and for recovery of $500 damages. Ancillary proceedings in claim and delivery were taken out. The defendant gave bond and retained possession of the horse.

The plaintiffs have practically set out three different causes of action, though they are not separately and distinctly stated and numbered:

1. Affirming the "swap," asking for judgment for $80 boot, and that the defendant's horse left with them decreed to be their property, and for declaration of a lien for $80 on the horse the defendant has in possession.

2. Disaffirming the contract, and seeking to recover the horse the defendant carried off.

3. Alleging that the defendant obtained the horse by fraud and misrepresentation, and asking his recovery and $500 damages.

Whether his Honor was correct in holding that the second was the chief cause of action, it is certainly one cause of action, and the Judge properly granted the defendant's motion to remove the cause to Johnston County. This cause differs vitally from *Woodard v. Sauls,* 134 N. C., 274. In that case there was but one cause of action, the recovery of the amount due plaintiff on a promissory note, and the recovery of sundry collaterals was asked for the purpose of applying their proceeds to the discharge of the judgment on the note. Here, on either the first or third cause of action, there is no legal ground to recover possession of the horse. That could be had only upon the second cause of action, and if had upon that cause of action the horse could not be applied, as in

Woodard v. Sauls, supra, upon any recovery upon the other causes of action.

No Error.

Cited: McCullen v. R. R., 146 N. C., 570.

(225)

BROWN v. SOUTHERLAND.

(Filed 9 October, 1906.)

Action for Breach of Covenant of Seizin—Jurisdiction—Title to Real Estate in Controversy—Practice.

1. Where the complaint alleges that the defendants conveyed to the plaintiffs certain lands by deed, "with full covenants of seizin"; that the defendants were not seized of a portion of said lands, and that by reason thereof there was a breach of said covenant whereby they sustained damage to the amount of $57, the Superior Court had jurisdiction of the action under Art. IV, sec. 27, of the Constitution, the title to real estate being in controversy.
2. The defendants by moving to dismiss on the pleadings, cannot oust the jurisdiction of the Superior Court, provided the complaint sets forth facts which present a case in which the title to real estate is in controversy.
3. The provisions of Rev., sec. 1424 cannot be invoked where it does not appear that the action before the Justice was dismissed "upon answer and proof by the defendant that the title to real estate was in controversy," as this cannot be inferred.

ACTION by R. Q. Brown and wife against R. B. Southerland and wife, heard by *Webb, J.,* and a jury, at the August Term, 1906, of WAYNE.

Plaintiff sued in the Superior Court alleging that defendants conveyed to them certain lands by deed, "with full convenants of seizin, against encumbrances and with general warranty." That defendants were not seized of a portion of the lands conveyed, and that by reason thereof there was a breach of said convenant of seizin whereby they had sustained damage to the amount of $57.58, wherefore they demanded judgment, etc. Defendants admitted the execution of the deed and denied that there was any breach of the convenant of seizin, except as set forth in the affirmative matter set up in the answer. Defendants, for a further defense, say that the land, in respect to which they had no seizin, was included in the deed by mistake of the draftsman.

(226) That plaintiffs contracted to purchase certain land, and that when the deed was prepared the draftsman followed a survey

which was furnished him and, by mistake, included in the description the land in controversy. When the cause came on for trial defendants moved the Court to dismiss the action, for that the Court had no jurisdiction, the amount demanded being less that two hundred dollars. His Honor being of the opinion that upon the pleadings the title to land was not in controversy, granted the motion. Plaintiffs excepted and appealed.

A. S. Grady and *W. C. Munroe* for the plaintiffs.
F. R. Cooper for the defendants.

CONNOR, J., after stating the case: Counsel concede that the exact point presented by the appeal has not been before this Court. The solution of the question depends upon the construction of the Constitution, Art. IV, sec. 27: "The several justices of the peace shall have jurisdiction * * * of civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy." See, also, Revisal, sec. 1419. This section, when analyzed, confers jurisdiction on justices in actions "founded on contract" wherein: 1. The sum demanded shall not exceed $200, and, 2. The title to real estate shall not be in controversy. Here the sum demanded is within the jurisdiction of the justice, but plaintiffs say that the jurisdiction is not given, because the title to land is in controversy. That upon the pleadings it is manifest that the issue raised—the alleged breach of the convenant of seizin—involves the inquiry whether the defendants were seized, that is, had title to the land conveyed in the deed. Defendants say that the answer admits that they had no title, therefore there was nothing to try. This position eliminates the defense that the land was included in the deed by the mistake of the draftsman, and presents the question upon the allegation and denial in respect to the breach of the covenant. The (227) answer, admits that the deed, as written, covers and includes the land in controversy. It is true that in their further defense defendants admit that they had no such land. The test by which jurisdiction is fixed, when the motion to dismiss is made upon the complaint, is whether from the allegations of fact the "amount in dispute" is more or less than two hundred dollars. *Froelich v. Express Co.*, 67 N. C., 1. This Court has uniformly held that when the sum demanded, in good faith, is in excess of two hundred dollars, the jurisdiction is not ousted by the reduction of the amount by failure of proof. *Martin v. Goode*, 111 N. C., 288, in which the decided cases are cited. *Sloan v. R. R.*, 126

N. C., 488. Applying the same test here, it is clear that the complaint alleges a state of facts which, if true, involves the title to land. Defendants, by moving to dismiss on the pleadings, cannot oust the jurisdiction, provided the complaint sets forth facts which present a case in which the title to real estate is in controversy. The fact, if it be conceded, that the answer admits the plaintiffs' right to recover, cannot affect the question of jurisdiction. The defendants do not admit that plaintiffs are entitled to recover; on the contrary, they set up an equitable defense that the land was included in the deed by mistake. If they should succeed in establishing this defense, of course the plaintiff would not be entitled to recover, either upon the ground that the deed would be corrected and thereby the land, in respect to which there is a breach of the covenant, eliminated, or the plaintiff would take only nominal damages. It was the evident purpose of the framers of the Constitution, while enlarging the jurisdiction of the justices of the peace in respect to the sum demanded, to exclude from their jurisdiction the trial of title to real estate. We can readily see that in actions for breach of covenants it would be almost impossible to avoid the trial of issues involving such title. The very matter in controversy here is (228) whether the defendants were seized of the land conveyed, thus presenting, necessarily, the question of title and thereby ousting the jurisdiction of the justice. It will be observed that the statute further provides that if the question of title is not raised upon the pleadings, but shall appear to the justice, "on the trial," to be in controversy, he shall dismiss the action. We are of the opinion that his Honor was in error in granting the motion to dismiss. In the case of *Templeton v. Summers,* 71 N. C., 269, cited by defendants, it was manifest that the title to land was not involved, and what is said there does not conflict with our conclusion. Plaintiffs call our attention to the fact that the case on appeal states that an action between the same parties on the same subject-matter had been dismissed before a justice of the peace of Sampson County, thereby invoking the provisions of sec. 1424 of the Revisal of 1905, which provides: "When an action before a justice is dismissed upon answer and proof by the defendant that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the Superior Court, and the defendant shall not be permitted, in that Court, to deny the jurisdiction by an answer contradicting his answer in the justice's court." Defendants insist that plaintiffs cannot take advantage of this section, because the judgment dismissing the action by the justice was not pleaded. Without passing upon that question, it is sufficient to say that it does not appear that the

action was dismissed "upon answer and proof by the defendant that the title to real estate was in controversy," and this cannot be inferred.

Judgment dismissing the action must be

Reversed.

(229)

BETTS v. RALEIGH.

(Filed 9 October, 1906.)

Mandamus—Prohibition—Petition for Election.

The provisions of ch. 233, Laws 1903, which require the election petitioned for to be held in the same year in which the petition is filed and prohibit the holding of the election within ninety days of any city, county, or general election, effectually bar the holding of the election petitioned for in this case, as the writ of *mandamus* is never issued to compel an unlawful or prohibited act, and the fact that the petitioners were compelled to resort to legal proceedings to compel the defendants to order the election is immaterial.

ACTION for *mandamus* by the State on the relation of S. J. Betts and others, petitioners, against the city of Raleigh, pending in WAKE and heard upon complaint and answer by *Webb, J.*, at chambers, in the city of Raleigh on 24 September, 1906.

This was a proceeding in *mandamus* to compel the Board of Aldermen of the city of Raleigh to order an election to determine the question as to whether prohibition shall be established in said city under the provisions of Laws 1903, ch. 233. From a judgment directing the issuing of the writ, the defendant appealed.

W. A. Montgomery and *J. C. L. Harris* for the plaintiff.

W. B. Snow for the defendant.

BROWN, J. It is contended by the defendant that the form of the petition presented to the Board of Aldermen is not in compliance with the act in that it fails to designate the questions which the petitioners desire to be voted upon at the election. In the view we take of the case it is unnecessary for us to pass on that contention. The writ of *mandamus* should have been denied for the reason that it is never granted to compel an unlawful or prohibited act.

The statute is express in terms and unmistakable in meaning. The election petitioned for is required to be held in the (230) same year in which the petition is filed. It cannot be held

during the subsequent year. The statute also prohibits the holding of the election within ninety days of any city, county, or general election. These provisions of the statute are as binding upon the courts as upon any other departments of the State Government, and effectually bar the holding of the election petitioned for. The fact that the petitioners aver they were compelled to resort to legal proceedings to compel the defendants to order the election is immaterial. Had the *mandamus* proceedings been commenced much earlier, and before their final determination the obligation of defendants to perform the alleged duty required of them, or the right of the relator to exact its performance, expired by lapse of time, the relief will be denied, since courts will not grant the writ when, if granted, it would be fruitless, or require the perfornance of an illegal or prohibited act. High on Extraordinary Remedies, p. 20; *Mauney v. Commissioners,* 71 N. C., 486; Topping on Mandamus, p. 67.

Proceeding Dismissed.

(231)

HICKS v. HICKS.

(Filed 9 October, 1906.)

Dower—Abandonment—Evidence—Examintion of Witnesses.

1. In a proceeding for dower, where the defense was set up that the plaintiff had wilfully and without just cause abandoned her husband, the Court erred in excluding the question asked plaintiff, "Did you leave your husband of your own volition?"
2. Whether the plaintiff left her husband's home of her own volition, or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under Rev., sec. 1631, formerly Code, sec. 590.
3. The competency of evidence is determined by the substance of the witness' answer, rather than by the form of the interrogatory.
4. Where a question is objected to and it cannot be seen on its face that the answer will be incompetent, the Court may call on counsel to state what he expects to prove or direct the jury to retire until it is learned what the witness will say.

PROCEEDING for dower, by Annie Hicks against J. R. Hicks and others, heard by *Ward, J.,* and a jury, at the February Term, 1906, of WAKE, upon an issue transferred from the Clerk.

It was admitted that the plaintiff is the widow of Joseph Hicks, who owned the land described in the complaint and is entitled to dower, un-

less she had wilfully and without just cause or excuse abandoned her husband and was not living with him at the time of his death, this being the defense set up in the answer.

The following issue was submitted to the jury: "Did the plaintiff willfully and without just cause abandon her husband, Joseph Hicks, and refuse to live with him, as alleged in the answer?" The jury answered the issue "Yes." Plaintiff admitted that she was not living with her husband when he died, but she alleged that she left him because he treated her cruelly and offered such indignities to her (232) person as to render her condition intolerable and her life burdensome, and that he had falsely charged her with infidelity.

There was testimony on the part of the defendant tending to show that the plaintiff of her own will abandoned her husband without any lawful excuse. The plaintiff's proof tended to show that they had lived together ten years, and had one child, who was now eight years old, and that plaintiff's character is good. It was admitted at the trial that she is and always had been a virtuous woman.

The plaintiff's counsel proposed to ask the witness, C. W. Horton, what he had heard Hicks say about his wife's character, the witness stating that he had not told her about it. On objection the testimony was excluded. It was in evidence that Hicks had told his wife to leave their yard and threatened, if she did not go, to shoot her. She used some offensive language and seemed not to be afraid of him. Plaintiffs counsel also proposed to ask the plaintiff, who testified in her own behalf, the following question: "Did you leave him (her husband) of your own volition?" Defendant objected and the question was ruled out.

There was no objection to the charge of the Court. Plaintiff moved for a new trial upon exceptions taken to the exclusion of testimony. Motion overruled. Judgment, and appeal by plaintiff.

R. H. Battle and *F. S. Spruill* for the plaintiff.
W. N. Jones for the defendant.

WALKER, J., after stating the case: The Court erred in excluding the question put to the plaintiff by her counsel while testifying in her own behalf. The competency of evidence is determined by the substance of the witness' answer rather than by the form of the interrogatory. *Sumner v. Chandler,* 86 N. S., 71. Whether the plaintiff left her husband's home of her own volition, or by reason of what the (233) law will recognize as compulsion, is an inquiry that does not necessary involve a transaction or communication with her husband

which disqualifies her under Revisal, sec. 1631, formerly Code, sec. 590. She may have left for valid reasons not arising out of any dealing with her husband. It cannot be seen, on the face of the question, that the plaintiff was induced to leave only by what her husband may have said or done.

In *Thompson v. Onley,* 96 N. C., 9, this Court held to be competent a question substantially similar to this one. It is there suggested that the party objecting to it could by a preliminary examination have ascertained if the witness intended to refer to a personal transaction or communication with a party then deceased. We add that the Judge here could have called upon the counsel to state what he expected to prove and thus have elicited the required information, or he could have directed the jury to retire until it was learned what the witness would say, and in that way not prejudiced either side. Any one of the suggested methods of inquiry would be in accordance with approved practice. *Sikes v. Parker,* 95 N. C., 232; *Fertilizer Co. v. Rippy,* 123 N. C., 656.

This case is not like *Davidson v. Bardin,* 139 N. C., 1, and *Stocks v. Cannon,* 139 N. C., 60, cited by the defendant's counsel, for in each of them it appeared from the very nature of the question that it could not possibly be answered without speaking of a transaction or communication with the deceased. Nor is it like *Peoples v. Maxwell,* 64 N. C., 313; *March v. Verble,* 79 N. C., 19; *Ducker v. Whitson,* 112 N. C., 44, and cases of a similar kind which were cited by the plaintiff's counsel; for there it was perfectly clear that no transaction or communication with the deceased was called for; but something very different from it was the object of the proof, such as sanity, insolvency, handwriting, and the like. The proposed evidence was relevant, as the statute (234) provides that abandonment of the husband which is wilful and without just cause, and refusal to live with him, followed by separation continued to the time of his death, shall constitute a bar to the right of dower. That the plaintiff did not leave her husband's home of her own volition, if she can establish the fact by competent proof, should certainly be considered by the jury upon the issue framed under that provision of the statute. What the witness will say, and whether she is qualified under Rev., sec. 1631, to speak of all or any of the matters that may be within the full scope of the proposed inquiry, we do not know, and, therefore, we are now unable to decide as to the extent of her competency, and must leave the question with the presiding Judge to pass upon when the facts are all disclosed.

The question put to the witness Horton is rather indefinite in form,

and we can only conjecture as to what was intended to be proved. If the husband made what turns out to be a false accusation against his wife, and one very degrading to her and which ought to have been humiliating to him, it perhaps might be competent and relevant as a circumstance showing the state of his temper and disposition towards her, or his animosity, to be considered by the jury in connection with the evidence introduced by the plaintiff that he had driven her from the yard. It might have a tendency to show why he did it and as to who was the aggressor in this most unfortunate affair. That his anger and resentment would be aroused, if he believed the truth of what he had uttered against her, can hardly be denied; and if he did not believe it, he evinced an utter disregard for the duty of protection he had promised and that he owed to her, to say the least of it, which was likely to result in domestic infelicity and a marital breach sooner or later. In either view of such testimony it may be regarded as furnishing some evidence of the motive with which it is alleged he maltreated her, if it is not a circumstance to show that the version of their separation, as given by her witnesses, is the true one. The question is so (235) generally and vaguely worded, though, that we cannot pass definitely upon its competency or relevancy.

We order a new trial, because the Court excluded the question propounded to the plaintiff herself.

New Trial.

MANN v. BAKER.

(Filed 9 October, 1906.)

Executors and Administrators—Account and Settlement—Evidence—Burden of Proof—Pleadings—Practice.

1. An action against an administrator for an account and settlement should not be dismissed because not brought "on relation of the State" when it had been pending for years.
2. In an action by the heirs and distributees against an administrator *d. b. n.* for an account and settlement, it is competent for them to show any indebtedness due the estate, whether by the former administrator or by other debtors.
3. In an action against an administrator for an account and settlement, when any indebtedness due the estate is shown, the burden is upon the administrator to show that he used due diligence in collecting the same, but was unable to collect, or, having collected, has accounted for the same. It is not sufficient simply to show that the administrator has accounted for the sums he actually collected.

4. In an action for an account and settlement, it is not necessary to specifically set out the debts which the administrator had failed to collect, but it is sufficient to aver a breach of duty in failing to file final account and to fully account and settle.

ACTION by W. H. Mann and others against George S. Baker, administrator of J. B. Mann, heard by *Jones,* J., on exceptions filed by plaintiffs to the report of the referee at the April Term, 1906, of FRANKLIN.

From the judgment rendered the plaintiffs appealed.

(236) *B. B. Massenberg* for the plaintiffs.

P. H. Cooke for the defendant.

CLARK, C. J. This is an action by the heirs at law and distributees of J. B. Mann against G. S. Baker, administrator *d. b. n.,* for an account and settlement. It was referred, and the referee found that J. B. Mann died in 1865 and H. H. Harris qualified as his administrator; that in 1870 Harris was removed and W. H. Spencer was appointed administrator *d. b. n.;* that he dying in 1877, G. S. Baker was appointed administrator *d. b. n.,* and has filed no final account. The plaintiff offered to show what W. H. Spencer, the former administrator, sold certain real estate of his intestate, under decree of Court, and received therefor, as appears by his recorded returns, the sum of $7,252.55. The referee excluded this evidence on the ground that this specific allegation was not made in the complaint, and excluded it in making up his findings on the facts and the law. The referee found that all the funds which had come to the hands of defendant as administrator *d. b. n. of* J. B. Mann had been properly accounted for, and held as conclusions of law: 1. That the action should be dismissed because not brought by plaintiffs "on relation of the State." 2. That defendant, not having filed his final account, was not protected by the statute of limitations. 3. That having disbursed all the funds which came into his hands, the defendant was entitled to recover costs against the plaintiffs, who were adjudged to have shown no cause of action.

The plaintiffs excepted to the first conclusion of law. The Court in its discretion allowed the plaintiffs to amend. Besides, as the case had been pending for years, this purely technical objection had been waived and came too late. *Brown v. McKee,* 108 N. C., 387. The plaintiffs further except because the referee's findings are based,

(237) as he states, upon an exclusion of the record evidence of the sums which came into the hands of the previous administrator, W. H. Spencer. This is a real point presented by the appeal. It is the duty of an administrator *d. b. n.* to investigate and collect in all sums due

the estate, whether by the former administrator, *Latham v. Bell,* 69 N. C., 135; *Smith v. Brown,* 99 N. C., 377, or by other debtors.

In an action by the heirs and distributees for a settlement, it is competent for them to show any indebtedness due the estate, and such being shown, the burden is upon the administrator to show that he used due diligence in collecting the same, but was unable to collect, or, having collected, has accounted for the same. It is not sufficient simply to show, as was done here, that the administrator has accounted for the sums he actually collected. Here the Court records offered in evidence showed that the former administrator had received $7,252.55, proceeds of realty of his intestate, which had been sold by order of Court. The defendant as administrator *d. b. n.* was the only person who could have taken steps to recover that sum or ascertain if it had been properly disbursed. It was his duty to take such steps in apt time, and he is responsible for any loss occurring from his failure to do so. When the plaintiffs offered to show that such sums were reported by the former administrator as being in his hands, they should have been allowed to do so, and the defendant should have been allowed to show that he used due diligence and ascertained that said sum had been accounted for, or that he was unable to collect. It was error to exclude all investigation of that matter; and the referee's report stating that his conclusions were based upon the evidence of the sums actually collected, excluding this evidence, it was error to confirm it. It is true that the referee offered to allow the plaintiff to amend by specifically charging the failure to collect any sum due by the former administrator, but it was not necessary in an action of this nature to specifically set out the debts which the administrator had failed (238) to collect, and the plaintiff, fearing the amendment would work further delay in an action already long drawn out, declined. It was sufficient to aver a breach of duty in failing to file final account and to fully account and settle. In fact, however, the complaint does allege a balance of $1,027.60 due on amount actually collected, as shown per defendant's annual account, and further the sum of $7,280.42 due by said administrator, of which plaintiffs averred that they had but recently received information. The complaint is sufficient to show that the action was for a full accounting and to recover not only any balance actually collected, but for an account of any sums which the administrator "should have collected." It was error to exclude evidence offered with that view, and the Judge erred in confirming the report.

Error.

KNOTT v. RAILROAD.

(Filed 9 October, 1906.)

Railroads—Fires—Pleadings—Evidence.

1. Where the plaintiff alleges that the spark-arrester was defective and the right-of-way foul, and states generally that the fire was caused by a spark emitted from the engine, which ignited the combustible material on the right-of-way, and thence spread to his standing timber, the plaintiff is not restricted to proof only of a defect in the spark-arrester and the bad condition of the right-of-way, and evidence as to a defect in the fire-box was not irrelevant and prejudicial.
2. In an action for damages to property alleged to have been burned by the emission of sparks from defendant's engine, it is not material to inquire how a spark happened to fall from the engine, whether from the smoke-stack or the fire-box, so that it lighted on the right-of-way, which was in bad condition, and caused the fire.
3. In an action for damages to the plaintiff's timber alleged to have been burned by the emission of sparks from defendant's engine, testimony of a witness that he had seen the same engine which caused the fire when plaintiff's timber was burned on April 4th, as it passed and repassed, and that sparks were flowing from the smoke-stack every night between 15 February and 15 April, and that it set the right-of-way on fire where the timber stood, is competent.

ACTION by J. B. Knott and wife against Cape Fear and North-
(239) ern Railroad Company, heard by *Council, J.*, and a jury, at the April Term, 1906, of WAKE.

The plaintiff alleged that he owned a tract of land through which the defendant's railway ran. That defendant permitted its right-of-way to become foul with leaves, brush, and other combustible material, and also used an engine without a proper spark-arrester to its smoke-stack. The seventh and eighth sections of the complaint read as follows:

"That on or about 4 April, 1904, the said combustible matter then and there being on the defendant's said right-of-way, which said combustible matter the defendant had negligently and carelessly failed to remove, was set on fire by a spark emitted from one of defendant's engines, and the fire thereby started was communicated to the lands of the plaintiffs. That the fire communicated as aforesaid to the lands of the plaintiffs spread through the woods upon the lands and burned over nearly the whole of said land; that the land so burned over amounted to one hundred and thirty acres, to the great damage of the plaintiffs."

The material allegations of the complaint were denied in the answer. The plaintiff introduced testimony to establish the allegations of his complaint, and the defendant's proof tended to show the contrary.

The plaintiff's counsel on the cross-examination of defendant's witness, W. J. Angier, asked him the following questions, which were admitted, and the defendant excepted:

"When the steam was shut off and the train was rolling down grade, were not sparks shaken frequently out of the fire-box? (240) Ans.: Yes, but when they fall out of the fire-box they fall into the ash pan.

"When they fall out of the ash-pan where do they fall? Ans.: I do not know."

A witness for the plaintiff, J. W. Adcock, was permitted to testify that sparks could be seen coming from the engine in question every night between 15 February and 15 April, 1904, and that it set the right-of-way "along there" on fire; and another of the plaintiff's witnesses, D. H. Fuquay, testified that he had taken notice of the engine. That in the daytime you could seldom see any sparks or fire, but occasionally you could see fire at night flowing from the smoke-stack and falling from the ash-pan. All of this testimony was duly objected to by the defendant. The defendant did not ask for any special instructions.

The Court thus charged the jury upon the first issue: "The negligence charged in the complaint is that the defendant permitted its right-of-way to become foul by the accumulation of inflammable matter upon it, and that its engine was not equipped with the propor kind of spark-arrester, and that by reason of the condition of the right-of-way and engine a spark was emitted from the engine of defendant, No. 99, and came in contact with the matter on the right-of-way, and in this manner set out the fire that burned plaintiff's woods and land. The plaintiffs, having alleged that defendant negligently burned their property and pointed out in the complaint the negligence charged, before the plaintiffs are entitled to have this issue answered 'Yes,' they must satisfy you by the greater weight of evidence that the defendant so negligently burned their property." There was no exception to the charge. The issues, with the answers thereto, were as follows:

"1. Was the plaintiff's property burned by the negligence of the defendant, as alleged in the complaint? Ans.: 'Yes.' 2. What damage, if any, are plaintiffs entitled to recover? Ans.: '$600.'"

Judgment was entered upon the verdict, and the defendant (241) appealed.

Graham & Devin and *Argo & Shaffer* for the plaintiffs.

H. E. Norris for the defendant.

WALKER, J., after stating the case: The contention of the defendant,

based upon the testimony of the witness, W. J. Angier, which was admitted by the Court over defendant's objection, is that the plaintiff in his complaint alleges, as the only acts of negligence on the part of the defendant, that the right-of-way was foul and the spark-arrester attached to the smoke-stack was defective, and there being no allegation in regard to the fire-box, any evidence as to a defect in that was irrelevant and prejudicial. It does not appear to us, after a careful reading of the complaint and giving it that liberal construction with a view to substantial justice between the parties which is required by the law (Revisal, sec. 495), that the plaintiff has thus restricted himself to proof only of the defect in the spark-arrester and the bad condition of the right-of-way. It is true, he alleges that the spark-arrester was defective, but in the seventh section of the complaint he states generally that the fire was caused by a spark emitted from the engine, which ignited the combustible materal on the right-of-way and thence spread to his standing timber, which was destroyed. But can it make any difference in the legal aspect of the case, whether the spark or live coal came from the smoke-stack or the fire-box, even assuming them to have been in the best condition, if eventually it fell upon the foul right-of-way and produced the conflagration? We think not, because the permitting its right-of-way to remain in a dangerous condition was an act of negligence, sufficient of itself to cause the damage and necessarily proximate to it, if the fire immediately, and without any inter-
(242) vening efficient and independent cause, spread to the plaintiff's woods. *Aycock v. R. R.*, 89 N. C., 321; *Phillips v. R. R.*, 138 N. C., 12; *R. R. v. Kellogg*, 94 U. S., 469.

If one does an act, lawful with respect to the complaining party, and does it in a proper way, the ensuing loss, if there is any, is not, in the legal sense, an injury, but *damnum absque injuria*. If the act is unlawful, or is done in an unlawful manner, it is an actionable wrong; and of course if it is done negligently, or, in other words, if in doing it he fails to exercise the foresight of a man of ordinary prudence and by reason thereof does not see that some damage will follow, when otherwise he would have discovered it, the wrongdoer is liable for the damage which proximately results. *Drum v. Miller*, 135 N. C., 204; *Jones v. R. R.*, ante 207, and *Hudson v. R. R.*, ante, 204.

The quality or particular character of the act of negligence is immaterial, so that it is sufficient to produce the injury. The Judge, after reciting substantially the allegation of the complaint, charged the jury in this case that before they could bring in a verdict for the plaintiff they must find that the defendant committed the very acts

of negligence so set forth by him, that is, that the spark-arrester was defective and the right-of-way foul, and that by reason of the defect in the spark-arrester a spark was emitted from the engine and fell on the right-of-way, where it ignited the inflammable material there lying and caused the destruction of the plaintiffs' property. So that the jury must have found that the spark-arrester was defective and the right-of-way foul, as they gave the plaintiff their verdict.

By the charge the testimony as to the fire-box and ash-pan was virtually taken from the jury. There were two acts of carelessness specified by the plaintiff in one part of his complaint, namely, having a defective spark-arrester and keeping a foul right-of-way; but when he came to allege, in another part, the negligence that caused the injury, he departed from this specific allegation and charged gen- (243) erally that the spark fell from the engine, without describing the particular place from which it was emitted, and that by reason thereof the fire was started on the right-of-way. In no view of the matter is it material to inquire how it happened to fall from the engine, so that it lighted on the right-of-way, which was in bad condition, and caused the fire. *Simpson v. R. R.*, 133 N. C., 95; *Troxler v. R. R.*, 74 N. C., 377; *Wise v. R. R.*, 85 Mo., 178. It does not necessarily require two acts of negligence to make a wrong. The jury must have found, as we have already said, that the right-of-way was foul, for there was no allegation that the spark fell outside of it, but on it, and if they followed his Honor's charge—and it must be assumed that they did—we are bound to conclude that they so found, as the foulness of the right-of-way was one of the integral elements of the negligence charged in the complaint, and they were clearly instructed, as has been shown, that unless they found the facts to be as therein alleged, they should return a verdict for the defendant. Having found this act of negligence, it was sufficient to sustain the verdict, and any error as to the fire-box and ash-pan, if there be any, was of course harmless.

The view we have taken is fully supported, we think, by the recent decision of this Court in *Williams v. R. R.*, 140 N. C., 623, where the *Chief Justice,* with great clearness, summarizes the law of negligence bearing upon cases of the class to which this belongs. We said in *Simpson v. R. R., supra:* "It can make no difference with respect to the plaintiff's right to recover whether the burning (of plaintiff's timber) was caused by a defective engine or by setting on fire combustible material carelessly left by the defendant on its right-of-way." See also *Craft v. Timber Co.*, 132 N. C., 151, in which the question of the liability of a railroad or a logging road for fires started on its right-of-way

by its engines is considered. The decisions in other jurisdictions
(244) seem to be in perfect accord with our own on this question. 3 Wood on R. R. (Ed. 1894), sec. 329; Baldwin Am. R. R. Law, 440; *R. R. v. Salmon,* 39 N. J. L., 299; *R. R. v. Rogers,* 62 Ill., 346; *Longabaugh v. R. R.,* 9 Nev., 271; *Salmon v. R. R.,* 38 N. J. L., 5. In Baldwin Am. R. Law, p. 441, it is said: "To support the action in these cases for burning property, it is not necessary to show that there was negligence in letting the engine scatter sparks. It is inevitable that some sparks should escape. The actionable negligence is that, notwithstanding this, the company left material on its premises upon which such sparks would naturally fall, and which they would naturally set ablaze." A typical case upon this subject is that of *R. R. v. Medley,* 75 Va., 499, where *Staples, J.,* says for the Court: "A railway company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, and operated by the most skillful engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most improved and best constructed machinery."

It all comes to this, that whether the spark-arrester or the fire-box was defective or not, if a spark was emitted from the engine and kindled the fire on defendant's right-of-way because it was foul, it is liable to the plaintiff for the loss of his timber caused thereby, and that fact having
evidently been found by the jury, all evidence as to the defect-
(245) iveness of the fire-box or as to live coals dropping therefrom, and even that as to the spark-arrester, was irrelevant and harmless.

The testimony of the witnesses Adcock and Fuquay was clearly competent, and there can be no doubt that it was relevant to the issue being tried. That they had seen the same engine which caused the fire when plaintiff's timber was burned, as it passed and repassed, and that sparks were flowing from the smoke-stack, and that between February and April, as stated by one of the witnesses, "it set fire on the right-of-way" near where the timber stood, must be some evidence bearing upon the

actual condition of the engine and showing that it was defective in some way. But the very question has been recently decided by this Court and such evidence held to be relevant. *Johnson v. R. R.*, 140 N. C., 581. It is therefore useless to prosecute the inquiry any further. *Ice Co. v. R. R.*, 126 N. C., 797, instead of being an authority against the admissibility of the testimony, by the plainest implication decides it to be competent and relevant. But as was the case with the other evidence to which the defendant objected, the questions put to the witnesses Adcock and Fuquay were immaterial and the answers thereto did no harm, as it made no difference whether the engine was defective or not, the bad condition of the right-of-way, which fact was manifestly found by the jury, being fully sufficient to sustain their verdict. We find no error.

Cited: Clark v. Guano Co., 144 N. C., 73; *Stewart v. Lumber Co.*, 146 N. C., 106; *Whitehurst v. R. R.*, 146 N. C., 591; *Deppe v. R. R.*, 152 N. C., 83; *Thomas v. Lumber Co.*, 153 N. C., 354; *Boney v. R. R.*, 155 N. C., 120; *Currie v. R. R.*, 156 N. C., 424; *Hardy v. Lumber Co.*, 160 N. C., 117, 118; *Aman v. Lumber Co., Ib.*, 373.

(246)

HOLLINGSWORTH v. SKELDING, Receiver.

(Filed 16 October, 1906.)

Carriers of Passengers—Degree of Care Required—Street Railways—Negligence—Nonsuit—Practice.

1. An instruction that "Carriers of passengers are insurers as to their passengers, except as to the act of God or of the public enemy. They are held to exercise the greatest practicable care, the highest degree of prudence and the utmost human skill and foresight which has been demonstrated by experience to be practicable. * * * They are against all perils bound to do their utmost to protect and prevent injury to their passengers," is erroneous. *Dictum* in *Daniel v. R. R.*, 117 N. C., 602, disapproved.
2. The duty a carrier owes a passenger is that as far as human care and foresight could go, he must provide for his safe conveyance, but the law does not require the carrier to exercise every device that the ingenuity of man can conceive.
3. In an action for personal injuries against a street railway, where the plaintiff testified that he was sitting near the rear end of the car, about 25 feet long, and that in order to get the money out of his pocket to pay his fare, he got up out of his seat and put one foot on the running-board, on the side of the car, and one on the floor, and just as he paid his fare an ice wagon came up and struck him; that

he did not see the wagon before the collision and that at the time of the collision the car was running at a pretty good speed and that the rear end of the wagon struck him, and that the wagon at the time was going in an opposite direction from that in which the car was moving: *Held*, that the motion to nonsuit should have been granted.

CLARK, C. J., and HOKE, J., dissenting.

ACTION by C. C. Hollingsworth against A. B. Skelding, receiver of the Wilmington Street Railway Company, and others, heard by *W. R. Allen, J.*, and a jury, at the January Special Term, 1906, of (247) DUPLIN.

This was an action to recover damages for a personal injury received by the plaintiff while a passenger on the cars of the Wilmington Street Railway Company.

There was evidence tending to prove that plaintiff had one foot on the running board and the other on the floor, and was injured by an ice-wagon coming in contact with him.

The Court submitted following issues: 1. Was the plaintiff injured by the negligence of the defendant? Answer: "Yes." 2. Was the plaintiff guilty of negligence which contributed to his injuries? Answer: "No." 3. What damage, if any, is plaintiff entitled to recover? Answer: "$600."

At the conclusion of the plaintiff's evidence the defendant moved to dismiss the action and for judgment of nonsuit. Motion overruled, and defendant excepted and appealed from the judgment.

Stevens, Beasley & Weeks for the plaintiff.
Davis & Davis for the defendant.

BROWN, J. His Honor charged the jury that "Carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the ground of public policy, reason and safety to their patrons. The exceptions are the act of God and the public enemy. If these, that is, the act of God or of the public enemy, be the proximate cause of the injury and without any neglect on the part of the carrier, the carrier is not liable. He is against all perils bound to do his utmost to protect and prevent injury to his passengers."

It is due to the learned Judge who tried this case to state that this instruction appears to have been given *verbatim* from the opinion of

Faircloth, C. J., in *Daniel v. R. R.*, 117 N. C., 602. An examination of the case discloses that it is a mere *dictum*, a generaliza- (248) tion, not necessary at all to the decision of the case. As a proposition of law it is not supported by authority, but on the contrary is against the teachings of the text-writers as well as the judgments of the Courts. It does not, therefore, meet with our approval.

The rule laid down by the late *Chief Justice* applies to the transportation of freight and all classes of inanimate objects only. The reasons given for this rule by *Lord Holt* were "to prevent the clandestine combinations with thieves and robbers to the undoing of all persons who had dealings with them." Hutchinson says this rule was never applied to carriers of passengers. Hutchinson on Carriers, sec. 4497. The Supreme Court of the United States in an elaborate opinion by *Chief Justice Marshall* refused to apply the rule to slaves. He says: "In the nature of things and in his character, he resembles a passenger, not a package of goods. It would, therefore, seem reasonable that the responsibility of the carrier should be measured by the law which is applicable to passengers rather than by that which is applicable to the carriage of common goods." *Boyce v. Anderson*, 2 Pet., 150.

When the attempt is made to hold the carrier responsible for injuries received by living human beings, negligence is the essential element in the case, and without it the injured person can not recover. This is universally true where the common law is administered. *Grote v. R. R.*, 2 Exch., 251; Hale on Bailments and Carriers, 517; Fetter on Carriers, 5-8; Thompson on Carriers, sec. 497; 2 Wood Railway Law, 1054-1059, and notes; 2 A. and E. Enc. (1 Ed.), 746, 747, where numerous authorities are collected. The degree of care required of carriers of the passenger has been the subject of much discussion by text-writers and judges. The weightiest authorities agree that this standard does not extend beyond the highest degree of a practicable care. Fetter, *supra*, sec. 11.

We doubt if any better definition of the duty of a carrier owes the passenger can be found than that of *Lord Mansfield* in *Chris-* (249) *tie v. Griggs*, 2 Camp., 29: "As far as human care and foresight could go, he must provide for their safe conveyance." In commenting upon this case Mr. Barrow says: "It must not be supposed, however, that the law requires the carrier to exercise every device that the ingenuity of man can conceive. Such an interpretation would act as an effectual bar to the business of transporting people for hire." In view of these authorities, and many others we could quote, the Judge erred in the instruction given, although in doing so he followed the language of the late *Chief Justice* in the *Daniel case*.

2. The defendant offered no evidence, and in apt time moved to dismiss the action and to nonsuit the plaintiff upon the ground that there was no evidence of negligence.

The only theory of negligence upon which the plaintiff's counsel rested his case in this Court is that the ice-wagon was in the act of crossing the car-track, in front of the car, when it was struck by the car and knocked completely around, so that its rear end struck the plaintiff, and that the motorman was guilty of negligence.

The plaintiff was the only witness who testified concerning the accident, and an examination of his testimony shows that this theory is purely conjectural and has no foundation in fact to support it. The plaintiff was near the rear end of the car, about 25 feet long. Running the length of this car is a running board about 18 inches from the ground, used by passengers in getting on and off. The plaintiff testified: "The conductor called on me for my fare, and I said 'All right,' and I got up out of my seat and put one foot on the running-board and one on the floor of the car so I could put my hand in my pocket, and got a nickel and paid him; and when I put my hand back in my pocket the wagon of Worth & Co. come up and struck me. It knocked me senseless for a minute or two, and when I came to my senses (250) some one had hold of me. I did not see the ice-wagon before the collision. At the time of the collision the street car was running at a pretty good speed." The wagon belonged to Worth & Co., and it is in evidence that at the time the plaintiff was injured it was moving in an opposite direction from that in which the car was going, and was drawn by a horse guided by a driver. On cross-examination the plaintiff says: "I think it was the rear end of the wagon, and it struck me on the right side."

The collision which the plaintiff refers to is evidently the collision of the wagon with himself, for there is no evidence that the wagon struck the car itself anywhere. Had the front of the car crashed into the wagon, while crossing the track, with sufficient force to knock it entirely around, the paintiff must have felt the jar before he was hurt, and could have testified to this. According to his version there must have been no previous jar and crash. The horse, driver and wagon had passed the motorman in safety before the plaintiff was hit. It is hardly within the domain of possibility that the car could have hit the wagon on the track and knocked it so entirely around that its rear end struck the plaintiff. Had such been the case, the horse could not have been pulling the wagon in an opposite direction from that in which the car was moving at the time the rear end of the wagon hit the plain-

tiff. Such a blow must have turned the horse around as well as the wagon, and demolished the latter.

Again, the plaintiff says that when the rear end of the wagon struck him the car was running at "a pretty good speed." This could not have been true had there been a collision immediately before on the track by the car running into the wagon. The force of such an impact would not only have been plainly felt by the passengers, but must have stopped the car, or have greatly reduced its speed before the rear end of the wagon could hit the plaintiff at the rear end of the car.

We conclude that, taking the account of the accident given by the plaintiff in the light most favorable to him, no reasonable (251) deductions can be drawn from it tending to sustain the only theory of negligence advanced by counsel. The motion to dismiss the action and nonsuit the plaintiff should have been granted. The cause is remanded to the Superior Court of Duplin County with instructions to so order.

It is suggested that a new trial should be ordered in this case. We do not think so. If the plaintiff can "mend his lick" and produce new evidence, this Court has declared that he has a right to bring a new action within twelve months. *Meekins v. R. R.*, 131 N. C., 1. If we ordered a new trial and the plaintiff should gather additional evidence, which possibly he should have had on the first trial, and thereby recover against the defendant, the latter would be taxed with the entire costs, including the first trial, in which plaintiff failed on his own showing. *Williams v. Hughes,* 139 N. C., 17. For this "false clamor" the plaintiff should pay the costs.

To order a new trial in this and similar cases works injustice to defendants, and is against the meaning and spirit of the statute. Revisal, sec. 539. As the plaintiff is not cut off from bringing a new suit, the justice of the matter is with the defendant, who should not be subjected ultimately to the possibility of paying the costs of a trial where plaintiff failed to "make out a case." The statute declares that if defendant moves to nonsuit at the close of all the evidence, and it is ruled against him, he shall have the "benefit of his exception" in this Court. If we order a new trial we do only what we would have done had the matter been determined on the refusal to instruct the jury "that upon the whole evidence plaintiff cannot recover." If a new trial is the only result, there is nothing whatever to be gained by excepting to a refusal to nonsuit. The defendant could just as well resort to a prayer for instruction. The statute was evidently intended to preserve the defendant's rights to the end that if the Court below erred, this

(252) Court should correct that error by directing the Court below to render the judgment which should have been rendered. There is no other way to give the defendant the full and just "benefit of his exception."

It is admitted that cases can be found in our reports, such as *Prevatt v. Harrelson,* 132 N. C., 252, where the motion to nonsuit was refused below and allowed here, when a new trial was ordered. So there are cases *contra* where "error" or "reversed" was written at the close of the opinion and a new trial was not ordered, which indicate plainly that the practice has not been uniform.

We think the practice was best settled by *Mr. Justice Hoke,* speaking for a unanimous Court as at present constituted, in a more recent case, *Dunn v. R. R.,* 141 N. C., 522. In that case the motion to nonsuit was denied below; verdict and judgment for plaintiff, and defendant appealed. The Court says: "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." This is the most recent precedent in our reports.

A new trial should be ordered in cases where there has been a verdict and error is shown in the rulings of the Court upon questions of evidence and in instructing the jury, and the like—errors such as is said in *Bernhardt v. Brown,* 118 N. C., 711, which "enter into and bring about an erroneous verdict." A motion to nonsuit or demurrer to the evidence does not enter into the trial so far as it affects a verdict. When it is interposed the facts in evidence are to be taken as true and interpreted in the light most favorable to the plaintiff. The matter is then one of law, as upon a "case agreed," and calls for a judgment upon those facts, and only those. This is what is said by this Court in *Neal v. R. R.,* 126 N. C., 641. If the judgment of the Court below upon such "case agreed" is erroneous, it is our duty to direct that the proper judgment be rendered. It is different where the plaintiff makes
(253) out his case, but the Court errs in the charge or rulings upon the evidence. Then a new trial is the only method of correcting the error. If this Court reverses or affirms a judgment it may at its discretion enter judgment here or direct it to be done below. *Bernhardt v. Brown, supra.* The Revisal, sec. 1542, says: "In every case the Court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon."

In order that the practice might be settled, we have considered this

matter anew, and again hold that where a motion to nonsuit is made and the requirements of the statute are followed, and such motion denied below, and sustained in this Court, upon the coming down of the judgment and opinion it is the duty of the Superior Court to dismiss the action.

Upon the inspection of this record it appears to us that at the close of all the evidence the Superior Court should have entered judgment dismissing the action. As it failed to do so, it is mandatory upon us to correct the error by directing such Court to enter such judgment.

Reversed.

CLARK, C. J., concurs in the opinion and in the conclusion, but submits that it is erroneous to insert the order that the Court below shall enter a judgment of nonsuit. The uniform practice and decisions of this Court, as well as justice, forbid it.

Where there is a nonsuit below and that is affirmed on appeal, such entry is proper. But when a case is tried by a jury below and on appeal any error is found in the proceedings, error is declared and the case goes back for a new trial.

If a demurrer to the complaint is overruled, and on appeal it is held that it should have been sustained, this Court does not direct judgment below. So, if a demurrer to the evidence is erroneously overruled, final judgment below should not be directed. The reason is the same in both cases. *Non constat* but if the Judge had ruled (254) correctly the plaintiff might then and there have asked and obtained leave to amend his complaint or amend the evidence. The plaintiff ought not to be put in a worse plight because, the Judge being with him, he did not ask leave to offer more evidence. If, when the case goes back, the plaintiff cannot "mend his lick" nonsuit will be voluntarily taken or will be ordered by the Court, but if the plaintiff can offer further evidence, what benefit will it be to the defendant to drive the plaintiff to a new action?

The practice is settled. In *Bernhardt v. Brown,* 118 N. C., at p. 711, it is said, refusing a motion to correct an entry of "new trial": "The errors affected the proceedings and went into and brought an erroneous verdict. The mover, however, insists that the error is so vital that this Court can see that on its correction the verdict on the next trial must be for the opposite party. It may be so. It may also be true that on the next trial there may be amendments to the pleadings or new evidence brought forward. The Court cannot consider argument as to the possibility or probability of such changes. If the error de-

clared by the Court is vital and irremediable, then on the new trial below the appellee will simply, in deference to our ruling, submit to a final judgment." This Court cannot enter or direct "judgment reversed" upon the assumption that the appellee will be compelled to take that course. When, on an appeal, error is found as to the proceedings anterior to and including the verdict, we can only declare error and order a new trial.

In *Prevatt v. Harrelson,* 132 N. C., 252, the very proposition now before us is expressly decided, the Court saying: "In refusing the motion to nonsuit there was error, for which, *under the uniform practice of this Court,* there must be a new trial. On such new trial, if the plaintiff can 'mend his lick' by additional and sufficient evidence, well and good. He has not lost the land. If he cannot offer additional evidence, this, though a new trial in form, will be virtually a finality against him." In the same case, it is further said to be "the (255) settled practice that when a motion to nonsuit (or a demurrer to the evidence) is erroneously refused, a new trial has always been ordered. *S. v. Adams,* 115 N. C., at p. 784; *S. v. Rhodes,* 112 N. C., at p. 858, are exactly in point, besides numerous cases in which it is taken as settled practice. The verdict and judgment being set aside, a trial *de novo* is necessary."

In *S. v. Adams,* 115 N. C., at p. 784, it is said: "In failing to sustain the demurrer to the evidence, and also for refusing to instruct the jury that there was no evidence to go to them, there was error. But this *does not necessarily dispose of the case. Non constat* that the State may not, in some cases, produce more evidence on the next trial. *S. v. Rhodes,* 112 N. C., 857."

Not only is this the settled and uniform practice, even in criminal cases as above shown, but it is a just practice both to save the unnecessary cost of a new trial, when if the plaintiff has additional evidence, it is to the interest of both parties that the matter shall be determined in this action, and because as said in *Prevatt v. Harrelson,* 132 N. C., at p. 253: "The verdict and judgment being set aside, a trial *de novo* is necessary." Indeed, it is then a constitutional right, if the plaintiff can offer evidence sufficient to go to a jury. The practice is settled thus, if uniform precedents can settle anything. There is no reason shown for overruling them and no benefit to any one.

HOKE, J., concurring: I agree with the *Chief Justice,* and am of opinion that the weight of authority, where the subject has been

considered by the Court, sustains the position that, on the facts in the present case, a new trial should be awarded.

In *Dunn v. R. R.*, cited in the opinion of the Court, the debated question was as to the liability of defendants on facts about which there was no substantial difference between the parties, and the mind of the writer was not especially attentive to the form of the order made (256) in the cause; nor was this question raised or discussed before us.

WALKER, J., concurring: In the complex situation which has resulted from the unsettled course of decision upon the question involved in this appeal as to the proper judgment to be entered, where there is a reversal of the Judge's refusal to grant a nonsuit or to dismiss the action upon the evidence, I find myself in sympathy with what is said by *Mr. Justice Brown* on that point. If I have unwittingly contributed to bringing about the confusion, the sooner I assist in extricating the Court from the unfortunate dilemma, the better. I suppose that now I am remitted to the right of expressing my opinion in accordance with the original view I have always taken of the statute: that it means what we now decide it to mean, or it means nothing, and was therefore a vain and useless enactment. To my mind, at least, it is clear that if the defendant has the right to dismiss at the close of the testimony in the lower Court, he must needs have the same right here, or we do not enforce the will of the Legislature according to the intent and spirit of its enactment and we refuse to reverse an error in law which, by the Constitution, which is the law of our creation (Art. IV, sec 8), and the statute (Revisal, secs. 1543 and 1542) we are commanded to do. I concur in the opinion, as written by *Mr. Justice Brown* for the Court, in all respects, except as to the effect of a judgment of nonsuit upon the right of the plaintiff to bring a new action and prosecute the same successfully. As to whether the former judgment of nonsuit is a bar to a new action, I perfer not to consider in this appeal, as the question is not presented. I confine my concurrence to what is actually decided by us in this case.

CONNOR, J., concurs in the concurring opinion of WALKER, J.

Cited: Peterson v. R. R., 143 N. C., 268; *Bowden v. R. R.*, 144 N. C., 30; *Tussey v. Owen*, 147 N. C., 337; *Baker v. R. R.*, 150 N. C., 568; *Peanut Co., v. R. R.*, 155 N. C., 164.

(257)

RAILROAD v. OLIVE.

(Filed 16 October, 1906.)

Railroads—Consolidation—Right-of-Way—Injunction Against Interference—Practice—Organization Within Two Years—Forfeiture—Acceptance of Charter—Incorporation of Chatham Railroad—Presumption as to Right-of-Way—Deed for Right-of-Way—Possession of Right-of-Way—No Presumption of Abandonment—"Completion of Road"—Use of Right-of-Way—Railroad, Judge of Necessity—Yard, Burial-Ground, etc.

1. Under Laws 1901, ch. 168; authorizing certain railroad companies to consolidate with other companies named therein, forming the plaintiff company, and the articles of consolidation and merger executed pursuant thereto, all of the rights, privileges, powers, etc., of the several companies entering into the merger vested in the plaintiff.
2. A railroad company is entitled to injunctive relief against interference with its right-of-way, without regard to the solvency of persons interfering therewith.
3. A railroad company acquires by the statutory method, either of condemnation or by prescription, no title to the land, but easement to subject it to the uses prescribed.
4. Before a railroad company is entitled to invoke the injunctive power of the Court, it must show clearly: (1) That it has a right-of-way over the lands in controversy; (2) the extent of such right; (3) that defendants are obstructing or threaten to obstruct its use.
5. If there is a controversy in respect to any facts necessary to be proved to entitle the plaintiff to the injunction, both parties will be restrained from trespassing or interfering until a trial can be had.
6. The failure of a railroad company to organize under an act of incorporation, within the two years prescribed, does not prevent a valid organization thereafter, unless forfeiture has been declared in proceedings instituted by the State.
7. The incorporators of a proposed private corporation must accept the charter, but from organization by the incorporators pursuant to its pro-

(258) visions acceptance will be presumed.

8. The Chatham Railroad Company acquired its corporate existence by virtue of Laws 1861, ch. 129.
9. Where a deed granting a right-of-way to a railroad, limits its extent to "so much and no more * * * than the said company by the act incorporating said company * * * would have a right to condemn for the use of said company," and the act confers the power to "condemn land for right-of-way and all other purposes of said company, and grants "all privileges, rights, etc., of corporate bodies of the State," and the general public statute confers upon all railroad companies the power to condemn land of the width of "not less than eighty feet and not more than one hundred feet": *Held*, the company had the right to condemn one hundred feet and the deed was a valid grant of a right-of-way one hundred feet in width or fifty feet on each side of the center of the track, and the company will not be restricted to the land actually occupied.

10. Under Rev., sec. 388, which was in force at the date of the grant of the right-of-way to the plaintiff by the defendants, the possession by the defendants of the land covered by the right-of-way cannot operate as a bar to or be the basis for any presumption of abandonment by the plaintiff of its right-of-way.

11. Under the provisions of plaintiff's charter as amended by Laws of 1863, ch. 26, a presumption of the conveyance of a right-of-way 100 feet on each side of the center of the track to be occupied and used for the purpose of the company, arises from the company's act in taking possession and building the railroad, when in the absence of a contract, the owner fails to take steps to have the damages assessed within two years after it has been completed.

12. Where a company has constructed a railroad between the termini named in its charter and amendments thereto, the fact that it is building sidetracks does not prevent the bar of the land owner's claim.

13. A railroad company is entitled to so much of the right-of-way as may be necessary for the purposes of the company, and the denial by a person in the possession of a portion of the right-of-way that the portion in controversy is necessary for the purposes of the company does not raise an issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use.

14. When a provision in a charter of a railroad company or a deed granting it a right-of-way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right-of-way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has been appropriated to such use since.

ACTION by Seaboard Air Line Railway against Percy J. Olive and others, pending in WAKE and heard by *Webb, J.*, at Lilling- (259) ton September, 1906, upon plaintiff's motion for an injunction. From an order denying the injunction, the plaintiff appealed.

T. B. Womack and *Hayes & Pace* for the plaintiff.
Argo & Shaffer, R. N. Simms and *J. M. White* for the defendants.

CONNOR, J. This case comes up on an appeal by plaintiff from an order of *Webb, J.*, declining a motion for an injunction, heard upon notice. Plaintiff, in the affidavit of its superintendent, sets up a claim to an easement over the lands of defendants, measuring from the center of its track, one hundred feet on each side. For the purpose of showing title the following statutes were introduced:

"An Act to Incorporate the Chatham Railroad Company," Private Laws 1854-'55, ch. 230. This act confers upon the company, when formed in accordance with its provisions, power to condemn a right-of-way over lands on its route, "one hundred feet wide on each side of the center of its track."

"An Act to Incorporate the Chatham Railroad Company," Laws

1861-'62, ch. 129. This act makes no reference to the Act of 1854-'55. It confers upon the company, when formed, the power "to condemn land for right-of-way and other purposes necessary to carry into effect the purposes of said company," and all "rights, privileges and immunities, and be subject to the limitations and restrictions of corporations in this State."

"An Act to Amend the Charter of the Chatham Railroad Company," Laws 1863, ch. 26. This act makes no specific reference to either of the other acts. Among other provisions, express power is conferred to condemn land for its track, etc., "one hundred feet on each side of the center of the track," etc. It is further provided that in the ab-
(260) sence of any contract or contracts with said company in relation to land through which the said road may pass, it shall be presumed that the land on which said road may be constructed, together with one hundred feet on each side of the center of the track has been granted to the company by the owner, and the company shall have good title and right thereto, and shall hold and enjoy the same as long as the same may be used for the purposes of the company, unless said owner, at the time of finishing the part of the road on his land, shall apply for the assessment of the value of the land within two years next after the finishing of such portion of the road."

Two ordinances of the convention of 1861 amending the "Charter of the Chatham Railroad," expressly referring to the Act of 1861.

The Act of 1871 authorizing the Chatham Railroad Company to change its name to the Raleigh and Augusta Air Line Railway, Laws 1871-'72, ch. 11; Laws 1899, ch. 68, authorizing the Raleigh and Augusta Air Line Railway Company to consolidate with the Raleigh and Gaston Railroad Company.

Laws 1901, ch. 168, authorizing said companies to consolidate with other companies named therein, forming the plaintiff company. Articles of consolidation and merger executed pursuant to the Act of 1901.

These acts and the articles of merger and consolidation vest in the plaintiff all of the rights, privileges, powers, etc., of the several companies entering into the merger. *Spencer v. R. R.*, 137 N. C., 107.

Plaintiff introduced the affidavit of Mr. Jenks, its superintendent, setting forth that the Chatham Railroad Company was incorporated by the Laws of 1868, ch. 26. That the said company completed its railroad through the town of Apex, in which the lands in controversy are situate, more than thirty years ago. That the owners of the lands at and near the town of Apex failed to apply for an assessment of the value

of the lands taken by said railroad for its right-of-way for more (261) than two years after the construction and completion of said road through their land. That by reason of the construction of the Durham and Southern Railroad, which crosses the plaintiff's road at Apex, and the increase in freights and business, it is essentially necessary that plaintiff shall build additional facilities at or near said town, including sidetracks, warehouses, station, etc., rendering it necessary to use and occupy a large portion of its right-of-way in order that it meet the demands of the public for transportation of passengers and freight. That, upon the application of a number of the citizens of Apex, the Corporation Commission on 4 August, 1906, made an order requiring the plaintiff and the Durham and Southern Railway Company to erect a union depot and to provide adequate freight facilities at said town within ninety days from date of said order. That plaintiff is engaged in a *bona fide* attempt to obey said order and to that end has a large force of hands making excavations for the union depot, warehouses and sidetracks necessary to provide adequate facilities to serve the public, etc. That defendants are in the actual possession of the land over which its right-of-way runs, and are forbidding and otherwise preventing plaintiff from proceeding with said work.

Defendant J. M. White in behalf of his wife, Mrs. Lydia White, avers, in an affidavit, that the Chatham Railroad Company was incorporated by the Act of 1861 and not of 1863. That said Act of 1863 was an amendment of the Act of 1861. That his wife is the daughter of P. W. Dowd, deceased, and inherited from her father the lot upon which she resides and over which plaintiff claims a right-of-way of 100 feet from the center of the track. That her father together with a number of other persons, owners of land over which said Chatham Railroad was to be constructed, on 1 May, 1862, entered into a contract with said corporation, a copy of which is attached. The contract referred to, executed by P. W. Dowd and a number (262) of other persons, recites that whereas the Chatham Railroad Company has been created for the purpose of effecting a communication between the North Carolina Railroad Company and the coal fields of Chatham County, and whereas the benefits which would arise from the building of said road would exceed the damage, etc.: In consideration of the premises the said parties granted and conveyed to the said Chatham Railroad Company a right-of-way over their lands, with power to enter upon same, "according to the pleasure of said company," to lay out, use and occupy such portion of said land contiguous to such railroad as they may deem necessary for sites for their depots, tool-

houses, warehouses, engine-sheds, workshops, water stations, woodsheds or other buildings or yards for the necessary accommodation of said company or for the protection of their property; "it being expressly understood that so much and no more of the lands belonging to, owned or held by us severally and respectively is hereby given, granted and surrendered to the said Chatham Railroad Company, than the said company by the Act of the General Assembly of the State of North Carolina, incorporating said company, and the ordinances of the Convention of the State in amendment thereof, would have a right to condemn for the use of said company." Following this language is a provision that no portion of said lands upon which a dwelling-house, yard, garden, or burial ground is situate shall be entered upon in such a way as to disturb any such yard, garden, etc. This deed is under seal and duly recorded 30 June, 1863. That the said contract gave plaintiff no right to enter upon or take more land than was necessary to construct said road at that time. That said company under and by virtue of the said contract entered upon the land and constructed its road, taking only so much as was necessary for that purpose. That the strip of land sought by the plaintiff in this action is a part of the yard and garden of defendants J. M. White and wife, and that the con-
(263) struction of the sidetrack would take one hundred feet lying between the dwelling and the present road and the digging of a cut of ten feet, the destruction of a public thoroughfare which has been in existence more than thirty years—thus cutting off all ingress and egress on that side and altogether rendering practically untenable the house as now situated. That Mrs. White has been in the open adverse possession of this land for more than thirty years. That she has reared her children there, and that she is strongly attached to the property by reason of the memories connected with her long residence upon it. That it is entirely practicable for plaintiff to build its sidetrack upon its own undisputed land and reach the union depot without in any way interfering with the premises of Mrs. White. Defendants admit that they object to plaintiff entering upon the premises, insisting that it has no right to do so. They deny that they have resorted to any other than lawful means to prevent plaintiff entering upon their lands.

Defendant Percy J. Olive in an affidavit admits that none of the other defendants nor their grantors have made any application to have damages assessed for the right-of-way used and occupied by plaintiff and its predecessors. He denies that plaintiff has acquired a right-of-way of one hundred feet in measuring from the center of the track, on each side thereof, or that the road has been completed. He says that the

plaintiff is building the union depot, ordered by the Corporation Commission, on land which it has purchased, and that the right-of-way over defendants' land is not necessary to meet or discharge any duties to the public. He also alleges that plaintiff has instituted an action of ejectment to recover possession of the alleged right-of-way, and that it is not entitled to an injunction pending the trial of said action. Defendants insist that before an injunction shall issue restraining them from preventing plaintiff entering upon their lands, the issues of fact raised by the affidavits should be settled by the jury. (264)

It is clear that from any point of view which we may take of this case, the plaintiff acquired only an easement over defendant's land. It is also clear that the remedy, if any, to which plaintiff may show itself entitled, whether granted on the affidavits and proofs, or at the end of the litigation, is, in its character, injunctive—either mandatory or prohibitory. It is by this method that the courts protect parties in the enjoyment of an easement, when not left to their action for damages for interference therewith. It would seem clear that when, as in the case of a railroad company, a right-of-way is acquired by any of the statutory methods, or by grant, for the purpose of enabling it to perform its duty to the public, such easement will be protected by injunction. It would be unreasonable to permit a railroad company to acquire a right-of-way for the purpose of constructing its tracks and necessary buildings and, when it is invaded or its enjoyment interfered with, confine the company to an action for damages. In this way the operation of railroads might be so much hindered that they would not be able to discharge their public duties, the primary object for which they are chartered. The law is well stated in Beach Mod. Eq., sec. 676: "The jurisdiction of a court of equity to protect a franchise from unlawful invasion or disturbance by injunction is clearly settled and has been recognized as benign and salutary. The ground of such jurisdiction is usually the prevention of irreparable injury, the avoidance of a multiplicity of suits and the abatement of annoyances in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege as well as the party interested. And while the Court will not interpose to prevent a mere trespass of an ordinary character, yet when a trespass or a series of trespasses will operate to destroy or seriously impair the exercise of a franchise, the ap- (265) prehended injury will be enjoined."

If one may obstruct the right-of-way of a railroad company and prevent it laying its tracks, or otherwise providing facilities for transporta-

tion of freight and passengers, and be responsible only to an action for damages, it would be impracticable for the Corporation Commission to enforce its orders providing for union depots, double tracks and other means necessary to the convenience and safety of the public. Injunctive relief against interference with the use of the right-of-way of a railroad company is not given because of any special consideration for these corporations, but because they are public agencies, chartered, organized and given the right of eminent domain, in contemplation of law, to serve the public. They are a part of the system of highways of the State. We find no difficulty in holding that the plaintiff is entitled to injunctive relief against interference with its right-of-way, without regard to the solvency of persons interfering therewith. It is well settled in this State that the company acquires, by the statutory method, either of condemnation or by presumption, no title to the land, but an easement to subject it to the uses prescribed. *Blue v. R. R.*, 117 N. C., 644; *R. R. v. Sturgeon*, 120 N. C., 225, in which the same charter now being considered was before the Court. *Barker v. R. R.*, 137 N. C., 214.

Before the plaintiff is entitled to invoke the injunctive power of the Court, it must show clearly: 1. That it has a right-of-way over the lands in controversy; 2, the extent of such right; 3, that defendants are obstructing or threaten to obstruct its use. If, upon this record, there is a controversy in respect to any facts necessary to be proved to entitle the plaintiff to the injunction, both parties will be restrained from trespassing or interfering until a trial can be had.

With these preliminary questions diisposed of, we proceed to inquire whether, upon all of the testimony and the several acts under (266) which plaintiff claims to have corporate existence, it is entitled to the relief demanded. We are met, at the threshold, with a controversy in regard to the origin of the corporate life of the Chatham Railroad Company. In any one of the several aspects of the controversy it is necessary to fix the date, and therefore the act, under which the company acquired a legal status. The affidavit of Mr. Jenks states that the company was incorporated by the Act of 1863. The defendants allege that it was incorporated by the Act of 1861. On the argument plaintiff contends that its origin is based upon the Act of 1854. If the plaintiff's contention in this respect is sustained, it had the power to condemn a right-of-way of two hundred feet in width, and it would seem that the deed of Mr. Dowd and others would confer a right-of-way of the same width. This act also contains the provision that an entry raises the presumption of title perfected at the end of two years. If, on the contrary, the corporate existence is based upon the Act of 1863,

the deed of Dowd and others, being dated 1 May, 1862, is invalid—there being no corporate entity at that date capable of taking the grant. It is not necessary to inquire whether the Act of 1854-'55, ch. 230, was repealed by the Act of 1861, ch. 26. While there is much similarity in the provisions of the two acts, there are marked differences not necessarily in conflict, but showing that, for some reason, the persons who were interested in the proposed road wished to have a new charter. But one of the persons named in the Act of 1854 is named in that of 1861. We concur with the plaintiff's counsel that the failure to organize under the Act of 1854, within two years prescribed, did not prevent a valid organization thereafter, unless forfeiture was declared upon proceedings instituted by the State. Womack Pr. Corp., 64-68, where the authorities are cited. While this is true, it may well be that, in view of the express provision that upon failure to begin work within two years, etc., "the privileges here granted shall be forfeited and cease," (267) etc., those interested in the proposed enterprise preferred to avoid any possible danger of a forfeiture by procuring a new charter. Again, we find that when amendments were desired to the charter from the Convention of 1861, the ordinances by which they were made expressly refer to the charter as the "Act of 1861, ch. 129, ratified 15 February, 1861," etc.

The defendants are not seeking to attack, collaterally, the charter of the company, as in *R. R. v. Lumber Co.,* 114 N. C., 690, but are seeking to ascertain under which of two charters the incorporators organized. It is well settled that the incorporators of a proposed private corporation must accept the charter, but from organization by the incorporators pursuant to its provisions, acceptance will be presumed. *Fertilizer Co. v. Clute,* 112 N. C., 440. Womack Pr. Corp., 76, 77. While there is no direct evidence in the record under which act the company was organized, we find that by the Act of 1863, ch. 26, amendments are made to "The Charter of the Chatham Railroad Company." This act does not expressly refer to either that of 1854 or 1861, but in sec. 4 reference is made to the ordinance of the Convention entitled "An ordinance in addition to an amendment of an act of the General Assembly, ratified 15 February, 1861, entitled An act to incorporate the Chatham Railroad," etc. By secs. 7 and 8 of this amendatory act power is given to condemn a right-of-way over lands "of one hundred feet on each side of the center of the track," etc. This is followed by sec. 9, providing for the acquirement of right-of-way after two years from entry, etc. It will be observed that neither of these provisions is in the Act of 1861, while both of them are in the Act of 1854 in substantially the same lan-

guage as in the amendment of 1863. This act is manifestly an amendment to the Act of 1861, and not of 1854.

In the light of these facts we are brought to the conclusion that the Chatham Railroad Company acquired its corporate existence by
(268) virtue of the Act of 1861, ch. 129, and that we must look there and to the acts amendatory thereof for the power and method of acquiring rights-of-way. As the right of the plaintiff to a right-of-way over the land owned by Mrs. White is dependent upon an entirely different basis than to the lands of the other defendants, it will be best to discuss this question first. Reading the deed or grant of Mr. Dowd and others in the light of the Act of 1861, we must hold either that it is void for uncertainity, or find some standard by which to apply the maxim *id certum est quod certum reddi potest.* The grant expressly limits the extent of the right-of-way to "so much and no more * * * than the said company by the act of the General Assembly of the State of North Carolina incorporating said company * * * would have a right to condemn for the use of said company." The Act of 1861 confers the power to "condemn land for right-of-way and all other purposes of said company."

We are no nearer the solution of the question, as to the width of the right-of-way, when we read the grant in the light of this language. If we hold that a right-of-way of the width necessary to carry into effect the purposes of the company was granted, we are confronted with the question whether the words "purposes of the company" must be confined to the purposes which existed at that time, and that its power to enter and occupy was exhausted when the road was constructed. This construction would, in the light of what we know to be the purpose of constructing a railroad, be entirely too narrow. It would confine the company to the soil actually covered by its crossties and rails, with the drains on either side. When we examine the charters of other railroads granted by the Legislature from 1833 to 1860, we find that when the width of the right-of-way is fixed, it is usually one hundred feet from the center of the track. Rev. Code, ch. 61, entitled "Internal Improvements," confers upon all railroad companies the power to condemn land of the width of "not less than eighty feet and not more than one
(269) hundred feet." It would seem that in the absence of any limit in the charter, the Chatham Railroad Company, by the general public law referred to and the express grant of all "privileges, rights, etc., of corporate bodies in the State," had "the right to condemn" to the extent of one hundred feet; and thus we find a standard by which to measure the right granted by the deed of May, 1862. Unless we

can, in this way, give effect to the deed by rendering the description of the easement certain, we would be compelled to hold it invalid. The maxim *"ut res magis valeat quam pereat"* admonishes us that it is our duty to uphold the deed if by reasonable construction it can be done. We think that the words, "so much as the said road would have the right to condemn," carry the right-of-way to the extent of one hundred feet, which would be fixed by adopting the center of the track as the point from which the measurement should be made, extending fifty feet on each side. This construction is sustained by the decisions of this Court in *Beattie v. R. R.*, 108 N. C., 425; *Lumber Co. v. Hines*, 127 N. C., 131.

Defendants call to our attention several authorities which apparently militate against this view and hold that where the description is uncertain, the right of this company will be restricted to the land actually occupied by the company. We have examined the cases, and find but one which is not easily distinguished from the language used in the grant before us. In *R. R. v. Sherry*, 126 Ind., 334, the grant was a right to construct said railroad agreeably to and in accordance with the laws of the State of Indiana, known and designated as "An Act to provide for the Incorporation of Railroad Companies," etc. The statute authorized the company to acquire by condemnation a right-of-way "six rods in width." The Court was of opinion that as the company was not required to acquire six rods, but could, it it saw proper, acquire less, the language of the statute did not make certain the language of the deed.

It has been held by this Court that a railroad company is not required to condemn the full width authorized by the charter, (270) *Beal v. R. R.*, 136 N. C., 298, but it has the "right to condemn" to the prescribed limit, and this is the standard fixed by the deed. In *Onthank v. R. R.*, 71 N. Y., 194, the easement granted was a right to lay a water-pipe. It was properly held that when the right was exercised the location could not be changed. We fully concur with the learned counsel for the defendants that such is the law. We are now endeavoring to ascertain the extent of the right. What passed by the deed? In *Hargis v. R. R.*, 100 Mo., 210, a right-of-way of indefinite width was given. So, too, in this case. The Court said: "Supposing there was no definite agreement as to width of the right-of-way, but an intention to give the right-of-way, then we think the railroad company in entering thereunder and building its road at large expense acquired the right-of-way to the extent authorized by law. The land-owner has not manifested his intention to give less than the company could acquire under

the statute, nor has the company sought to limit its appropriation to any less amount, and it seems to us that the only rule that would be fair and just to both parties in most cases of this sort, so far as the extent of appropriation is concerned, is the rule which the law provides." 1 Wood on Railways, sec. 211. While it is true, as stated in the brief, that Judge Elliott says that when the width of the right-of-way is not specified in the grant the company will, in general, acquire only so much as is actually taken and used, or is reasonably necessary, he adds, "There is much reason, however, for holding that where the width is not specified, and there is nothing either in the contract or in the acts of the parties, indicating that less than the statutory width was granted, it will be presumed that a right-of-way of the full statutory width was intended." The decided cases are not uniform. 23 A. & E. (2 Ed.), 701.

It must be noted that the grant or deed for the right-of-way (271) signed by Mr. Dowd is also signed by thirty-three other persons.

It does not appear what distance is covered by the lands of the several grantors, but it is not reasonable to suppose that the right-of-way over the lands of so many persons was intended to be confined to the land actually occupied. We are therefore of the opinion that the deed was a valid grant of a right-of-way and that, read in the light of the statutes, its width was one hundred feet or fifty feet on each side of the center of the track. This being so, the plaintiff acquired the same right as if it had condemned the right of way pursuant to ch. 61, Rev. Code.

The question next arises, what use may it make thereof and whether it has lost or forfeited such rights as it acquired. The defendant, Mrs. White, says, and we take it as true, that she and her father have been in the actual occupation and use of the land, except that portion upon which the track is located for more than forty years. Whatever effect such possession may have had is controlled by the provisions of Rev. Code, ch. 65, sec. 23; Rev. 1905, sec. 388: "No railroad * * * company shall be barred of or presumed to have conveyed any real estate right-of-way, easement, which may have been condemned, or otherwise obtained for its use as a right-of-way, station-house, or place of landing, by any statute of limitation or by occupation of the same by any person." This statute was in force in 1862 at the date of the grant to plaintiff. It was commented upon and sustained in *R. R. v. McCaskill,* 94 N. C., 746; *Bass v. Nav. Co.,* 111 N. C., 439. The possession by defendants by the land covered by the right-of-way, therefore, cannot operate as a bar to or be the basis for any presumption of abandonment by the Chatham Railroad Company or its successors. As the other

questions apply with equal force to all of the defendants, we defer discussing them until we have disposed of the branch of the case affecting the other defendants.

In regard to the right-of-way claimed over the lands of the other defendants, there being no contract or grant and no con- (272) demnation, the plaintiff relies upon the provisions of the charter as amended by Laws 1863, ch. 26, sec. 9, set forth in the statement of facts. The same provision is found in the charter of other railroad companies and has been sustained by several decisions of this Court. In *McCaskill's case, supra,* construing the identical language, *Smith, C. J.,* said: "The presumption of the conveyance arises from the company's act in taking possession and building the railway, when, in the absence of a contract, the owner fails to take steps for two years after it has been completed for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title or estate. Thus vesting, it remains in the company as long as the road is operated of the specified breadth." We had occasion in *Barker v. R. R.,* 137 N. C., 214, to consider the question, and stated the conclusion to which we arrived as to the construction of the statute. The amendment of 1863 conferred upon the Chatham road the right to acquire the right-of-way by presumption, as prescribed by the statute. While the exact dates are not given, we do not understand that any controversy is made in regard to the entry upon the lands and construction of the road by the Chatham Railroad Company since the amendatory Act of 1863, and that there was no contract authorizing such entry. This being so, we can see nothing to prevent the acquisition of the right-of-way under the provisions of the statute by the admitted failure to have the damages assessed within the two years. The defendants deny that the company has ever completed the road. We do not understand this denial to be that the company has not constructed a railroad between the termini named in the charter and the amendments thereto, but that by building sidetracks it continues to construct, the condition has not arisen making the bar complete. We think this construction of the statute too narrow. If adopted, (273) the provision would be made of no effect. It will be observed that the bar becomes complete at the end of two years "after the finishing of such portion of the road."

As we said in *Barker's case, supra,* "With the policy which prompted the Legislature in the early history of railroad building in the State to put this provision in the charter of the contemplated roads we have

nothing to do. Finding them to be constitutional, it is our duty to interpret and enforce them in accordance with well-settled principles of legal construction." The point of view from which charters for railroads were drawn in this State fifty years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred, not inconsistent with the exercise of the sovereign power of the State in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights-of-way were granted, or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be of sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the State, the capital stock to be subscribed by large numbers of people; legislatures were ready to make broad concessions to these domestic corporations, and, as shown by the record in this and other cases in this Court, the owners of lands, because the "benefits which will arise from the building of said raidroads to the owners of the land over which the (274) same may be constructed will greatly exceed the loss which may be sustained by them," were "desirous to promote the building" thereof and to that end to give to them rights-of-way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardship.

In *McCaskill's case, supra,* the Court held that the company was not required to use every part and parcel of the condemned land at once, and a permissive use of a portion of such land did not deprive the corporation of the right to take possession of the land when needed for corporate purposes. It is supposed that this decision is modified, in respect to the right of the company to occupy the entire right-of-way, by *R. R. v. Sturgeon,* 120 N. C., 225. We do not find any language in the opinion in that case conflicting with the proposition that the company is entitled to occupy so much of the right-of-way as may be necessary to accomplish the purpose of the original acquisition.

Mr. Justice Montgomery, in *Sturgeon's case,* says: "What reasonable meaning can be attached to the words 'for the purposes of the company,' except that the land should be used for such purposes as are

conducive and necessary to the conducting of the business of the company, that is, of safely and rapidly transporting and conveying passengers and freight over its railroad? That is the whole business of the company. They need land for no other purposes than to properly construct their road-beds and drain them, build sidetracks when necessary and houses for their employees, warehouses and station-houses with convenient ingress and egress, and for a few other purposes that may have escaped our attention. If the company should need the whole of the right-of-way for these purposes, it has the right to use the whole." In that case the action to recover possession of the right-of-way was dismissed because the complaint did not allege that the land occupied by the defendant was necessary for the purposes (275) of the company. In *McCaskill's case* this question was not raised.

Defendants say that, conceding the law to be as stated, they deny that the portion of the right-of-way in controversy is necessary for the purposes of the company, and that this denial raises an issue of fact which must be determined by a jury. If this be a proper construction of the law announced in *Sturgeon's case,* very serious consequences would follow. Any person in the possession of the right-of-way of a railroad could, by denying the necessity for its use by the company, drive it to an action of ejectment, delaying the laying of a sidetrack, building of a block-house or station, ordered to be built by the Corporation Commission, or decided by the company to be necessary for the safety of the travelers or moving freight. We cannot think the Court ever intended to so hold. As the company is held accountable for the condition of its right-of-way, and may be compelled to build sidetracks and other structures necessary for the discharge of its duties to the public, it must have the co-relative right to be the judge of the necessity and extent of such use. The question was presented and discussed by *Chief Justice Shaw* in *Brainard v. Clapp,* 64 Mass., 6. After a clear statement of the extent to which railroad companies may use their right-of-way at the time of construction, he says: "And the Court are also of the opinion that the right and power of the company to use the land within their limits may not only be exercised orginally, when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations, it is found necessary, in the judgment of the company, to make further uses of the land assigned to them for the purposes incident to the safe and beneficial occupation of the road, * * * they have a right to do so to the same extent as when the railroad was originally laid out and constructed." In that case

the Judge charged the jury that they were the judges of the necessity.

The Court says: "We think the jury ought to have been in-
(276) structed that the company had a right, under the powers given them by their act of incorporation, to cut down the trees in question, as one of the acts to be done on the land within the five rods, to fit and prepare the track for the safe and convenient use of it for transportation of persons and freight by cars and locomotive engines; that they were the judges of what this exigency required." This we think the correct view. Of course the right is limited by the express words of the grant, "for the use of the company." Within that limit the officers of the company must be permitted to exercise their judgment. To permit others to do so would seriously interfere with the power of the roads to meet the constantly increasing demand of the public.

We have not discussed the provision in the deed or the charter prohibiting the plaintiff from entering upon the yard, garden, burial-place, etc., of defendants, because it is not alleged that any portion of the land in controversy was so used at the date of the acquisition of the right-of-way. If it has been appropriated to such use since, the right of the plaintiff would not be thereby interfered with. In drawing the injunction order provision should be made to prevent any unreasonable or unnecessary damage to defendants' premises, by affording reasonable time for gathering corps, removing fences and otherwise protecting defendants' property. These matters may be dealt with by the Court in the order to be made herein.

Upon a careful and anxious examination of the entire record, we find no controverted facts affecting the legal merits of the case. We are of the opinion that there was error in his Honor's order refusing the injunction. That in regard to the lands of Mrs. White, the plaintiff is entitled to a right-of-way of fifty feet on each side of the center of the track to be occupied and used for the "purposes of the company."

That in regard to the other defendants, the right-of-way ex-
(277) tends one hundred feet on each side of the center of the track for like purposes. That the defendants should be restrained from preventing or interfering with the use of such right-of-way. That this opinion be certified to the Superior Court of Wake County, to the end that further proceedings may be had in accordance therewith.

Error.

Cited: Parks v. R. R., 143 N. C., 293; *Lumber Co. v. Price*, 144 N. C., 59; *Beasley v. R. R.*, 145 N. C., 274; *McCullock v. R. R.*, 146

N. C., 319; *Staton v. R. R.*, 147 N. C., 443; *R. R. v. New Bern, Ib.*, 168; *McCullock v. R. R.*, 149 N. C., 309; *Muse v. R. R., Ib.*, 446; *May v. R. R.*, 151 N. C., 389; *R. R. v. Goldsboro*, 155 N. C., 365; *Earnhardt v. R. R.*, 157 N. C., 362, 364; *R. R. v. McLean*, 158 N. C., 500.

SMITH v. MOORE.

(Filed 16 October, 1906.)

Deeds—Fraud—Transaction with Deceased—Attorney and Client—Declarations Against Interest—Relation of Parties—Principal and Agent—Presumption of Fraud—Failure to Register Deed—Evidence—Contingent Remainders, Conveyance of.

1. In an action by the plaintiff to set aside for fraud a deed executed by her, the testimony of the plaintiff as to what was said to her at the time of its execution by the attorney of the grantee of the deed, in the latter's presence, and as to what was done at the time, is incompetent under Rev., sec. 1631 (Code, sec. 590), the grantee being dead.
2. Where an attorney acts or speaks for his client, or an agent for his principal in their presence, the one is by the law thoroughly identified with his client and the other with his principal as much so as if the attorney or agent had not been present at all, and the client or principal had acted for himself, or the existence of the former had been merged into the latter.
3. In an action to set aside a deed for fraud because what was in fact a deed was represented to be a will, the declarations of the life-tenant, then in possession, now deceased, and made *ante litem motem*, that she had made a deed, that she executed it upon a meritorious consideration and that she acted freely and voluntarily, were competent, and this is not affected by the fact that she had only a life-estate and that the plaintiff at the time had only a contingent remainder which has since become vested.
4. Nor is said declaration incompetent on the ground that because the life-tenant supposed she had executed a deed, it is not evidence (278) that the plaintiff had the same opinion as to the transaction, where the fraud charged is a misrepresentation in the presence of the life-tenant and the plaintiff, her daughter.
5. Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, whether it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) that he had no probable motive to falsify the fact declared.
6. The declaration is admissible as an entirety, including statements therein which were not in themselves against interest, but which are integral or substantial parts of the declaration; the reason why this is so being that the portion which is trustworthy, because against interest, imparts credit to the whole declaration.

7. In an action to set aside a deed for fraud, an instruction that from the relation of the parties, the grantee being the "agent, confidential friend and adviser" of the grantor, the law raised a presumption of fraud as to any transaction between them, and the burden was upon the defendant of showing that the transaction was fair and honest, was correct.

8. In an action to set aside a deed for fraud because what was in fact a deed was represented to be a will, the fact that the grantee did not register the deed for ten months is a circumstance to be left to the jury, with the other facts, but the Court should direct their attention to the fact that the deed was registered in 1886 and has remained on the record to the bringing of this suit.

9. Where property was devised by a father in trust for the sole and separate use of his daughter for her life and after her death to such of her children as should then be living, and the trustee after the death of the husband of the life-tenant conveyed it to said life-tenant for life and remainder to her only child, a deed by the life-tenant and her child conveyed a perfect title, legal and equitable, for when the life-tenant died, the statute of uses executed to the use in the child or her grantee, and her interest passed by her deed to her grantee by way of an equitable assignment.

ACTION by Louisa B. Smith against Susan E. Moore and others, heard by *W. R. Allen, J.*, and a jury, at the April Term, 1906, of NEW HANOVER.

The object of the action is to set aside a deed for a lot in the city of Wilmington, at the northeast corner of Second and Red Cross
(279) Streets, which was executed to Mr. Moore, the husband of the defendant, Susan E. Moore, and the father of her co-defendant, by Mrs. Mary E. Smith and her daughter, the plaintiff, and which it is alleged was obtained by fraud.

The lot was devised in 1862 by Samuel Frink, the father of Mrs. Mary E. Smith and grandfather of the plaintiff, to his son Lorenzo Frink and Henry Nutt and the survivor of them, in trust, for the sole and separate use of his daughter, Mary E. Smith, for and during her life, and at her death to such of her children as should then be living, and the issue of such as might be dead, the issue to take *per stirpes*. Mr. Nutt died in 1881, and on 27 February, 1885, Lorenzo Frink conveyed the said lot "to Mary E. Smith for life, with remainder to Louisa B. Smith in fee," reciting in the deed that the lot had been devised to Mary E. Smith for her sole and separate use, so that it would not become liable for the debts of her then husband; that the latter had since died, leaving his widow, Mary E. Smith, who was well advanced in years, and an only child, Louisa B. Smith, his other children being dead without issue surviving them. He had three children, Rebecca Smith (who was the first wife of Mr. Moore, and died in 1869, leaving one child

who died in 1884), the plaintiff, and another who died without having married. Mrs. Mary E. Smith died intestate in April, 1895, and Mr. Moore died in 1900.

The plaintiff attacked the deed from her mother and herself to Mr. Moore upon the ground that, at the time it was executed, his attorney stated to her in the presence of her mother and Mr. Moore that it was a will. That she was ill at the time and confined to her bed, and that she signed the deed thinking that it was a will, and she did not know it was a deed until after Mr. Moore's death. There was evidence in corroboration of the plaintiff's testimony, consisting of statements to the same effect made afterwards by her to other persons.

It was admitted that Mr. Moore was "the agent, confidential friend and adviser of the plaintiff and her mother." It was also (280) in evidence that the plaintiff and her mother remained in possession of the premises conveyed by the deed until the mother's death, and that after her death the plaintiff has continued in possession to the present time. The deed to Mr. Moore was executed 3 March, 1885, and registered 3 January, 1886.

The defendants introduced in evidence a paper-writing in the form of a lease from Mr. Moore to Mary E. Smith and the plaintiff, dated 15 March, 1885, by which he covenanted and agreed that they should occupy and possess the said lot "for and during the term of their joint lives, and after the death of either of them, then for the term of the natural life of the survivor of them, yielding and paying therefor annually on 15 March in each and every year during the said term one cent as rent."

The plaintiff put in evidence a letter from Mrs. Smith to Mr. Moore's attorney, dated 2 March, 1885, in which she expressed the greatest affection and esteem for her son-in-law, Mr. Moore, and referred in strong terms to his many kindnesses and to his sympathy for her, and further, to the fact that he had paid her taxes and insurance for twenty years, repaired her house, and in other ways assisted her in time of need. She states it to be her first and greatest wish, if she should outlive her child (the plaintiff), that the house and lot should "descend" to him and his children; and she evinced the greatest anxiety that he should own the lot free from any claim against her. Then she states that she gives to him all of her household furniture, books, pictures and silver to dispose of as he thinks best. The plaintiff stated that this letter was introduced to show that the attorney was not authorized to draw a deed, but a will.

The defendants put in evidence the deposition of Mrs. Boudinot, and

proposed to prove by her that Mrs. Smith, who was her sister,
(281) had stated to her that she had executed the deed to Mr. Moore, and gave substantially the same reasons for so doing as those set forth in the letter to the attorney. The testimony was excluded by the Court, and the defendants excepted. On cross-examination she testified that Mrs. Smith had told her the deed had been executed, giving in detail what was said by her about the deed. She also stated that the plaintiff had told her "that she had signed a deed and that she and her mother had fixed it all up." The defendants objected to the testimony of the plaintiff as to what was said to her by his attorney in the presence of Mr. Moore at the house, and also as to what was done at that time. The objection was overruled and the defendants again excepted. It was shown that the attorney had died before this action was commenced.

The Court charged the jury that if Mr. Moore was the agent of the plaintiff and her mother and attended to their business, and they were in the habit of relying on him for advice, this would constitute such a confidential relation between them and that from it the law raised a presumption of fraud, which would be evidence of fraud to be considered by the jury, and the burden would then rest on the defendants to show that the transaction was fair and honest, and if they had failed to do so the jury should answer the issue "Yes." That this presumption was rebuttable, and if upon all the evidence the jury found that the transaction was fair and honest, they should answer the issue "No." That the letter of 2 March, 1885, did not authorize the attorney to draw a deed in fee-simple, and that the listing of the property for taxes by Mr. Moore in the name of Mrs. Smith and after her death in the name of her heirs, the failure to register the deed from 3 March, 1885, to 3 January, 1886, and the continued possession of the lot by the plaintiff, were each circumstances to be considered by the jury. The defendants objected to that part of the charge as to the non-registration of the deed.

The Court further charged that if the jury should find the facts
(282) to be those related by the plaintiff in her testimony as to what occurred at the time the deed was executed, the transaction would be fraudulent, and they should answer the issue "Yes;" but if they did not find by the greater weight of the evidence that the execution of the deed was procured by fraud, they should answer the issue "No." The jury for their verdict found that the deed was procured by fraud, and judgment having been entered thereon, the defendants

appealed, and specially assigned as errors the several rulings and the instructions of the Court to which exceptions had been taken.

John D. Bellamy & Son and *E. K. Bryan* for the plaintiff.
Rountree & Carr and *Bellamy & Bellamy* for the defendants.

WALKER, J., after stating the case: The testimony of the plaintiff as to what was said and done when Mr. Moore and his attorney were at her home for the purpose of having the deed executed, was incompetent, because the witness, under the admitted circumstances of this case, was disqualified by the statute to speak of that matter, and not because the facts related were not pertinent to the inquiry. It is a principle of the common law, and one of its favorite maxims, as well as an indispensable requirement of justice, that they who are to decide shall hear both sides, giving the one an equal opportunity with the other of knowing what is urged against him and of making good his claim or defense, if he has any. This rule, so essential to the fair administration of the law, was embodied in the maxim, "No man should be condemned unheard." (*audi alteram partem*).

At common law, no party to an action or person having an interest in the event of the same was permitted to testify in his own behalf, with certain well-defined exceptions. The Legislature, deeming this exclusion to be founded upon an insufficient reason and to (283) be unjust in itself, changed the law in this respect and admitted interested parties as witnesses, subject to the wise provision that no such party should be allowed to testify in his own behalf against the other party representing a deceased person as to a transaction or communication between him and such deceased person. Code, secs. 589 and 590; Rev., secs 1629 and 1631.

So we see that the ancient principle of the law, to which we have referred, has been preserved in this enactment, and one of the parties to the transaction will not be heard if the other is dead and cannot, therefore, be called in reply. "The proviso rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance, even by the oath of a relevant witness, to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." *McCanless v. Reynolds,* 74 N. C., 301. This construction was approved in *Pepper v. Broughton,* 80 N. C., 251, and the defendant

forbidden as a witness to testify that he had not refused to speak to Lougee, his father-in-law, who was then deceased, although plaintiff introduced testimony showing the mere declaration of Lougee that he had, and although both parties claimed under the deceased person. The idea was that the opposing testimony should be of the same kind, whereas, in fact, Pepper had only an unsworn declaration to stand against and overcome the proposed sworn testimony of Broughton. In *McRae v. Malloy,* 90 N. C., 521, the defendant proposed to show a conversation between himself and the attorneys of the plaintiff's intestate (who were then living and who were present at the time of the communication) touching a matter relevant to the controvesy. The testimony was excluded and this Court held the ruling to be cor-
(284) rect, although the attorneys were still living at the time of the trial and could have testified and thus arrayed two witnesses in behalf of the plaintiff against only one for the defendant, and he the defendant himself and therefore vitally interested. This seemed to present a strong reason for making an exception to the rule of exclusion, but the Court adhered to the principle that the dead man could not be heard, and therefore the living one must not be. The attorneys were present and speaking and acting for their client and with his constant and direct sanction in all that was said and done, and it was the same as if he had acted personally. *"Qui facit per alium facit per se."* It will be observed that there the attorneys were living, and here the attorney is dead. The case is directly in point and decisive of this one, though this is much stronger, if anything, than that one, by reason of the fact that the attorney is dead. The law is explicit that the one party shall not testify if the other cannot, and this without reference to the presence of third parties at the time of the transaction, unless the representative is himself examined in his own behalf, or the testimony of the deceased person is introduced as to the same transaction.

If we reverse the position of the parties on the record, *Halyburton v. Dobson,* 65 N. C., 88, is a case exactly like ours. There the plaintiff's testator, Harshaw, went with the defendant to the office of the testator's attorney, Pearson, who advised him to take certain money from the defendant, and the latter proposed to show this by his own testimony, it being material to the controversy. He was held to be incompetent, though he took no part in the conversation, which was confined to Pearson and Harshaw. *Judge Pearson,* for the Court, said: "The reason for the exception is apparent. There could never be a recovery against an unscrupulous party, if he were permitted to testify where it would be impossible to contradict him. The statute ought to be con-

strued in view of this mischief." The result is that where an attorney acts or speaks for his client, or an agent for his princi- (285) pal in their presence, the one is by the law thoroughly identified with his client and the other with his principal, as much so as if the attorney or agent had not been present at all and the client or principal had acted for himself, or the existence of the former had been merged into the latter. We thus preserve the saving principle of the law, that the litigants must both be heard, each being given an equal chance; and equality of opportunity means that the one shall be silenced unless the other also is living and can speak. The Court erred in admitting the testimony to which the defendants objected.

This case is not like either *Peacock v. Stott,* 90 N. C., 518, or *Johnson v. Townsend,* 117 N. C., 338. There the deceased had been jointly interested with another person, who was present at the time of the transaction and who survived. *In re Peterson,* 136 N. C., 13. This is sufficient to dispose of the appeal, did we not think other questions are raised which should be considered, as, in all probability, they will again be presented, and it is well to express our views in regard to them for the guidance of the Judge who will preside at the next trial.

The second assignment of error, embracing the next six exceptions, relates to the exclusion of a part of Mrs. Boudinot's testimony, which was taken by deposition. She deposed, among other things, that Mrs. Smith, who was her sister, had told her that she had made a deed to Mr. Moore for the lot, and, in the conversation with her, used language substantially similar to that which is contained in her letter to Mr. Moore's attorney, dated 2 March, 1885. It would seem that the defendants by questions 16 and 17, and her answers thereto, on the cross-examination, had received the full benefit of her testimony as to the fact that both the plaintiff and her mother, Mrs. Smith, had admitted the execution of the deed, or of the paper in question as a deed. But if the testimony of Mrs. Boudinot, which was excluded, is (286) competent, it was error to reject it, and besides, all of what was said by Mrs. Smith to her sister, Mrs. Boudinot, is not included in the answers of the latter to questions asked on her cross-examination. We will, therefore, consider the competency of all that was said. The testimony was evidently ruled out by the Court because it was regarded as nothing more than hearsay; but we think it comes within one of the well-known exceptions to the rule excluding such testimony.

Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears:

1. That the declarant is dead. 2. That the declaration was against his pecuniary or proprietary interest. 3. That he had competent knowledge of the fact declared. 4. That he had no probable motive to falsify the fact declared. 1 Elliott on Ev., sec. 439 to 454, where the subject is fully discussed.

The declaration is admissible as an entirety, including statements therein which were not in themselves against interest, but which are integral or substantial parts of the declaration, the reason why this is so being that the portion which is trustworthy, because against interest, imparts credit to the whole declaration. It will be well to consider the origin and development of these two principles separately. The earliest case on the subject of such declarations is *Searle v. Lord Barrington,* 2 Strange, p. 826; *Lord Barrington v. Searle* (on appeal), 3 Brown's Cases, 535; *Ib.,* 8 Mod., 278. In that case, decided in 1730, an endorsement of a payment of interest on a note was admitted to repel the statute of limitations. The case was ably argued and remarkably well considered. It originated in the Court of King's Bench and was tried at Guildhall before *Lord Raymond,* then Chief Justice, who admitted the proof of payment, and afterwards it was (287) heard in the Exchequer Chamber and the House of Lords respectively, where the ruling was sustained. It is regarded as the first and leading case, and is reviewed, in connection with the subsequent cases on the same question in the year 1833, in *Gleadon v. Atkin,* 3 Tyrwh. (Exch.), 289. It was there held, following the lead of the earlier case, that as the declaration was against interest and as there was no motive to misrepresent, it was admissible, not only against privies in blood or estate, but against all the world.

The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judical oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against interest, is so strong that when one has declared anything to his own prejudice, his statement is so stampted with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility. A discussion of this rule of evidence, which shows how thoroughly it

has been adopted by the courts, whether the declarations are in the form of mere words or of written entries, will be found in 1 Greenleaf Ev. (16 Ed.), secs. 147 to 154; 2 Wigmore Ev., secs. 1455 to 1471; McKelvey on Ev., pp. 254 to 261.

Higham v. Ridgeway, 10 East, 109 (3 Smith's L. C., 9 Am. Ed., 1), recognized the principle to its fullest extent, and held that it embraced, not only the particular statement which was against interest, but others contained in it, *Lord Ellenborough* saying that it is idle to admit a part without the context. "All parts of the speech or entry (288) may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." 2 Wigmore Ev., sec. 1465. Especially should the part of the declaration that is not deserving be admitted if it is not in itself self-serving, and tending, therefore, to promote the interest of the declarant. In *Reg. v. Overseers,* 1 B. & S. (101 E. C. L.), 763, the rule was held to apply to oral declarations as well as to written entries or averments, the difference between the two affecting rather the weight than the competency of the testimony.

The three leading cases we have cited have been approved in the later decisions and are regarded by the law-writers as having firmly settled the principle to which they severally relate. 9 Am. and Eng. Enc. of Law (2 Ed.), pp. 8 to 13; 16 Cyc., 1217 to 1222; *Davies v. Humphreys,* 6 M. & W. (Exch.), 152; *Warren v. Greenville,* 2 Strange, 1129; *Doe v. Robson,* 15 East, 32; *Doe v. Jones,* 1 Camp., 367; *Marks v. Colnaghi,* 3 Bing. N. C., 408; *Percival v. Nanson,* 7 W. H. & G. (Exch.); *Queen v. Church Wardens,* 101 E. C. L., 761 (1 B. & S.), 763; *Doe v. Cartwright,* 1 C. & P., 216 (11 E. C. L., 373); *Doe v. Rawlings,* 7 East, 279; *Middleton v. Melton,* 10 B. & C., 319 (21 E. C. L., 84); *Taylor v. Williams,* L. R., 3 Ch. Div., 605.

In the case last cited *Sir George Jessell* said: "It is, no doubt, an established rule in the courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes," and that the argument against its competency based upon the nature of the particular evidence offered, as affecting its weight, has nothing to do with it. "The question of admissibility is not a question of value." The cases decided in this country are quite as emphatic and as much to the point. *Elsworth v. Muldoon,* 15 Abb. Pr., 440. That case also decides that it makes no (289) difference whether the deceased and the party against whom the declaration is offered were in privity or not. Cases which are very in-

structive and which review the English decisions at length are *County of Mahaska v. Ingalls,* 16 Iowa, 81; *Livingston v. Arnoux,* 56 N. Y., 519; *Humes v. O'Bryan,* 74 Ala., 78, and *Halvorsen v. Moon,* 87 Minn., 18. See, also, *McDonald v. Wesendonck,* 62 N. Y. Sup., 764; *Heidenheimer v. Johnson,* 76 Texas, 200; *Quinby v. Ayres,* 1 Neb. (unofficial), 70; *Hinkley v. Davis,* 6 N. H., 210; *Taylor v. Gould,* 57 Pa. St., 152; *Bartlett v. Patton,* 3 W. Va., 71; *R. R. v. Fitzgerald,* 108 Ga., 507; 3 Am. Law Reg. (N. S.), 641. They all support the doctrine of the leading cases we have cited.

This species of evidence was at one time said to be anomalous and to stand on the *ultima thule* of competent testimony; but an unbroken line of decisions in England and one almost so in this country, have established beyond question that verbal declarations are receivable under the conditions we have mentioned, even in controversies between third parties. The law in thus strongly stated in *Hinkley v. Davis, supra:* "In many cases where a man has the means of knowing a fact, and it is against his interest to admit it, his admission is evidence even against another person. The evidence results, in such a case, from the improbability of a man's admitting as true what he knows to be false, against his interest. In some cases such an admission is as strong against another person as it is against the person who makes it." *Lord Ellenborough* thus tersely persented somewhat the same view of the matter when, in *Doe v. Robson,* supra, he said: "The ground upon which this evidence has been received is that there is a total absence of interest in the person making the entry (or declaration) to pervert the fact, and at the same time a competency in him to know it." There is nothing that so strongly attests the truth of what a person declares, not even his oath and the searching light of a cross-examination,
(290) as when he has asserted the existence of a fact and it appears that his interest at the time lay the other way. *Doe v. Jones, supra.* The words of sacred writ, "He that sweareth to his own hurt and changeth not," were uttered long before the era of our jurisprudence and set before us not only one of the most exalted attributes possessed by the exemplar of true virtue and probity, but embodied at the same time the highest standard by which we can safely gauge our trust and confidence in human testimony. It is not at all a matter for surprise, therefore, that the common-law jurists should have regarded it as a perfectly safe test for discerning the truth in judicial investigation.

This rule of evidence has been fully adopted by this Court, as its decisions will show. The principal case is *Peck v. Gilmer,* 20 N. C., 391. Recognizing the authority of the cases at common law to which we have

referred, *Judge Gaston,* for the Court, thus states the principle: "It is a well-established rule that where a person who has peculiar means of knowing a fact makes a declaration or written entry of that fact which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons." This case was followed and the rule as therein stated, applied, in *Peace v. Jenkins,* 32 N. C., 355; *Patton v. Dyke,* 33 N. C., 237; *Williams v. Alexander,* 50 N. C., 162; *Carr v. Stanly,* 52 N. C., 131; *Jones v. Henry,* 84 N. C., 324; *McCanless v. Reynolds,* 67 N. C., 268; *Braswell v. Gay,* 75 N. C., 515.

We must not confuse these declarations with entries made in a due course of business or in the discharge of a public duty, nor with a declaration which accompanies and explains an act, and deemed, therefore, to be a part of the *res gestæ* (*Yates v. Yates,,* 76 N. C., 142), because while they are all admitted as evidence, they are not so admitted for the same reason.

We must now consider whether the declaration of Mrs. Smith to Mrs. Boudinot comes within the rule stated. Was it a declara- (291) ration against her interest, at the time she made it? We think it was. She was then in possession of the lot and ostensibly the owner thereof, and when she declared that she had parted with her title and did not own the estate of which she was apparently seized, it could not be anything other than such a declaration. In *Ivat v. Finch,* 1 Taunton, 141, *Lord Mansfield,* speaking of the declaration of a party that she had assigned or transferred certain property, said: "The evidence ought to have been received; though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission, supposed to have been made by Mrs. Watson, was against her own interest." The evidence was received. To the same effect are *Bank v. Holland,* 99 Va., 501; *Reg. v. Overseers,* 1 B. & S., 763 (101 E. C. L., 768 and 769); *Chadwick v. Fonner,* 69 N. Y., 404; *Turner v. Tyson,* 49 Ga., 165; *Bowen v. Chase,* 98 U. S., 254. Cases which appear to be directly in point are *Lyon v. Ricker,* 141 N. Y., 225; *Tuggle v. Hughes,* (Tex.), 28 S. W., 61, and *Howell v. Howell,* 49 Ga., 492. We have seen that any other statement associated in the declaration with the one against interest, is just as competent as the latter, and especially is that true in a case like the one at bar, where the collateral statement bears directly on the other and tends to confirm and strengthen it. The deed to Mr. Moore is attacked for fraud, because what was in fact a deed was represented to be a will, and the declaration by Mrs. Smith

to Mrs. Boudinot was, not only that she had made a deed, and therefore knew the character and contents of the paper-writing, but that she executed it upon a meritorious consideration and substantially that she acted freely and voluntarily when she did so. What could be more against her interest than such a statement, and what could carry with it more conclusive evidence of its truth and accuracy? It was (292) in disparagement of her apparent title, and made at a time which was recent with respect to the date of the main transaction, when it must be supposed she had a clear recollection of what had occurred, and also long prior to the beginning of this controversy—*ante litem motem.* Her interest was all on the side of herself and her daughter, who lived with her, or at least it must now be supposed to have been that way, nothing else appearing. Her motive was a most commendable one—gratitude for what Mr. Moore had done for her; and she spoke with feeling and emphasis; but this does not have the effect in law, as the cases show, to rebut the presumption that she was declaring against her own interest. But it may be suggested that she was not in privity with her daughter, the plaintiff, as she had but a life-estate and her daughter a contingent remainder, which since the death of her mother has become a vested one in interest and possession. This is true, but it does not prevent the application of the rule, for the declaration being against interest, it is admitted because of the likelihood of its being true and of its general freedom from any reasonable probability of fraud or imposition, and is for that reason held to be competent as to third parties. It is not, therefore, within the principle of exclusion, as being *res inter alios acta. Lyon v. Ricker,* 141 N. Y., 225; *Higham v. Ridgeway, supra.* It may be further objected that even if the declaration is otherwise competent, the fact that Mrs. Smith supposed she had executed a deed is not evidence that the plaintiff had the same opinion as to the nature of the instrument. There is every reason, we think, why under the peculiar facts of the case we should hold this objection to be untenable and the reason for it to be unsound. The allegation is that the deed was executed at the home of Mrs. Smith and her daughter, in the presence of Mr. Moore, the attorney, and some other persons who are now dead, the plaintiff being the sole survivor of those then present. The deed was executed by the (293) mother and daughter then and there, and the alleged representation of the attorney was to both of them at that time. It was all one and the same transaction, without a single break in its continuity from beginning to end. Under such circumstances, can it be denied that the impression received by Mrs. Smith of what was said

and done, the execution of the deed being a joint act, is at least some evidence as to what the true nature of the transaction was; and as she heard what the attorney said, should it not be received as some evidence of what his words were and what they really meant; and finally, may it not safely be admitted to show that possibly the plaintiff is mistaken as to what was said and as to what did occur? Where two persons have equal opportunity of knowing a fact, one is as competent to give a correct version of it as the other—or at least should be. We frequently receive the evidence of two persons, one against the other, as to whether a certain thing was done or not, one testifying that he saw it done and the other that he did not. The declaration of Mrs. Smith was equivalent to her saying that she did not hear any such representation made as that which is imputed to the attorney, or that it was not in fact made, according as her testimony is contrued. We are constrained to think that the evidence is both competent and relevant and should be heard by the jury in its entirety.

Before taking leave of this part of the case, we will refer to three cases which seem to be very much in point just here. The first is *Lamar v. Pearre,* 90 Ga., 377, which bears a striking resemblance to our case in several of its features. There it was held, when it was attempted to establish a trust in certain property, that a declaration of a life-tenant as to the subject under investigation was competent against the remainderman, as it disparaged her own estate in the property, and was, therefore, against her interest, and that the additional statements relevant to the principal fact and embraced with it in the declaration against interest were also competent. In that case, (294) as here, the life-tenant and remainderman acquired their interests under a settlement in trust for their benefit. The two cases are practically parallel. The second is *Howell v. Howell,* 47 Ga., 492, in which the deed in question was attacked as having been procured by undue influence and fraud. The declarations of the donor were held competent to show that he knew the nature and contents of the paper, and to repel the imputation of fraud. The third is *Bowen v. Chase,* 98 U. S., 254, which, while not precisely like the other two cited cases, nor like our case, in the object for which the suit was brought, is in its main features, and so far as the general question now being discussed is concerned, enough like them to be an important authority in support of the principle we have already stated and applied. The cases in our own reports which approach more nearly than any others to a decision of the very question here presented, are *Pearce v. Jenkins,* 32 N. C., 355; *Patton v. Dyke,* 33 N. C., 237.

The fact that the plaintiff relies on the continued possession of the lot by herself and her mother, after making the deed, as evidence of the false representation, imparts still greater significance to the mother's declaration, as from her declaration the jury might have found that she did not so regard the retention of possession by her and her daughter, and that the latter shared in that view, the fraud being alleged to have been practiced upon both of them at the same instant of time, and it being, therefore, at least probable that it produced the same impression upon both. Speaking with reference to a case somewhat similar, *Judge Nash* said: "The declarations were made by a man, upon the subject in controversy, against his interest, and when he could have no conceivable interest to declare that which was not true," *Pearce v. Jenkins, supra;* and so we say here concerning the declaration in question. The text-books and the cases do not justify the statement
(295) that this species of evidence is anomalous in character and approaches the verge of admissible testimony, for even a cursory examination of the authorities will show that it is well-nigh universally conceded to be an established exception to the rule excluding hearsay and an unshakable principle in the law of evidence. As *Lord Ellenborough* said in the opening passage of his opinion in *Higham v. Ridgeway,* 10 East, 108: "We should be extremely sorry if anything fell from the Court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren v. Greenville.*" Having disposed of this exception, we now proceed to consider the remaining questions in their order.

We cannot sustain the exception to the instruction of the Court that from the relation of the parties—Mr. Moore being the "agent, confidential friend and advisor of the plaintiff and her mother"—the law raised a presumption of fraud as to any transaction between them, which is evidence of fraud to be considered by the jury and imposes upon the defendants the burden of showing that the transaction was fair and honest, and that if the defendants had failed so to do the jury should answer the issue as to fraud "Yes." With reference to the fiduciary relations from which presumptions of fraud or undue influence are raised, that of principal and agent is thus classified: 1. When one is the general agent of another and has entire management of his affairs, so as in effect to be as much his guardian as the regularly

appointed guardian of an infant, a presumption of fraud, as matter of law, arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted. 2. When the only rela- (296) tion is that of friendly intercourse and habitual reliance for advice and assistance and occasional employment in matters of business as agents, a presumption of fact only is raised from such a transaction, which may be strong or slight according to circumstances. The latter is for the jury to consider and act upon. *Lee v. Pearce,* 68 N. C., 76; *Timmons v. Westmoreland,* 72 N. C., 587; 1 Bigelow on Fraud (1890), p. 295. When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the Court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion or, it is often said, a presumption of fraud—a suspicion or presumption, arising as matter of law, that the transaction brought to the notice of the Court was effected through fraud or, what comes to much the same thing, undue influence by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable." 1 Bigelow on Fraud, p. 261, *et seq.* This presumption is raised where there have been dealings between the parties, because of the advantage which the situation of the parties respectively gives to one over the other. The doctrine rests on the idea, not that there actually was, but that there may have been fraud, and an artificial effect is given to the fiduciary relation beyond its natural tendency to produce belief of the fact that fraud really existed. *Lee v. Pearce, supra.* It does not appear clearly from the evidence or the admission, whether or not Mr. Moore was the general agent of the plaintiff and her mother at the time the deed was executed, and had the management of their entire business, nor does it appear (297) what was the nature and scope of his agency. It is merely said that he was their agent. We take it that this was intended to mean a general agency investing him with control and management of all of their affairs, and so considered, in connection with the other part of the admission, that he was also their confidential friend and adviser, we think the charge of the Court was correct. In *Lee v. Pearce,* the *Chief Justice,* referring to the facts of that case, at p. 87, says: "Our

case would seem, from what appears by the statement, to come under the last instance (second class mentioned above); for there is no evidence that Pearce was the general agent of Mrs. Lindsey, intrusted with the management of all her affairs or business, although he was looked up to by her, and relied on for advice and assistance, and frequently acted as her agent in buying wood and leasing her property; all of which evidence should be passed upon by a jury, as raising a presumption of fraud or undue influence, and as being a link in a chain of circumstantial evidence," It may be that the proof at the next trial will disclose just such a relation as there described and change the nature of the presumption or weaken its force. Be this as it may, we do not think his Honor, upon the facts as presented at the trial, and as we now construe them, misapplied the rule, as stated in *Lee v. Pearce.* The presumption of fraud is of course a rebuttable one.

The last assignment of error questions the correctness of the charge, so far as it relates to Mr. Moore's failure to register the deed from the day of its date, 3 March, 1885, to 3 January, 1886, it being ten months. In the trial of questions of fraud the evidence necessarily takes a wide range and great latitude is allowed in adducing proof to disclose the true nature of the transaction, and it has been said to be enough if the evidence falls within a broad interpretation of the rule of relevancy.

(298) Circumstances very slight and apparently trivial in themselves are permitted to be shown in connection with the other facts in order to sustain the allegation of fraud. 1 Bigelow on Fraud, 146. The plaintiff does not contend that Mr. Moore was compelled to register the deed under the statute, it being good as between the parties without registration, which is required only to protect the grantee against creditors and subsequent purchasers. *Nadal v. Britton,* 112 N. C., 180. But she says that withholding this deed from record was some evidence of a purpose to conceal it, so that the public could not see it and thereby diminish the chance of the grantor's discovering that it was a deed instead of a will. While, perhaps, very slight evidence and inconsequential in itself, we yet think that it was a circumstance to be left to the jury with the other facts. But the Court should be careful, in submitting it, to direct their attention also to the fact that the deed was registered on 3 January, 1886, and has remained on the record to the bringing of this suit. This fact they should consider in connection with the other, in order to determine what weight they will give to the latter.

We have discussed all of the exceptions as they may be repeated if there is another appeal and we had not done so, but we order a new trial

because of the error committed in permitting the plaintiff to testify as to what the attorney said in the presence and hearing of herself and her grantee, now deceased.

The plaintiff's counsel contended that the deed of Lorenzo Frink, to her and her mother, vested the legal title in them in trust to serve the uses declared in the will of Samuel Frink, and that Mr. Moore, under the deed to him, took the title in the same plight as they formerly held it. It is not necessary to discuss this proposition, so far as the life-estate of Mrs. Smith is concerned, as it terminated at her death and is therefore out of the way. But see *Cameron v. Hicks,* 141 N. C., 21. If the plaintiff acquired the legal title by the deed of her trustee, Lorenzo Frink, it either merged with her equitable es- (299) tate, or if it was held by her separately from it, as contended, then when Mrs. Smith died, there being no longer any need for the separation of the two estates, the plaintiff's contingent remainder having become a vested one, the statute, if she had not conveyed to Mr. Moore, would have transferred the seizin or possession to the use. By her deed to Mr. Moore she passed both the legal and equitable estate held by her, that is, all the interest she then had, and when Mrs. Smith died, the statute executed the use, in the same manner, if he who was then entitled to the use had not already, in another way, acquired the seizin, and the operation of the statute was not therefore required to vest it in him. It is not necessary to inquire whether the deed of Lorenzo Frink had the effect to convey his legal title, as the same result would follow if it did not have that effect, for in that case it would have descended to his heirs charged with the trust, and their seizin would, at the death of Mrs. Smith, have been transferred to the use, as it was no longer required to remain in them to serve the purposes of the trust. *Cameron v. Hicks, supra.* If the plaintiff did not acquire the legal title by the deed of Lorenzo Frink, or if she did and it was held by her separate from the use, her deed, she having at the time a contingent remainder, was sufficient to pass the latter to Mr. Moore by way of equitable assignment, and operated not merely as an executory contract to convey, but as an executed one by way of passing her interest. This was expressly decided in the recent case of *Kornegay v. Miller,* 137 N. C., 659, where the subject is so fully and clearly discussed by *Mr. Justice Connor* as to make it unnecessary that we should pursue the inquiry any further. See, also, *Cheek v. Walker,* 138 N. C., 466; *Gray v. Hawkins,* 133 N. C., 1; *Bodenhamer v. Welch,* 89 N. C., 78; *Watson v. Smith,* 110 N. C., 6.

So that, *quacunque via data,* Mr. Moore got the complete and

(300) perfect title, legal and equitable, by the transaction, and his widow and her heirs are entitled to keep and enjoy the same, unless the deed to him was obtained by fraud charged in the complaint, or can in some other way be invalidated.

For the reason we have already stated, a new trial is awarded.

New Trial.

HOKE, J. concurs in the result.

Cited: Moseley v. Johnson, 144 N. C., 268; *Balthrop v. Todd,* 145 N. C., 114; *In re Fowler,* 156 N. C., 341; *Alford v. Moore,* 161 N. C., 386.

THOMASON v. RAILROAD.

(Filed 16 October, 1906.)

Railroads—Liability for Nuisance—Use of Corporate Powers—Damages—Pleadings—Estoppel.

1. Where a complaint alleges that plaintiffs own a lot on which is located their dwelling, and that defendant owns and operates, prusuant to its charter, a railroad, the right-of-way of which abuts upon plaintiffs' property, and that for the better conducting its business it purchased a lot adjoining plaintiffs', which it permits to be used as a coal and wood yard, and has constructed over said lot a spur-track, a portion of which is a trestle or a coal-chute, ten feet above the ground, pointing directly to plaintiffs' dwelling, extending within five feet of their fence and twenty feet of their sleeping apartment; that the location of the track, its construction and proximity to their dwelling, is *per se* a nuisance, menacing the safety of their persons and property, when used in the ordinary way, and causing noises, dust, smoke and other disagreeable and injurious nuisances, and that the defendant has negligently used the track, specifying instances in which plaintiffs were threatened with injury, and one in which their property sustained physical injury: *Held,* these facts constitute an actionable nuisance.

2. The powers conferred upon a railroad company by its charter must be exercised in a lawful way, that is, in respect to those who suffer
(301) damage, with due regard for their rights. When exercised in an unreasonable or negligent way, so as to injure others in the enjoyment of their property, the injury is actionable.

3. While for smoke, cinders, etc., emitted by engines in the ordinary operation of the business of a railroad company, no action lies, yet when there is evidence that the engines were used upon a structure and under conditions which the jury have found to be negligent, the damage inflicted by them is proper to be considered by the jury.

4. In an action against a railroad for damages for maintaining a nuisance, an instruction, in regard to the measure of damages, that the jury should consider all of the circumstances, the depreciation in the value of the plaintiffs' home as a dwelling during the three years next preceding the bringing of the action, the inconvenience, discomfiture and unpleasantness sustained, was correct.
5. Where a demurrer to the complaint was sustained and the plaintiff filed an amended complaint which the defendant answered and did not set up the judgment upon the demurrer, and his request to amend was denied, an exception to the Court's refusal to hold that the judgment upon the demurrer was an estoppel, cannot be sustained.

ACTION by Henry Thomason and wife against the Seaboard Air Line Railway Company, heard by *Jones, J.*, and a jury, at the February Term, 1906, of VANCE.

This action is prosecuted for the purpose of recovering damages alleged to have been sustained by plaintiffs by reason of a nuisance maintained by defendant.

It appears from the record that at the institution of the suit plaintiffs filed a complaint setting forth several causes of action, to which defendant demurred. The demurrer to each cause of action was sustained at October Term, 1905, and leave given plaintiffs to file an amended complaint. A complaint was accordingly filed 1 December, 1905. It does not clearly appear in what respect this complaint differs from the first one, to which a demurrer was sustained. In the last complaint plaintiffs alleged that twenty years prior to the institution of this action they purchased a lot in the town of Henderson and have used and occupied it as a dwelling place and residence until (302) the beginning of this action. That said lot was bounded partly by the right-of-way of the Raleigh and Gaston Railroad, upon which it had, and maintained, tracks over which its engines and cars passed, etc. That by consolidation and merger the defendant has succeeded to all of the rights, duties, etc., of the said railroad company. Among many other matters and things not necessary to be noted in this appeal, plaintiffs alleged: That defendant had, since the purchase by plaintiffs of said lot, and its occupation as a residence, purchased a lot in excess of its right-of-way adjoining plaintiff's lot, upon which it permitted and maintained a coal-yard, and it had "negligently and with wanton indifference to plaintiffs' rights and safety maintained through and over said coal yard a trestle with a spur railway track thereon, some ten feet above the ground, pointing directly to plaintiff's sleeping-room, extending within about five feet of plaintiffs' yard fence, and within about twenty feet of their sleeping-room; and ran cars and locomotives thereon. On two occasions coal cars have been neg-

ligently forced over the end of the spur-track and the trucks with a large portion of the car suspended in and over plaintiffs' said yard and within less than half a car's length of their sleeping-room—so near that if the cars had lost their balance or had been run into by other cars and thrown over endwise they would have crushed into plaintiffs' sleeping-room to the great danger of their lives and property. That on one occasion the car was negligently permitted to remain in such position by the defendant a week or more; the plaintiffs were driven and kept from their usual bedroom by the imminence of the danger which thus threatened them. That they requested the defendant through its agent to remove the car and abate the nuisance, which it wantonly and contemptuously refused to do until they engaged counsel, etc. Defendant continued to use the said spur-track until some time in March, 1904, when a fast night passenger train, coming (303) into and through the town at a great speed, negligently ran through an open switch, upon this track, wrecked their locomotives and a number of coaches, together with the trestle upon which said track was laid, and threw a coal car from said track over the intervening space between such track and plaintiffs' yard, partly into said yard and within a few feet of their sleeping-room, crushing their fence, nearly throwing them from their bed by the violence of the concussion, etc. They alleged that such spur-track, together with the negligent manner of its use, was a nuisance, injuring their property, depreciating its value, and otherwise damaging them.

Defendant made a specific denial of the matters alleged, and for further answer said:

"That the alleged damages charged in the complaint, if any, were the result only of the usual and ordinary incidents of operating railroads, which no care, caution or foresight of the defendant could have prevented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said railroad spur-tracks, etc.; and for further defense this defendant says that more than twenty years before the commencement of this action, it and its predecessor, the Raleigh and Gaston Railroad Company, erected its said railroad and spur-tracks, and have been in the peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and by said twenty years of quiet, peaceable and undisturbed use of said railroad spur-tracks, rights-of-way, coal and wood yards, it has acquired a prescriptive right to operate and use the same, and this defendant pleads said twenty years' use and prescriptive right in bar of any recovery herein."

Defendant, when the case was called for trial, demurred *ore tenus* to the seveal causes of action set forth in the complaint. The Court sustained the demurrer as to all of the causes of action, except the fourth, to wit: "The defendant demurs to so much of the plaintiffs' complaint as alleges damage by the construction of sidetracks into (304) and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct sidetracks for the accommodation of the authorized enterprises constructed and operated along its right-of-way, and it is not liable for damage resulting from the lawful performance of such duty." The judgment of his Honor upon the demurrer concludes; "That is to say, that all the grounds of demurrer, as to the different causes of action in said complaint, are sustained, except the cause of action for damages to plaintiffs' fence, and whatever damages the defendant may have caused the plaintiffs by reason of the construction and operation of the spur-track on the lot of land used for a coal and wood yard, other than injuries to fence and plaintiffs' health." To this judgment defendant excepted.

Defendant thereupon asked leave to amend its answer by setting up the judgment of October Term, 1905, sustaining the demurrer to the original complaint as *res judicata* of the plaintiffs' cause of action. Motion denied. Defendant raised the same question by an exception.

The cause went to trial upon the following issues, resulting in a verdict, as set forth: "2. Did the defendant commit and maintain the nuisance complained of? Ans.: Yes. 3. What damage, if any, has plaintiff sustained by reason of the nuisance complained of? Ans.: $450. 4. What damage, if any, has plaintiff sustained by reason of damage to his household and kitchen furniture? Ans.: $50. 5. What damage, if any, has plaintiff sustained by reason of the destruction of his fence? Ans.: $10."

Defendant pleaded the statute of limitations, but no exceptions appear in the record in regard to his Honor's rulings thereon. There was judgment upon the verdict, and defendant appealed.

H. M. Shaw and *T. M. Pittman* for the plaintiffs.

Day & Bell, Murray Allen and *J. H. Bridgers* for the de- (305) fendant.

Defendant's appeal.

CONNOR, J., after stating the case: It will be convenient to first dispose of defendant's exception to his Honor's refusal to sustain the fourth cause of demurrer. This calls into question the right of plaintiffs, upon the allegation in the complaint, to proceed with their proof. If this contention be correct, it becomes unnecessary to examine the other exceptions. The question presented by the demurrer is both interesting and important. It has been so frequently and so thoroughly considered and discussed by courts of the highest authority that but little is left to be done save to apply well-settled principles applicable to it. The judgment upon the other causes of demurrer eliminates, for the purpose of this appeal, a number of questions and presents the single proposition advanced by the plaintiffs, that, conceding to the defendant its right "to do a lawful thing in a lawful way," they are entitled to recover on the cause of the action stated in the complaint. Freed from all formal or technical verbiage, the case, developed by the complaint, is simply this: Plaintiffs own a lot upon which is located their dwelling in the town of Henderson. Defendant owns and operates, pursuant to its charter, a railroad, the right-of-way of which abuts upon plaintiffs' property. Defendant, for the better conducting its business of common carrier, purchased a lot adjoining plaintiffs' which it permits to be used as a coal-yard. For the delivery of coal and other purposes defendant has constructed over said lot a spur-track, a portion of which is a trestle or coal-chute, some ten feet above the ground, pointing directly to plaintiffs' dwelling, extending within about five feet of plaintiffs' fence and twenty feet of their sleeping apartment.

Plaintiffs allege that the location of this track, its construction and proximity to their dwelling, is *per se* a nuisance, menacing the
(306) safety of their persons and property, when used in the ordinary way, and causing noises, dust, smoke and other disagreeable and injurious nuisances. They further say that the defendant has negligently used the track, specifying several instances in which they were threatened with injury and one in which their property sustained physical injury and they were compelled to abandon their bedroom by the violent concussion caused by the collison of defendant's trains.

Adopting Blackstone's definition, there can be no doubt that the facts, set forth in the complaint, constitute a private nuisance, "Anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." 16 Am. and Eng. Enc., 682. "An act or use of property, to constitute a nuisance, must violate some legal right, either public or private, and must work some material annoyance, inconvenience or injury, either actual or implied from the invasion of the right."

Ib., 686. The defendant says that, conceding the damage done plaintiffs, they have no cause of action, or that the damage done is not an actionable nuisance, for that defendant was acting within its chartered rights, or, as expressed in many of the authorities cited, "doing a lawful act in a lawful way." This contention is based upon the elementary proposition that "no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." Pollock on Torts (7 Ed.), 128.

The principle applied to railroad companies, as *quasi*-public agencies—assimilating them, in this respect, to municipal corporations—has been well stated in the exceedingly able opinion by *Beasley, C. J.*, in *Beseman v. R. R.*, 50 N. J. L., 285: "They are not responsible for those incidental damages that result from the proper exercise of their functions." The principle applied to municipal corporations is recognized by this Court in *Meares v. Wilmington,* 31 N. C., 73. In that case the municipal authorities, in grading a street, removed the earth to the depth of several feet, causing the plaintiff's lot (307) adjoining the street to fall, bearing with it a brick wall, to plaintiff's damage, etc. Defendant contended that by its charter, and ordinance passed pursuant thereto, it was empowered to grade the street, and that by reason thereof it was not liable to plaintiff, whether due caution was used or not. His Honor instructed the jury that the act of defendant was lawful, provided it was done with due caution, etc. From a judgment for plaintiff defendant appealed.

Pearson, J., said: "If the defendants had caused the grading to be done with ordinary skill and caution, and by the erection of a substantial wall as the excavation proceeded had so managed as to prevent any caving in of the plaintiff's lot, so that the damage, if any, would have resulted, not from a want of ordinary skill and caution, but merely from the fact that, by reason of the grading, the lot was left higher above the level of the street, and so was more difficult of access, and, therefore, less valuable, the case would have presented a very grave question; and we are strongly inclined to think, with his Honor, that the plaintiffs would have been without remedy; for, as it was lawful for the defendants to do the work, *if it was done in a proper manner,* although the plaintiffs were damaged thereby, it would be *damnum absque injuria,* and give no cause of action." The principle announced in this case was approved with much caution in *Wright v. Wilmington,* 92 N. C., 156. This may be regarded as the settled doctrine in this State. *Wolfe v. Pearson,* 114 N. C., 621. In *Salisbury v. R. R.*, 91 N. C., 490, *Smith, C. J.*, says that the question whether the same principle

applies to railroads is not presented, and therefore it is not "passed upon." He futher says: "We do not understand the counsel for the defendant to deny that if the power conferred in the charter was exercised negligently and without a due regard to the interests of others, and an injury was suffered in consequence, the company would be (308) exposed to an action for redress in some form," citing *Meares v. Wilmington, supra.* While in the very well considered and exhaustive brief of defendant many cases are cited in which railroad companies are given the same immunity from actions for consequential injury to property sustained by the lawful exercise of power as municipal corporations, this Court, in *Staton v. R. R.,* 111 N. C., 278, in an opinion by *Shepherd, C. J.,* denies such immunity. It is there held that the authority granted to a corporation by its charter to construct a railroad does not thereby confer upon it an immunity from liability for damages to others in respect to their adjacent lands, when, under the same circumstances, a private individual would be liable. That case involved the question of the right of an adjacent land owner to recover damages for flooding his land by the construction of ditches on defendant's right-of-way. It may be noted that such flooding of the lands amounted to a "taking," and comes within the elementary principle that in such cases compensation must be made.

For the purpose of disposing of this appeal it is not necessary to further discuss the question presented in *Staton v. R. R.,* 111 N. C., 278. From either viewpoint the limitation is always annexed, that the right be exercised "in a lawful way," that is, in respect to those who suffer damage, with due care for their rights. When done negligently, and without due regard for such rights, there is *damnum et injuria,* that is, in contemplation of the law *injuria,* which is always actionable. We find the same limitation imposed upon the doctrine in all of the cases, from other jurisdictions, cited in defendant's brief.

In a well sustained opinion by *Judge Keith* in *Fisher v. R. R.,* 102 Va., 363, he concludes the discussion with this language: "But in order to secure this immunity, the power given by the Legislature must be exercised without negligence, and with judgment and caution. For damage which could not have been avoided by any reasonable, (309) practicable care on the part of those authorized to exercise the power, there is no right of action; but they must not do needless harm, and, if they do, it is a wrong against which the ordinary remedies are available." Pollock on Torts, 129.

In a case strikingly similar to ours, *R. R. v. Baptist Church,* 108 U. S., 317, it appeared that under the powers conferred upon the defendant

to erect such works as it might deem necessary and expedient for the completion and maintenance of its road, it erected in the city of Washington, in close proximity to the defendant Baptist Church, an engine-house, machine shop, etc., and used them in such a way as to disturb the congregation assembled in the church; to interfere with religious exercises therein, break up the Sunday-schools and destroy the value of the building as a place of worship. For the purpose of recovering damages, the church instituted an action. The same defense was relied upon as in this case. *Field J.*, said: "Plainly the engine-house and repair-shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, * * * that is, a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. * * * It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine-house and repair-shop in question were thus necessary and expedient; that they are skillfully constructed. * * * In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without refer- (310) ence to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with the noises and disturbances necessarily attending their use, no law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. Undoubtedly, a railway over the

public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises an disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria.* The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship."

This case cited with approval in *Bates v. Holbrook,* 171 N. (311) Y., 460; *Ridge v. R. R.,* 58 N. J. Eq., 172, in which the Chancellor says: "Therefore, the right of this company to use the strip of land upon which the three tracks are placed * * * for terminal purposes, does not include the right to use them for all purposes to which a terminal yard may be devoted. The company is bound to take into consideration the environments and adjust its operations so as to produce the least annoyance to persons and property in placing the instrument necessary to its business." In *Willis v. Bridge Co.,* 104 Ky., 186, citing the *Church case,* it is said: "Whenever a railroad company has been granted authority to use a street, it is accompanied with an implied qualification that its use shall not unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Such a grant does not license the railroad company to use the street in disregard of the private rights of others, and with immunity for their invasion."

In *R. R. v. First Methodist Church,* 102 Fed. Rep., 85, in which it appeared that the company erected a hydrant in a street opposite the church and built tracks to it, in the use of which the engines made noises, emitted smoke, cinders, etc., a right of an action was sustained by the Court of Appeals. Defendant insists that this appeal is to be distinguished from the *Baptist Church case* because, "1. It did not appear that the railroad had the proper legislative authority to construct and use the building complained of in the place at which it was located, and it appeared affirmatively that it was at an unreasonable place." It appeared that the road was, by its charter, empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of its

road. The defendant's charter is in substantially the same language. The location of the road was expressly permitted and approved by Congress. Conceding that the location of the spur-track upon the lot purchased by defendant for that purpose was authorized (312) by the charter, the complaint is that the construction of it, the trestle pointing directly to plaintiffs' dwelling and extending to within a few feet of their fence and twenty-seven feet of their dwelling, it would seem that, considering the purpose for which it was built and was to be used, it was at least a menace to plaintiffs' property.

In *Romer v. R. R.*, 75 Minn., 211, it is said by the Court that no negligence was imputed to defendant. In *Dolan v. R. R.*, 118 Wis., 362, a recovery was denied for a nuisance in maintaining a stock-yard, because it was not shown that the location was not a reasonably proper one or that the company did not use reasonable diligence in preventing unhealthy conditions. The distinction is apparent. This contention is, we think, met by the language of *Judge Field* above quoted. Conferring the power to erect all structures, buildings, etc., necessary and convenient for its business cannot be construed to empower it to locate and use them as it might think proper without reference to the rights of others. *Terminal Co. v. Jacobs*, 109 Tenn., 797; *Ridge v. R. R.*, 58 N. J. Eq., 172. To give it such a construction would impute to the Legislature a disregard of private rights, trenching closely upon, if not in violation of, constitutional limitations.

In *R. R. v. Meth. Church, supra*, it is said: "If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury, and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensation for the injury." Defendant says that the cases are distinguished in that "the engine-house was a part of the defendant's private works, used exclusively for its private business, and bearing no relation to the public." We do (313) not find that the Court so regarded the engine-house; on the contrary, the entire discussion proceeds upon the theory that defendant was acting within its chartered powers, but in violation of the duty imposed to use them in a reasonable manner and with due regard to the rights of others. However this may be, the plaintiffs aver that in the use of the trestle defendant was negligent, specifying several instances in which it is alleged there was gross negligence. In *Dargan v. Wad-*

dill, 31 N. C., 244, holding that a stable in a town was not *per se* a nuisance, *Ruffin, C. J.,* says: "But, on the contrary, if they be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises and impair their value as places of habitation, stables do thereby become nuisances." We do not discuss the question whether the rights of the plaintiffs are affected by the fact that the spur-track and trestle were on a lot purchased by defendant for use as a coal-yard as distinguished from a like use of land covered by the right-of-way. Without entering further in this domain, wherein frequent attempts to restate the doctrine has sometimes led to obscurity, we conclude that his Honor correctly overruled the demurrer.

The allegation is specifically made that defendant wantonly and negligently created, maintained, etc., the nuisance, specifying each negligent act. These terms are repeated in respect to each act complained of, and permeate the entire complaint in respect to this cause of action. Postponing the consideration of several exceptions to rulings upon the admissibility of testimony, we proceed to examine such as relate to his Honor's instructions.

After stating the contentions of the parties his Honor said: "So then, gentlemen, the question is for you to find, as to whether the defendant in this case committed and maintained, caused and continued a nuisance on the lot adjoining plaintiffs', not on the right-of-
(314) way, but outside of the right-of-way and next to and adjoining the plaintiffs' lot." To this defendant excepted.

We find no error in this. His Honor clearly stated to the jury the limits within which, by the judgment upon the demurrer, he had restricted plaintiffs. His Honor proceeded to instruct the jury: "So, if you find from the greater weight of the evidence that the lot occupied and used by the defendant is off its right-of-way and adjoining the plaintiffs' lot; that plaintiffs acquired their lot and erected a dwelling on same before the defendant built the spur on its lot and commenced to use the same as a dwelling; that the end of the spur-track was insecurely built, or not safely constructed; that it extended to within five and a half feet of the plaintiffs' line fence and to within twenty-seven and a half feet of plaintiffs' dwelling and sleeping apartments; that defendants' cars were several times wrecked and dropped over towards the plaintiffs' dwelling, and that by reason of this fact the plaintiffs had reasonable grounds to believe and did believe that they were by reason of the proximity of the track in danger of being hurt; then if you find these facts to be true from the evidence, and by the greater weight of the evidence, the Court charges you the operation of the spur-track by the defendant under these circumstances would create a nui-

sance on the part of the defendant. And plaintiffs would be entitled to recover if you find this condition existed within three years prior to the bringing of this actiion."

"And if you shall find from the greater weight of the evidence that the defendant negligently and carelessly permitted its cars to run off of the spur-track and knock down plaintiffs' fence, then the plaintiffs would be entitled to recover of the defendant the damage to the fence caused by reason of the negligence of the defendant in throwing its cars on the fence, if you find that it was negligent."

"If the jury shall find by the greater weight of the evidence that the defendant operated its engines and cars over the spur (315) in a reckless and careless manner, and because of the proximity of the defendant's track to the residence of the plaintiffs it kept the plaintiffs in constant dread and fear, and you shall further find that because of this proximity of defendant's track to plaintiff's house and because of the soot, cinders and smoke the plaintiffs' house was rendered less valuable as a residence, and made the house uncomfortable and disagreeable to its occupants, the plaintiffs, then these facts and circumstances, if proven by the greater weight of the evidence, would make the acts of defendant a nuisance."

These instructions, we think, are sustained by the authorities which we have cited in regard to the ruling upon the demurrer. They fairly present to the jury the averments contained in the complaint upon which there was testimony; in fact, there was no contradictory testimony in respect to the damage sustained by plaintiffs. Several of defendant's witnesses corroborated the plaintiffs' evidence.

His Honor further instructed the jury: "Or, if you shall find from the evidence, and by the greater weight of evidence that the defendant in operating its engines and cars upon the spur-track on the lot adjoining the plaintiffs' lot, and in so doing you find that its engines emitted such smoke, cinders, and threw out such smoke and cinders through the windows and doors of the plaintiffs' house, and injured the plaintiffs' property, their household and kitchen furniture, the plaintiffs would be entitled to recover for damages thus sustained." Defendant insists that in this instruction his Honor eliminated the question of negligence and permitted the plaintiffs to recover damage to their furniture for smoke, cinders, etc., emitted from the engines. The charge must be so read that each portion shall be construed in the light of the whole. While it is true that for smoke, cinders, etc., emitted by engines in the ordinary operation of the business of defendant, no action lies, yet when, as in

(316) this appeal, there is evidence that the engines were used upon a structure and under conditions which the jury have found to be negligent, it would seem that the damage inflicted by them is proper to be considered by the jury. The instruction is in accordance with the opinion in *R. R. v. Baptist Church, supra.* The testimony in regard to the damage sustained from this annoyance was clear, and, taken in connection with all the facts in the case, we think it was competent for the jury to consider it in fixing the damage. In regard to the measure of damages, his Honor instructed the jury that they should consider all of the circumstances, the depreciation in value of the plaintiffs' home as a dwelling during the three years next preceding the bringing of the action; the inconvenience, discomfiture and unpleasantness sustained. The instruction in this respect is fully sustained by the authorities. It seems to have been drawn with reference to the language of *Judge Field* in the *Church case.* We find in all that is said in that case authority for the ruling of his Honor. While we have carefully examined a number of cases cited in defendant's brief, we have found no other so nearly analogous to this appeal. While recognizing the general principles governing the liability for railroads to actions for nuisances, it is founded upon sound reason and principles of manifest justice. The exceptions in regard to the admission and rejection of testimony were not pressed in this Court, and we do not find in them any reversible error.

The case was tried upon the theory of a negligent and unreasonable use of the powers conferred upon defendant by its charter, and, as we have seen, the very great weight of authority recognizes this limitation upon the maxim that no action lies for "doing a lawful thing in a lawful way." It is difficult to conceive how the law could be otherwise or how it can be said that to do any act, however lawful, without a due regard to the rights of others to be affected thereby is doing such act in a "lawful way." While large powers are of necessity granted to rail-

(317) way companies in the construction and operation of the business in which they are engaged and by which, when properly restrained, the public welfare is promoted, it would be contrary to fundamental principles of law and conceptions of natural justice to say that the Legislature will, or can, confer upon any person, either natural or corporate, absolute and uncontrolled power to injure or destroy the property of the citizen without making compensation. No matter how extensive the power conferred, it must not be exercised in an unreasonable or negligent way so as to injure others in their enjoyment of their property. Within this limitation the principle of immunity from lia-

bility for "doing a lawful thing in a lawful way" is sound and salutary; without the limitation, it confers abitrary power to be exercised in an arbitrary manner.

The effect of the judgment upon the demurrer to the first complaint, as an estoppel, is not presented by any pleadings. The defendant answered the amended complaint and did not set up the judgment upon the demurrer. The request to amend was denied. The exception to his Honor's refusal to hold with defendant in that respect can not be sustained. We find upon an examination of the entire record,

No Error.

Cited: Hickory v. R. R., 143 N. C., 460; *Stewart v. Lumber Co.*, 146 N. C., 106; *Staton v. R. R.*, 147 N. C., 442, 433; *Dorsey v. Henderson*, 148 N. C., 425; *Staton v. R. R.*, 153 N. C., 434.

(318)

THOMASON v. RAILROAD.

(Filed 16 October, 1906.)

Railroads—Right-of-Way—Negligence—Damnum Absque Injuria—Side tracks—Roundhouses—Pleadings.

1. When a railroad company acquires a right-of-way, in the absence of any restrictions either in the charter or the grant, if one was made, it becomes invested with the power to use it, not only to the extent necessary to meet the present needs, but such further demands as may arise from the increase of its business and the proper discharge of its duty to the public.
2. A railroad company may, if necessary to meet the demands of its inlarged growth, cover its right-of-way with tracks and, in the absence of negligence, operate trains upon them without incurring, in that respect, additional liability either to the owner of the land condemned or others; and it is immaterial that it has become since its organization a branch of a great trunk line.
3. A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the Court can see that there has been a breach of duty, is defective and open to demurrer.
4. While pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability.
5. A person dwelling near a railroad constructed under the authority of law cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it; nor of damage caused by the escape of smoke, cinders, etc., from the engines, if the company has used due care to prevent such escape as far as practicable.

6. The use of its sidetracks by a railroad as a hostelry for the engines of a short branch line is not unreasonable, nor is the fact that they are cleaned, fired and steamed without any roundhouse or smoke-stack sufficient to carry the smoke beyond the adjoining property, unreasonable or negligent.

ACTION by Henry Thomason and wife against the Seaboard Air Line Railway Company, heard by *Jones, J.*, and a jury, at the February Term, 1906, of VANCE.

Plaintiffs alleged that they were and had been for many years (319) the owners of a lot upon which was situate a dwelling occupied by them as a residence in the town of Henderson. That prior to 1887 the Raleigh and Gaston Railroad, being about 96 miles in length, ran near to and its right-of-way abutted upon plaintiffs' lot. That in 1889 the Durham and Northern Railroad was constructed, Henderson being one of its termini. That the original corporations in 1901 were merged into and with other roads formed the defendant corporation. That by such a merger a great through line of railroad was established, more than a thousand miles in length, which has since been greatly increased and the traffic has been such as to greatly increase the burdens upon lands lying along its lines far beyond the damages paid or contemplated in the creation of the Raleigh and Gaston Railroad, for which no compensation has been made. That since plaintiffs' purchase of said lot the defendant and its predecessor, the Raleigh and Gaston Railroad Company, have wantonly and negligently created and maintained and permitted on their premises, adjoining and contiguous to plaintiff's land, such nuisances as to greatly endamage plaintiffs in their comfort, persons and property, by rendering their said dwelling-house and premises unfit and dangerous for occupancy as a place of residence and interrupt their quiet and peaceable occupation thereof; which said nuisances consist in the use of certain side track or tracks immediately in rear of plaintiffs' said premises and within a few feet thereof as a hostlery for storing, standing and keeping the locomotives of the Durham and Northern Division of the defendant's railways when not in use, the yard engine of the defendant at Henderson, and such other engines of the defendant as may for any cause be in Henderson and not in immediate use (Henderson being terminal of said Durham and Northern Division). Here such locomotives were kept at night, and on Sundays and at other times when not in actual service, and cleaned, fired, steamed, and kept in (320) order without any roundhouse or other structure enclosing or covering the same, and without chimneys or smoke-stacks of sufficient height to carry the smoke, steam, dust, cinders and odors above

the surrounding property. From the engines so placed, tended and handled there were daily and many times during the day and night the noise of escaping steam, the ringing of bells and blowing of whistles; in summer when the doors and windows of plaintiffs' said dwelling-house were open for light and air, smoke and cinders, ashes and dust were discharged and blown from such locomotives in and through the doors and windows, settling upon the occupants of the house and upon the furniture and furnishings, and soiling clothes, bedding, curtains and other articles therein, and accompanied by foul and offensive odors, which tainted and corrupted the atmosphere and rendered the dwelling-house and premises of plaintiffs unfit for habitation, whereby plaintiffs were greatly annoyed, inconvenienced, discomforted and damaged both in their person and their property; further, the defendant, as plaintiffs are advised and believe, without authority in their charter to engage in such business, held a lot of land in excess of its right-of-way, adjoining plaintiffs on the northeast, and let the same as a coal and wood yard and suffered the lessee or occupant thereof to set up thereon, and to maintain and operate a steam-boiler without spark-arrester, engine and circular saw, near the line of plaintiffs' lot, near their front door and within thirty or forty feet of their sleeping-room, and plaintiffs were greatly and continuously annoyed and disturbed by the noise therefrom, and their fences, out-houses and dwelling were greatly in danger from fire.

To the foregoing cause or causes of action the defendant demurred *ore tenus*. The demurrer sets forth:

"1. The defendant demurs to so much of the plaintiffs' complaint as alleges damage 'from smoke, noise, odors, vibrations resulting from the operations of the defendant's railroad,' because such allegation does not state a cause of action, inasmuch as the Seaboard Air (321) Line Railway is authorized by law to operate a steam railroad, and the smoke, noise, odors and vibrations complained of are the results of the proper operation of such road, and the damage thereform is *damnum absque injuria*.

"2. The defendant demurs to so much of the plaintiffs' complaint as alleges damages from fright or nervous trouble resulting therefrom, for failure to state a cause of action, because fright, unaccompanied by physical injury, is not an element of damage.

"3. The defendant demurs to so much of the plaintiffs' complaint as alleges injury from the operation of a steam-boiler and engine and circular saw on the defendant's property adjoining the plaintiffs' lot, for failure to state a cause of action, because, as is alleged, the said

lot was leased for the purpose of establishing thereon a coal and wood yard, which is a lawful business when properly operated, and the defendant is not liable for any damage resulting from a nuisance created by the tenant in the operation thereof.

"4. The defendant demurs to so much of the plaintiff's complaint as alleges damage by the construction of sidetracks into and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct sidetracks for the accommodation of the authorized enterprises constructed and operated along its right-of-way, and it is not liable for damages resulting from the lawful performance of such duty."

The defendant demurs to the sixth allegation of said complaint because the same fails to state a cause of action.

His Honor sustained the demurrer, rendering judgment as follows: "After due consideration, it is ordered and adjudged that the first, so far as it applies to the main line, and second, third and fifth
(322) causes of demurrer be and the same are hereby sustained." Judgment accordingly. Plaintiffs excepted and appealed.

H. M. Shaw and *T. M. Pittman* for the plaintiffs.
Day & Bell, Murray Allen and *J. H. Bridgers* for the defendant.

Plaintiffs' appeal.

CONNOR, J., after stating the case: Before proceeding to discuss the principal question presented upon plaintiffs' appeal, it will be well to notice the suggestion made in the complaint that defendant's right to use its right-of-way is limited by conditions existing at the time of the organization of the Raleigh and Gaston Railroad Company and the length of its track when completed. Whatever may be the extent of the rights acquired by the corporation against the owners of the land condemned, when a new corporation is formed by consolidation and merger with other corporations, pursuant to authority conferred by the Legislature, we cannot perceive how the plaintiffs, whose land, so far as appears, was never condemned and no right-of-way acquired over it, can complain of the enlargement of the business of the company. The right of defendant to operate a railway, carrying on the business of a common carrier, with all of its incidental powers and duties, is derived from the statute authorizing the consolidation and the merger effected

pursuant thereto. Private Laws 1901, ch. 168; *Spencer v. R. R.*, 137 N. C., 107. Defendant succeeded to the rights of the Raleigh and Gaston Railroad Company and took them unimpaired. *Dargan v. R. R.*, 113 N. C., 603. It would seem that, upon the reason of the thing and from the nature of and the purpose for which the powers are granted, when the company acquired the right-of-awy, in the absence of any restrictions, either in the charter or the grant, if one was made, it became invested with the power to use it, not only to the extent necessary to meet the then present demands, but such further demands as arose from the increase of its business and the proper discharge of its duty to the public. Any other construction of its charter, (323) in this respect, would defeat the very purpose for which it was created—the growth and development of the resources of the country through which it was constructed. It would seriously interfere with railroads in the discharge of their duty to the public, in a country the population and business of which are rapidly increasing, if because, to meet and encourage these conditions, they doubled their tracks, erected larger depots, made connections with branch lines, etc., new rights of action accrued against them in regard to the use of their right-of-way.

It is immaterial, for the purpose of deciding this appeal, that the Raleigh and Gaston Railroad, orginally only ninety-six miles in length, has became a part of a great trunk line of one thousand miles, with branch lines connecting at Henderson and other points. It may, if necessary to meet the demands of its enlarged growth, cover its right-of-way with tracks and, in the absence of negligence, operate trains upon them without incurring, in that respect, additional liability either to the owner of the land condemned or others. We therefore attach no weight to the fact that the Raleigh and Gaston Railroad Company has became a part of the defendant's system of roads, or that the Durham and Northern has formed a physical connection with it as a part thereof.

Plaintiffs say that his Honor was in error in sustaining the demurrer, because they have alleged that the nuisances complained of were wantonly and negligently created and maintained. As we have seen in the discussion of defendant's appeal in this case, if this is true, the defendant cannot maintain the position that it is "doing a lawful thing in a lawful way," for it can never be lawful to use or exercise any power or right in a wanton and negligent way, and, for any damage inflicted thereby, a right of action accrues to the injured party. It be-

comes, therefore, necessary to ascertain whether the conduct com-
(324) plained of is so characterized by plaintiffs. It is undoubtedly true that plaintiffs allege that defendant has "wantonly and negligently created, maintained and permitted on their premises, adjoining and contiguous to plaintiffs' said land, such nuisances," etc. If the allegation had ended there, it is clear that the defendant could have successfully interposed a demurrer, or at least demanded that the plaintiffs specify the matters and things which they claimed constituted a nuisance. A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the Court can see that there has been a breach of duty, is defective and open to demurrer. *Hagins v. R. R.*, 106 N. C., 537; *Mizzell v. Ruffin*, 118 N. C., 69. The learned counsel well knew this elementary rule of pleading, and he therefore, after making the general averment, proceeds to say, "which said nuisances consist in the use of certain sidetracks," etc. It will be observed that it is not alleged that the said sidetracks were negligently constructed or used. The evident purpose of the plaintiff was to allege that, by using said sidetracks, in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance. This theory runs through the complaint in the statement of the cause of action to which his Honor sustained the demurrer.

It is manifest that, in stating their cause of action in respect to the use of the coal-yard, the construction and use of the spur-track, trestle, etc., a different theory is advanced. They allege "that without authority in the charter to engage in such business defendant held a lot in excess of its right-of-way, etc., and let the same, as a coal and wood yard." They next allege that, upon said lot, defendant negligently maintained a trestle; that upon two occasions coal cars were negligently forced over the end of said trestle; that they were negligently permitted to re-
main in such position; that on another occasion the fast train
(325) negligently ran into said spur-track and collided with locomotives. It will be noticed that in respect to each and every act specified as constituting the nuisance connected with the erection and use of the spur-track, negligence is specifically alleged. We are brought to the conclusion that, by a proper construction of the complaint, in respect to the first cause of action, the plaintiffs have alleged and intended to allege that, by using the sidetracks in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance, or, to express the thought in different form,

that the use of tracks for the purpose set out constitutes, as a matter of law, a wanton and negligent nuisance.

While pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability. The cases bearing upon the subject are collected in Clark's Code, sec. 233, p. 194. Considered from this point of view, the appeal presents a question the solution of which is of great importance to the citizens and railroads of this State. It is not of first impression, having been frequently discussed and decided in other jurisdictions. *Chief Justice Beasley* in *Beseman v. R. R.*, 50 N. J. L., 235, says: "If a railroad by the necessary concomitants of its use, is an actionable nuisance with respect to plaintiff's property, so it must be as to all property in its vicinity. It is not only those who are greatly damnified by athe illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all. * * * The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the enjoyment of property in their neighborhood; and, consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus (326) molested." He proceeds to show that if such actions may be maintained, it would be impracticable to operate railroads.

In *R. R. v Baptist Church,* 108 U. S., 317, upon authority of which we held defendant liable on its appeal, *Field, J.,* drawing the distinction, says: "Undoubtedly, a railway over the public highway * * * may be authorized * * * and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria.* The private inconvenience, in such case, must be suffered for the public accommodation." The principle is well stated by Pollock in his work on Torts, p. 128: "A person dwelling near a railway constructed under the authority of Parliament for the purpose of being worked by locomotive engines, cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it; nor of damage caused by the escape of sparks from the engines, if the com-

pany has used due caution to prevent such escape as far as practicable. * * * If an authorized railway comes near my house, and disturbs me by the noise and vibration of the trains, it may be a hardship to me, but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and without noise and vibration trains cannot be run at all." The principle is illustrated by the maxim that "no action can be maintained for loss or inconvenience of an authorized thing done in an authoritzed way."

The question involved in this appeal is very clearly stated (327) and discussed in *R. R. v. Armstrong,* 71 Kan., 366, and the conclusion reached, "That the company having been specifically authorized to make the alleged improvement in its road-bed, in the absence of any charge that it was unnecessary, or unskillfully done, or made at a place not authorized, it is not liable for damages as for the maintenance of a nuisance." The Court thus states the reason upon which the law is founded: "The damages alleged to have been sustained in this case are purely incidental and arise from a proper operation of the defendant's locomotve engines. Railroad companies are public corporations organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience to the public and discomfiture and possible damages to person living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual for the public good."

In *Carroll v. R. R.,* 40 Minn., 168, the same conclusion is reached, the Court saying: "Railroads are a public necessity. They are always constructed under authority of law. They bring to the public great benefits. Operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads, streets, and the like. One person may suffer more from these than another. * * * But the difference is only in degree, and not in kind. * * * If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible." *Parrot v. R. R.,* 10 Ohio St., 627. The question underwent a thorough investigation in *Fisher v. R. R.,* 102 Va., 363, and the conclusion reached, with the authorities upon which it is sustained, are cited and discussed by *Keith, J.*

In *Jones v. R. R.,* 151 Penn. St., 30 (47), *Williams, J.,* says: (328) "The business authorized by the charter of a railroad corporation is the carriage of persons and goods. The work of construction is provided for as an indispensable preliminary, * * *

but in the operation of its road a company is liable only for negligence or malice. Smoke, dust and noise are the usual and, in the present state of knowledge on the subject, the necessary consequence of the use of steam and the movement of trains, just as noise and dust are the consequences of the movement of drays and carts over an ordinary highway. The resulting inconvenience and discomfort are, in both cases, *damnum absque injuria.*" *Romer v. R. R.*, 75 Minn., 211.

In *Bates v. Holbrook,* 171 N. Y., 460, *Bartlett, J.,* says: "Damages which are inflicted upon abutting property-owners in the performance of public works, reasonably and properly conducted, are regarded as *damnum absque injuria.* This exemption rests upon the necessity of the situation and commends itself to all reasonable minds." For an able and exhaustive discussion of the question, see *Austin v. Augusta Term. Co.,* 108 Ga., 671; *Transportation Co. v. Chicago,* 99 U. S., 635. To the same conclusion the authors of the text-books have arrived. Baldwin Am. R. R. Law, 28.

Judge Elliott says: "A railroad company authorized by the Legislature to construct and operate a road for the public use is thereby relieved from many of the consequences attending the construction and operation of a road by an individual without such authority; and it may, perhaps, be stated as a general rule that, so long as it keeps within the scope of the powers and authority granted, a railroad company is not liable either civilly or criminally for a nuisance which is the necessary result of the construction and operation of its road in accordance with its charter." Elliott on Railroads, sec. 718; 21 Am. and Eng. Enc. (2 Ed.), 737; *R. R. v. Truman,* L. R., 11, App. Case (1886), 49; *Adams v. R. R.,* 110 N. C., 325.

While not directly in point, the principle upon which defendant claims immunity from liability is recognized by this (329) Court in several cases. In *Morgan v. R. R.,* 98 N. C., 247, the action was for frightening plaintiff's horse. *Merrimon, J.,* said: "The defendant certainly had the right on its roadway to move its locomotives with or without cars attached to it, in the orderly course of such work, to and fro in making up its trains, etc. The noises ordinarily—naturally—incident to this work, when done, when it may be lawfully done, do not constitute negligence nor nuisance. * * * Harm thus sustained is *damnum absque injuria.*" *Harrell v. R. R.,* 110 N. C., 215. In *Sawyer v. Davis,* 136 Mass., 229, the same principle is announced.

It will be observed that plaintiffs do not allege that defendant has exceeded its right-of-way. The complaint is that it has used its side-

track as a hostlery for the engines of the Durham and Northern Division of defendant. We may take notice of the fact that the Durham and Northern is a short branch line, and but few engines can be used on it. We cannot see that the use by defendant of its sidetracks for the purpose stated is unreasonable. It is said they are kept there at night and on Sundays, and cleaned, fired and steamed without any roundhouse enclosing or covering the same. We cannot see anything unreasonable or negligent in so using and handling the engines. There is no suggestion that by carelessness or want of due care and caution any other or different noises are made than is usual or necessary in caring for the engines and preparing them for use. It is said that no smoke-stack is provided of sufficient size to carry off the smoke, dust, etc., above the surrounding property. There is no suggestion that the smoke-stacks attached to the engines are not such as are generally in use. It would hardly be insisted that a railroad company is required to erect and maintain a roundhouse at every station where a short branch or feeder makes connection with it. There is no allegation that it is usual to do so. We are not able to say, as a matter of law, that defendant should have a roundhouse or smoke-stack suffi-
(330) cient to carry the smoke beyond the adjoining property. It may be that if, to protect plaintiffs' property from dust, smoke and cinders, a way was provided to cast them upon the premises of others, not so near the track, a liability, to them, would be incurred. Plaintiffs say that from the engines so placed, tended and handled, they were annoyed by the ringing of bells, blowing of whistles, smoke, cinders, etc. These are all, as we know from observation and experience, the usual, ordinary, and, to a certain extent, necessary concomitants of using and operating locomotive engines. To subject the company to actions for damages for them would be to practically render them useless.

While the law will afford a remedy for damages sustained by the negligent or unreasonable use of these powerful agencies of industrial life and progress, to impose unreasonable restrictions would be unwise. In this day when almost unlimited legislative control over these public agencies is being asserted and sustained by the courts, by the requirement of larger facilities and greater security for travel and transportation by double tracks, union depots, block systems, and many other modern devices, it would seriously interfere with such control to put new and unreasonable restrictions upon their mode of operation. Again, this and all other courts have imposed upon railroads very stringent rules requiring them to give warning of the movement of their engines by

ringing bells, sounding whistles, etc. Failure in this respect, followed by injury to persons upon the track, results in large verdicts for damages. The law must be reasonable and just; it would be neither if, for demands on the one hand, it subjected the corporation to actions for nuisances on the other. The slightest reflection will show the wisdom of the law in this respect.

We have treated the plaintiffs' complaint as in an action for a nuisance and not for compensation demanded by reason of a constructive "taking" of his property. We would not be understood as abating in any degree the fundamental principle of law, that no matter how urgent the demands of the public may be or how nec- (331) essary to the progress of the country, no man's property may be taken without compensation. In those cases wherein the right is asserted to flood lands, or otherwise appropriate or subject them to an additional burden, the question of negligence is not involved. Courts uniformly hold that where the action is for damages, by way of compensation which, when paid, secures an easement, the owner of the property is entitled to recover.

In *Staton v. R. R.*, 111 N. C., 278, the injury for which compensation was sought was, as said by *Shepherd, C. J.*, equivalent to a "taking" and an appropriation, hence the question of negligence was not presented. This theory was adopted in *Ridley v. R. R.*, 118 N. C., 996, and *Parker v. R. R.*, 119 N. C., 677.

Douglas, J., in *Beach v. R. R.*, 120 N. C., 498; *Lassiter v. R. R.*, 126 N. C., 509, and *Geer v. Water Co.*, 127 N. C., 349, says that in such cases permanent damages should be assessed, and, when paid, the defendant acquires an easement to so use the lands. This must in the nature of the case be so. There is no statutory mode prescribed for a railroad to acquire an easement by condemnation to flow water over adjoining lands. The necessity to do so, to protect and render safe its road-bed, is apparent; hence the courts will not enjoin the company. *R. R. v. Mining Co.*, 112 N. C., 661; *Merrick v. R. R.*, 118 N. C., 1082. As said by *Judge Douglas*, the defendant cannot, by law, acquire a right to continue a legal trespass, by paying damages; hence the law permits the acquisition of the easement, in such cases, by the payment of permanent damages, the judgment having that effect. *Brown v. Power Co.*, 140 N. C., 333. It is manifest that no easement can be acquired to emit smoke, cinders, make noises, causing vibrations, etc.

Beasley, C. J., says: "The laws, in providing for the acquisition and condemnation of lands, authorize the taking of such lands only as are requisite for the necessary structures of the road and the ac- (332)

commodation of its business, and require the payment of damages only to that class of land-owners. These corporations are not permitted to sequester any other property, nor to compensate for other damages. The central idea of the system is that for incidental damages these companies are not responsible." When it is said that, in contemplation of the law, there is no wrong without a remedy, it must be noted that the term "wrong" has a legal signification distinct from "damage," and is synonymous with *"injuria"*—signifying a legal injury—hence, the maxim *damnum absque injuria,* which "is used to designate damage which is not occasioned by anything which the law esteems an injury."

The same argument which is made to sustain this action may, with equal force, be made in every case wherein this maxim is invoked. It is an illustration of the truth that the law is not a system of logical or of ethical perfection, but a practical science, and that almost all of its general principles, however wide their application may seem to be, have on all sides their reasonable limitations. The value of property is constantly being affected by the conduct of adjoining owners. Changes in the value of property in towns and cities are constantly being made by the demands of trade, manufacturing, channels of travel and many other causes. So long as they are done within legal rights and without negligence there is "damage," but no *injury,* therefore no action. Of course, if the business engaged in is *per se* wrongful, hurtful to health or otherwise destructive of legal rights, another maxim of the law, *sic uture tuo ut alienum non laedas,* applies. Without further pursuing the interesting question involved, we find, upon principle and in the light of the authorities, no error in his Honor's ruling sustaining demurrer.

The judgment must be

Affirmed.

Cited: Dewry v. R. R., 142 N. C., 401; *Taylor v. R. R.,* 145 N. C., 403, 406; *Barger v. Barringer,* 151 N. C., 446; *R. R. v. Goldsboro,* 155 N. C., 370; *Earnhardt v. R. R.,* 157 N. C., 365; *Power Co. v. Wissler,* 160 N. C., 273.

WILSON v. RAILROAD.

(Filed 16 October, 1906.)

Railroads—Negligence—Kicking Cars—Running Switch—Instructions—Proximate Cause—Violation of Ordinance—Damages, Compensatory and Punitive—Contradictory Instructions.

1. It is negligence to permit a car to be "cut loose" and roll on un- (333) controlled by any one across a much used crossing.
2. In an action against a railroad for injuries received at a street crossing, where there was evidence that the car was "kicked" across the street to make a running switch, with no one on it, and that the plaintiff was doing all he could to safeguard himself, a motion of nonsuit was properly overruled.
3. An objection to an instruction that it ignored the necessity for determining the proximate cause of the injury is not well taken, where the jury had just been told in unmistakable terms that they must find "that such negligence produced the injury complained of," and again "that such negligence was the proximate cause of the injury," before they could answer the first issue "Yes," as the charge must be taken in its entirety, and not in "broken doses."
4. The use in an instruction of the language that "the fact that the plaintiff was deaf does not make him an outlaw," when taken in connection with the charge which preceded it, could not have made the impression upon the jury that the Judge was so hostile to the defendant as to intimate an opinion that it was treating the plaintiff as an outlaw, and does not necessitate a new trial.
5. An exception to an instruction "that if the jury find that the defendant was operating the train which injured the plaintiff in violation of a city ordinance, and that it did not have a man on the end of the car as required by said ordinance, then this alone is a sufficient circumstance from which the jury may infer negligence on the part of the defendant, and to justify them in answering the first issue 'Yes,'" is without merit.
6. An instruction that "in considering the question of damages and in the attempt to reach the amount which the jury will award, they may take into consideration the question whether the injury was due to such negligence which amounts to a little more than an accident, or, such negligence that shows wanton disregard of the rights of the plaintiff and if they find that the conduct of the defendant has (334) been such as to indicate a reckless disregard of its duty to the plaintiff, they may, if they feel disposed, increase the allowance of damages for that reason," is erroneous where there was neither allegation nor evidence that the injury was wilfully, wantonly and recklessly inflicted in utter disregard of plaintiff's rights.
7. Where the Court charged as to compensatory damages and then instructed the jury practically that punitive damages might be allowed, and "at the conclusion of the whole charge, counsel for plaintiff asked if the Court would not charge that plaintiff could recover punitive damages, and the Court said that it would charge the jury that they

must not allow punitive damages," these contradictory instructions upon the issue of damages entitle the defendant to a partial new trial; for if the Court intended to correct his charge, it was his duty to have called the attention of the jury to it as a correction.

ACTION by C. D. Wilson against the Atlantic Coast Line Railway Company, heard by *Webb; J.*, and a jury, at the May Term, 1906, of NEW HANOVER.

This was an action to recover damages for an injury received by the plaintiff at the crossing of the defendant's tracks over Nutt Street in the city of Wilmington. The Court submitted the three issues relating to negligence, contributory negligence, and damage. The jury found the issues in favor of the plaintiff and assessed his damages. From the judgment rendered, the defendant appealed.

Rountree & Carr, W. J. Bellamy and *W. Kellum* for the plaintiff.
Davis & Davis for the defendant.

BROWN, J. The plaintiff was walking on Nutt Street in the city of Wilmington, at a locality where many of defendant's tracks cross it leading to the wharves on the Cape Fear River, when he was run into by a car and knocked down and injured. There are no exceptions to the introduction of evidence, and the errors we are asked to (335) review are confined to the charge of the Court.

The evidence is very conflicting as to how the injury was occasioned, as to speed of the moving car, as to whether it was an attempt to make a running switch, and as to the vigilance of the flagman and the other servants of the company. There was evidence introduced by plaintiff tending to prove that the crossing is a dangerous one; that there are some fifteen tracks crossing Nutt Street there; that trains and engines are constantly going in different directions at the same time on some of these tracks; that the street leads across these tracks to the Seaboard Air Line depot, and that there is much traffic and passing along it; that there are no gates to close when engines and trains are passing and only one flagman whose duty it is to warn passers of the approach of trains.

Plaintiff testifies that on 16 January, 1905, he had crossed thirteen tracks and was looking out for the cars; that he saw some up towards the bridge standing still; that he then looked towards the compress for cars on that track; that he continued to walk on, looking for cars, when he was hit by one unawares and badly injured; that the car was a flat-car with no one on it; that Mr. Hankins, the crossing-flagman,

was in a little house 125 feet away, and if he saw him he did not come to his rescue. Plaintiff also offered some evidence tending to prove that the flat-car which struck him was a loose car which had been "kicked," in railroad parlance, from the train for the purpose of making a "running switch;" that the car was moving fast across Nutt Street when it hit plaintiff, and that "there was no one on it or near it;" and one witness said that "there was no flagman at all." There was strong contradiction of this evidence by defendant's witnesses, but it is unnecessary to set out the tenor of their evidence.

The defendant offered, also, evidence tending to prove contributory negligence upon the part of the plaintiff.

It is not to be doubted that upon plaintiff's showing the defendant was guilty of negligence, and in the absence of con- (336) tributory negligence the plaintiff is entitled to recover damages.

The attempt to make a running switch across a much-frequented street is not only a negligence, but a most dangerous and unwarranted operation, and has been so held by a number of courts: *Bradley v. R. R.*, 126 N. C., 735; *Brown v. R. R.*, 32 N. Y., 597; *Fulmer v. R. R.*, 68 Miss., 355; *R. R. v. Summers,* 68 Miss., 566; *French v. R. R.*, 116 Mass., 537; *R. R. v. Garvey,* 58 Ill., 83; *R. R. v. Baches,* 55 Ill., 379.

It matters not whether the purpose was to "shunt" the car off on a switch or to gave it force enough to roll along on the same track; it is negligence to permit a car to be "cut loose" and roll on uncontrolled by any one across a much-used crossing.

The jury having taken plaintiff's version as the true one, there is sufficient evidence to uphold their finding on the first issue. Upon the issue of contributory negligence the evidence is conflicting. The evidence of the plaintiff, carefully examined, tends to prove that he was exercising all the care a man in his condition and circumstances could well exercise. There are a great many tracks along there, and the most prudent of men may get confused; but the plaintiff states how he looked, and where he looked, and it is evident from his statement he was doing all he could to safeguard himself. The plaintiff's evidence, if believed, abundantly justified the verdict of the jury. It is therefore our opinion that his Honor properly overruled the motion to nonsuit. It is not necessary that we should set out his Honor's charge. It is very clear and comprehensive, stating with fullness and fairness the contentions of plaintiff and defendant and then instructing the jury clearly as to the law upon the different phases of the evidence.

At the close of the evidence the Court gave certain instructions
(337) at request of plaintiff, and in the words of the prayers, which are excepted to. Among others, he gave the following:

"If the jury find from the evidence that the crossing along Nutt Street, having fifteen or more tracks upon which engines and cars were constantly shifting, was used by a very large number of people in the conduct of their business, then it was the duty of the defendant to furnish to persons desiring to cross the railroad at Nutt Street, in the city of Wilmington, either on foot or with vehicles, a reasonably safe method of crossing, either by way of bridges, gates, an adequate number of flagmen or watchmen, or in some other way. That even if the jury should find from the evidence that the plaintiff was negligent in not using ordinary care in looking and listening for approaching trains, still the jury should answer the first issue 'Yes' if they further find from the evidence that the defendant could have prevented the injury by the use of means at hand or that it could have had at hand, or the use of reasonable care and diligence; and the fact that the plaintiff was deaf does not make him an outlaw, neither does it lessen the responsibility of the defendant company to warn him of approaching danger."

The first objection made to this instruction is that it ignores the necessity for determining the proximate cause of the injury. Taken alone, the criticism may be well founded. But the charge must not be taken in sections, but as a whole. The jury had just been told in unmistakeable terms that they must find "that such negligence produced the injury complained of," and again, "that such negligence was the proximate cause of the injury," before they could answer the first issue "Yes." We think his Honor fully explained the doctrine of proximate cause, so as to leave no misapprehension in the minds of the jury. The other objection is by no means trivial. It relates to the words, "that the plaintiff was deaf does not make him an outlaw." We think

the use of such language in the prayer for instructions un-
(338) fortunate, to say the least; but we cannot think when repeated from the bench that the jury inferred that his Honor was stating it to be his opinion that defendant had treated plaintiff as an outlaw. We do not place any such construction upon it, and we do not believe the jury did. The charge which preceded this particular instruction was so clear, fair and impartial in its general tenor that we are sure the jury did not receive the impression that the Judge was so hostile to defendant as to intimate an opinion that it was treating plaintiff as an outlaw. While it was not well advised in the Court to have adopted

such language, under all circumstances we do not think it necessitates a new trial on that ground.

Another prayer of plaintiff given and excepted to is as follows:

"That if the jury find from the evidence that the defendant company was operating the train which injured the plaintiff in violation of an ordinance of the city of Wilmington, and that it did not have a man on the end of the car approaching the crossing, as required by said ordinance, then this alone is a sufficient circumstances from which the jury may infer negligence on the part of the defendant, and to justify them in answering the first issue 'Yes.'"

It is insisted that this instruction contravenes the rule laid down in *Smith v. R. R.*, 132 N. C., 824, and *Duval v. R. R.*, 134 N. C., 332, where it is held that running trains through cities and towns at a greater speed than is allowed by the municipal ordinances is some evidence of negligence to be submitted to the jury. The ordinance of the city of Wilmington requiring that the railroad company shall have a man on the end of a car approaching this crossing is an affirmance of the general law of the State. It did not declare anything to be law which was not already in force. In giving this instruction the Court did not tell the jury that a violation of a city ordinance was *per se* negligence, but that the jury might infer negligence from the circumstance that no man was on the end of the car. This was (339) substantially what the Court had already charged, and the giving of this further instruction was unnecessary and harmless. It is true, in this portion of the charge there is no reference to proximate cause, but we repeat that the charge must be taken in its entirety and not in "broken doses." It is unnecessary to lengthen this opinion by considering in detail the prayers of defendant upon the issue of contributory negligence. Most of them are substantially given in the charge of the Court, and many of them were given *verbatim*. In instructing upon this issue his Honor was eminently just to defendant, and applied the law applicable to the differing phases of the evidence with clearness and accuracy. We discover no error in any instruction he gave or omitted to give as to contributory negligence.

After charging the jury fully and correctly as to actual or compensatory damages, the Court, at request of plaintiff, gave the following special instruction:

"In considering the question of damages, and in the attempt to reach the amount which the jury will award, if they are satisfied by the evidence that the plaintiff is entitled to any damage, they may take into consideration the question whether the injury was due to such negli-

gence which amounts to a little more than an accident, or such negligence that shows wanton disregard of the rights of the plaintiff; and if they should find in this case that the conduct of the defendant has been such as to indicate a reckless disregard of its duty to the plaintiff, they may, if they feel disposed, increase the allowance of damages for that reason."

This is an instruction that plaintiff is entitled to recover punitive damages in some phases of the evidence, and is erroneous. There is no allegation in the complaint, and no evidence that the injury was wilfully, wantonly and recklessly inflicted in utter disregard of plaintiff's rights. There is nothing in the facts of this case to bring it within the principles laid down in *Holmes v. R. R.*, 94 N. C., (340) 318, cited by plaintiff. Neither is *Purcell v. R. R.*, any authority for awarding punitive damages to plaintiff. That case was overruled in *Hansley v. R. R.*, 115 N. C., 603, and reinstated upon a rehearing of same case, 117 N. C., 570, upon another ground than that given in the original opinion, viz., that Purcell was treated with indignity and contempt in rushing by the station when there was room for passengers on the train. In actions *ex delicto* the motive of the defendant becomes material. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to such as are called compensatory or actual. 1 Sutherland on Damages, sec. 373; 5 Am. and Eng. Enc. (1 Ed.), p. 21, where the authorities are collected. *R. R. v. Arms*, 91 U. S., 489, and the elaborate opinion of *Mr. Justice Avery* in *Hansley v. R. R.*, 115 N. C., 605.

It is contended that the Court finally instructed the jury that punitive damages should not be allowed in this case, in that the record disclosed that "At the conclusion of the whole charge, counsel for plaintiff asked if the Court would not charge that the plaintiff could recover punitive damages, and the Court said it would charge the jury that they must not allow punitive damages."

As we have held, his Honor instructed the jury in the previous part of his charge practically that punitive damages might be allowed. If he intended this as a correction of the former part of his charge, it was his duty to have called the attention of the jury to it as a correction. It would seem from this colloquy between Judge and counsel that both thought that the Court had not already instructed practically that the jury could award exemplary or punitive damages. The Court ought to have defined what is meant by punitive damages, for as it is a technical legal term, the jury might not have considered that his Honor had already charged in effect that they could award them.

So we think that, notwithstanding what the Court stated at the conclusion of the charge, the jury might have felt at liberty to (341) go beyond compensatory damages under the authority of what had been previously said. They had a right to suppose that if his Honor intended to correct his charge he would have called their attention to it as a correction.

The jury were, therefore, left at sea, between contradictory instructions upon the issue of damages, which, under numerous decisions of this Court, entitles the defendants to a partial new trial.

In *Edwards v. R. R.*, 132 N. C., 101, it is said: "It is well settled that when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the Judge states the law correctly and when incorrectly."

Edwards v. R. R., 129 N. C., 78; *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 662.

Let one-half the costs of the appeal be taxed against the plaintiff and one-half against the defendant. It appears that unnecessary portions of the record were sent up at the plaintiff's request. It is ordered that one-third of the costs of printing the record and one-third of the costs of making out the transcript in the Superior Court be taxed against the plaintiff individually.

It is ordered that there be a new trial on the third issue.

Partial New Trial.

WALKER, J., concurring in part: I think it clear that an error was committed as to the issue of damages, in the respect stated in the opinion of the Court, and therefore concur in that opinion, and in the conclusion reached as to that issue. When the Court charged as to compensatory damages and then gave the instruction as to an increase in the allowance of damages by reason of a reckless or wanton disregard of plaintiff's rights, it plainly referred to an enlargement of compensatory or actual damages, and the jury were well warranted in so construing the charge. Es- (342) pecially is this so, in view of the fact that counsel afterwards inquired if the court would hold that the plaintiff was entitled to punitive damages and was told that it would not, and it so instructed the jury. This last instruction was not corrective or explanatory of the first, but was either in direct conflict with it, which would make it a reversible error under *Tillett v. R. R.*, 115 N. C., 662; *Williams v. Haid*, 118 N. C., 481; *Edwards v. R. R.*, 132 N. C., 99; or, if consist-

ent with it, more surely evinced the Court's reference to actual or compensatory damages when, in the former instruction, it told the jury that they might increase the amount of damages if the defendant's conduct was more than merely negligent. The degree of negligence, if there are any degrees, could not, of course, enhance the actual damages.

I am fully convinced there was error in the charge relating to the first issue, and consequently that the new trial should be general. It must be remembered that the expression in the charge, namely, "the fact that the plaintiff was deaf does not make him an outlaw," was used, not by counsel in argument, but by the Court in direct response to plaintiff's request for instructions. In *S. v. Horner,* 139 N. C., 603, a similar remark was made by the Solicitor in his address to the jury when referring to the lawless acts of the defendant. This Court clearly intimated that, if the word "outlaw" had been used in its ordinary or legal sense, and the effect upon the jury of such an abusive epithet had not been counteracted by the Court, a new trial would have followed. But the Solicitor explained that he merely meant to describe the defendant as one who had put himself beyond the reach of the law's process by avoiding arrest, and the word was not used in the sense that he had put himself beyond the pale of the law and forfeited its protection, as in the case of a fugitive from justice for whom proclamation had been made and who may be slain, if he refuses to sur-
(343) render, by any citizen without accusation or impeachment of crime. Revisal, 3183. This Court, in view of the Solicitor's explanation, and of the charge of the Court that the evidence in its most favorable light made the defendant guilty of man-slaughter, of which offense he was convicted, held the remark to be harmless, or at least not "grossly or manifestly prejudicial." But it is also said, in that connection, that the use of any term of reproach, especially in regard to a party to the cause, is not commended, and the clear implication is that but for the explanation of the Solicitor and the charge of the Court, the use of the term "outlaw" would have been good ground for a new trial, the defendant having duly objected to its use. Here the objectionable language is employed *by the Court,* and the fact that it was done at the instance of one of the parties does not neutralize its effect, but rather intensifies it. The logical, if I may not say the inevitable, implication from its use is that the defendant had treated the plaintiff as one who had been deprived of the benefit of the law or excluded from its protection, which is the ordinary and accepted meaning of the word "outlaw." The fair deduction from the remark of the Court is that though he was deaf the plaintiff had certain rights, which

the defendant had ignored, and that instead of recognizing them, it had treated him as an outlaw. It was also the intimation of an opinion that the defendant had acted towards the plaintiff as if he were an outlaw. It was not a direct charge that it had done so, but there is no escape, I think, from such a construction of it, and it is just as harmful as if the accusation had been made in so many words. It conveys but the one meaning. I do not say merely that I think his Honor did not intend so to use the words, but that I know he did not, and I know that counsel did not appreciate, at the time, the force and effect of the language employed in the instruction. Neither Judge nor counsel would advisedly use the expression. It was an inadvertence —a mere slip. But, nevertheless, it had the baneful effect, or (344) may have had it, all the same, and we must look, not at the motive in giving the instruction, but at the probable prejudice actually resulting from it, or that may have resulted from it. We should be careful in the trial of causes to see, not only that parties receive a fair and impartial hearing, but we would give them no reasonable ground to complain that justice has been denied them. There is nothing so calculated to make the "wavering balance shake," as when a remark falls from the Court, though casual or accidental, which even constructively imputes wrong to either side. The slightest intimation from the Court is sufficient to turn the scales against either litigant, and hence our statute, which forbids even a suggestion from the Court upon the facts. We must consider the instruction as it is, and not as it was intended to be. If the objection to this part of the charge is "by no means trivial" and "the language is unfortunate," how can we say that it may not have influenced the jury and turned the scales against the defendant?

My opinion, also, is that there was error in giving the third of the plaintiff's prayers, it being the one fully set out in the opinion of the Court, and which refers to the violation of the city ordinance. The Court thereby instructed the jury that a violation of the ordinance *alone* was sufficient to justify them: 1. In inferring negligence, and 2, in answering the first issue "Yes." In other words, that the violation of the ordinance was a circumstance which, standing by itself, justified them in giving an affirmative answer to the first issue. This goes beyond all of our precedents on this subject, and is, I think, plainly in conflict with them. It has always been held that the violation of an ordinance was merely evidence of negligence, and not negligence *per se*. The effect of this instruction is to make it negligence *per se* or negligence, without reference to any inquiry as to whether it proximately

caused the injury or not or as to whether there was any causal
(345) connection between the violation of the ordinance and the injury. If there was a violation the jury need go no further, but may stop there and answer the first issue "Yes." This instruction eliminated the element of proximate cause, and the error thus committed was not corrected by anything the Court charged generally upon the subject afterwards, for the use of the word "alone" necessarily so restricted their inquiry as to render the other instructions wholly inapplicable. There is another objection to the instruction. It excludes from their consideration the evidence in regard to the flagman, who, it is alleged, was walking in front of the moving car. No case requires absolutely that a watchman should be on the end of the car. If there is one walking in front of it, so much the better for the safety of pedestrains and others crossing the track, and this is, in law, an equivalent for the presence of a lookout on the top, or on a foot-board in front, of the car. I say it excludes this evidence from the case, because the jury are told that the violation of the ordinance alone, and it alone, necessarily without reference to other testimony making in defendant's favor, will warrant a verdict for the plaintiff upon the question of negligence. Therefore, I concur in the opinion so far as it awards a new trial on the issue as to damages, but dissent from the view of my brethren that the defendant is not entitled to a new trial without restriction, and for the reasons I have stated.

As regards the crossing in question, it is a very dangerous one, if the evidence is credible, and the vigilance of the defendant should be proportioned to the danger. From the situation as now presented, it may well be argued that the defendant is bound to extraordinary care in the protection of the public while crossing its tracks at that place, but whether it has used the care in this particular instance which was required of it is a mixed question of law and fact, its liability depending upon the application of well-established principles in the law
(346) of negligence.

CLARK, C. J., concurring: In *S. v. Horner,* 139 N. C., 603, counsel for the State referred to the defendant as an "outlaw." This was held not to be ground for a new trial. Here the Judge charged at request of plaintiff that the plaintiff was *not* an outlaw. Certainly the defendant cannot be hurt thereby. He does not contend that the plaintiff was outlawed.

If there was an incorrect intimation in the charge that the plaintiff could recover punitive damages, this was corrected after the charge

was concluded, by the Judge refusing such prayer when asked by the plaintiff, and the express charge given that the plaintiff could not recover punitive damages. This is not the case of contradictory instructions in the same charge. No intelligent jury could fail to understand that this was the final instruction of the Court. The jury are presumed to be competent and intelligent men—as competent in the discharge of their office of triers of facts as the Judge is taken to be in instructing them upon the law. If so, this last instruction of the Court, made after the charge had been concluded and in refusing a special instruction asked by the plaintiff, could not have failed to impress the jury that punitive damages could not be given by them. But is it entirely clear that the negeligence of the defendant was not so gross as to amount to wilful and wanton neglect of duty? Was there not, indeed, criminal negligence on its part? The use of the public street by defendant in that mode had been so long persisted in, and was so glaringly dangerous, that it might well be that punitive damages would be required to prevent a continuance of the danger. The street had been laid out as such by authority of law. Its primary use, therefore, was for citizens on foot or in carriages. The defendant had a right to use it only subject to the primary right of the public. The defendant had 15 to 21 tracks, laid across this public street, most of which is used for shifting purposes, as it had five shifting en- (347) gines there. One or two tracks, perhaps, were used for carrying freight to the warehouse, or to vessels, at the wharf. The defendant could, and should, have elevated the tracks it used for that purpose above the street, as it has done with the adjacent track used by it for passengers.

And the other tracks used for shifting purposes should have been moved further out, to a shifting yard that would not be crossed by a public street which, by a decree of Court, has been laid out, as this street had been, for the use of the public. The defendant added to its great negligence in maintaining at that point 15 to 21 tracks, crossing a public street on the same grade, not only by having no gates, but by having only one flagman for so may tracks, who could have been of no protection to the plaintiff at the crossing of a distant track. Besides the flagman who was stationed midway these 20 tracks signaled the plaintiff to go ahead, and he was struck by a flying switch, the cars running backward, without a lookout, and in violation of a town ordinance requiring a watchman on a board at rear end of the car 12 inches from the ground.

Such conduct by the deefndant practically compels the citizens need-

ing to use that street to take their lives in their own hand and to "run amuck." It is a practical denial and reversal by the defendant of the decree of Court which dedicated that street primarily to the use of the public. The street thus crossed by so many tracks leads to the depot of the S. A. L. Railway, and was greatly used by the public, both for passengers and in hauling freight, and for the ordinary passing to and fro of the public.

When the defendant's track was laid out some seventy years ago, population and business were small, and the revenues to the company were light. It was not dangerous at that time to lay the defendant's track on a level with the public street, nor did the defendant then have 15 to 21 tracks at this point. The railroad companies must take (348) notice that with the great increase of population and of their traffic it has become criminally negligent to continue to cross on a grade at points where the number of those crossing and their own numerous trains make the use of the street or crossing dangerous to the public. Wilmington now has over 30,000 people, and in the near future will doubtless have 100,000 or more. The use of one of its public streets can not be interfered with by 15 or 21 railroad tracks with constantly moving cars and engines. The people of the city have a right to use their streets with safety. The defendant has no right there except in subordination to the prior right of the citizens to the use of the streets. The defendant should remove its shifting tracks and place its other tracks above the streets. This must necessarily be done sooner or later, and it is questionable whether it is not criminal negligence for railroads to fail to change their tracks and run above or below the roadway at such places as this. Last year the railways in this country killed, according to the published official reports of the United States Government, nearly 10,000 people, and wounded or crippled nearly 90,000 more—a total of nearly 100,000 killed and wounded in one year. So far as this vast amount of suffering and misery can be reduced by proper care—and the relative number killed and wounded in foreign countries is very far less—it is the duty of courts and juries to see that a neglect to do so is properly punished.

Throughout Europe railroads are very rarely permitted to cross a public road, even in remote country districts, and never in or near a town. In Connecticut, Massachusets, and to some extent in New York, railroads have been compelled by statute to change their tracks so as to pass always above or beneath roads and streets used by the public, and to make the change, of course entirely at their own expense. Such statutes have been held constitutional not only by the courts of those

States, but by the Supreme Court of the Union. *R. R. v. Bristol,* 151 U. S., 556; *R. R. v. Kentucky,* 161 U. S., 696; *R. R. v.* (349) *Defiance,* 167 U. S., 99; *Wheeler v. R. R.,* 178 U. S., 324; *R. R. v. McKeon,* 189 U. S., 509. See cases from State courts cited 140 N. C., at p. 229.

Now that their attention has been called to it, doubtless these great corporations, with their great and abundant revenues, derived from the public, and with their constantly increasing number of trains, will feel moved by considerations of humanity, as well as by their own interest, to abolish grade crossings at such places as this and at all others where their longer retention will be inconvenient or dangerous to the public.

Cited: Hickory v. R. R., 143 N. C., 456; *Allen v. R. R.,* 145 N. C., 217; *Gerringer v. R. R.,* 146 N. C., 35; *Wright v. Mfg. Co.,* 147 N. C., 536; *Bordeaux v. R. R.,* 150 N. C., 532; *Vaden v. R. R.,* 150 N. C., 702; *Farris v. R. R.,* 151 N. C., 487; *R. R. v. Goldsboro,* 155 N. C., 365; *Speight v. R. R.,* 161 N. C., 86.

SLOCUMB v. CONSTRUCTION COMPANY.

(Filed 16 October, 1906.)

Appeals—Certiorari—Case on Appeal—Corrections—Settling Case—Power of Court—Setting Aside Verdict—Continuances.

1. Where the plaintiff dockets the case on appeal "settled" by the Judge and asks for a *certiorari* for the record proper, upon an affidavit that the papers have been misplaced, without any laches of his, so that they could not be copied, he is entitled to a *certiorari.*
2. Where the Judge has settled "the case on appeal" this Court has no power to issue an order to the Judge to make sundry changes in the "case."
3. A *certiorari* to give the Judge an opportunity to correct the "case on appeal" already settled by him never issues (except to incorporate exceptions to the charge filed within ten days after adjournment) unless it is first made clear to this Court, usually by letter from the Judge, that he will make the correction if given the opportunity.
4. Having "settled" the case, at the time and place, of which counsel had notice, the Judge is *functus officio* unless, by agreement of parties, or by *certiorari* from this Court upon proof of his readiness to make correction, opportunity is given him of correcting such (350) errors as have occurred by inadvertence, mistake, misapprehension and the like.
5. If counsel agree, the Judge has nothing to do with making up the "case on appeal"; but when they differ, he sets a time and place for settling

the case, after notice that counsel of both parties may appear before him. He then "settles" the case. Rev., sec. 591. In so doing "he does not merely adjust the differences between the two cases," but may disregard both cases, and should do so, if he finds that the facts of the trial were different.

6. An exception that the Judge "set aside the verdict in his discretion" is without merit, as this is not reviewable.

7. Under Rev., sec. 531, the continuance of a case upon the payment of the the costs of the term is a matter in the discretion of the trial Judge.

ACTION by A. H. Slocumb, receiver of the Southern Sawmill and Lumber Company, against the Philadelphia Construction Company and others, heard by *O. H. Allen, J.*, and a jury, at the May Term, 1906, of ROBESON. From an order setting aside the verdict, the plaintiff appealed.

Iredell Meares and *R. E. Lee* for the plaintiff.

McIntyre & Lawrence and *McLean, McLean & McCormick* for the defendants.

CLARK, C. J. The plaintiff dockets the case on appeal "settled" by the Judge, and asks for a *certiorari* for the record proper, upon an affidavit that the papers have been misplaced, without any laches of his, so that they could not be copied. This is the proper course. *Burrell v. Hughes,* 120 N. C., 277, and cases cited; *Parker v. R. R.,* 121 N. C., 504; *McMillan v. McMillan,* 122 N. C., 410. Ordinarily, it is the record proper that is docketed, and the *certiorari* is for the "case on appeal," but the principle is the same; all of the transcript that can be obtained must be docketed at the first term and *certiorari* asked to complete the transcript. *Pittman v. Kimberly,* 92 N. C., 562. The plaintiff is entitled to a *certiorari* to bring up a transcript of
(351) the record proper in this case.

But the plaintiff further asks that the *certiorari* include an order to the Judge to make sundry changes in the case on appeal. This would be a *mandamus,* which this Court has no power to issue to a Judge who has settled a case. *S. v. Blackburn,* 80 N. C., 474. All this Court has ever done is to issue a *certiorari* to give the Judge an opportunity to correct the "case" already settled by him, and such *certiorari* never issues (except to incorporate exceptions to the charge filed within ten days after adjournment: *Cameron v. Power Co.,* 137 N. C., 99) unless it is first made clear to the Court, usually by letter from the Judge, that he will make the correction if given the opportunity. *Allen v. McLendon,* 113 N. C., 319. and cases cited in *Cameron v. Power Co.,* 137 N. C., at p. 105.

In this case the Judge's letter, filed by petitioner, declines to make the amendments asked, and for reasons says: "I do not think I have any right to do so except by consent of the parties or of the Supreme Court, and for the further reason that the statement in my opinion, is fair and correct in all the material parts." The Judge was correct in holding that he did not have the power. Having "settled" the case, at the time and place, of which counsel had notice, he is *functus officio* unless, by agreement of parties, or by *certiorari* from this Court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension and the like. *Boyer v. Teague,* 106 N. C., 571. As was said in *Cameron v. Power Co.,* 137 N. C., at p. 104: "As to all matters transpiring during the trial, if counsel cannot agree upon a statement the Judge settles the case, and the case thus settled is conclusive. This Court has no power to examine witnesses and find the facts differently, nor can we command the Judge to state the facts differently, for he acts under the obligations of his duty and oath of office." (352)

This ruling has never been based upon any idea of courtesy to the Judge, but upon the principle of *Magna Charta* that we "Will not delay justice." If appellant has shown that any diligence whatever he has always ample time—for the case must be docketed and printed at least a week before it is called for argument—in which to make application to the Judge and learn whether or not he will make the correction if given the opportunity. Certainly, if the appellant will not take the trouble to write a letter to the Judge, he ought not to get a delay of six months upon a suggestion of error in the Judge's case on appeal when he was, or could have been, present when the case was settled and his averment of inadvertent omission is denied by counter-affidavit. To give such delays to an appellant upon a vague statement that he believes the Judge will make a correction, when if there is the slightest diligence shown he can lay the Judge's reply to his letter before us, would lead to the gravest abuse and a delay of several months in almost any case in which it was desired by a party. This ruling has been uniform. *Smith, C. J., Porter v. R. R.,* 97 N. C., 65; 2 Am. St., 272, and cases cited; *McRae, J., Allen v. McLendon,* 113 N. C., 319, and cases cited; *Broadwell v. Ray,* 111 N. C., 457; *Lowe v. Elliott,* 107 N. C., 718; *Bank v. Bridgers,* 114 N. C., 107, and very many other cases, both before and since Clark's Code (3 Ed.), p. 936. The ruling in this Court has been uniform (but there is no "rule of court" on the subject), and it seems to be the uniform practice in all other jurisdictions, and for the same reason. A

contrary practice would be unjust to the appellee and fruitful of unnecessary delays and expense. By the slightest diligence the appellant can always ascertain whether the Judge would probably make the correction, and lay that fact before us in making his application—in which case it is always allowed.

The petitioner contends, however, that upon examining the ap-
(353) pellant's and appellee's statements of case on appeal, the Judge, in some respects, has been more unfavorable to the plaintiff than the appellee's statement of case. If counsel agree, the Judge has nothing to do with making up the "case on appeal," but when they differ he sets a time and place for settling the case, after notice, that counsel of both parties may appear before him. He then "settles" the case. Rev., 591. In so doing "he does not merely adjust the differences between the two cases," but may disregard both cases, and should do so if he finds that the facts of the trial were different. *S. v. Gooch,* 94 N. C., at p. 985. The *certiorari* must be denied so far as it seeks to direct the Judge to change a case on appeal which he certified at the time, by the very act of signing it (and has since reiterated by his letter), to be "fair and correct."

The chief exception set out in the case on appeal is that the Judge "set aside the verdict in his discretion." This is not reviewable. *Edwards v. Phifer,* 120 N. C., 406, and cases there cited.

As to the alleged impropriety on the part of the Judge, we are bound by the facts as found by his Honor, and they present no ground for a review of the discretion exercised in setting aside the verdict.

The exception that the Court did not sign judgment upon the verdict is merely a repetition of that already discussed.

The only other exception stated in the "case on appeal" is that at a previous term the Court continued the cause for plaintiff upon payment of the costs of the term. This was a matter in the discretion of the trial Judge. Rev., 531.

These exceptions should properly have been discussed after the coming in of the record proper, upon return of the *certiorari,* but having been fully presented, we have deemed it best to decide them, as unless there are errors upon the face of the record proper it will be useless to bring it up by *certiorari,* and there will only remain the duty of executing
(354) the order or reference (which had been previously asked by plaintiff) which was ordered by the Judge after setting aside the verdict.

No Error.

WALKER, J., concurring in result: The conclusion of the Court in this case has my full concurrence, but I take occasion to repeat here what was said by me in *Cameron v. Power Co.*, 137 N. C., 99. I do not think this Court, in exercising its constitutional and remedial power of supervision over the lower courts (Const., Art IV, sec. 8), should require a letter from the Judge before issuing the writ of *certiorari* to correct errors of statement in cases on appeal. This procedure is so contrary to the usual course of practice in the courts, and is fraught with so much danger that, in my judgment, it should no longer prevail. The capital objection to it is that it is *ex-parte,* when it is the right of every litigant to be heard upon any matter and everywhere when his interests may be put in jeopardy. The consent of the Judge to an amendment of the case on appeal, upon application of one of the parties without notice to the other, may often effect a change in a respect vital to the latter, and reverse what would otherwise have been the decision of this Court. Such a proceding is so much out of the ordinary, and so opposed to good practice, that I must withhold my assent to its continuance as one which is sanctioned by this Court and indispensable to the amendment of a case on appeal. The Judge should either correct the case upon a formal petition presented to him, after notice to the other side, in which case his order of amendment could be certified to this Court when filed in the Clerk's office, or we should issue the writ in the first instance and let him proceed in the matter as in other like cases. In my opinion, if there is error in the case suggested by petition to this Court, the complaining party is entitled to be heard by the Judge of the Superior Court, as a matter of right, as much so as he is so entitled when there is any other mistake in the record. (355) In my practice I have always found the Judges ready to correct inadvertencies, and I am persuaded to believe that they are always anxious to present the case just as it was tried below. But there should be regularity in our procedure, instead of loose and careless practice, which in many instances may lead to injustice. The views entertained by me upon this subject are so well expressed by *Mr. Justice Douglas* in his concurring opinion in *Cameron v. Power Co.*, that I take the liberty of referring to it. An order for a *certiorari* in such case is no imputation upon the Judge who tried the case; on the contrary, the learned, able and upright Judges who preside in our Superior Courts will always welcome opportunity thus afforded by regular procedure to correct any error or mistake which has inadvertently been committed.

Cited: Harvey v. R. R., 153 N. C., 574; *Walker v. Burleson,* 154 N. C., 175.

MORRISEY v. HILL.

(Filed 16 October, 1906.)

Executors and Administrators—Accounts Rejected—Counter-claim—Statute of Limitations.

Where the defendant presented to the plaintiff an account for board and services rendered plaintiff's testator, and the same was rejected and not referred, and no action was commenced for the recovery thereof, and more than six months thereafter the defendant set up this demand as a counter-claim to an action instituted against him by the plaintiff, and to this counter-claim plaintiff pleaded the statute, Rev., sec. 93: *Held*, the counter-claim was barred and this is true although the estate was solvent and still unadministered, and although the general notice to creditors had not been published as required by sec. 39.

ACTION by J. K. Morissey, executor of D. G. Morissey, against (356) W. L. Hill, heard on appeal from justice of the peace, by *Webb, J.*, and a jury at the February Term, 1906, of DUPLIN, upon the following facts agreed upon by the plaintiff and defendant.

1. That D. G. Morissey died in June, 1901, and plaintiff qualified upon his estate immediately thereafter. That said executor has not filed his final account, and that said estate is not settled and is solvent.

2. That defendant is indebted to plaintiff in the sum of $200, with interest thereon at six per cent from 11 March, 1901, evidenced by a certain due-bill.

3. That on 12 November, 1901, the defendant presented to the plaintiff an account for board and services rendered plaintiff's testator, amounting to $310, which said claim was rejected by the plaintiff on the same day.

4. That said claim was not referred or put in action by the said defendant, but on 13 February, 1904, plaintiff instituted an action against the defendant before J. H. Fonvielle, a justice of the peace, upon the due-bill aforesaid, and the defendant offered as a counter-claim upon the said trial the account referred to in the third paragraph hereof.

The defendant waived all of said account except $200, which he claims as an offset to plaintiff's due-bill. Plaintiff plead the six months' statute of limitations, under sec. 1427 of The Code. Revisal 1905, sec. 93. Upon these facts, the Judge below held that the defendant's counter-claim was barred under sec. 93 of the Revisal, and gave judgment for the amount of plaintiff's demand and interest due thereon; and from this judgment defendant excepted and appealed.

Grady & Graham for the plaintiff.

H. L. Stevens for the defendant.

HOKE, J., after stating the case: Revisal 1905, sec. 93, provides that when a claim is presented to and rejected by an executor, administrator or collector, and not referred, as provided by a previous (357) section, the claimant must, within six months after due notice of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. According to the facts agreed upon, defendant in person presented the claim—an account for board and services rendered the testator—to the executor on 12 November, 1901; and on that day same was rejected by the executor.

More than two years thereafter defendant endeavors to set up this demand as a counter-claim to an action instituted against him by the executor, and to this counter-claim plaintiff pleads the statute. We agree with his Honor that the counter-claim is clearly barred by sec. 93 of the Revisal, and the judgment in favor of the plaintiff must be affirmed. It is urged by defendant that as the estate is solvent and still unadministered, there is no good reason why defendant should be precluded from asserting his claim. But such a position cannot be allowed against the plain and imperative provision of the statute.

Under sec. 94 of the Revisal, a claimant who has not presented his claim within twelve months after general notice duly published, is allowed to assert his demand as against unadministered assets of the estate, and without cost against the administrator or executor. But even this privilege would seem to be shut off by sec. 41 of the Revisal if personal notice to exhibit his claim has been served on the creditor, and he fails to make such exhiibt within six months. And so, when the claim is presented and rejected, action must be commenced within six months, or the claim is forever barred. It is the policy of the statute that these estates should be speedily settled, and a plain and express provision of law looking to this end cannot be disregarded as set aside because, in some exceptional case, it may shut off a righteous claim.

Again, it is insisted that the provisions of this section should not be enforced because it nowhere appears that the general (358) notice provided for in sec. 39 of The Revisal has been given, and that the publication of this notice is necessary to the operation and enforcement of sec. 93.

We do not so understand or construe the law, nor do we see any such connection as that suggested between the two sections.

Section 39 of The Code, directing that a general notice shall be published, was enacted more for the protection of the executor, and is nec-

essary to enable him to go on and administer the estate without regard to claims which are not presented within the year; but it has no necessary connection with sec. 93, which applies to claims which have been presented and rejected by executors.

The language of the statute is positive and explicit, and must be enforced in accordance with the plain meaning of its terms. A like construction has been placed on a statute substantially similar in other jurisdictions. *Benedict v. Haggin,* 2 Cal., 386.

There is no error, and the judgment below is

Affirmed.

BRICK v. RAILROAD.

(Filed 16 October, 1906.)

Railroads—Trunks Containing Merchandise—Negligence—Jurisdiction of Justice of Peace.

Where a plaintiff sued in a court of a justice of the peace for the value of the contents of a trunk, which was lost, containing his wearing apparel and a quantity of merchandise, an exception to the charge that the plaintiff could not, in any view of the evidence, recover the value of the merchandise, will not be considered, because whatever cause of action the plaintiff may have had for the nondelivery of the merchandise was for negligence, for a tort, and the demand of damages therefor being in excess of $50, was not within the jurisdiction of a justice's court.

ACTION by A. B. Brick against the Atlantic Coast Line Rail-
(359) road Company, heard upon appeal from a justice of the peace, by *Council, J.,* and a jury, at the September Term, 1906, of ROBESON. From the judgment rendered, the plaintiff appealed.

McIntyre & Lawrence for the plaintiff.

McLean, McLean & McCormick for the defendant.

CLARK, C. J. Plaintiff sued for value of the contents of a trunk into which he had packed certain of his wearing apparel, and also a quantity of jewelry intended for sale in his store at Chadbourn. He purchased a ticket and checked the trunk and then delivered the ticket and check to his brother, who was a clerk in his employ in said store and who rode upon said ticket. The trunk was lost. This action was begun in the court of a justice of the peace. On the trial on appeal to the Superior Court, the Judge charged the jury that as to the jewelry,

the defendant was liable only for gross negligence; that the burden was upon the plaintiff to establish such negligence, that the mere showing delivery to defendant and the non-production of the trunk upon demand was no evidence of gross negligence, and that in no view of the evidence could the plaintiff recover the value of the jewelry. The plaintiff excepted. There was a verdict for $46.75, the value of the wearing apparel only.

We need not consider the charge excepted to, because the action was begun in the justice's court, which had jurisdiction of the breach of contract of safe carriage of the wearing apparel, but whatever cause of action, the plaintiff may have had for the non-delivery of the jewelry was for negligence, for a tort, and the demand of damages therefor, being in excess of $50, was not within the jurisdiction of a justice's court. *Malloy v. Fayetteville,* 122 N. C., 480. (360)

Indeed, if the defendant had excepted and appealed, a very interesting question might have been raised, whether a recovery could have been had for the wearing apparel of plaintiff, seeing that the ticket, to the use of which the carriage of baggage was appurtenant, was not used by the plaintiff, but by his brother. The defendant having failed to except and appeal, that question, however, is not before us.

Hoke, J., concurs in result.

McKEITHEN v. BLUE.

(Filed 23 October, 1906.)

Allotment of Homestead—Rights of Judgment Debtor—Exceptions to Allotment—Practice.

1. Under Art. X, secs. 1 and 2, of the Constitution, and Rev., sec. 688, a judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the face of the return that he was not present, by no fault of his own, the appraisal and allotment of a homestead under an execution is void.
2. While the defendant's exceptions to the allotment did not comply with the requirements of Rev., sec. 699, and while the proceeding is not, in some respects, regular, yet it appearing that the defendant's constitutional right had not been preserved, the matter of form becomes immaterial, and the facts having been found by the Judge and all the parties being before the Court, the proceeding may be treated as a motion in the cause, and relief administered.

ACTION by N. A. McKeithan against N. A. Blue, heard by *Moore, J.*, at the March Term, 1906, of MOORE.

The Sheriff of Moore County having in hand, for collection, (361) an execution issued upon a judgment in favor of the plaintiff against the defendant, summoned appraisers to allot and set apart to said defendant his homestead and personal property exemptions. On 6 January, 1906, the Sheriff, by his deputy, together with said appraisers, went to the home of the defendant for the purpose of notifying him of their proceeding and giving him an opportunity to select his homestead and personal property exemption, and also for the purpose of laying off and allotting the defendant's homestead and personal property exemption; that the defendant was not at his home, but was in the country, and his absence had no connection with the visit of the Sheriff and jurors. That thereupon and without notice to the defendant, the said jurors, after being duly sworn, laid off and allotted to the defendant his homestead, etc., and signed the return thereof. That said return was delivered to the Sheriff, with the execution, who on 18 January, 1906, filed same in the office of the Clerk of the Superior Court of Moore County. No minute of said return has been made on the execution, minute or judgment docket in said Clerk's office. On 22 January, 1906, the defendant, by his attorney, filed exceptions to said allotment in the office of the said Clerk, which were attached to the said return. No undertaking for cost was filed with said exceptions, but on 5 March, 1906, a check for one hundred dollars was filed with said Clerk in lieu of such undertaking. On 5 March, 1906, additional exceptions were filed to said returns. No notice of said exceptions, filed on either day, was given plaintiff or his attorneys or the Sheriff of Moore County. The attorneys for plaintiff entered a special appearance for the purpose of lodging a motion to dismiss the exceptions. His Honor, after finding the foregoing and other facts not material to the disposition of the appeal, declined to pass upon the questions raised or attempted to be raised by said exceptions, and dismissed the proceeding, including the exceptions. To this judgment defendant duly (362) excepted and appealed.

U. L. Spence for the plaintiff.

H. F. Seawell and *Murchison & Johnson* for the defendant.

CONNOR, J., after stating the case: Among other exceptions filed by the defendant, is the following: "Because he was not given an opportunity to be present and select such portion of his property as he

might choose to constitute his homestead and be exempt from levy and sale under execution."

His Honor and the counsel in the cause treated this preceeding as an exception, filed by defendant, pursuant to the provisions of Rev., sec. 699, because he was "dissatisfied with the valuation and allotment of the appraisers," etc. The procedure prescribed by that section of the Revisal is clear and explicit. If the defendant's contention be treated as coming within the statute, we concur in the opinion of his Honor that it cannot be sustained. He failed in several material and essential particulars to comply with its plain requirements. This is settled, both by the language of the statute and the decision of this Court in *Allen v. Strickland,* 100 N. C., 225.

We are of opinion, however, that the basis of defendant's exceptions to the action of the Sheriff and appraisers involves his constitutional and statutory right to select his homestead and to that end to have notice of the time of its appraisal and allotment. Const., Art. X, secs. 1 and 2, are explicit in guaranteeing to every resident of the State his homestead and personal property exemption of the value fixed—"to be selected by the owner thereof." The statute, Rev., sec. 688, in accordance with the Constitution, provides that the appraisers, after being "sworn, shall proceed to value the homestead with the dwelling and buildings thereon and lay off to said owner such portion as he may select, or to any agent, attorney or other person in his (363) behalf," etc. To meet the contingency of the owner of the homestead not being present to exercise his right of selection, it is provided by sec. 693 as follows: "In case no election is made by the owner, his agent, attorney or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make such election for him, including, always, the dwelling and buildings used therewith." A similar provision in respect to the selection of the personal property exemption is made by sec. 697. It is thus apparent that the defendant was entitled to an opportunity to be present and exercise his constitutional right to select his homestead, and, as it appears upon the face of the return he was not present, by no fault of his own, the appraisal and allotment was void. This is held in *McGowan v. McGowan,* 122 N. C., 165. In that case the present *Chief Justice* said: "The Constitution, Art. X, sec. 2, gives him the right to make the selection, and The Code, sec. 503, provides that the appraisers shall lay off such portion as he may select. As it appears that this was not done, and that the petitioner was given no opportunity to select, it was error to dismiss the exceptions. They should have been sustained and the matter remanded

to the appraisers that they might give the defendant such opportunity." We think this conclusive of the defendant's right. While his proceeding was not, in some respects, regular, we think that it having been called to the attention of the Court that his constitutional right had not been preserved, the matter of form becomes immaterial. We may treat the proceeding as a motion to bring up the record or as a rule upon the Sheriff to show cause why the appraisement should not be set aside as invalid. From either point of view, the facts having been found by his Honor and all the parties being before the Court, we see no reason why the proceeding should not be treated as a motion in the cause, and relief administered. The cause should be remanded with
(364) direction to the Court below to set aside the appraisement, for the same reasons given, and an order that the appraisers, after notice to the defendant, proceed to appraise and allot his homestead as provided by law.

Reversed.

Cited: S. c., 149 N. C., 96.

HATCHER v. FAISON.

(Filed 23 October, 1906.)

Attorney and Client—Appearance—Unauthorized Appearance—Service of Summons—Judgments—Effect of Revival—Judicial Sales—Recitals in Decrees—Innocent Purchasers—Judgments, When Vacated.

1. When a defendant has been served with process he should pay proper attention to the matter, and where a solvent attorney practicing regularly in said Court, though not authorized by him, assumed to represent him in open Court, he is bound by the judgment, certainly as to an innocent purchaser of said judgment, or at an execution sale under it, when with notice of said judgment he takes no steps to set it aside.
2. Though a party is not served with summons, if he appeared in the action either personally or by duly authorized attorney, this waives service of summons.
3. When there is no service of summons, an unauthorized appearance by counsel will not put the party in court and bind him by the judgment obtained in said action.
4. Where notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed.
5. Where a judgment regular upon its face recites that there has been service of process, an innocent purchaser will be protected. And this applies to the purchaser and assignee of the judgment equally with the purchaser at execution sale under the judgment.

6. While courts have the power to correct their records and set aside irregular judgments at any time, they will not exercise this power where there has been long delay or unexplained laches on the (365) part of those seeking relief against the judgment complained of, especially where the rights of third parties may be affected.

7. An assignee of a judgment has the right to rely upon the recital in the judgment of the service of summons; that counsel purported to represent the judgment debtor; his subsequent admissions of the justice of the judgment in conversation with the said counsel, and provision made by him in a deed of trust for payment of the judgment; the failure to set up any defense to the motion to revive; the acquiescence for more than sixteen years, and the absence of any meritorious defense; and the motion to set aside the judgment was properly denied.

ACTION by Benjamin H. Hatcher, administrator of J. W. Blount, against F. L. Faison, administrator of A. M. Faison, and others, heard by *Shaw, J.*, at the January (Special) Term, 1906, of DUPLIN.

From an order denying the defendants motion to set aside a judgment rendered at February Term, 1889, the defendant appealed.

F. R. Cooper, J. D. Kerr and *G. E. Butler* for the plaintiff.
Grady & Graham for the defendant.

CLARK, C. J. This is a motion made at August Term, 1905, of Duplin by J. F. Faison, administrator of W. A. Faison, to set aside a judgment rendered at February Term, 1889, of said court. The Court at January Term, 1906, refused the motion and found the following facts: On 11 January, 1889, the plaintiff issued a summons against F. L. Faison, administrator of A. M. Faison, W. A. Faison and William Boyette, returnable to February Term of Duplin. It was duly served on F. L. Faison and Boyette and returned, "Served on W. A. Faison by leaving a copy at his house." On the docket for that term on the margin opposite the names of defendants is entered "Faison," which the Judge finds stood for the name of Henry E. Faison, an attorney at law practicing in said court. A verified complaint was filed setting out a promissory note under seal signed by A. M. Faison, with W. A. Faison and William Boyette sureties. No answer was filed and (366) judgment by default final was taken for the principal and interest of said note, which judgment recited that "the defendants have been duly served with summons"; that a duly verified complaint had been filed, and no answer.

When the case called Henry E. Faison, who was a practicing attorney in said court, and whose name was entered as counsel for the defendants, stated to the Court that he had read the judgment and exam-

ined into the merits of the case and that he had no defense whatever to said action, and that there was no objection to the Court signing the judgment set out in the record. After the judgment was rendered W. A. Faison had several conversations with Henry E. Faison in which he stated that he owed the said debt and told him that he had made provision in a deed of trust to pay said judgment.

On 15 September, 1890, W. A. Faison made a deed in trust in which he provided for the payment of sundry judgments, and among them he recited the aforesaid judgment, placed it in the first class, and required payment of one-half thereof. The Judge further finds that Henry E. Faison was not employed by W. A. Faison, and in fact did not represent him when the judgment was taken. On 1 October, 1889, the judgment was assigned to C. S. Boyette, who on 14 January, 1899, instituted proceedings to revive said judgment in which the notice to show cause was served on F. L. Faison, administrator, and on W. A. Faison, neither of whom made any defense, which fact and the service of notice are recited in the order reviving the judgment. W. A. Faison never contested the validity of the judgment, and died 31 December, 1904, and this motion was first instituted by his administrator, doubtless, merely in discharge of what he deemed his official duty. There is no suggestion that there is any defense to the plaintiff's cause of action should the judgment be set aside.

(367) When a defendant has been served with process he should pay proper attention to the matter; therefore, if a solvent attorney, practicing regularly in said Court, though not authorized by him, assumed to represent him in open court, he is bound by the judgment, certainly as to an innocent purchaser of said judgment, or at an execution sale under it, when with notice of said judgment, or at an execution sale under it, when with notice of said judgment he takes no steps to set it aside. *University v. Lassiter,* 83 N. C., 38; *Chadbourn v. Johnston,* 119 N. C., 288. On the other hand, though a party is not served with summons, if he appeared in the action, either personally or by duly authorized attorney, this waives service of summons. *Caldwell v. Wilson,* 121 N. C., 425. But these cases would not sustain the proposition that when there is no service of summons an unauthorized appearance by counsel would put the party in court and bind him by the judgment obtained in said action. It is also true that when notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed. *Koonce v. Butler,* 84 N. C., 221.

But "when a judgment, regular upon its face, recites that there has

been service of process, an innocent purchaser will be protected." *Harrison v. Hargrove,* 120 N. C., 96. And this applies to the purchaser and assignee of the judgment equally with the purchaser at execution sale under the judgment. "While courts have the power to correct their records and set aside irregular judgments at any time, they will not exercise this power where there has been long delay or unexplained laches on the part of those seeking relief against the judgment complained of, especially where the rights of third parties may be affected." *Harrison v. Hargrove,* 109 N. C., 346.

The judgment here is in the hands of the assignee, who has the right to rely upon the above recited circumstances, *i. e.,* the recital in the judgment of the service of summons; that counsel purported to represent W. A. Faison, the subsequent admissions of W. A. (368) Faison, of the justice of the judgment in conversation with the said counsel, and provision made by him in deed of trust for payment of judgment; the failure to set up any defense to the motion to revive; the acquiescence for more than sixteen years, and the absence of any meritorious defense. The effect of opening the judgment would be to permit the defeat of the claim by the plea of the statute of limitations.

The order denying the motion to set aside the judgment is

Affirmed.

PERRY v. HACKNEY.

(Filed 23 October, 1906.)

Deeds—Effect of Alterations—Rule in Shelley's Case—Use, Benefit and Profit of Land.

1. Where a deed conveying land to P was acknowledged by the grantor, and afterwards the name of the original grantee was stricken out and that of his wife inserted without the consent or knowledge of the grantor, and, in this form, it was registered, the altered deed was not binding on the grantor and did not transfer any title to the wife.
2. In an action of ejectment by the wife, to which her husband was made a party only *pro forma,* where there was no allegation in the complaint of any title in him, he was not entitled to recover on proof that the equitable title to the land was in him.
3. Where a testator devised to his granddaughter "the use and benefit and profit" of his land during her natural life, and to the lawful heirs of her body after her death, the words are sufficient to pass an estate in the land, the Rule in Shelley's case applies and the granddaughter acquired a fee-simple.

ACTION by J. W. Perry and wife against Spencer Hackney heard by *Moore, J.,* and a jury, at the May Term, 1906, of (369) CHATHAM.

PERRY *v.* HACKNEY.

The *feme* plaintiff sued to recover a tract of land, and her husband was joined with her *pro forma,* there being no allegation in the complaint of his title or right of possession. The sole allegation was that the wife owned the land and was entitled to the possession thereof, and the prayer was that she be declared to be the owner and that she recover the possession. It is presumed, of course, that the case was tried upon the only issue raised by the pleadings, the issue upon which it actually was tried not being set out in the record. It was admitted that Stepheness Chambless owned the land, and that he died leaving a will by which he devised it in the following terms: "I will and bequeath unto Nancy Richardson the use and benefit and profit of all my estate, real, personal and mixed, of every species and description whatever, during her natural life, and to the lawful heirs of her body after her death." Nancy was his granddaughter. She died about six years ago, leaving her surviving three children, John, Hannah and Sarah. Hannah conveyed the land to J. W. Perry, one of the plaintiffs, by deed dated 7 Aug., 1878, and sufficient in form to pass the entire estate in the premises. This deed was acknowledged by the grantor, and afterwards the name of J. W. Perry, the original grantee, was stricken out and that of his wife, M. E. Perry, inserted without the consent or knowledge of the grantor, and, in this form, it was registered. There was testimony as to the possession of the property, which need not be stated, as in the view taken of the case it has become immaterial. There was evidence that Nancy Richardson conveyed the land to Elizabeth Hackney, mother of the defendant. The plaintiff introduced the will of Stepheness Chambless and the deed of Hannah J. Richardson in evidence.

The Court held that the deed did not convey any title to the *feme* plaintiff and, on motion, dismissed the action, under the statute.

(370) The plaintiff excepted and appealed.

Womack, Hayes & Bynum for the plaintiff.

H. A. London & Son for the defendant.

WALKER, J., after stating the case: The first question raised is the sufficiency of the deed of Hannah Jane Richardson to pass title to the *feme* plaintiff. The deed was originally made to John W. Perry, his name was erased and that of his wife inserted in its place, and, as thus altered, it was registered. The deed, therefore, which was made to John W. Perry, has never been registered, and the deed which was registered was not the one made by Hannah Jane Richardson. A deed presupposes contract, and, indeed, is itself an executed contract, passing

the equitable title after delivery and before registration, the latter taking the place of the livery of seizin to the grantee, and after registration the seizin or legal estate also passes. *Davis v. Inscoe,* 84 N. C., 396; *Hare v. Jernigan,* 76 N. C., 471; *Respass v. Jones,* 192 N. C., 5. The deed before registration may be redelivered or surrendered, as the cases we have adready cited show, and a deed made by the grantor to a new grantee, at the request of the first grantee, if there is no fraud or other vice in the transaction. But that is not our case. A contract requires the assent of two minds to one and the same thing, and so, as to a deed, says Blackstone, for it is essential to its validity that there should be parties able and willing to contract and be contracted with for the purposes intended by the deed and a thing or subject-matter to be contracted for, all of which must be expressed by the parties in their deed. It therefore follows that there must be a grantor, a grantee and a thing granted, and in every lease, a lessor, a lessee and a thing demised. 2 Blk., 295-7. Consent, which is the vital element of every contract, is wanting here. Hannah J. Richardson never agreed to be bound by a conveyance to the person whose name was inserted in the deed after its execution by her. She (371) had an undoubted right to determine, by the exercise of her contractual right of selection, to whom she would convey the land. There is another reason why the deed to the *feme* is not good. A deed must always be consummated by delivery, which is the final act of execution, and this delivery must be either actually or constructively made by the grantor to the grantee. There has been no delivery by the grantor to Mrs. Perry. The only contract so far as she is concerned, if there was any at all, was between her husband and herself, and the only delivery by him to her, and that even was not the delivery of a deed, in the sense of the law, but of a paper-writing having no legal efficacy as an instrument passing title. We, therefore, hold that the deed to J. W. Perry, when altered by the insertion of his wife's name, was not binding on the grantor, and did not transfer any title to her. *Jones v. Respass, supra; Hollis v. Harris,* 96 Ala., 288; *Hill v. Nesbit,* 58 Ga., 586. The deed was afterwards restored to its original form by the reinsertion of the name of J. W. Perry. It may be that he could have recovered on his equitable title, if this was his suit, and he had properly pleaded and relied on his title. *Murray v. Blackledge,* 71 N. C., 492; *Condry v. Cheshire,* 88 N. C., 375; *Farmer v. Daniel,* 82 N. C., 152. But it is in fact his wife's suit, to which he is made a party only *pro forma,* and there is no allegation in the complaint to which proof of his equitable interest can apply. It is familiar learning that there must be allegation

as well as proof, and they must correspond. There was no request for an amendment, if one could have been allowed under the circumstances, which we do not decide.

This disposes of the appeal and affirms the judgment, but the counsel have asked us to pass upon the other question as to the construction of the will of Stepheness Chambless, in order to prevent further (372) litigation. As we have a decided opinion upon that matter, we will do so, for it may enable the parties to adjust their differences.

The appellant contends that only a life-estate was given to Nancy Richardson by the will, as the land was not devised, but merely its "use, benefit and profit," and for this reason the Rule in Shelley's case does not apply. We think the words are sufficient to pass the estate in the land and that the Rule does apply. The words "all my rents" were held sufficient to pass real estate; for it was said to be acording to the common phrase, and usual manner of some men, who name their lands by their rents. 2 Gr. Cruise (2 Ed.), p. 229 (7 Cruise 176). So a devise of the "rents, issues and income" of lands was held to pass the land itself. *Anderson v. Greble,* 1 Ashmead, 136. A person having let several houses and lands for years, rendering several rents, devised as follows: "As concerning the disposition of all my lands and tenaments, I bequeath the rents of D to my wife for life, remainder over in tail." The question being whether, by this devise, the reversions passed with the rents of the lands, it was resolved that they did, as that was clearly the intention, and the will should be construed according to the intent to be gathered from its words. *Kerry v. Derrick,* Crokes Jac., 104; *Allan v. Blackhouse,* 2 Ves. & B., 74. A devise of the income of land was held to be in effect a devise of the land, *Reed v. Reed,* 9 Mass., 372; so a devise of the "rents, profits and residue" of the testator's estate received a like construction. *Den v. Drew,* 14 N. J. L., 68. In *Parker v. Plummer,* Cro. Eliz., 190, a devise in the following words: "I will that my wife shall have half the issues and profits of the land during her life," the question being whether she had any interest in the premises or was only entitled to have an account of rents. It was determined that she had an estate, "for to have the issues and profits and the land were all one," and the same was held with respect to a devise of a "moiety of the rents, issues and profits of my estate," the words (373) beings equivalent to a devise of the estate in fee. *Stewart v. Garnett,* 3 Sim., 398. See, also, *Beekman v. Hudson,* 20 Wend., 53; *Cook v. Gerrard,* 1 Saund., 186c; *Whittome v. Lamb,* 12 M. & W., 813; *Mannox v. Greener,* L. R., 14 Eq., 456. The language of this will is much stronger to show an intention to devise the land itself than was

that used in any of the cases cited. It appears that he gave to the heirs of her body precisely the same interest that he gave to the life-tenant. If he intended that they should have the *corpus,* why should not the mother also have it, by the same construction of his words? The law searches for the intention of the testator and executes it when discovered, without any special regard to the particular manner of expressing it, testators generally being *inops consilii.* In this case, there is no reference to the *corpus,* either in the first or second limitation, but each, as to the subject of the devise, is couched in the same terms. No trustee is appointed to hold the legal title, and it cannot be supposed that the testator intended the legal title to remain in his heirs forever for the "use, benefit and profit" of those named in the will. Those words are appropriate in law, as the authorities show, to create a beneficial interest in the land, and show clearly an intention to do so. There is no apparent reason for keeping the legal and beneficial interest apart, and we must presume that they were intended to go together to the object of the testator's bounty. But if the testator ever withheld the legal estate and it descended to his heirs, he used words fit, and sufficient in law, to raise a use in favor of his granddaughter, Nancy Richardson. Why did not the statute execute the use by drawing the legal title to it and thus unite the two estates, so as to form what is called in Fleta the only perfect title (*Fit juris et seisinæ conjunctio*)? 2 Blk., 311.

Not only does the very language of the will, when considered in its ordinary sense, clearly indicate a purpose to give both the legal and beneficial interest to the devisee, but the inference thus drawn (374) from it is in accordance with the interpretation of the law. "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction, to find out the intention of the testator, which intention ought to prevail if agreeable to the rules of law? *Goodlittle v. Whitby,* 1 Burrows, 233. We think those rules, as well as the proper understanding of the words used, justify our construction of the will. The law carries into effect the intention of the testator, if sufficiently expressed, however defective the language may be. This is one of the rules of construction. The case of *Floyd v. Thompson,* 20 N. C., 616, seems to be directly in point, as the language is substantially identical with that of the devise in question. There the property was limited to the use and benefit "of the legatees for life, and then to 'descend' to the heirs of their body," and the words were held to denote that the heirs took in succession from and not merely after the first taker. *Ruffin, C. J.,* added: "If the subject

here had been land, the daughter, first taker, would undoubtedly have the fee, and we think less than the entire property in the slaves will not satisfy the words." To the same effect are *Donnell v. Mateer,* 40 N. C., 7; *Worrell v. Vinson,* 50 N. C., 91; *King v. Utley,* 85 N. C., 59; *Ham v. Ham,* 21 N. C., 598. In the case last cited the subject is fully discussed and the authorities collated by *Daniel, J.* The conclusion is, therefore, irresistible, that the testator used the words "use, benefit and profit" as synonymous with the land itself. 3 Gr. Cruise, p. 229; 2 Underhill on Wills, sec. 692.

Having settled this point, it is not difficult to decide that the Rule in Shelley's case applies to the limitation. It is within the very words of the Rule, for where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, in fee or in
(375) tail, always, in such case "the heirs" are words of limitations of the estate, and not words of purchase; and superadded words of limitation, not varying the course of descent, do not prevent the application of the rule. *Shelley's case,* 1 Coke, 104. The rule applies only where the same persons will take the same estate, whether they take by descent or purchase, in which case they are considered to take by descent. *Ward v. Jones,* 40 N. C., 400; *Howell v. Knight,* 100 N. C., 257. They who take in remainder, must take in the quality of heirs according to the course of descent established by law. The rule is one of law, and not merely one of construction for the purpose of ascertaining the intention and when the words of the limitation bring the case within the rule, it applies, regardless of the intent, or, if expressed differently, the intention is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning. *Leathers v. Gray,* 101 N. C., 162; *Wool v. Fleetwood,* 136 N. C., 460; *Tyson v. Sinchair,* 138 N. C., 23; *Pitchford v. Limer,* 139 N. C., 13. Under the devise in this will, the limitation over carries the estate to the same parties, whether they take by descent or by purchase, and the words "heirs of the body" are therefore words of limitation, and not words of purchase, as those so designated are presumed to take by descent in the quality of heirs. *May v. Lewis,* 132 N. C., 115; *Mills v. Thorne,* 95 N. C., 362. It follows that Nancy Richardson acquired a fee-simple under the devise. If she conveyed to Mrs. Hackney, her daughter, Hannah J. Richardson, got nothing by descent, and her deed to J. W. Perry consequently passed nothing to him. She had nothing to grant. But if she had not parted with her title and died intestate, her three children took from her by descent, as tenants in common. We do not

know what are the facts, as they were not found, the case having been taken from the jury.

No Error.

Cited: *Webb v. Borden,* 145 N. C., 202; *Lumber Co. v. Lumber Co.,* 153 N. C., 51; *Wicker v. Jones,* 159 N. C., 111; *Lummus v. Davidson,* 160 N. C., 486.

(376)

RAYBURN v. CASUALTY COMPANY.

(Filed 23 October, 1906.)

Partial New Trial—Costs on Appeal.

Under Rev., sec. 1279, where the appellant was awarded a partial new trial only, and as to one issue only out of several, the costs of the appeal are in the discretion of the Court.

ACTION by S. C. Rayburn against Pennsylvania Casualty Company. This was a motion of defendant for judgment against the sureties to plaintiff's prosecution bond.

No counsel for the plaintiff.

S. Gallert for the defendant.

PER CURIAM. The defendant appealed and a new trial was granted upon the fourth issue. 141 N. C., 425. The defendant now moves for judgment and execution against the prosecution bond of plaintiff, for the costs of the appeal. This would be allowed under the terms of Revisal, 1251, if the defendant had gained an entire reversal in this Court, but as it was awarded a partial new trial only, and as to one issue only out of several, the costs are in the discretion of this Court (Rev., 1279), and each party will pay his own costs of the appeal.

Motion denied.

Cited: Riley v. Sears, 154 N. C., 522.

(377) YARBOROUGH v. TRUST COMPANY.

(Filed 23 October, 1906.)

Handwriting Experts—Harmless Error—Pleadings as Evidence—Banks and Banking—Forged Checks—Ratification—Burden of Proof.

1. An exception to the Court's refusal to permit a witness to testify as to how the signature to a check in controversy compared with a signature admitted to be genuine, is without merit where the same evidence was later admitted, after the witness had qualified as an expert.
2. An exception to the admission of a part only of two paragraphs of the answer is without merit where it is apparent that the admission of a part of the paragraphs and the rejection of the remainder, which contained only conclusions drawn by defendant, could not possibly mislead the jury upon the real issues.
3. A bank is presumed to know the signature of its customers, and if it pays a forged check, it cannot, in the absence of negligence on the part of the depositor, whose check it purports to be, charge the amount to his account.
4. In an action to recover from a bank the amount of a deposit, where the bank admitted the deposit, the burden was upon it to show payment, and an instruction that if the defendant had shown by the greater weight of the evidence that plaintiff signed the check, they would answer the issue "Yes," is correct.
5. Upon an issue as to whether the plaintiff ratified her husband's act in transferring her deposit to another bank and depositing it to his credit, an instruction that "if she dealt with the fund after it was deposited in her husband's name, knowing it was in her husband's name, or if with a knowledge that the fund was deposited in the name of her husband she allowed it to remain there in his name for any length of time, and took no steps to have the same placed to her individual credit, * * * these are matters which the jury may consider in determining whether she ratified the deposit in her husband's name or not; and if the jury are satisfied that she recognized and adopted the deposit in her husband's name, they will answer the issue 'Yes,'" is correct.

ACTION by Amanda Yarborough against the Banking, Loan and Trust Company, heard by *O. H. Allen, J.*, and a jury, at the May (378) Term, 1906, of CUMBERLAND.

Plaintiff, a married woman, deposited during the month of December, 1904, in defendant banking company, the sum of $1,200, which was duly credited to her account and deposit ticket sent her. On 21 September, 1905, she drew a check on the bank for said deposit, payment of which was refused, said check returned to her endorsed "No funds." This action is prosecuted to recover the amount of said deposit. Defendant admitted that plaintiff made the deposit, but by way of defense alleged that on 23 December, 1904, a check for the

amount thereof, to which plaintiff's name was signed, payable to the National Bank of Fayetteville, was presented to, and paid by, defendant. That thereafter, about 1 January, 1905, at the end of the current month, the regular monthly statement of the plaintiff's account, together with said check, as a voucher, was mailed, addressed to her at Hope Mills, N. C. That defendant received no notice of any objection thereto until September, 1905. That the proceeds of said check were placed to the credit of plaintiff's husband, J. R. Yarborough, in said National Bank of Fayetteville, and that plaintiff was notified thereof and acquiesced in and ratified the same, drawing checks thereon. Defendant, for a further defense, alleged that the check of the plaintiff, or what purported to be her check, for the sum of $1,200 in favor of the National Bank of Fayetteville as payee, which was presented to and paid by the defendant on or about 23 December, 1904, was duly endorsed and forwarded for collection by the said National Bank of Fayetteville; that the said National Bank of Fayetteville was at that time, and still is, a solvent bank, and that the defendant relied on their endorsement as a guarantee of the genuineness of signature of the plaintiff, the defendant not having the plaintiff's signature on file, and paid the check without question; and that if there is any liability on the part of any one to the plaintiff, the liability exists against the said Na- (379) tional Bank of Fayetteville, which is a necessary party to this action.

For a further defense the defendant alleges that in paying the check, or what purports to be the check, of Amanda Yarborough for the sum of $1,200 to the payee, the National Bank of Fayetteville, as alleged, it relied not only upon the endorsement of said bank as a guarantee, but also upon the established usage among banks which requires that a check made payable to a bank shall be placed to the credit of the drawer, or his order, alone; that as the defendant is informed and believes, the said National Bank of Fayetteville, contrary to all usage, precedent, and law, placed the said fund to the credit of the said J. R. Yarborough, the plaintiff's husband, and paid out the said fund upon his checks, rendering the said National Bank of Fayetteville liable to it for said sum, or liable to the plaintiff, should she be entitled to recover.

Plaintiff, in her reply to the new matter contained in the answer, denied that she had signed the check of 23 December, 1904, or that she had received the statement of January, 1905, or that she knew of or had acquiesced in or ratified the transfer of the amount of her deposit in defendant bank to the credit of her husband in the National Bank of Fayetteville. The following issues were submitted to the jury:

"1. Did plaintiff, Mrs. Yarborough, deposit $1,200 with the defendant, as alleged? Ans.: Yes.

"2. Did the defendant pay to the National Bank of Fayetteville $1,200 upon a check signed by the plaintiff, as alleged in the answer? Ans.: No.

"3. Did the plaintiff know that the $1,200 had been transferred to the National Bank of Fayetteville, and that it was deposited there to the husband's credit, and did she ratify such transfer? Ans.: No."

There was a judgment upon the verdict, and defendant appealed.

(380) *Q. K. Nimocks* and *Sinclair & Dye* for the plaintiff.
H. L. Cook for the defendant.

CONNOR, J., after stating the case: There are a large number of exceptions to his Honor's ruling in the record. In defendant's brief several are abandoned or not relied upon. The first exception discussed in the brief is number eleven in the record. Mr. Cunningham, the cashier of defendant, being examined, testified that he paid on 23 December, 1904, a check for $1,200, signed by Amanda Yarborough, payable to the National Bank of Fayetteville. He was asked how the signature of the check compared with the signature of plaintiff to deed admitted to be genuine. Neither check nor deed was produced, and witness had not qualified as an expert. Plaintiff's objection was sustained, and defendant excepted. Later in the examination of this witness, he qualified himself as an expert, when he was permitted to express his opinion that the signature to the check was the same as that to the complaint, saying: "It is the same hand-writing." Whatever force there was in the defendant's exception to the rejection of the testimony is clearly dissipated by the admission of the same evidence after the witness had qualified as an expert. We cannot concur with the ingenious argument of defendant's counsel that the opinion of a witness before qualifying as an expert is of more value, or that a jury would so regard it, than after qualifying as such. There may be a prejudice in the minds of jurors against the testimony of experts in hand-writing, but the Court could hardly take note of it, as a matter of law. As neither the check nor the deed were in the hands of the witness at the time the question was asked, so that if he had expressed an opinion, he could have been cross-examined, it is exceedingly doubtful whether his Honor's ruling was not correct. However that may be, the defendant had the full benefit of the opinion of the witness. The exception cannot be sustained.

The next question discussed in the brief is pointed to his Honor's ruling in regard to the admission of certain portions (381) of the answer. The record shows that the sections of the answer involved in the exception were introduced by defendant. It is insisted in this Court that the plaintiff introduced them. Counsel agree that we may so cinsider the record. His Honor admitted sections four and five of the answer, "except to parts containing legal conclusion and hearsay."

Defendant contends that by excluding these portions of the answer the jury were misled, or, as stated in the brief, "The portions admitted by the Court were doubtless construed by the jury to be an admission on the part of the defendant of its liability to the plaintiff, whereas if the entire paragraph had been admitted it would have appeared otherwise." An examination of the language of the two sections shows that they do not allege any facts which could, to any material extent, affect the real question involved in the issues. The only questions to be passed upon by the jury were whether the plaintiff signed the check and, if not, whether she had ratified the payment of her money to her husband. The sections of the answer made no admission in respect to either of these issues. The purpose of the pleader was to set up an independent defense by suggesting that, conceding the plaintiff's contention, which was in other parts of the answer denied, her remedy was against the Fayetteville bank. This was not insisted upon, for the manifest reason that it was not available. If defendant paid out plaintiff's money on a forged check, it could not cast upon her the duty of seeking to recover it from the corporation which received it. It is well settled that a bang is presumed to know the signature of its customers, and if it pays a forged check, it cannot, in the absence of negligence on the part of the depositor, whose check it purports to be, charge the amount to his account. 5 Cyc., 544. We cannot perceive how the admission of a part of the paragraphs and the rejection of the remainder, which contained only conclusions drawn by defendant, could possibly mislead the jury upon the real issues. The defendant's (382) contention in regard to the admission of fragmentary portions of a pleading is correct, but, as we have seen, does not apply to this case.

The other exceptions are pointed to his Honor's charge. In response to the prayer that if the jury should find that defendant paid the individual check of the plaintiff duly presented to it in the ordinary course of business, it should answer the first issue "Yes," his Honor instructed the jury that if the defendant had shown by the greater weight of the evidence that plaintiff signed the check, they should answer the issue

"Yes." We think this was a substantial compliance with the prayer and the correct statement of the law. The defendant having admitted the deposit, the burden was upon it to show payment.

In response to the prayer that, "If the jury shall find from the evidence that the plaintiff during the month of January, February or March, 1905, had knowledge that her money, to-wit, $1,200, had been transferred to the National Bank of Fayetteville, and stood upon its books to the credit of J. R. Yarborough, her husband, and she took no steps to have the same transferred to her name or for her use, but acquiesced in said money remaining in her husband's name, that she thereby released the defendant from all liability to her," his Honor charged the jury: "If she dealt with the fund, that is, the $1,200, after it was deposited here in her husband's name, knowing it was in her husband's name, or if with a knowledge that the fund was deposited in the name of her husband she allowed it to remain there in his name for any length of time, and took no steps to have the same placed to her individual credit, these are matters which the jury may consider in determining whether she ratified the deposit in her husband's name or not, and after considering these, and all evidence bearing on this question, if the jury are satisfied by
(383) the greater weight of the evidence that she recognized and adopted the deposit in her husband's name, they will answer the third issue, 'Yes,' and if not so satisfied, they will answer it 'No.'"

We think this is a correct response to the prayer. We have examined the other exceptions and find that his Honor substantially and, we think, correctly instructed the jury in response to the phases of the case presented by them. There was evidence to the effect that the plaintiff's husband drew the money and had it put to his individual credit in the Bank of Fayetteville. Plaintiff testified that she had no knowledge or information in regard to his conduct until February, 1905, when he notified her that he had done so and had abandoned her. She denies positively that she signed the check or had any knowledge thereof prior to that time. In regard to the alleged ratification, the testimony was conflicting. We think that his Honor correctly left the decision of the question to the jury. Upon an examination of the entire record, we find

No Error.

McCOY v. RAILROAD.
(Filed 23 October, 1906.)

Railroads—Fires—Negligence—Evidence—Pleadings.

1. In an action for damages for a fire alleged to have been set out by defendant's negligence, where the only allegation of negligence was that the defendant negligently allowed its right-of-way to become foul with inflammable material, and the plaintiff's evidence was to the effect that the place where the fire caught was very clean, that there was a little dry grass on the right-of-way, and that there was an extraordinary drought at the time, the motion to nonsuit should have been allowed.
2. Proof without allegation is as unavailing as allegation without proof.

ACTION by L. C. McCoy and wife against Carolina Central Railroad, heard by *O. H. Allen, J.*, and a jury, at the March (384) Term, 1906, of BRUNSWICK.

The plaintiff sued to recover damages alleged to have been sustained by reason of the defendant's negligence in keeping a foul right-of-way to which it was charged that fire was communicated from defendant's engine and thence to plaintiff's land.

The following issues were submitted:

"1. Is the plaintiff the owner of the lands mentioned and referred to in the complaint? Ans.: Yes.

"2. Was the plaintiff damaged by the negligence of the defendant, *as alleged in the complaint?* Ans.: Yes.

"3. What damage is plaintiff entitled to recover? Ans.: $250."

From the judgment rendered the defendant appealed.

No counsel for the plaintiff.

Meares & Ruark for the defendant.

BROWN, J. The only allegation of negligence set out in the complaint is as follows: "That on said date the said defendant carelessly and negligently allowed its right-of-way to become foul with dry grass and other inflammable matter, which was fired by sparks from a passing engine, the fire immediately reaching plaintiff's land, burning over said land, destroying and burning up quantities of timber, pine-straw and other products of value, to plaintiff's damage $800."

It is to be observed that no negligence is alleged other than such as relates to the condition of the right-of-way. The controversy is therefore limited to two inquiries: Was the right-of-way in the condition

alleged? If so, was the fire caused by such alleged negligence? The plaintiff offered the following evidence:

L. C. McCoy testified solely to the title to the land and damages. He knew nothing of the fire or its cause, or the condition of the right-of-way.

Charles McCoy testified: "I was at Northwest station on the
(385) day of the fire. The train had passed going towards Wilmington. After it passed a fire sprang up. The place where the fire started was between the telepraph pole and the railroad track on the right-of-way. The fire also caught further down in a bay adjoining the right-of-way. This second fire which caught in the bay broke out into a big fire and burned over the land and is the one which did the damage. There was some dry grass where the fire first started." On cross-examination he said: "I do not know the width of the defendant's right-of-way where the fire started. I do not know the width of the right-of-way at the point where the bay adjoined same. I do not know whether the telegraph pole is on the defendant's right-of-way. The place where the fire first started was very clean. There was a little dry grass. It had been burned over in the spring of 1900. There was an extraordinary drought at that time; it had been a very long dry spell and rain was much needed. When the fire started in the bay it broke out into a big fire and burned over the land."

At the conclusion of this evidence plaintiff rested. Thereupon defendant moved to nonsuit plaintiff and dismiss the action under the statute, for that there was no evidence of negligence as alleged in the complaint. This motion was overruled and the defendant excepted.

The defendant introduced five witnesses, who testified that the right-of-way was perfectly clean and had recently been "burned off" by the section-master, and also that the damage was very small, and rested its case.

Plaintiff offered no other testimony.

Defendant renewed motion to nonsuit, which being overruled, defendant excepted.

The defendant also requested the Court, among other matters of law,
to charge that there was no evidence of the existence of inflam-
(386) mable or combustible material on the right-of-way, which was refused, and defendant again excepted.

We think the motion to nonsuit should have been sustained. The only allegation of negligence relates to the condition of the right-of-way, and the second issue pointedly refers to that specific negligence alleged in the complaint, and to no other. As will be seen by his

Honor's charge, the case was tried with reference to that character of negligence only. The Court charged as follows: "This is an action for damages alleged to have been sustained by reason of neglience of the defendant in allowing its right of way to become foul with inflammable material, and by reason of a fire originating on said right-of-way and burning over plaintiff's lands. The burden is upon the plaintiiff to satisfy you by the greater weight of the evidence that inflammable material had been allowed to accumulate upon defendant's right-of-way, and that by reason of the existense of the same a spark emitted from defenant's engine ignited such inflammable material."

There is no evidence whatever that the defendant was negligent as to the condition of the right-of-way, or that the fire caught on the right-of-way because of any accumulation of inflammable material, as alleged in the complaint. The plaintiff's only witness testified that the place where the fire caught was *very clean;* that there was a little dry grass on the right-of-way, and that it had been burned over in the spring of 1900. He also said: "There was an extraordinary drought at that time; it had been a very long dry spell." The fact that there was a "little dry grass" on the right-of-way in a period of extraordinary drought is not negligence. But if it was, that grass did not catch fire, for the witness distinctly says the place where the first fire caught was "very clean." It caught nowhere else on the right-of-way. Furthermore, the fire which caught on the right-of-way at the "very clean" place mentioned by the witness spread no further. It died out and did not get off the right-of-way, due probably to its clean condition. (387) According to the witness, it was not this fire which spread over plaintiff's land, but another fire which originated further down and off the right-of-way. The evidence therefore fails to sustain the only allegation of negligence set out in the complaint. That allegation specifies and particularizes the negligence, and the plaintiff cannot recover on any other. It is a settled maxim of the law that proof without allegation is as unavailing as allegation without proof. The authorities are in accord. *Moss v. R. R.*, 122 N. C., 891; *Conley v. R. R.*, 109 N. C., 692; Elliott on Railroads, sec. 1594.

The evidence in the case having failed to prove the alleged negligence set out in the complaint, the motion to nonsuit should have been allowed. For failing to do so there is

Error, and Reversed.

Cited: Maguire v. R. R., 154 N. C., 387; *Alexander v. Tel. Co.*, 158 N. C., 482.

WALL v. WALL.

(Filed 23 October, 1906.)

Ejectment—Deeds and Grants—Boundaries—Non-navigable Rivers—Withdrawal of Grant—Estoppel—Title to Bed of Non-navigable Streams—

1. A grant of land bounded in terms by a creek or river not navigable carries the land to the grantee to the middle or thread of the stream.
2. There was no error in permitting the defendant to withdraw during the argument a grant from the State which he had introduced where neither party had offered any evidence locating said grant and there was nothing on its face which indicated *per se* that it covered the land in controversy.
3. The contention that the defendant, by the introduction of a grant from the State which the Court later permitted him to withdraw as evidence, its relevancy not being disclosed, was estopped to deny the State's title, and that the plaintiff, having an older grant, was entitled to recover, is without merit.
4. *Prima facie*, the title to the bed of an unnavigable stream to the thread thereof, and to islands between the mainland and said thread, is in the owner of the adjacent mainland. Where the lands on both sides the stream belong to the same person, the entire bed of the stream and all the islands therein between such lands belong to him.
5. Evidence that the defendant and those under whom he claims took possession of the island in 1845; that they got lumber off of it constantly for various purposes; that after 1854 the island was used more than any other part of defendant's land for getting timber; that goats were placed there and cattle were pastured on it, and that in 1899 defendant cleared two acres of the land; that from 1890 until the trial defendant used the island all winter every year for cattle pasturage, is sufficient evidence of actual possession to ripen color of title into an indefeasible title.

ACTION by ejectment by Edwin Wall against John T. Wall, heard by *Moore, J.*, and a jury, at the February Term, 1906, of ANSON.

From a verdict and judgment for the defendant, the plaintiff appealed.

H. H. McLendon for the plaintiff.

Robinson & Caudle and *J. A. Lockhart* for the defendant.

BROWN, J. The *locus in quo* is an island in the Pee Dee River, called Martin's Island, containing about six acres of land. The evidence tends to prove that the island is separated from the Anson County mainland by a narrow "thoroughfare" of the river about eighty feet wide, which can be easily forded. The main body of water which

flows between the island and the Richmond County side is three hundred yards wide. The island is on the Anson County side of the "thread" of the stream. Plaintiff claims title under a grant from the State to plaintiff dated 1 April, 1879, which describes the island. Defendant claims under deed dated 15 December, 1843, from Wil- (389) liam Locke and wife to Stephen Wall, from whom defendant derives title.

We will not consider the twenty-nine exceptions in the record *seriatim,* but will group the contentions of the parties under three heads: First. Does the description in the deed from William Locke and wife to Stephen Wall cover the island in controversy? Second. Is the defendant estopped to deny the State's title by the introduction of the grant of 1882? Third. Was there sufficient evidence of adverse possession on the part of the defendant?

1. The description in the deed is as follows: "Beginning at a black-oak southwest of Pee Dee River, William W. Koy's corner tree, and runs with W. Koy's line south 15 chains to a pine, etc.; then east 29 chains to the river; then up the various courses of said river to the beginning, containing 300 acres." It appears in evidence that Stephen Wall owned and occupied the land on both sides the Pee Dee River opposite Martin's Island.

It was decided as long ago as 1831 that the Pee Dee at this point was not a navigable stream and that the owners of the land on each side of it have a right to the middle of the river. *Ingram v. Threadgill,* 14 N. C., 61. The same is the law in respect to rivers which divide nations. *Handly v. Anthony,* 5 Wheaton, 374. It is not disputed that if the call of the deed is extended to the thread or middle of the stream and then up the various courses thereof to the beginning, the land in controversy is included in its boundaries. There is no rule of the common law better settled, and more universally adopted in this country, than that which prescribes that a grant of land bounded in terms by a creek or river not navigable carries the land to the grantee *usque ad filum aquae,* to the middle or thread of the stream. *Wilson v. Forbes,* 13 N. C., 30; *Ingram v. Threadgill, supra; Williams v. Buchanan,* 23 N. C., 535; *Rowe v. Lumber Company,* 128 N. C., 303, and 133 N. C., 433. The evidence shows conclusively that the (390) thread of the Pee Dee is the dividing line between Richmond and Anson counties, and that it runs between Martin's Island and the Richmond side of the river. In fact, the plaintiff's grant describes the island as located in Anson County.

2. The defendant introduced a grant from the State to Stephen G.

Wall dated 20 December, 1882, for a tract of 130 acres of land. During the argument plaintiff's counsel contended that by this grant it was shown that both plaintiff and defendant claimed under a common source; that defendant was estopped to deny the State's title, and that plaintiff, having the older grant, is entitled to recover. There is nothing upon which to base such contention. Neither plaintiff nor defendant had offered any evidence locating said grant of 1882, and there is nothing on its face which indicates *per se* that it covers Martin's Island. The defendant stated it did not cover the island in controversy, and the Court permitted him to withdraw it as evidence. As its relevancy to the matter at issue is not disclosed, we see no error in this. It was a matter within the sound discretion of his Honor. Besides, the plaintiff did not ask to be permitted to reintroduce this grant and to offer evidence locating the island within its boundaries.

3. The evidence tends to prove that Stephen Wall owned and was in possession of the land on both sides of the river opposite Martin's Island for some years prior to the war, and that his possession extended one-half mile or more up and down the river on the Anson side and for two or three miles on the Richmond side, and that he was in possession of it at the time of his death in 1845. Stephen Wall devised "to my brother James Wall's two youngest sons, to-wit, those by his last wife, all the land I own in Anson County, supposed to be about 500 acres."

The sons by the last wife of James Wall were A. G. and S. G. (391) Wall, under whom defendant justifies his right to possession.

As Stephen Wall was the owner and in possession of the lands on both sides of the river, he is presumed to have title to the island between. *Prima facie,* the title to the bed of an unnavigable stream to the thread thereof, and to islands between the mainland and said thread, is in the owner of the adjacent mainland. Where the lands on both sides the stream belong to the same person, the entire bed of the stream and all the islands therein between such lands belong to him. 17 A. and E. Ency. Law (2 Ed.), 532, and cases cited; *Granger v. Avery,* 64 Me., 292; *Stolp v. Hoyt,* 44 Ill., 220. Independent of such presumed title, there is abundant evidence of such actual possession of the island as ripens the color of title under the Locke deed into an indefeasible title. The evidence tends to prove that the defendant and those under whom he claims took possession in 1845; that they got timber off the island constantly for various purposes; that after 1854 the island was used more than any other part of defendant's land for getting timber; that goats were placed there and cattle pastured on it, and that in 1899

defendant cleared two acres of the land; that from 1890 until the trial defendant used the island all winter every year for cattle pasturage.

Upon a review of the entire record, we are of opinion that the case was well tried, and there is

No Error.

Cited: *Guano Co. v. Lumber Co.*, 146 N. C., 188.

DEWEY v. RAILROAD.

(392 (Filed 23 October, 1906.)

Union Depot Act—Construction—Legislative Power—Eminent Domain—Change of Route—Corporation Commission—Depot Site Outside City—Rights of Property-owners—Damnum Absque Injuria.

1. Rev., sec. 1097, subsec. 3, empowering the Corporation Commission where practicable and under certain limitations to require railroads to construct and maintain a union depot in cities and towns, and giving to the railroads, subject to such order, the express power to condemn lands, is a valid exercise of legislative power.
2. The above statute in its principle purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction.
3. Whenever a power is given by a statute, everything necessary to make it effective or requisite to attain the end is inferred.
4. The Union Depot Act, giving to the railroads affected the express power to condemn land for the purpose, confers on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public as contemplated by the act.
5. The position that the Corporation Commission can only act under the union depot statute when the roads can connect on the right-of-way as already laid out, is not well taken, but the statute was intended to apply to all the cities and towns in the State, where, in the legal discretion of the Commissioners, the move is practicable, etc.
6. While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State.
7. Rev., sec. 2573, requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the Aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission, acting under express legislative authority and direction, require the (393) railroad to make the change for the convenience of the general public.
8. Where the Corporation Commission, acting under the Union Depot Act, have selected, after due inquiry, a site at the terminus of an important and much frequented street of the city, 210 feet from the corporate

line, within four blocks of the former depot and within the police jurisdiction of the city, the railroads will not be enjoined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city is being sidetracked or that their property will be damaged by the proposed change.

9. If the Legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence, cannot be wrongful. If damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it.

ACTION by Charles Dewey and others on behalf of themselves and other citizens of Goldsboro against the Atlantic Coast Line Railroad and others, heard by *Webb, J.*, at the August Term, 1906, of WAYNE, upon a motion to dissolve a restraining order theretofore issued.

Defendants, the Atlantic Coast Line, Atlantic and North Carolina Railroad, and Southern Railway, intending to carry out an order of the Corporation Commission directing that they establish and maintain a union passenger depot at the terminus of Walnut Street about 210 feet from the western boundary of the city of Goldsboro, and within the police jurisdiction of the same, were stayed by a temporary restraining order issued in the cause at the instance of plaintiffs.

The material facts connected with the order of the Corporation Commission in the premises are as follows:

For many years the city of Goldsboro and its citizens and the traveling public generally have been insisting upon the erection and maintenance of a union passenger station at Goldsboro, N. C. Pursuant to
(394) this sentiment, the city of Goldsboro, on 5 July, 1905, passed the following resolutions:

GOLDSBORO, N. C., 5 July, 1905.

The following preamble and resolutions were adopted by the Board of Aldermen of the city of Goldsboro, at a regular session of said board, on 3 July, 1905:

Whereas, the city of Goldsboro is the terminus of three railroads, and the most important way-station of a fourth railway; and whereas, all of said railroads do a large passenger traffic in said city; and whereas, said railroads have provided absolutely no shelter for passengers entering or leaving their trains; and whereas, the waiting and baggage rooms are not of sufficient size to supply their intended purposes and are not up to date in their appointments: *Therefore, be it*

Resolved, by the Board of Aldermen of the city of Goldsboro, that the Corporation Commission of this State be requested to take speedy action to cause the erection of a proper passenger depot in said city.

Resolver further, that the clerk of this board transmit a copy of these resolutions, attested by the seal of the city, to said Corporation Commission.

(SEAL.) D. J. BROADHURST, *Clerk.*

Which said resolutions were laid before the North Carolina Corporation Commission; that in pursuance of said resolutions, the North Carolina Corporation Commission gave notice that it would hear the petition of the city of Goldsboro, at Goldsboro, 4 January, 1906, and thereupon the city of Goldsoboro, through its Board of Aldermen, adopted the following resolutions:

GOLDSBORO, N. C., 20 December, 1905.

The following preamble and resolutions were adopted at a meeting of the Board of Aldermen of this city, held this day, to wit:

Whereas, the North Carolina Corporation Commission has given official notice that the petition of this board for the (395) erection of a proper passenger depot in this city has been set for hearing at this place on Thursday, 4 January, 1906: *Therefore, be it*

Resolved, by the Board of Aldermen of the City of Goldsboro, that in behalf of the citizens we thank the Commission for their response to our petition; we urge them to require speedy action in giving relief to a long-suffering public, and we express no choice as to the location of the said depot, being willing to abide by the action of the Commission, which represents the traveling public no less than the citizens of Goldsboro.

Resolved further, that a copy of these resolutions be furnished the Commission upon their visit here on 4 January, 1906.

D. J. BROADHURST, *Clerk.*

That upon said hearing at Goldsboro, 4 January, 1906, the said railroads moved the Commission to continue the proceedings ninety days, in order that they might confer and choose some available site; that on 3 April, 1906, the railroad companies reported to the Corporation Commission that they had agreed upon the location of said union passenger station, and accompanied their report with a blue-print, showing tracks connected therewith; that said site selected was at the foot of Walnut Street, about four blocks from the present stopping-place of the trains of said railroads; that thereupon all the plaintiffs filed exceptions to said report, alleging as ground therefor that such location

would greatly inconvenience the citizens of Goldsboro and the traveling public and work irreparable damage to a large proportion of the property-owners of the city of Goldsboro; that thereupon, to-wit, on 3 May 1906, at Goldsboro, after due notice to the city of Goldsboro, to the railroads, and to the parties excepting, the Corporation Commission gave a full hearing to all parties, petitioners and exceptors; that at said
(396) hearing the plaintiffs herein were represented by W. T. Dortch, Esq., and appeared in person, and a number of them were examined as witnesses; that the Hon. George Hood, Mayor of the city of Goldsboro, stated that the site agreed upon, or any other that would be acceptable to the Corporation Commission, would be satisfactory to the city of Goldsboro; that after a full hearing of said matters the Corporation Commission found the following facts, to-wit:

"That the location agreed upon is accessible and available for each of the three railway companies; that it is within four blocks of the site used at present by the said railway companies, and that the grounds are sufficient and ample for the construction of waiting-sheds and buildings necessary for the convenience, comfort and protection of the traveling public; and this location will promote the convenience of the traveling public; that there is constant and increasing danger resulting from the operations of the trains on Center Street, and that will, to a great extent, be removed by adopting the proposed site."

And thereupon the North Carolina Corporation Commission ordered that the union passenger station be located at the terminus of Walnut Street, Goldsboro, being the site proposed by the defendant railroad companies; that in obedience to this order of the North Carolina Corporation Commission, and for no other purpose, and with a motive to subserve the public in the best possible way, and in obedience to law, the said railroad companies were at the beginning of this action taking steps to construct tracks leading to the said proposed union passenger station.

No appeal was taken from this order of the Corporation Commission; but on 7 May, 1906, the Board of Aldermen of the City of Goldsboro, by a vote of five to four, passed a resolution of protest against the proposed location on the site selected.

The four minority members filed a dissent and adhered to
(397) the original resolution of the board. Defendants, as stated, were preparing to carry out the order of the Commission, when plaintiffs, for themselves and all other citizens of Goldsboro who would make themselves parties, instituted the present suit, claiming that the

order of the Commission and the action of defendants thereunder were without warrant of law. That the three railroads heretofore and for many years had their tracks and operated their trains along Center Street of the city of Goldsboro, and this is the location of all the defendant roads in and through the city of Goldsboro; and they have also for many years past had and used a joint ticket office and waiting-room rented for the purpose in a building on Center Street, near the Hotel Kennon in said town.

The interest of some of the plaintiffs in property claimed to be damaged and the grievances alleged as the basis of their demand are thus stated in the complaint:

"That they are informed and believe, under the charter of said railroad companies, it is their duty to continue said right-of-way along said Center Street. That, as they are informed and believe, the citizens of Goldsboro, relying, as they have a right to rely, on the presumption that the railroad companies, in maintaining their right-of-way, would conform to their charter provisions, and upon the strength of this presumption have made large investments at this point, and the town of Goldsboro has been built up along said street and adjacent thereto, with a view to a permanent location of said railroads along said street.

"That the plaintiffs, relying upon said presumption, have invested large sums at or near said point, and along said Center Street, and on the streets adjacent thereto, and they are of the opinion that the removal of said right-of-way and tracks of said railroad from said street will greatly injure and impair their investments and property rights along said streets adjacent thereto, as well as the commercial interests and conveniences of all the citizens of the city of Goldsboro.

"That some of the plaintiffs, to-wit, H. Weil & Brothers and M. E. Robinson, are largely interested in two large and costly (398) hotels, constructed immediately upon the east side of said Center Street, and near said ticket offices of said railroads, and an ice plant immediately east of said right-of-way; and one of the plaintiffs, Charles Dewey, is largely interested in foundry works, established immediately on the western side of Center Street, and all other plaintiffs have other and valuable properties either upon said street or adjacent thereto, which, in their opinion, would be greatly endamaged if the said right-of-way and tracks of said railroads were removed from said street."

Defendants deny that they have any intent to abandon their right-of-way or discontinue the use of their tracks along Center Street for purposes of carrying and delivery of freight; but avow their intention of carying out the order of the Commission in reference to the pas-

senger depot and the operation of their passenger trains. That a compliance with the order of the Commissioners will involve some change of the roads in and near Goldsboro to enable the passenger trains to make use of the union depot at the site selected, and no power to do this after the roads have been once located appears in the charters of the companies, so far as same have been examined or put in evidence. Upon the facts, the Judge below dissolved the restraining order, and plaintiffs excepted and appealed.

W. C. Munroe and *Dortch & Barham* for the plaintiffs.
Aycock & Daniels and *Isaac F. Dortch* for the defendants.

HOKE, J., after stating the case: The Revisal 1905, sec. 1097, subsec. 3, empowers and directs the Corporation Commission to require, when practicable, and when the necessities of the case, in the judgment of the Commission, demand it, any two or more railroads which now or hereafter may enter any city or town to have one common or (399) union passenger depot for the security, convenience and accommodation of the traveling public, and to unite in the joint expense of erecting, constructing and maintaining said union passenger depot, etc., etc.

Another clause of said section confers on the railroads so ordered to construct a depot, the power to condemn land for the purpose, and the section closes with the proviso that nothing in the section shall be construed to authorize the Commission to require the construction of a union depot should the railroad companies have separate depots which, in the opinion of the Corporation Commission, are adequate and convenient and offer suitable accommodation for the traveling public.

The power of the Legislature to enact a statute of this charater has been established by numerous and well-considered decisions of this and other courts of supreme jurisdiction and is no longer open to question. *Industrial Siding case,* 140 N. C., 239; *Corporation Commission v. R. R.,* 139 N. C., 126, and authorities cited.

The Corporation Commission having taken action under the above statute, the right of the parties to the controversy may be made to depend largely upon its true interpretation.

The statute in its principal purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction. Endlich on Interpretation of Statutes, secs. 107-108. Lewis' Southerland Statutory Construction, sec. 336.

In a note to this citation from Endlich it is said: "In any classifica-

tion of acts of Parliament, the most important is that by which they are divided into remedial and penal statutes; or, rather, into such as are construed liberally and such as are construed strictly."

The author in the text further says:

"Of such statutes, as distinguished from penal statutes, more especially is it said that they are to be construed liberally to carry out the purpose of the statute to suppress the mischief and advance the remedy contemplated by the Legislature." (400)

And further:

"The object of this kind of statute being to correct a weakness in the old law, to supply an omission, to enforce a right, or redress a wrong, it is but reasonable to suppose that the Legislature intended to do so effectually, broadly, and completely, as the language used, when understood in its most extensive signification, would indicate."

Another accepted rule of construction is that "whenever a power is given by statute, everything necessary to make it effective or requisite to attain the end is inferred." Southerland Statutory Construction, 508. Endlich on Construction of Statutes, 418.

The first author, at page 518, further states: "It is a well-established principle that statutes containing grants of power are to be construed so as to include all things necessary to accomplish the object of the grant. The grant of an express power carries with it, by necessary interpretation, every other power necessary and proper to the execution of the power expressly granted."

Applying these principles to the case before us, we think it clear that the statute empowering the Corporation Commission where practicable, and under the limitations contained in the act, to require railroads to construct and maintain a union depot in cities and towns, and giving to the railroads subject to such order the express power to condemn lands, will confer on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public, as contemplated by the act. The authorities cited by the defendant from 70 Fed. Rep., pp. 748 and 940, are to the effect that the right of eminent domain is never implied and can only be exercised under and by virtue of an express grant. Here, as stated, the power of eminent domain is given in express terms to the rail- (401) roads, which act under the statute and pursuant to orders properly made by the Corporation Commission. We do not think the position of defendant is well taken, that the Corporation Commission can only

act when the roads can connect on the right-of-way as already laid out. Such a construction is altogether too restricted, and if allowed would go far to defeat the beneficent purpose of the Legislature.

The words of the act are general, and the remedy was intended to apply to all the towns and cities in the State where, in the legal discretion of the Commissioners, the move is practicable, the convenience of the traveling public require it, and the existing facilities, in the judgment of the Commissioners, are inadequate.

If this be a correct interpretation of the statute, then it follows of necessity that the plaintiffs must fail in their action. The defendants, having legislative authority to make the proposed change, are acting within their right. So far as now appears, they are only doing, or proposing to do, "a lawful thing in a lawful way;" and in such case, if harm comes to a third person, it is not a wrong for which the law will afford redress. It is *damnum absque injuria. Thomason v. R. R.* (paintiff's appeal), ante 322. Broom Legal Maxims (8 Ed.), p. 200; Pollock on Torts (7 Ed.), pp. 126-7, 8 A. and E. Ency. (2 Ed.), 697. The doctrine is well stated in this last citation as follows: "It may be stated as a general rule that if the Legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the outhorized way and without negligence cannot be wrongful. If damage results as a consequence of its being done, it is *damnum absque injuria,* and no action will lie for it."

The principal objection urged by plaintiffs against the validity of these proceedings is that a railroad company has no right to
(402) change its route without legislative authority. That, having once exercised its discretion in locating its line, the power is exhausted, and such location cannot be thereafter changed. The position is sound, as a rule, and the authorities cited in the carefully prepared and learned brief of appellants' counsel are apt to support it. It is not necessary, however, that the power to change a route should be given in the charter or a direct amendment thereto; but, as stated in one of the authorities, "It may be given by charter or by special enactment or by the general railroad laws of the State." Under the construction we have given the statute, there is legislative authority for the proposed change, and the power of eminent domain having been expressly given to the extent required to carry out the purpose of the statute, this position of plaintiff is now without force and the authorities referred to no longer apply. It is further insisted that by sec. 2573 of the Revisal the contemplated change can only be made when sanctioned by a two-thirds vote of the Aldermen of the City of Goldsboro. It may be that

such sanction could be found in the fact that the Board of Aldermen, as such, were the actors who set this proceeding in motion, and, in their resolutions of 6 July, 1905, and 4 July, 1906, unanimous, so far as the record discloses.

But, without passing on this question we are of opinion that this requirement of a two-thirds vote only applies where the railroad, of its own volition and for its own convenience, contemplates a change of route.

It is found in the general railroad law as a clause in the section which confers on the directors of a company the power to voluntarily change their route; and does not apply to cases like the present, where the Corporation Commission, acting under express legislative authority and direction, require the railroad to make the change for the convenience of the general public.

Again, it is insisted that the site selected is not within the corporate limits of the city, and that to permit this contem- (403) plated action on the part of the roads would be to sidetrack the city of Goldsboro, to the great damage of the city and the citizens owning property therein; and we are referred to decisions where railroad companies have been restrained from a move of this character at the instance of citizens owning property within the limits of the city or town, and which would suffer depreciation in value by reason of the change. But we do not think this position is borne out by the facts, or that it is available in law to sustain the plaintiffs.

The site selected is at the terminus of Walnut Street, an important and much-frequented street of the city, just 210 feet from the corporate line, within four blocks of the former depot on Center Street and within the police jurisdiction of the city.

There is authority for the position that such placing may be considered within the city as a matter of reasonable construction. *Old Ladies' Home v. Hoffman,* 117 Iowa, 716; *Wichita v. Burleigh,* 36 Kansas, 34.

But, however this may be, the Corporation Commission the body authorized and required by law to determine the matter, after full and due inquiry, have fixed upon this as the proper site, and they give, as it seems to us, good reason for their decision, as follows: "That the location agreed upon is accessible and available for each of the three railway companies; that it is within four blocks of the site used at present by the said railway companies, and the grounds are sufficient and ample for the construction of waiting-sheds and buildings necessary for the convenience, comfort and protection of the traveling

public; that there is constant and increasing danger resulting from the operation of the trains on Center Street, and that, to a great extent, will be removed by adopting the proposed site."

We do not think, therefore, that the facts support the claim (404) of plaintiffs, that the city of Goldsboro is being sidetracked.

And, on the authorities cited to the effect that a citizen of the town, owning property therein, may, under given circumstances, interfere by action to prevent a railroad from removing its tracks from the town limits, they all rest on the basic position that the contemplated move on the part of the railroad is without warrant of law.

Where, as in this case, the railroads are proceeding to an authorized act, and in a lawful manner, there is no legal wrong done the plaintiffs, and the Judge below was right in denying relief. There is no error, and the judgment below is affirmed.

Affirmed.

Cited: White v. Kincaid, 149 N. C., 420; *Barger v. Barringer,* 151 N. C., 446; *Butler v. Tobacco Co.,* 152 N. C., 419; *Commrs. v. Bonner,* 153 N. C., 70; *S. v. R. R., Ib.,* 561, 562; *R. R. v. Goldsboro,* 155 N. C., 363; *S. v. R. R.,* 161 N. C., 273.

CHERRY v. POWER COMPANY.

(Filed 23 October, 1906.)

Trusts and Trustees—Equitable Separate Estate—Restraint Upon Alienation—Execution of Power—Statute of Uses—Color of Title—Statute of Limitations—Disabilities of Married Women.

1. Where land was conveyed to a trustee upon the following trust: That during the joint lives of the husband and wife the trustee should permit the wife to remain in possession and occupy the rents and profits for her sole use, but so that she should not sell, transfer, mortgage or in anywise change the same without the consent of the trustee; and should she survive her husband, then the trustee should convey the land to her; but should she die in the lifetime of her husband, leaving any children surviving, then the trustee should hold the land to the sole use of, and convey the same to, such children: *Held,* the wife had an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent upon her predeceasing her husband.

2. The provision placing a restraint upon her right of alienation without the consent of her trustee, applies to her power to sell, transfer, etc., her interest or estate in the property, and a deed in fee-simple executed (405) by the husband and wife (the husband being the substituted trustee)

was a valid execution of the power to the extent of conveying to the grantee all the right, title and interest of the wife, and his possession thereunder to the day of her death was righted.

3. Upon the death of the wife, during the coverture, leaving children surviving, her interest ceased and it became the duty of the trustee to convey the land to the children; and as the purpose of the trust was fully accomplished, by operation of the statute of uses the use becomes executed and the legal title vested in the children and the statute of limitations began to run from the death of their mother.

4. As the deed from the husband and wife professed to convey the fee, it was good as color of title from the death of the wife, and the children, unless under disabilities, were barred at the end of seven years from that time.

5. In an action of ejectment, the *feme* plaintiffs are not barred by adverse possession under color of title under the provisions of the Act of 1899, ch. 778, where the action was begun 10 February, 1906, as they had seven years from 13 February, 1899, to sue.

ACTION by L. G. Cherry and others against the Cape Fear Power Company and others, heard by *Justice, J.*, at the August Term, 1906, of CHATHAM.

This action was brought by the plaintiffs for the recovery of the real estate described in the complaint. A jury trial having been duly waived, his Honor found the following facts:

That this action was begun on 10 February, 1906; that Margaret A. Moore and her intended husband, J. A. Harman, duly executed a marriage settlement and deed of trust to Joel Hines on 15 December, 1855, conveying, among other property, the land in controversy upon the following trusts, to-wit: "To have and to hold her distributive share of said land unto him, the said Joel Hines, his heirs, executors, administrators and assigns, upon the trusts, nevertheless, and to and for the uses, intents and purposes hereinafter set forth and expressed, viz.: That during the joint lives of the said James A. Harman and Margaret A. Moore, the said Joel Hines shall suffer and permit the said Margaret A. Moore, notwithstanding her coverture, to (406) remain in possession and occupy the rents and profits of the said tract of land and negro slaves for her sole and separate use; but so that the said Margaret A. shall not sell, transfer, mortgage, or in anywise change the same without the consent of the said Joel Hines, and should the said Margaret A. Moore survive the said James A. Harman, then and in that event the said Joel Hines, his heirs, etc., shall transfer and convey the said tract of land and negro slaves and their increase unto the said Margaret A. Moore; but should the said Margaret A. Moore die in the lifetime of the said James A. Harman, leaving any child or children surviving her by the said James A. Har-

man, then and in that event the said Joel Hines, his heirs, executors, or administrators, shall hold the said tract of land and negro slaves, and their increase, to the sole use and benefit of such child or children, and convey the same to them at any time if they or any of them should survive the said Margaret A. Moore; but should there be no issue from the said Margaret A. Moore and James A. Harman, and the said Harman should survive Margaret A. Moore, he is to have the use and profits of one-half of the said negroes during his lifetime, but not the land." There are some ulterior, contingent limitations not necessary to be noted in the decision of this appeal.

That shortly thereafter Margaret A. Moore and J. A. Harman were duly married and lived together as man and wife until the death of Margaret, on 25 June, 1885. That by decree of the Superior Court of Equity of New Hanover County, in an action duly instituted in said Court, Joel Hines was permitted to resign as trustee, and Oliver P. Meares was thereupon duly appointed trustee in his stead, and duly accepted the said trust. That out of funds arising from sale of some of the property conveyed in deed of trust to Joel Hines, the real (407) estate described in the complaint was purchased and deed made conveying the same upon the terms and trusts declared in said marriage settlement. That subsequently, in 1859, by a decree made in the Court of Equity of New Hanover, duly instituted and pending, Oliver P. Meares was permitted to resign the trust, and J. A. Harman was duly appointed trustee, and accepted the same; and pursuant to said decree the said Oliver P. Meares, on 27 January, 1859, executed and delivered to J. A. Harman a deed conveying, among other property, the land described in the complaint, to be by him held upon the same trusts as declared in the marriage settlement. That on 16 May, 1868, J. A. Harman and Margaret A. Harman executed and delivered to H. H. Prince a deed in fee-simple for said land. That H. H. Prince entered upon said land and took possession thereof, and subsequently conveyed it to J. M. Heck, and the defendants acquired the title thereto by mesne conveyances, the said deeds conveying the land in fee with full covenants of warranty, and the several successive owners entered into open and actual possession thereof and have held and maintained such possession continuously under their deeds since said 16 May, 1868. That Margaret A. Harman died on 25 June, 1885, and James A. Harman died on 2 May, 1903. That Margaret A. Harman died leaving surviving her the following children, to-wit: John Edgar, born 6 November, 1856; Mary P. Cherry, wife of L. G. Cherry, born 12 August, 1858, and was married 27 December, 1877; Harriet Irene Howard,

wife of M. E. Howard, born 10 March, 1860, married ...., 1888; Viola Braddy, born 27 December, 1869, and was married in September, 1889; V. C. Wren, wife of J. L. Wren, was born 13 November, 1863, and was married after she became 21 years of age; that Clarence H. Harman was born 24 August, 1866; that George L. Harman was born 31 October, 1871; that Mrs. Mary P. Cherry, Mrs. Harriet Irene Howard, Mrs. V. C. Wren, and Mrs. Viola Braddy have remained (408) continuously, since their marriage, *feme covert.*

The Court, upon the foregoing facts, concluded as a matter of law that the plaintiffs Mary P. Cherry and Viola Braddy are entitled to recover one-seventh each of the land, and to be let into possession of said land with the defendants; that the plaintiffs Harriet Irene Howard, V. C. Wren, George L. Harman and Clarence H. Harman are not entitled to recover of the defendants any part of said land, but that any title they may have had is vested in the defendants.

To so much of said judgment as declares and adjudges that Mary P. Cherry and Viola Braddy are entitled to one-seventh each of said land and to be entitled to be put in possession thereof, and the writ therefor, the defendants except and assign the same as error. The plaintiffs Harriet Irene Howard, V. C. Wren, George L. Harman and Clarence H. Harman except to said judgment. Both parties appealed to the Supreme Court.

H. A. London & Son for the plaintiffs.

Manning & Foushee and *Womack, Hayes & Bynum* for the defendants.

CONNOR, J., after stating the case: Eliminating so much of the history of the title to the land in controversy as precedes the execution of the deed by Judge Meares to J. A. Harman, trustee, the case comes to this: The *locus in quo* was conveyed to Harman to hold in trust for his wife, Margaret A., for her sole and separate use for the joint lives of her husband and herself, and if she survived her husband, then to her in fee. But if she should die while under coverture, leaving children surviving, then to such children in fee. Other contingent estates are provided for, but as the first limitation has been met, and the fee vested, it is unnecessary to set them out. Thus, as we construe the deed, Mrs. Harman had an equitable estate for the joint life (409) of her husband and herself and a contingent remainder in fee dependent upon her surviving him, with remainder over to her children dependent upon her predeceasing her husband. The further provision

placing a restraint upon her right of alienation, without the consent of her trustee, applies to her power to sell, transfer, etc., her interest or estate in the property. There is nothing on the face of the deed indicating an intention to permit her to dispose of a larger estate than that vested in her. In that respect the deed differs from that in *Cameron v. Hicks,* 141 N. C., 21, wherein the power to appoint was "in fee or otherwise," and *Kirkman v. Wadsworth,* 137 N. C., 453, where the power was to appoint "such estates as the *feme covert* might limit." The draughtsman evidently thought that Mrs. Harman, unless restrained by the deed, would have the power to dispose of her equitable separate estate as a *feme sole,* as was the English doctrine and once so held by us, and, for her protection, placed restraint upon her power by prescribing that she could do so only with the consent of her trustee. The substitution of her husband as trustee was permissible and valid. *Kirkman v. Wadsworth, supra.*

It is not material to inquire whether the deed from Mr. and Mrs. Harman refers to the power or not. If necessary that it should have done so, we think that there is sufficient evidence upon the face of the deed to show that they were pursuing the power. It is, however, well settled that the deed is a valid execution of the power to the extent of conveying her interests. The question is fully discussed and the authorities cited by *Mr. Justice Brown* in *Kirkman v. Wadsworth, supra.*

Prince, the grantee, in the deed of 16 May, 1868, acquired all of the right, title and interest of Mrs. Harman, and his possession under the deed to the day of her death, 25 June, 1885, was rightful. In (410) this respect the case is distinguished from *King v. Rhew,* 108 N. C., 696; *Kirkman v. Holland,* 139 N. C., 185, and *Cameron v. Hicks, supra.* In neither of these cases did the trustee join in the deed, and no title passed as against him by the deeds executed by the *cestui que trustent.* For this reason the entry by the grantee was an ouster of the trustee and put him to his action; the statute thereby began to run against him, with the result that by lapse of time his right of entry was barred, and the right of his *cestui que trustent* fared the same fate.

Here the entry was rightful, and the possession continued to be so until the death of Mrs. Harman, 25 June, 1885. Upon the happening of that event her interest ceased, and it became the duty of the trustee to convey the land to her children, the present plaintiffs. As the purpose of the trust was fully accomplished, the necessity and reason for keeping the legal and equitable estates separate no longer existed, and, by operation of the stautute of uses, aptly called "parliamentary magic,"

the use becomes executed and the legal estate vested in the plaintiffs. *McKenzie v. Sumner,* 114 N. C., 425; *Perkins v. Brinkley,* 133 N. C., 154.

When an estate is given to a trustee for a special purpose creating a special trust, as for the sole and separate use of a *feme covert* or to preserve contingent remainders, the legal title vests in him so long as the execution of the trust requires it, and no longer. *Battle v. Petway,* 27 N. C., 576; *Cameron v. Hicks, supra; Steacy v. Rice,* 67 Am. Dec., 447. The plaintiffs' right of entry, therefore, accrued upon the death of their mother, and the statute began to run from that time. As the deed from Mr. and Mrs. Harman professed to convey the fee, it was good as color of title from that time, and the plaintiffs, unless under disabilities, were barred at the end of seven years, or on 25 June, 1892. His Honor found that two of the plaintiffs were at that time and, until the beginning of this action, continued under disabilities. As to the others, the statute is a bar.

Several interesting questions were discussed in the briefs and the oral arguments which, in view of the construction which (411) we have put on the marriage settlement, do not arise. The *feme* plaintiffs are not within the provisions of Laws of 1899, ch. 78. They had seven years from 13 February, 1899, or until 13 February, 1906, to sue. The action was begun 10 February, 1906.

We concur with his Honor in both appeals. Let it be certified that there is

No Error.

LUMBER COMPANY v. CEDAR COMPANY.

(Filed 23 October, 1906.)

Trespass — Irreparable Damage — Injunctions — Timber Trees — Practice — Prima Facie Title—Exceptions in Grants—Sufficiency—Burden of Proof.

1. Before a court of equity would exercise its jurisdiction to enjoin civil trespasses two conditions were required to concur, namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been of such a peculiar nature as to cause irreparable plainant was attempting to establish it by an action at law and needed protection during its pendency, and secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage.

2. The usual method of showing irreparable damage, when the trespass was the cutting of timber trees, was by alleging and proving insolvency. But by the Revisal, sec. 807 (Acts of 1885, ch. 401), it was provided

that in an application for an injunction it shall not be necessary to allege insolvency when the trespass is continuous in its nature or consists in cutting timber trees.

3. Rev., sec. 808 (Acts of 1901, ch. 666), provides that when the Judge finds it to be a fact that the contention on both sides, as to the title to the land and the right to cut timber hereon, is *bona fide* and is based upon evidence of facts constituting a *prima facie* title, neither party shall be permitted during the pendency of the action to cut the trees, without
(412) the consent of both, until the title is regularly determined.

4. Rev., sec. 809, provides that if it is found that the contention of either party is in good faith and is based upon a *prima facie* title, and the Court is further satisfied that the contention of the other party is not of that character, it may allow the former to cut the trees upon giving bond to secure the probable damage, as required by law.

5. In an action to enjoin the defendant from trespassing on certain land by cutting timber, where the defendant exhibited a perfect paper title to three tracts and adduced testimony reasonably sufficient and satisfactory to show the location of the land included within the boundaries of those three tracts, and that he has acted in good faith in all respects, and the plaintiff made no claim to these tracts, the Court erred in enjoining the defendant from cutting timber on said three tracts.

6. A party claiming land to be within an exception must take the burden of proving it.

7. An exception in a grant of 167,500 acres "within which bounds there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to P 9,600 acres, which begin at J's northeast corner of 2,000 acres grant on Mill Tail and runs south and east for complement," is sufficiently certain to exclude the lands therein described from the operation of the grant.

ACTION by East Lake Lumber Company against East Coast Cedar Company and others, pending in DARE, and heard by *Neal, J.*, at chambers on 14 August, 1906, on a motion for an injunction.

The plaintiff brought the action to restrain the defendants from trespassing on the land described in the complaint by cutting and removing timber therefrom, some of the defendants having a large plant and being engaged extensively in the timber business. The Court granted an injunction to the hearing and the defendants appealed. The plaintiff claimed to be the owner of a large body of land in Dare County, which was granted to John Gray Blount, 7 September, 1795, and said to contain 100,000 acres, according to the quantity given in the grant,
(413) but in fact a much larger acreage, that is, about 167,500 acres.

The grant is said to embrace all of the county of Dare, except Roanoke and perhaps Durant Island and the Banks. It contains an exception, as to senior grants and entries, which is thus stated in the grant: "Within which bounds there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to Mr. George Pollock, 9,600 acres *of* which begins at Samuel Jackson's north-

east corner of 2,000 acres grant on Mill Tail and runs south and east for complement." As the context shows that the word "of" was evidently inserted in the copy by mistake, we have compared it with the original in the office of the Secretary of State and find this to be so. A correct copy is set forth in *Manufacturing Co. v. Frey,* 112 N. C., at p. 159. The word "of" should be stricken out and the comma should be placed after the word "acres" and before the word "which," instead of after the word "Pollock" and before the figures "9,600," so that the exception when properly quoted will read: "Within which bounds there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to Mr. George Pollock 9,600 acres which begin at Samuel Jackson's northeast corner of 2,000 acres grant on Mill Tail and runs south and east for complement." The plaintiff asserted title to the entire body of land covered by the said grant, with which it claimed to have connected itself by mesne conveyances. The defendants denied they had committed any trespass on land alleged to be owned by the plaintiff and contended here that the plaintiff had not shown any such trespass by the proof, and further, they averred that they have cut no timber except on land which is either excepted in the Blount grant under which the plaintiff claims, or the title to which as being in the defendants, or those under whom they claim, the plaintiff is estopped to deny, the title to the said lands having been fully adjudicated, and as to some of them the location fixed, in judicial proceedings by which the plaintiff is in law bound and concluded. The two defendant companies disclaim any title to the land in dispute and deny (414) that they have cut any timber on the same or on any land of the plaintiff, or that they have ever authorized any one else to do so, but aver that they have not recently been engaged in the business of cutting timber in Dare County. The plaintiff alleges that all of the defendants are operating under the name of the Buffalo City Mills, Incorporated, and have changed their business name from time to time for the purpose of defeating the process of the Court, and thereby escaping liability for their unlawful trespasses. This is denied by the defendants and the counter-charge made that the plaintiff is an insolvent foreign corporation and a land speculator; that the title to the land claimed by it is radically defective and its boundaries have not been shown, and that the land claimed to be embraced by its outer lines is occupied by hundreds of people whose titles and right of possession are undisputed and unassailable. The defendant sets forth circumstantially its title to the tracts of land upon which it has cut timber. As to the "McRae Tract" of 5,080 acres and the "Blount-Rodman tract" of 5,000 acres, they allege that the plaintiff is estopped by certain judicial proceedings to deny

the title of those under whom the defendants claim and justify their acts, which are alleged to be trespasses, and the defendants deduce their title to these tracts from the State, by showing grants duly issued for the same and judicial proceedings and mesne conveyances, which put the said title in the Buffalo City Mills, Incorporated, Andrew Brown and A. J. Brown, respectively, it being the title under which A. J. Brown claims and his co-defendants so justify. As to the other land, known in the case as the "Pollock tract," the defendant introduced the record of a suit in equity pending in the United States Circuit Court, between the plaintiff and the Buffalo City Mills, Incorporated, and referred specially to the third section of the complainant's bill, in which it is admitted that the said tract of land is not covered by (415) the John Gray Blount patent, but is excepted therefrom, the specific admission being that the exception in that grant, heretofore mentioned, comprises 22,633 acres previously granted, and the Pollock survey of 9,600 acres, for which a grant was to be issued and was in fact afterwards issued to George Pollock upon his entry and survey. This conforms the description of the exception in the Blount grant to what we have said is the correct one. The defendants then show that Pollock's title was thereafter acquired by A. J. Brown, under whom the other defendants, except the two corporations, justify. The plaintiff admitted in this case that it did not own either the McRae or the Blount-Rodman tract, nor does the plaintiff apparently lay any valid claim to the Pollock land, 3000 acres of which it admits has been properly located, though it denies, perhaps, that there has been any correct location of the remainder of that tract or of the McRae and Blount-Rodman tracts. It appears that the grant for the last-named tract which was issued 5 September, 1795, antedates the John Gray Blount patent, issued 7 September, 1795, and the defendants rely on this fact, in addition to the estoppel. There was much testimony taken as to the true location of these three several tracts, the defendants alleging that they had been correctly located and exhibiting carefully prepared maps showing the lines and boundaries, while the plaintiff insisted that they had not been identified by any competent and sufficient testimony, though apparently it does not profess to know or to be able to state where the metes and bounds would be with reference to the lines of the John Gray Blount patent, if they were surveyed and marked on the ground. They simply deny the defendant's location. There was also considerable testimony taken as to the *locus in quo* or place in which the cutting of the timber was done. The defendant contended that, according to the evidence offered by the plaintiff, the timber alleged to

have been cut was standing on the McRae, the Hunning, the Belangia and the Blount-Rodman tracts, the land lying north of (416) the McRae tract, on which the plaintiff alleges there was cutting of timber, being the Belangia tract, and that on the east the Blount-Rodman tract. The plaintiff introduced the record in the case of the *East Coast Cedar Co. v. Peoples Bank of Buffalo,* it being a suit for partition, the object of this proof being to estop the defendants (by the decree declaring the parties to be tenants in common) from denying the title of the plaintiff to the land covered by the Blount patent, the assignors of the respective parties to this action having been parties to that suit. The insolvency of the defendant is alleged in the complaint, but denied in the answer.

The Court enjoined the defendants from cutting trees, logs and timber on or removing them from the premises described in the complaint, being the lands covered by the Blount grant, and enjoined both the plaintiff and the defendant from cutting any timber on the lands described in the McRae, Pollock and Blount-Rodman patents, until the true location thereof is established by surveys made under its orders; and from this order the appeal of the defendant was taken to this Court.

Pruden & Pruden and *Shepherd & Shepherd* for the plaintiff.
Aydlett & Ehringhaus and *F. H. Busbee & Son* for the defendant.

WALKER, J., after stating the case: As a general rule, a court of equity did not exercise its jurisdiction so as to enjoin offenses against the public or civil trespasses. The rule as to the former seems to have been without exception (*Paul v. Washington,* 134 N. C., 363), but, as to the latter and after much hesitation, it finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases, namely, the plaintiff's title must have been admitted or (417) manifestly appear to be good, or it must have been established by a legal adjudication, unless the complainant was attempting to establish it by an action at law and needed protection during its pendency, and secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage, as, for instance, in the case of the destruction of shade trees or of any other wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned for by compensation in money, such as torts committed on property

and things having a value distinct from their intrinsic worth: for instance, *a pretium affectionis,* though not a merely imaginary value. It was held in England that the destruction of timber trees would be enjoined because it was thought to be destructive waste which impaired the substance of the land—an injury to the freehold—but the settled doctrine of this Court was that the mischief wrought by such a trespass was not irreparable in itself, and did not become so, unless it was shown that the trespasser was insolvent. Courts of equity could not conveniently, on account of their peculiar constitution, try the title to land, and hence the necessity for having the title established as one of the essential prerequisites to the exercise of its jurisdiction, and it would not proceed unless it further appeared that adequate redress could not be had at law or the legal remedy would be ineffectual, so that the courts, proceeding according to the course of the common law, could not meet the requirements of justice. The principle upon which courts of equity took cognizance of such cases and administered the right through its remedial process of injunction, with the limitations thereof made necessary by practice and experience, has been clearly settled by the decisions of this Court. *Gause v. Perkins,* 56 N. C., 177; *Irwin v. Davidson,* 38 N. C., 311; *Thompson v. Williams,* 54 N. C., 176;

Lyerly v. Wheeler, 45 N. C., 267; *Bogey v. Shute,* 57 N. C., 174;

(418) *Thompson v. McNair,* 62 N. C., 121; *Newton v. Brown,* 134 N. C., 439; *Lumber Co. v. Wallace,* 93 N. C., 22; *Lewis v. Lumber Co.,* 99 N. C., 11. The usual method of showing irreparable damage when the trespass was the cutting of timber trees, was by alleging and proving insolvency. But by the Acts of 1885, ch. 401, it was provided that in an application for an injunction, it shall not be necessary to allege insolvency when the trespass is continuous in its nature or consists in cutting timber trees. Revisal, sec. 807. Laws 1901, ch. 666, provided that when the Judge finds it to be a fact that the contention on both sides, as to the title to the land and the right to cut the timber thereon, is *bona fide* and is based upon evidence of facts constituting a *prima facie* title, neither party shall be permitted during the pendency of the action to cut the trees, without the consent of both, until the title is regularly determined. Revisal, sec. 808. But if it is found that the contention of either party is in good faith and is based upon a *prima facie* title, and the Court is further satisfied that the contention of the other party is not of that character, it may allow the former to cut the trees upon giving bond to secure the probable damage, as required by law. Revisal, sec. 809. We believe this exhibits, in a general way, the course of decision and legislation upon the subject, which has at

this time become an exceedingly important one, in view of the ever-increasing and expanding business of cutting timber trees in our forests for the purpose of sale and manufacture. It would appear that the growth of the timber industry in the State was the cause of the legislation in the recent past, which was enacted, not only to protect our forests against depredations and consequent useless denudations, which is a most wholesome policy, but with the further object of preventing unlawful invasions of lands for the purpose of cutting timber thereon, in favor of the land-owners of the State, who might have found little or no protection in the law as it existed at the time of these (419) radical changes. We should construe and enforce these laws so as to execute this intention, but at the same time the principles of the former system which remain should also be allowed their full operation.

Let us now examine this case in the light of what we have already said. Under the Act of 1885, and even before its passage, it was held that the Court would not interfere with the cutting of timber, if there was no irreparable damage, in its strictly technical sense, and the plaintiff could be compensated in damages; and therefore a bond was required, instead of issuing an injunction, and a receiver was appointed to ascertain and report the quantity and value of the timber cut by the defendant. Notwithstanding the Act of 1885, this Court was still averse to stopping important enterprises by injunction if the plaintiff could otherwise be secured against loss, and in such a case it directed a bond to be given and a receiver to keep the accounts. *Lumber Co. v. Wallace, supra; Horton v. White,* 84 N. C., 297; *Lewis v. Lumber Co., supra.* This procedure, as we have seen, is forbidden by the Act of 1901, ch. 666, without the consent of the parties, where the dispute is *bona fide* on both sides and founded upon titles *prima facie* good, and only permitted when one of the parties is at fault and the other not. *Johnson v. Duvall,* 135 N. C., 642. In our case the Court did not proceed altogether under the statutes above enumerated, but found as facts that this is an action to try the title to land, which is chiefly valuable for its timber; that the contention of the defendants is not made in good faith, nor is it based on evidence sufficient to constitute a title *prima facie* good, and that the plaintiff's contention is *bona fide* and its evidence shows a *prima facie* title to the land in dispute. The defendants, upon this finding, are enjoined from cutting any timber upon the McRae, Pollock and Blount-Rodman tracts of land until the true location of those tracts is established by surveys to be made under the order of the Court. We are unable to agree with the learned (420) Judge, for we do not think the order of injunction can be sus-

tained in law by the case as made in the record. In the present state of the proof, however it may be varied when fully developed by cross-examination at the trial, it can hardly be questioned that the defendants have exhibited a perfect paper title to the three tracts named in the order, and in our judgment they have adduced testimony, oral and documentary, which at this stage of the case is reasonably sufficient and satisfactory to show the location of the land included within the boundaries of those three tracts. It is in both respects, at least *prima facie,* a good title which they have shown. Indeed, the paper title being without any apparent flaw, we do not see how, under the circumstances, and where no order of survey has been made by the Court, they could have been more definite and explicit in their proof. They have offered evidence of surveys and diagrams of the land, showing the situation of them with reference to the land described in the John Gray Blount grant, as it is alleged to be located, and the plaintiff attempted to meet this proof and overcome it to the extent of convicting the defendants of bad faith by merely asserting, and offering testimony exceedingly general in its character to show that the location is not correct, but without undertaking to inform the Court where the proper one should be with reference to the larger body of land covered by the patent under which they claim. We cannot believe that the law as it formerly was, nor as it now is under recent statutes, contemplating that one of the parties should have an advantage over his adversary upon such a showing. As far as we are able to see, the defendants have acted in apparent good faith in cutting the timber and in defending the suit and they have presented proof which shows *prima facie* that they have title to those three tracts. The finding of facts by the Court must be set aside, and the contrary finding is made by us, namely, that the defendant has acted, or is acting, in good faith in all respects, and has
(421) *prima facie* a title to the said three tracts of land. While it is true the order for the injunction is not confined to the three tracts we have named, but extends to all the land embraced by the Blount patent, it nevertheless appears that the plaintiff makes no claim to them or either of them. Why should the defendants, at the instance of the plaintiff, be enjoined from trespassing on lands which do not belong to the plaintiff, and to which it makes no claim, as the brief of counsel and the argument before us show? The Court having also enjoined the defendants from cutting timber on any land within the external boundaries of the Blount patent, and outside of the boundaries of the three tracts to which the defendants assert title, the defendants will have to cut timber, under our decision, if at all, at the risk of vio-

lating the order of the Court, and should, therefore, be quite sure that the lands claimed by them are properly located under their paper title. As it now appears, whatever may have been intended, the defendants have in part been enjoined from cutting timber on land which belongs to them, and which, of course, the plaintiff has no right or equity to protect by injunction. We are not aware of any principle requiring the owner of land to stop using it in the ordinary way, until it has been located, and no authority sustaining the validity of an order to that effect was cited to us.

We have not discussed the many other questions argued before us and presented in the elaborate briefs, because in view of the admissions and the facts appearing in the case, we do not find it necessary to do so. It has been assumed, and it so appears at present, that the plaintiff is the owner of the title alleged to have been derived from the Blount patent. The questions so ably and learnedly considered in the brief of plaintiff's counsel as to *lis pendens, res judicata* and the validity of the deed to the plaintiff, which is questioned by the defendant, and other controverted matters, need not be considered at this stage of the case, and the same may be said of the other questions debated by (422) counsel. Both parties seem to have acted in good faith—the plaintiff, as to the claim under the Blount patent, and the defendants as to their claim of the three tracts named in the order.

As to the exception in the Blount grant, it may now be taken as settled law that a party claiming land to be within an exception must take the burden of proving it. *Gudger v. Hensley,* 82 N. C., 481; *McCormick v. Monroe,* 46 N. C., 13; *King v. Wells,* 94 N. C., 344. The reference in an exception to lands previously entered or granted is sufficient to let in evidence of identification under the maxim, *id certum est quod certum reddi potest. Brown v. Rickard,* 107 N. C., 639; *Gudger v. Hensley,* 82 N. C., 481; *McCormick v. Monroe,* 46 N. C., 13; *Melton v. Monday,* 64 N. C., 295; *Scott v. Elkins,* 83 N. C., 424; *Midgett v. Wharton,* 102 N. C., 14; *King v. Wells,* 94 N. C., 344, and *Manufacturing Co. v. Frey,* 112 N. C., 158, which relates to this very grant. The exception of a definite number of acres without any description or reference by which to locate them, is of course void for uncertainty, as the reservation of 5,000 acres out of a larger body of land granted. *Waugh v. Richardson,* 30 N. C., 470; *McCormick v. Monroe, supra; Robeson v. Lewis,* 64 N. C., 734. But these question have now become immaterial and we refer to them merely to show that they have not been overlooked, as they were strenuously pressed upon our attention. The Pollock grant is of course

within the exception; the Rodman grant also antedates the Blount patent, and the title to the McRae tract is shown by proof sufficient to vest the title in the defendants apart from any consideration of the exception or of plaintiff's title under the Blount patent. We should add that since we have shown, in the statement of the case, the correct wording of the exception in the Blount patent, there can be no doubt that under the cases we have cited it is sufficiently certain to exclude the lands therein described from the operation of the grant.

We would not pass upon the merits of this controversy, and (423) could not do so when considering an interlocutory order for an injunction to the hearing. The truth of the matter cannot now be known, as a great deal of the evidence is merely *ex-parte,* and has not been subjected to those tests ordinarily required to elicit the truth. What we have said, therefore, should not be used to the prejudice of either party in the further investigation of the case. It is applicable only to the particular question now being decided and does not relate to the merits as they may finally be disclosed.

The finding and order of the Court below as to the McRae, Pollock and Blount-Rodman tracts of land was erroneous, and is, therefore, reversed, and as to those tracts the injunction will be dissolved, as to both parties. In other respects it will remain in force. One-half of the costs of this Court will be paid by the plaintiff and the other half by the defendants.

Error.

Cited: Lumber Co. v. Smith, 146 N. C., 162; *Lodge v. Ijames,* 156 N. C., 161; *Lumber Co. v. Cedar Works,* 158 N. C., 164; *Thomason v. Hackney,* 159 N. C., 304; *Foster v. Carrier,* 161 N. C., 475.

FAYETTEVILLE STREET RAILWAY v. RAILROAD.

(Filed 30 October, 1906.)

Railroads—Rights-of-way—Location, How Acquired—Priority of Right—Survey—Filing Map and Profile—Street Railway Charter—Collateral Attack—Route—When Organized—Stock Not Issued or Paid Up—Power of Railroad to Condemn Right- of-Way of Another Road—Injunctions Against Railroads.

1. Where the grants to railroad companies are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which first locates the line; and, in the absence of statutory

regulations to the contrary, the first location belongs to that company which first defines and marks its route and adopts the (424) same for its permanent location by authoritative corporate action.

2. Where the line of a railroad is clearly defined by the existence of an old road-bed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not essential.

3. The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company from locating on the same line.

4. Where priority of right has been secured by priority of location, it can not be defeated by a rival company agreeing with the owners and purchasing the property.

5. By sec. 2600 of the Revisal, railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for the information of that body and is not required as a part of a correct and completed location.

6. In an action to enjoin defendant railroad from interfering with a right-of-way claimed by plaintiff street railway, objections to the validity of plaintiff's claim on the ground that the capital stock has not been issued and that no money has been paid thereon; that plaintiff, incorporated as a street railway, has built no part of the road as yet, in Fayetteville or any other town, but is only proceeding in the country, and on a branch road, before the main road is constructed, such objections, even if valid, could only be made available by direct proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers, or by the State, for abuse or non-use of its franchise, and are not open to collateral investigation in a case of this character, nor at the instance of defendant.

7. Street railways organized under the general corporation law include railways operated by steam or electricity or any other motive power, used and operated between different points in the same municipality or between points in municipalities lying near or adjacent to each other, or between the territory lying contiguous to the municipality in which is the home office of the company, etc.

8. There is no requirement of the statute that the stock of a street railway company organized under the general corporation law shall be issued or paid up before a valid organization can be effected or corporate action taken.

9. A provision in a charter giving a railroad company the specific right to condemn old and abandoned road-beds does not apply to an old and abandoned road-bed over which another railroad has established a prior right of appropriation and which has become a part of (425) the latter's right-of-way.

10. Property which has been appropriated to public use, railroad or other, may, under lawful authority and procedure, be condemned and so appropriated to another public use. But where such second appropriation is entirely inconsistent with the first, or practically destroys it, such power can only be exercised by reason of legislative authority given in express terms or by necessary implication.

11. Where the plaintiff had located its right-of-way along an old road-bed and the defendant has no express grant to condemn plaintiff's right-of-way and there is no necessity shown for such action, and this road-bed is only sufficient to permit the laying of one track, and if the defendant is allowed to condemn and appropriate it, such action will practically destroy the use of this right-of-way on the part of plaintiff, the Court will protect plaintiff's right to the exclusive use of this road-bed, by injunctive relief, as against the defendant's claim to appropriate it for its own right-of-way.

12. A railroad company has no right to enter on land for the purpose of constructing its road, until it has acquired the right to do so by agreement with the owner or by paying into court the amount awarded by commissioners in condemnation proceedings duly had.

ACTION by The Fayetteville Street Railway against The Aberdeen and Rockfish Railroad Company for a permanent injunction to restrain defendant from interfering with a right-of-way claimed by plaintiff, pending in CUMBERLAND and heard by *Council,* J., at Lumberton, N. C., on 14 September, 1906, on an order to show cause why the temporary restraining order theretofore granted should not be continued.

It seems to have been agreed between the parties that the restraining order should be continued on both parties till their rights should be finally determined, and that the Judge should hear the testimony and find the facts, to the end that such determination should be had before him at this hearing, and considered and passed upon in the present appeal; and the record states that the Judge, on hearing the pleadings, affidavits, proofs and admissions, found the facts and entered judgment

(426) that the plaintiff had acquired no superior rights to defendant to occupy and build a road on the location in dispute, and that the permanent injunction prayed for be refused.

From the facts found by the Judge, it appears that plaintiff, on 23 August, 1906, after securing a franchise from the city of Fayetteville to build a street railway, obtained a street railway charter for that purpose from the Secretary of State under the general corporation law, which, among other things, authorizes the construction of branch lines to towns within a radius of fifty miles; and on the same day, after organizing by electing directors and officers, held a directors' meeting, and by formal resolutions adopted as the permanent location of its branch line to the town of Hope Mills, seven miles distant, the old road-bed of the Cape Fear and Yadkin Valley Railroad, between Fayetteville and Hope Mills, which had been abandoned several years before, and ordered the same to be staked out and a force of hands put to work clearing it.

That on 24 August, 1906, plaintiff had its adopted location staked out by driving stakes in the center of said abandoned road-bed from a

point near Holt-Morgan Mills, the southern suburb of the city of Fayetteville, to a point where the said road-bed should cross the main street of the village of Hope Mills; and on said 24 August plaintiff commenced work at a point near the Holt-Morgan Mills, clearing off its adopted location.

That on the evening of 23 August plaintiff engaged the services of C. J. Hedgpeth and J. W. Hodges, a justice of the peace, to get options from the owners of land along which its adopted location extended; and on the next day, five such options were secured; another on the 27th, and another on the 28th.

That a special meeting of the directors of plaintiff was duly called and held on 27 August, 1906, at which W. D. McNeil, president of plaintiff, and W. E. Kinley, vice-president, made a report that plaintiff had had the said abandoned road-bed its adopted loca- (427) tion, staked out 24 August, and on that day commenced clearing off the same; that further, at said meeting, the board of directors, by resolutions approved, ratified and confirmed the action of the company at prior meetings, and re-adopted the old road-bed, which had been staked out under its directions, as the adopted location of its line between said two towns.

That plaintiff was duly organized 23 August, 1906, $60,000 of its capital stock having been subscribed for, and on 27 August had a stockholder's meeting, at which all of the capital stock was represented; stock was assessed at one hundred per cent, to be paid as same should be called for by the directors; that on the same day the diectors made a call for a sum sufficient to meet present demands of the company, which was paid into the treasury; but no other part of the subscription had been paid in.

That plaintiff had done no work whatever in Fayetteville, Hope Mills, or any other incorporated town, up to the time of action against it; that such work as had been done by plaintiff was outside of any incorporated town, beginning about a mile from Fayetteville; and further, that plaintiff had proceeded, up to the time of action commenced, without procuring a right-of-way over any of the land along said road-bed from any of the owners, or instituted any condemnation proceedings; and without paying in any part of the capital stock except as heretofore stated.

That the bottom of excavations and top of embankments along the line of the abandoned road-bed is wide enough for only one railroad track; and if the defendants are allowed to interfere with plaintiff's preparation of its right-of-way, the damage will be irreparable.

Plaintiff avers, in its complaint, used as an affidavit, that it proposes to institute all proper proceedings for the ascertainment and payment of damages to the lands over which it has located its road where agreement as to price cannot be had with the owners of the lands.

That the defendant the Aberdeen and Rockfish Railroad
(428) Company, is a solvent corporation which began the construction of its road at Aberdeen, N. C., and has completed the same to Hope Mills, has laid down fifty-four miles of track, with necessary rolling-stock, and is operating the said road to that point, and having by its charter, in addition to its general right of condemnation, the right to condemn any abandoned road-bed not now in use. That on 8 July, 1904, the defendant having reached the village of Hope Mills, entered into a contract with the Atlantic Coast Line Railroad Company that it would not then cross the line or build beyond said village towards Fayetteville for a period of five years, there being no other railroad connection to be acquired by extending its line to Fayetteville; that after plaintiff had adopted and located the line as above stated, at different dates, from 29 August to 8 September, the defendant company proceeded to obtain deeds for portions of the abandoned road-bed between Fayetteville and Hope Mills, which said deeds are now on record and registered within the dates above specified, and said defendant company has further instituted condemnation proceedings against other owners of property along said disputed line, the summons in said proceedings bearing date at different times; but all on or after 30 August, 1906.

And on 29 August, 1906, the defendant company had its chief engineer, Jerry Respass, to survey a line over the road-bed in dispute; and defendant avows its intention to acquire and appropriate the said abandoned road-bed by purchase and condemnation for its right-of-way.

In section 11 of the answer the purpose of the claim of the defendant is set forth as follows: That this defendant regards this abandoned road-bed as open and unused land over which no railroad company or street car company or power company or any other company had any right, dominion or control other than such rights as might be acquired

by due process of law over any other unoccupied, unused, and
(429) uncleared real estate; and in good faith, and acting upon such belief, it has proceeded, by the two methods provided by the laws of the State to acquire title, to-wit, by purchase and condemnation; and has been pursuing these two courses in order to secure its right-of-way.

As heretofore stated, his Honor dissolved the injunction, held that the plaintiff had acquired no prior right to the defendant to occupy

and build the road over the land in dispute, and refused the permanent injunction.

To this judgment, the plaintiff excepted and appealed.

S. H. McRae and *Sinclair & Dye* for the plaintiff.

Rose & Rose and *McLean, McLean & McCormick* and *Robinson & Shaw* for the defendant.

HOKE, J., after staing the case: There seems to be no substantial difference between the parties as to any facts material to the controversy and the principal question presented on this appeal is as to which of these two companies has the better right to appropriate and use the old and abandoned road-bed from Fayetteville to Hope Mills as its right-of-way.

It may be well to note that defendant does not resist the plaintiff's claim in this matter simply by reason of its having purchased certain portions of this old road-bed from some of the owners along the route; but, as shown in section 11 of the answer, the defendant, denying the validity of any claim made by plaintiff, asserts its own intention and right to go on and acquire, by condemnation and purchase, the use of this road-bed for its own right-of-way.

The question, then, is fairly presented as to which of these two claimants has the better right; and on this question the authorities are to the effect that where the grants are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which first locates the line; and, in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks its route and adopts the same for its (430) permanent location by authoritative corporate action. Lewis on Eminent Domain, sec. 366; *R. R. v. R. R.,* 141 Pa. St., 407; *R. R. v. R. R.,* 159 Pa. St., 331; *Johnson v. Callery,* 184 Pa. St., 146; *R. R. v. Blair,* 9 N. J. Eq., 635; *R. R. v. R. R.,* 110 Fed., 879.

In *Railway v. R. R.,* 159 Pa., 331, it is held: "That the requisites of a valid location of a railroad as to third persons and rival corporations are: First, a preliminary entry by engineers and surveyors who run and mark the lines and report them to the company. Second, the adoption of such a line by the board of directors."

This entry of engineers and survey is to define and mark the line; and where this is clearly defined, as here, by the existence of an old road-bed, which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors

as its permanent location, in such case a survey by engineers is not of the substance, and should not be considered as essential.

Lewis Eminent Domain, sec. 306, criticising the decision of *R. R. v. R. R.*, 105 Pa., 13.

In the section referred to, this author says: "Where the conflict arises out of rival locations over the same property by companies acting under general powers, that one is entitled to priority which is first in making a completed location over the property, and the relative dates of their organizations or charters are immaterial."

And again, in same section, as pertinent to this question:

"The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company from locating on the same line."

And further:

(431) "Where priority of right has been secured by priority of location it cannot be defeated by a rival company agreeing with the owners and purchasing the property. The reasoning of *Shiras, J.*, upon this point is so cogent that we cannot do better than quote it: 'It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expenses thereof, should have a prior claim for the right-of-way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but as against a railroad company, it may have a prior right, and better equity. The right to the use of a right-of-way is a public, not a private, right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have a prior right to pay the damages to the owner, and therefore acquire a perfected right to the easement. The owner cannot, by conveying the right-of-way to A, thereby prevent the State from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right-of-way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right. * * * The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right-of-way over parts of the located line, and either prevent the construction of the road or

extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to built the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, (432) may confer the prior right, even though a rival company may have secured the conveyance of the right-of-way by purchase from the property-owners after the location, but before the application to the Sheriff for the appointment of commissioners.'"

In some of the authorities supporting this position it is stated as one of the requirements that the route, or line, after being surveyed, shall be platted and returned to the general offices of the company, and there approved as stated; and in others, that such survey and plats shall be filed in some public office and there recorded. But this will, no doubt, be found, on examination, to be on account of some public statute or provision of the charter, and is not an incident of a completed location, as a general proposition. There is no such statute with us. By sec. 2600 railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for information deemed necessary to enable that body to deal intelligently with matters within the scope of its duties, and is not required as a part of a correct and completed location.

An application of these principles to the facts before us clearly establishes, we think, that the plaintiff has the prior right to the use of the road-bed as a part of its right-of-way.

After obtaining a charter and organizing under it, this road-bed, on 23 August, by resolution of its directors, was formally adopted as its permanent location between Fayetteville and Hope Mills, and direction given to mark and stake the line. On 24 August this was done by the agent of the company appointed for the purpose; report was duly made to the company; and on 27 August this action was likewise, by resolutions of the directors, approved, ratified and confirmed; and plaintiffs avow their good faith and their intention and ability to go on and condemn the right-of-way and construct their road (433) pursuant to law.

There are various objections urged by defendant against the validity of plaintiff's claim, but none of them, we think, can be sustained.

It is contended that the capital stock has not been issued and that no money has been paid thereon; that plaintiff, incorporated as a street railway, has built no part of the road as yet, in Fayetteville or any

other town, but is only proceeding in the country, and on a branch road, before the main road is constructed.

These, and all such objections, even if valid, could only be made available by direct proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers, or by the State, for abuse or nonuse of its franchise, and are not open to collateral investigation in a case of this character, nor at the instance of defendant. *R. R. v. Lumber Co.*, 114 N. C., 690.

But these objections are not valid. Plaintiffs have taken out their charter under the general corporation law, as they are authorized to do by sec. 1138 of the Revisal; and this section also provides that the term street railways includes railways operated by steam or electricity or any other motive power, used and operated between different points in the same municipality or between points in municipalities lying near or adjacent to each other, or between the territory lying contiguous to the municipality in which is the home office of the company; and such railways may carry and deliver freight, etc.; with a proviso that no such railway shall operate a line extending in any direction more than fifty miles from the municipality in which the home office is situate, etc.

Sec. 1140 provides that the persons associated shall constitute a corporation from the time of filing a proper certificate in the office of the Secetary of State. And sec. 1141 provides that until the directors are elected, the signers of the certificate shall have the direction (434) of the affairs and organization of the corporation, and may take such steps as are proper to obtain the necessary subscriptions and stock and to perfect the organization. We find no requirement of the statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken.

The plaintiff, therefore, has thus far acted in accordance with law and within its chartered rights and privileges, and the objections referred to are not well taken.

Again, it is claimed by defendant that its charter gives it the specific right to condemn old and abandoned road-beds; and so it does. And if this route in dispute had remained an old and abandoned road-bed simply that, and nothing more—defendant would have the undoubted right to acquire and use it. But if plaintiff, as we have held, has established over it a prior right of appropriatoin, then this old road-bed has changed its complexion. It no longer fills the description of this specific provision of plaintiff's charter. It has, so far as de-

fendant's present claim is concerned, become a part of plaintiff's right-of-way.

Defendant further takes the position that it has the right to condemn this road-bed, including the plaintiff's right-of-way, under the general powers given in its charter.

This position is hardly open to defendant; for, as heretofore stated, defendant is here asserting that plaintiff has no right-of-way, and seeks to condemn the route as open and unoccupied territory; but, assuming that the allegations and evidence set out in the record present the question, the law is against the defendants position.

It is undoubtedly true that property which has been appropriated to public use, railroad or other, may, under lawful authority and procedure, be condemned and so appropriated to another public use. But where such second appropriation is entirely inconsistent with the first, or practically destroys it, such power can only be exercised by reason of legislative authority given in express terms or by necessary implication. The test as to when this authority will be implied (435) is well stated in the case of *Springfield v. R. R.*, 58 Mass., 63, as follows:

"An act of the Legislature which authorizes the construction of a railroad between certain termini, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along an existing highway; but it is competent to the Legislature to grant such authority, either by express words or by necessary implication; and such implication may result either from the language of the act or from its being shown, by an application of the act to the subject-matter, that the railroad cannot, by reasonable intendment, be laid in any other line."

And elsewhere it is further held: "That it must be a necessity arising from the very nature of things over which the corporation has no control, and not a necessity created by the company itself for its own convenience or for the sake of economy."

This statement of the doctrine will be found supported by the weight of well-considered authority. 1 Lewis on Eminent Domain, sec. 267c; 3 Elliott on Railroads, sec. 974; *Springfield v. R. R., supra; Hickok v. Hine,* 28 Ohio St., 523; *In re City of Buffalo,* 68 N. Y., 167; *Pittsburg Junction v. R. R.,* 122 Pa., 511.

A decision referred to in our Court, *R. R. v. R. R.,* 83 N. C., 489, is in accord with another principle applicable to the subject: "That while a general grant of power will not ordinarily justify the taking of property already devoted to a public use and applying it to another

and different use, a general grant of a power of eminent domain for a particular purpose may be sufficient to authorize such an appropriation as will not essentially injure or interfere with the public use to which the property is already devoted." 10 A. & E., 95.

This principle does not in any way conflict with our present-
(436) ruling, which, as stated, involves the proposition that the application to the second use is entirely inconsistent with, or practically destroys the enjoyment of the first.

An extract from the North Carolina decision will disclose the principle on which it was based, and show that the opinion in no way conflicts with our present decision. Says the *Chief Justice:*

"It is reasonable, as contended in the argument for the plaintiffs, that land of one such corporation, necessary for the exercise of its franchise and to the discharge of its duties, should not be taken and appropriated by another corporation no more important or useful, unless upon a clear expression of the legislative intent to confer it, and then the act itself would be a declaration that the condemnation was required for the public good. If the present application were to have this effect and seriously injure the business of the plaintiff companies, we would hesitate to hold that the right-of-way demanded by the defendant could be condemned under the general words found in its charter. But it is entirely otherwise. No real interruption of the plaintiff's business, no interference with the exercise of the franchise conferred in the charter, and, in the opinion of the witnesses, little or no inconvenience to transportation, will result from the construtcion of another track by the side of that of the plaintiff's, and eight feet or more from it, as proposed to be done by the commissioners. At least such additional track can be laid down, and if built will not seriously, if at all, disturb the operations of the plaintiff companies, or their putting down and using a second track when required for an enlarged transportation in the future." *R. R. v. R. R.*, 83 N. C., 495.

1. Here, as we have just seen, there is no express grant to condemn the plaintiff's right-of-way.

2. There is no necessity shown for such action. The defendant, under the general power of condemnation, can readily, at least
(437) so far as the testimony shows, obtain another right-of-way from Hope Mills, its present terminus, to Fayetteville.

3. The evidence further shows that this road-bed is only sufficient to permit the laying of one track, and if defendant is allowed to condemn and appropriate it, such action will practically destroy the use of this right-of-way on the part of plaintiff.

We are of opinion, therefore, and so hold, that plaintiff's right to the exclusive use of this road-bed, as against defendant's claim to appropriate it for its own right-of-way, is clear.

And it is equally clear, we think, that the plaintiff is entitled to the injunctive relief as demanded in his complaint.

This right to condemn land is a part of the plaintiff's franchise: *R. R. v. Dunbar,* 95 Ill., 571; and it is well settled that courts of equity will protect one in the exercise and enjoyment of a *quasi*-public franchise of this character by process of injunction, where the threatened injury is irreparable or the remedy at law is inadequate.

The grounds of this jurisdiction are well set forth in the opinion of *Mr. Justice Connor, R. R. v. Olive,* ante 264, citing Beach Modern Equity Jurisprudence, sec. 676. And decisions to like effect in other courts of supreme jurisdiction fully support the doctrine so clearly stated in that opinion. *R. R. v. R. R.,* 129 Mo., 62; *Cunningham v. R. R.,* 27 Ga., 499; *Railway v. Railway,* 75 Ill., 113.

The case cited for the defendant from our own Court, *R. R. v. R. R.,* 88 N. C., 79, has no application here. In that case it is stated that the construction forces of the two rival companies were miles apart and not likely to come in contact for a long time to come. There was no present interference, actual or threatened, with the enjoyment of plaintiff's franchise; and injunction was denied because, on the facts as they appeared, no injury would result by denial of the application. (438)

Here, the parties are already on the same ground; the defendant is seeking, by purchase and proceedings of condemnation, to acquire the road-bed for its own right-of-way, which, as we have seen, it has no legal right to do; and its engineers are surveying the route with a view of presently carrying into effect its avowed and unlawful purpose.

It may be well to note that, according to a decision, in *S. v. Wells,* post, 590, plaintiff has no right to enter on this land for the purpose of constructing its road, until it has acquired the right to do so by agreement with the owners or by paying into Court the amount awarded by commissioners appointed in condemnation proceedings duly had. But it has the right, if it proceeds in good faith and without unnecessary and unreasonable delay, to go on and appropriate the land under the methods provided by law, and to be protected in the exercise and enjoyment of its franchise.

There is error in the judgment below, and this will be certified, to the end that the injunction against the plaintiff be dissolved,

and that defendant be enjoined from further interference with plaintiff's right as indicated in this opinion.

Reversed.

NOTE.—Since this opinion was written, attention has been called to a decision of the West Virginia Court—*R. R. v. R. R.*, 57 W. Va., 641, and it is considered desirable that this full and learned opinion should be cited as an additional and apposite authority on some of the questions presented and discussed in the principal case.

Cited: R. R. v. R. R., 148 N. C., 76; *Comrs. v. Bonner*, 153 N. C., 70.

(439)

SOLOMAN v. SEWERAGE COMPANY.

(Filed 30 October, 1906.)

Contracts—Questions for Court—Interlocutory Injunction—Effect of Decision on Appeal—Specific Performance of Contract—Uncertainty as to Time—Want of Mutuality—Public Service Corporations—Contracts of Sewerage Company.

1. Where the terms of a contract are found by the jury, the relative rights and duties of the parties under the contract become questions of law for the decision of the Court.
2. The decision of an appeal from an order continuing or refusing to grant an interlocutory injunction is neither an estoppel nor the "law of the case."
3. In an action for the specific performance of a contract between the plaintiffs and the defendant sewerage company by which the company agreed that if they would pay to the company the sum of fifty dollars for making the connection between the premises of each of them and the pipes, the company would charge each so paying the fifty dolars, as an entrance fee, and for the use and service of the sewerage system the sum of two dollars, as an annual rental, the Court will not decree specific performance because the contract is uncertain in regard to its duration, and because there is an absence of mutuality in the obligation.
4. The principle that a corporation owing the duty to serve the public, charging reasonable and equal rates, cannot contract away its power to discharge such duty, applies to a sewerage company.

ACTION by B. Solomon and others against Wilmington Sewerage Company, heard by *Webb, J.*, and a jury, at May Term, 1906, of NEW HANOVER.

This action was brought by the plaintiffs for the purpose of restrain-

ing the defendant from disconnecting their residences from the main sewer-pipe of the defendant company and for specific performance of the contract set out in the complaint. The undisputed facts are that, prior to 1902, there were several private companies and systems of sewerage in the city of Wilmington. That defendant com- (440) pany was chartered by an act of the General Assembly of North Carolina (Private Laws 1893, ch. 382), by which it is permitted, authorized and empowered to establish a system of sewage in, under and through the streets and public lanes, roads and alleys of the city of Wilmington, and lay all such necessary pipes, conduits and mains as may be deemed requisite to carry out the provisions of said act, under such rules and regulations as may be prescribed by the Board of Aldermen of said city, and have authority to charge for the use of said sewers such reasonable sums as the board of directors may, from time to time, adopt, and to enforce the collection of such charges by severing the connection of said defaulting user with the main sewer. That permission was duly granted to the said defendant to lay down its pipe and construct a system of sewerage in the said city. That the plaintiffs are citizens and residents of said city, living along the streets upon which the defendant, pursuant to said authority, laid down its pipes and constructed its sewerage system. That plaintiffs entered into a contract with the said defendant company, the terms of which, as set out in the complaint, are as follows:

"That these plaintiffs and a great many other of the citizens of Wilmington, living along the streets and on the alleys upon which, by public authority, the defendant has laid down its pipes and constructed its sewerage system, whose names are not all known to these plaintiffs, and cannot by reasonable diligence be ascertained, were desirous of obtaining the benefit of an efficient sewerage system for their respective premises, and at what they regarded as a reasonable cost; and each of the plaintiffs, and the others so situated, approached the proper officers of the defendant and made application for connection, and, after some negotiations, the defendant company proposed to these plaintiffs, and for all others for whom this suit is brought, that if they would pay to the defendant the sum of fifty dollars for making the connection between the premises of each and every one of these plaintiffs (441) and the others, and the pipes of the defendant, that the defendant would charge each of them so paying the sum of fifty dollars, as an entrance fee, and for the use and service of the sewerage system of the defendant the sum of two dollars, as an annual fee or rental, and no more; or, alternately, that if persons desiring to connect with and

to use their said system preferred it, they might pay an entrance fee of twenty-five dollars and an annual rental of four dollars, and no more."

That pursuant to said contract the connections were made and plaintiffs have, in all respects, complied with the terms of said contract, paying the annual rental of two dollars per year. That the control of the stock of the defendant company passed into the hands of other persons subject to said contracts. That on 1 January, 1903, in disregard and in violation of the contract rights of the plaintiffs, the defendant undertook to raise the rate of annual rental for the use of said system.

The jury upon an issue submitted to them found for their verdict that the defendant entered into the contract with the plaintiffs as alleged. Under the instruction of the Court they found that, notwithstanding such contract, defendant had a right to raise the rate of annual rental.

The Court thereupon rendered the following judgment: "This cause, having been called for trial, and being tried, * * * and during the trial the plaintiffs' counsel having admitted in open Court, for the purposes of this action alone, that the rates charged as set forth in the answer in Exhibit B, are reasonable and not discriminative, and that the said rates set forth in the answer have been raised from the amount set forth in the complaint to the amount set forth in the answer, as shown in Exhibit B, and that a resolution of the defendant company, raising the rates, was promulgated on 2 November, 1902, to go into effect 1 January, 1903; and it being further admitted
(442) by the defendant that the plaintiffs continued to pay at the old rates up to 1 January, 1903, and that the present owners of the corporation obtained control thereof some time in the year 1901; and it being further admitted that this suit began on 1 March, 1903, and that the payments made by the plaintiffs under the old rate were paid by them from 1 January, 1902, to 1 January, 1903; and it being admitted that the following plaintiffs obtained their connection with the defendant company, paying fifty dollars connection fee, and two dollars annual dues, on the dates mentioned, as follows * * *: It is ordered, adjudged and decreed by the Court, that the restraining order heretofore issued in this cause be and the same is hereby dissolved, vacated and annulled. It is further ordered, adjudged and decreed by the Court, that the plaintiffs are not entitled to a perpetual injunction in this cause."

The plaintiffs excepted to said judgment and appealed, assigning

errors alleged to have been committed in the course of the trial and in rendering the judgment, all of which, other than those abandoned, are set out in the opinion.

Bellamy & Bellamy and *Rountree & Carr* for the plaintiffs.
E. K. Bryan and *John D. Bellamy & Son* for the defendant.

CONNOR, J., after stating the case: Considered from the point of view in which this case was argued by counsel, and which we think decisive of the merits of the controversy, much of the testimony and many of the exceptions become immaterial. There is no substantial contradiction in the testimony regarding the terms of the contract. The jury having found it to be as allaged in the complaint, we concur with plaintiffs that the second issue was unnecessary. The relative rights and duties of the parties under the contract become, in the light of the admissions, questions of law for the decision of the Court. The plaintiffs insist that we decided the question when the case was here upon an appeal from the order continuing the injunc- (443 tion of the hearing. We cannot concur in this view; it must be conceded that the writer of that and of this opinion used language calculated to make such an impression. The only question then before the Court was whether the defendant should be enjoined, pending the litigation. For the reasons and upon the authorities there set out we held with the plaintiffs' contention. We then said: "Whether the plaintiffs shall be entitled to specific performance of the contract, and for what length of time the contract shall exist, and to what extent it might be in the power of the defendant corporation to perform the contract without impairing or destroying its power to perform its duties to the public, or whether the rates now charged are unreasonable or discriminating are all questions to be determined upon the facts as they may be found by some competent tribunal upon the final hearing."

The effect of an appeal from an order continuing or refusing to grant an interlocutory injunction is discussed in *Carter v. White*, 134 N. C., 466. The decision of such an appeal is neither an estoppel nor the "law of the case." It effect upon the rights of the parties to the action in the final hearing is pointed out in the decision in that case. The plaintiffs concede that the contract does not create or vest in them an easement to flow their sewage through the pipe, because not in writing, nor is it a license to do so.

Plaintiffs' counsel, with his usual frankness, rests his case upon the proposition that his clients have made a valid contract with defendant

founded upon a valuable consideration, and that by reason of the peculiar nature of the subject-matter of the contract, the right acquired under it can only be secured to them by a decree for specific performance and a perpetual injunction against its infringement. That no time being fixed for the life of the contract, it extends to the corporate life of the defendant company. This the defendant denies, and
(444) insists: 1. That no time being fixed during which the two-dollar rate was to continue, it is indefinite, and therefore its specific performance cannot be enforced. 2. That the contract is wanting in mutuality, that defendant only is bound, whereas plaintiffs are under no obligation to use the sewer and pay the two-dollar rate. 3. That the defendant company is a public utility, subject to the well-defined duty to serve all persons entitled to its service, at reasonable rates, without discrimination between its customers.

If the defendant can sustain either of these propositions, the plaintiffs may not invoke the equitable jurisdiction of the Court. These are certain well-defined limitations imposed by the courts upon the right to call for specific performance of contracts.

After enumerating several of the requisites essential to the right to demand specific performance, Mr. Bispham says: "The other circumstances, in addition to those already mentioned, which usually influence the discretion of a Chancellor in decreeing or refusing specific performance, are that the agreement must be *mutual,* that its terms must be *certain,* and that its performance by the Court must be practicable." Equity, 377. He further says: "It was one of the rules laid down by *Lord Rosslyn* in *Walpole v. Oxford,* that all agreements, in order to be executed in this Court, must be certain and defined, and the law, as thus stated, is well settled, both in England and in this country. If the uncertainty is owing to the default of the defendant or, in obedience to the maxium, *id certum est quad certum reddi potest,* performance will be decreed if the means of ascertaining the contract are at hand." In *Leigh v. Crump,* 36 N. C., 299, *Gaston, J.,* says: "An agreement, to be carried into execution, must be certain, fair and just in all of its parts. Although it will be valid at law and, if it had been executed by the parties, could not be set aside because of any
(445) vice in its nature, yet, if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." The uncertainty in this contract is in respect to its duration. How long shall the plaintiffs enjoy the right to use the sewer-pipe of defendant company? They say "as long as they please, even to the

life of the company, by paying the annual dues." This would extend it sixty years. Private Laws 1893, ch. 382.

Defendants say that as the charge of two dollars a year is a rental, the contract is for but one year, or, at most, from year to year, with a right on its part to put an end to it after reasonable notice. If it be suggested that the right continued for a reasonable term and until, by reason of changed conditions, or, as defendant says, largely increased cost of building and maintaining the sewerage system, it would become harsh and unjust to compel its continuance, we would have no satisfactory guide by which to fix the limit of its duration. If we seek for analogies for guidance, we find but little aid.

In contracts for personal service the English rule is that, when no time is fixed and no stipulation as to payment made, it will be presumed to extend for a year. In this country, when no time is fixed, and no stipulated period of payment made, the contract is terminable at the will of either party. 20 A. & E. (2 Ed.), 14. This seems to be the rule adopted by this Court in *Edwards v. R. R.*, 121 N. C., 490.

We cannot think that it was the intention of the parties that the contract was to last for sixty years. To put this construction upon it would, when we consider the probable changes in the status of the property and the parties, the growth of the city and enlarged demands upon defendant company, the almost certain exhaustion of the connecting pipes from wear, weather and other causes, be unreasonable. Again, how would it be possible for a court of equity to supervise and enforce the performance of its decree during so long a period?
If we do not adopt the plaintiffs' view in respect to the dura- (446)
tion of the contract, we have no guide, and if we reject, as equally unreasonable, the defendant's contention that it is limited to one year, we are confronted with the insuperable difficulty that the contract, in regard to one of its essential elements, is uncertain and therefore not capable of specific performance. This view does not involve the proposition that the contract is *void* for uncertainty.

In an action for damages for breach of the contract we presume that the law would read into it that the right to use the sewer, upon the terms fixed, should continue for a reasonable time—to be settled in view of the character of the contract and all other matters and things pertinent to the inquiry. In this view of the case, we simply hold that, by reason of its uncertainty in respect to time, specific performance will not be decreed.

In regard to the second objection urged by defendant, we find the rule laid down by courts of equity to be, that a contract which is not

mutual, that is, in which both parties are not and cannot be bound by the decree, will not be specifically enforced. In *Ten Eyck v. Manning,* 52 N. J. Eq., 47, *Van Fleet, V. C.,* speaking of the right to demand specific performance of contracts, says: "The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance," citing Fry on Spec. Perf., sec. 286; Waterman Spec. Perf., sec. 196.

In *Beard v. Linthicum,* 1 Md., ch. 345, it is said that if one of the parties is not bound, or is not able to perform his part of the contract, he cannot call upon the Court to compel specific performance by the opposite party. *Duvall v. Myers,* 2 Md., ch. 401. The princi-
(447) ple is well stated in *Woodruff v. Woodruff,* 44 N. J. Eq., 349:

"The lack of mutuality, it is claimed, exists in the fact that the covenant gives the complainant the right to repurchase, but does not provide that he must do so. It is laid down, as a general rule, that equity will not specifically enforce the performance of a contract when, from its terms, a right does not arise in favor of each party against the other, and when each party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party," citing Pomeroy Spec. Perf., 162; *R. R. v. Ripley,* 77 U. S., 339. As stated in the opinions cited, and by Mr. Bispham and other authors, there are exceptions to these general rules, as when, by the terms of the contract, it is optional with the plaintiff to be bound, and he elects and consents that he will be so bound, as in contracts for the sale of land, he will pay the purchase-money, or immeditely perform the contract on his party. The contract becomes mutual and, if otherwise free from obligation, will be specifically enforced. There are decided cases, however, which hold that the element of mutuality must enter into the contract at its inception. That if either party could not demand strict performance or maintain an action for damages for breach, specific performance will not be decreed. It is said by the Supreme Court of Arkansas: "What is meant by mutuality of remedy is that the contract must be of such a nature that performance on both sides can be judicially secured." *Shields v. Trammell,* 19 Ark., 51; 26 A. & E., 32.

In *Rodman v. Robinson,* 134 N. C., 503, this Court held that when a contract was entered into to convey land, the promise to pay the purchase-money constituted a valuable consideration to support the prom-

ise. This is unquestionably correct. The case was argued and decided largely upon other questions, and that which we are discussing was not pressed or considered. There is much contrariety of opinion where mere options will be specifically enforced. (448)

Ours is not the case of an ordinary option; parties who are not bound ask specific performance of a contract to run sixty years, during which time they may at any moment put an end to it by refusing to pay the rental. We have here several parties suing, for themselves and many others not known to them, to compel specific performance on the part of the defendant of a contract to run for considerably more than the average life of an adult human being, during all of which period, either by death, sale of the property connected with the sewer, or at the mere will and pleasure of any one or more of them, the contract may be terminated and the defendant be without remedy to compel plaintiffs to continue to use the sewer.

The difficulties which would be encountered in attempting to make or enforce a decree in such a case are pointed out in *R. R. v. Marshall,* 136 U. S., 393. Plaintiffs urge upon our attention *Telegraph Co. v. Harrison,* 145 U. S., 459. The objection made to the decree in that case was that by reason of change of conditions since the execution of the contract, and increased value of the privilege conferred to maintain the wires upon the poles of the plaintiff company, specific performance would be harsh and inequitable. The Court held that in ascertaining the value of the privilege it would look to the conditions existing at the time of making the contract, and that no such change in conditions was shown to deprive the defendant of the right to have strict performance. The general principles governing the courts in such cases were conceded. The facts were peculiar, and in many respects distinguishable from those before us. *Fuller C. J.,* and *Brewer, J.,* dissented from the decision in that case.

The last objection urged by defendant against the relief demanded presents interesting and important questions. How far contracts of this character may be made by corporations owing a duty to serve the public at reasonable rates and without discrimina- (449) tion, is an interesting question. Whether such contracts are void, as contrary to public policy, or become unenforceable when it is shown that their enforcement will disable the corporation from serving the public, is also interesting. We are not prepared, and it is not necessary for us to do so, to decide the question. The authorities cited by defendant sustain its contention that the contract is made subject to the limitations imposed by the charter, and that whatever rights

plaintiffs acquired are subject to such provisions. *Salt Lake City v. Hollister,* 118 U. S., 256; *Cent. Trans. Co. v. Pul. Pal. Car Co.,* 139 U. S., 24. It seems well settled that a public corporation or a private one owing the duty to serve the public, charging reasonable and equal rates, cannot contract away its power to discharge such duty. The principle has been applied by this Court to County Commissioners in *Glenn v. Comrs.,* 139 N. C., 412, and to Town Commissioners in *Edwards v. Goldsboro,* 141 N. C., 60. In the opinion of *Mr. Justice Walker,* in the last case, authorities are cited applying it to railroad companies. That gas and water companies come within the rule is well settled. *Griffin v. Water Co.,* 122 N. C., 206; *Williams v. Gas Co.,* 52 Mich., 499. The same reasons apply to sewerage companies. We do not understand the plaintiffs to controvert this proposition. Plaintiffs admit that the advanced rates are reasonable and not discriminative. Defendant makes an allegation, in its answer, which, if true, would seem to show that if compelled to serve plaintiffs at the contract rate, it would be unable to serve other citizens of Wilmington at what is conceded to be a reasonable rate. No facts, however, in this respect are found or admitted; hence, we may not consider the allegations in this connection. We place our conclusion upon the ground that the contract is uncertain in regard to its duration and that there is an absence of mutuality in the obligation. We incline to the opinion that if we were to
(450) accept the plaintiffs' view that it gave them the right to use the sewer at the contract rate for sixty years, in view of the character of the contract, its subject-matter, and defendant's duty to render equal service at equal rates to all of the citizens of Wilmington, the contract would be unreasonable, and therefore plaintiffs would not be entitled to the decree demanded.

Upon an examination of the entire record we concur with his Honor, and the judgment must be

Affirmed.

Cited: Durham v. Cotton Mills, 144 N. C., 714; *Burns v. McFarland,* 146 N. C., 384; *Currier v. Lumber Co.,* 150 N. C., 695; *Wagon Co. v. Riggan,* 151 N. C., 306; *Telephone Co. v. Telephone Co.,* 159 N. C., 17.

DAVIS v. WALL.

(Filed 30 October, 1906.)

Trespass in Cutting Timber—Pleadings—Damages Recoverable—Prayer for Relief—Judgment in Processioning Proceeding—Estoppel—Exceptions—Rules—Dismissal of Appeals—Exceptions not Stated and Numbered—No Assignment of Errors—Index not at Front of Record.

1. Where the plaintiff complains for trespass in cutting and removing timber trees from his land "to his great damage," under this allegation he is entitled to recover the value of the timber so removed, "together with adequate damages for any injury done to the land in removing it therefrom."
2. The prayer for relief is not an essential part of the complaint, and the Court will give any relief appropriate to the complaint, proofs and findings of the jury, without reference to the prayer for relief.
3. Where in an action for trespass it appears that the boundary-line between the plaintiff and defendant had been established in a processioning proceeding in which the defendant did not raise an issue of title, he is estopped by the judgment in that proceeding from denying (451) the boundary thus determined to be the true line and from asserting title to any land beyond it.
4. A "broadside" exception "for errors in the charge" cannot be considered on appeal.
5. The appellee's motion to dismiss the appeal because (1) the exceptions are not "briefly and clearly stated and numbered" as required by the statute, Rev. 591, and Rule 27 of this Court: (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal as required by Rules 19 (2) and 21; (3) the index is not placed at the front of the record as required by Rule 19 (3) is allowed under Rule 20, in the expectation that appellants hereafter will conform to these requirements.
6. Ordinarily, hereafter, motions to dismiss appeals will be allowed, upon a failure to comply with the Rules of this Court, without discussing the merits of the case.

ACTION by J. D. Davis against W. H. Wall, heard by *Ferguson, J.*, and a jury, at the April Term, 1906, of GRANVILLE. From a judgment for the plaintiff, the defendant appealed.

Graham & Devin for the plaintiff.
B. S. Royster for the defendant.

CLARK, C. J. The plaintiff complains for trespass in cutting and removing timber trees from plaintiff's land "to his great damage." Under this allegation plaintiff was entitled to recover the value of the timber so removed, "together with adequate damages for any injury done to the land in removing it therefrom." *Gaskins v. Davis*, 115 N. C., 85. Though paragraph 3 of the complaint puts the value of the timber at

$150, and the prayer for relief is for the same amount, the latter is not an essential part of the complaint: *Wright v. Insurance Co.,* 138 N. C., 488; and the Court will give any relief appropriate to the complaint, proofs and findings of the jury, without reference to the prayer for relief. *Moore v. Nowell,* 94 N. C., 265.

In *Hammond v. Schiff,* 100 N. C., 161, where the complaint alleged damages from the falling of a wall, evidence of damage from water used to put out fire caused by the falling wall was held (452) competent, *Smith, C. J.,* saying that the "rule in pleading is not so stringent as to require a special averment of every immediate cause of the injury suffered. The primary and efficient cause of all the injury, however directly produced from fire or water, was the falling wall, and this was brought about by undermining the earth near to it, and all the consequences resulting therefore are within the compass of the demand for compensating damages."

The boundary-line between the plaintiff and defendant had been established in a processioning proceeding, and the defendant admitted that he had cut and removed the trees from land lying on the plaintiff's side of said boundary-line. It is true that a processioning proceeding is for a settlement of a boundary-line, title not being involved; but if the defendant therein denies the title of the plaintiff, as well as the location of the boundary-line, upon the issue of title thus raised the case would have been transferred to the Superior Court at term time for trial, and tried as if the action had been originally brought in that Court, just as when an issue of title is raised in proceedings in partition. *Smith v. Johnson,* 137 N. C., 43; *Stanaland v. Rabon,* 140 N. C., 202. Not having raised such issue, the defendant is estopped by the judgment in that action from denying the boundary thus determined to be the true line and from now asserting title to any land beyond it. *Parker v. Taylor,* 133 N. C., 103.

"The broadside" exception "for errors in the charge" cannot be considered on appeal. *Sigmon v. R. R.,* 135 N. C., 184, where it is said: "It admits of some surprise that an exception in such terms should still appear in any case sent to this Court."

The plaintiff moves to dismiss because: (1) The exceptions are not "briefly and clearly stated and numbered" as required by the statute, Rev., 591, and Rule 27 of this Court. (2) The exceptions relied on are not grouped and numbered immediately after the end of (453) the case on appeal as required by Rules 19 (2) and 21, 140 N. C., 660. (3) The index is not placed at the front of the record as required by Rule 19 (3), 140 N. C., 660.

Under Rule 20, one of the alternatives is to dismiss the appeal, and the motion is allowed, in the expectation that appellants hereafter will conform to these requirements. *Sigmon v. R. R.*, 135 N. C., 182, and cases cited. Ordinarily, hereafter, such motions will be allowed, upon a failure to comply with the Rules of this Court, without discussing the merits of the case as we have done in this instance.

Appeal Dismissed.

Cited: Woody v. Fountain, 143 N. C., 71; *Green v. Williams,* 144 N. C., 63; *Lee v. Baird,* 146 N. C., 364; *Smith v. Mfg. Co.,* 151 N. C., 262; *Whitfield v. Lumber Co.,* 152 N. C., 214; *Pegram v. Hester, Ib.,* 766; *Jones v. R. R.,* 153 N. C., 421, 423; *Williams v. Lumber Co.,* 154 N. C., 310; *Brown v. Hutchinson,* 155 N. C., 207; *Hobbs v. Cashwell,* 158 N. C., 597.

HULL v. ROXBORO.

(Filed 30 October, 1906.)

Municipal Corporations—Liability—Nuisances—Failure to Enforce Ordinances—Remedy of Injured Citizen.

1. A municipal corporation is exempt from liability for any injury resulting from a failure to exercise its governmental powers, or for their improper or negligent exercise, but it is amenable to an action for injury caused by its neglect to perform its ministerial functions or by an improper or unskilful performance of them.
2. A municipal corporation is not civilly liable for the failure to pass ordinances to preserve the public health or otherwise promote the public good, nor for any omission to enforce ordinances enacted under the legislative powers granted in its charter, or to see that they are properly observed by its citizens, or those who may be resident within the corporate limits.
3. If a citizen is injured by the erection and maintenance of a nuisance on private premises in violation of an ordinance, he has, in addition to the right of criminal prosecution, a remedy either preventive by injunction or remedial by abatement.

ACTION by Luther Hull against Town of Roxboro, its Mayor and Commissioners, heard by *Moore, J.,* at the August Term, (454) 1906, of PERSON.

Plaintiff alleges that defendant is required by its charter to enact and enforce ordinances which may be necessary to preserve the public health and to prevent the existence of nuisances, and that in compliance with this requirement it did pass ordinances for the suppression

of nuisances and the protection of public health, which prescribed fines and penalties for their violation, and, among others, an ordinance providing how pig-sties and hog-pens and privies should be erected and kept clean so as to prevent offensive odors therefrom, which would cause contamination of the air and produce disease, thereby making them a nuisance; that one of the plaintiff's neighbors, living on an adjoining lot, kept his hog-pen and privies in a filthy condition contrary to the provisions of the said ordinances, and that they were so situated with reference to the plaintiff's dwelling, being on a higher level, that the drainage from them was carried upon the plaintiff's premises, and that by reason thereof the health of the plaintiff's wife and of his infant child was seriously impaired, and that he was consequently put to great trouble and expense in their cure; that he requested the Mayor and two of the Commissioners of the town to notify the Board of Commissioners of the existing condition of his neighbor's lot, and warned them that it was a menace to the health of his family, but that the defendants failed to enforce the said ordinances and abate the nuisance, though the health officer of the town reported the condition of his neighbor's premises to the board, and they were therefore advised of the situation. The plaintiff then alleges the special damage he has suffered as the result of the alleged wrongful acts and omissions of the defendants, and prays judgment for $1,500 and costs. The defendants first answered, denying the material allegations of the complaint; but at the trial they demurred *ore tenus* thereto, upon the ground that no cause of action was stated therein. The Court
(455) sustained the demurrer and dismissed the action. Plaintiff excepted and appealed.

Manning & Foushee and *W. T. Bradsher* for the plaintiff.
William D. Merritt for the defendant.

WALKER, J., after stating the case: The plaintiff seeks in this action to recover damages upon the ground that the defendant has failed to enforce certain ordinances it had enacted for the suppression of nuisances, and he alleges that by reason of this omission of duty he has suffered an injury in the way he describes. The particular grievance of which he complans seems to be that, as the defendant had the power under its charter to pass ordinances for the protection of the public health, and did pass such ordinances, which were adequate for that purpose, it was bound, through its officers, to insure an absolute observance of them by the inhabitants of the town. and that a liability

arises to any one who is specially damaged whenever such officers fail, even in a passive way, to secure their observance, and that this asserted principle entitles him to compensation for the injury resulting from their inaction. He bases his whole claim upon the theory thus advanced.

There is nothing better settled in the law than that the powers and the correlative duties of a municipal corporation are of a two-fold character—the one public, that is, governmental and legislative or discretionary, and the other private, that is, absolute and ministerial. In the former case it acts as an agency of the State for the purpose of governing that portion of its people residing within the municipality, but in its corporate and private capacity it acts for itself and for its own benefit and advantage, though the public may derive common benefit from the due and proper exercise of its powers and the performance of its duties which are ministerial. It is exempt from liability for any injury resulting from a failure to exercise its governmental powers or for their improper or negligent exercise, but (456) it is amenable to an action for any injury caused by its neglect to perform its ministerial functions or by an improper or unskilful performance of them. Where it is acting in its governing capacity, it is not responsible, because it is then presumed to be in the exercise of a part of the power of the State, and therefore under the same immunity. We believe the distinction between the two classes of powers and duties, as we have stated it, is clearly recognized by the authorities, which appear to be quite uniform. Joyce on Nuisances, sec. 354; 2 Dillon Mun. Corp. (4 Ed.), sec. 949; *McIlhenny v. Wilmington,* 127 N. C., 146; *Jones v. Williamsburg,* 97 Va., 722.

The courts in enforcing the principle thus established have held almost with unanimity that a municipal corporation is not civilly liable for the failure to pass ordinances, even though they would, if passed, preserve the public health or otherwise promote the public good. A leading case upon this suject is *Hill v. Charlotte,* 72 N. C., 55, which has been cited with approval in many other courts. It is equally well settled that if the corporation has enacted ordinances under the legislative power granted in its charter, it is not civilly liable for any omission to enforce them or to see that they are properly observed by its citizens or those who may be resident within the corporate limits. 2 Dillon, *supra,* sec. 950; *Hines v. Charlotte,* 72 Mich., 278; *Wheeler v. Plymouth,* 116 Ind., 158; *Harman v. St. Louis,* 137 Mo., 494; *Forsyth v. Atlanta,* 45 Ga., 152; *Robinson v. Greenville,* 42 Ohio St., 625; *Fifield v. Phœnix,* 36 Pa., 916; *New Orleans v. Abbagnato,* 62

Fed., 240; *Rivers v. Augusta,* 65 Ga., 376; *Brinkmeyer v. Evansville,* 29 Ind., 187; *Moran v. Car Co.,* 134 Mo., 641; *Griffin v. N. Y.,* 9 N. Y. (5 Selden), 456; *Lorillard v. Monroe,* 1 Kernan (11 N. Y.), 392.

A few striking passages selected from those cases and law-writers which are among the best authorities will serve to show the steady trend of judicial thought upon this important question, the lead-
(457) ing idea being that for a failure in governmental action municipal corporations are responsible only to their corporators or to the power which brought them into being. "A municipal corporation is, for the purposes of its creation, a government possessing to a limited extent sovereign powers which in their nature are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating them, are of necessity entrusted to the judgment, discretion and will of the properly constituted authorities to whom they are delegated. And being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them or for errors committed in their exercise." *Kistner v. Indianapolis,* 100 Ind., 210. "The defendant in this case is a municipal government whose powers are defined and limited by the terms of its charter of incorporation. The exertion of its powers, by its constituted authorities in prescribing rules of police and imposing and inflicting penalties for their infraction is but a mode of exerting the power of the government of the State within the limits of the city. It is a government within the limits of the city. It is a government within a government. Still, they are the same, the one being the execution of the will of the other within certain established boundaries of power and in a certain locality." *Peck v. Austin,* 22 Texas, 261. "The town was empowered to legislate in regard to all nuisances, and the omission to provide a remedy against the owner of private property permitting the nuisance or to execute an ordinance passed to prohibit such a nuisance, and to abate it, is made the foundation of the action. The failure to take legislative action or to enforce the law when enacted by entering upon the private estate of the citizen and staying the manner of the execution of the owner's work upon it, gives no cause of action against the city. The failure to exercise that governmental power,
(458) whether legislative or judicial, is not within the class of cases or the rule by which the liability of the town is to be determined." *James v. Harodsburg,* 85 Ky., 191. "The corporation is un-

doubtedly vested with certain legislative powers, among which is the authority to restrain swine from running at large in the streets, and they have exercised it by enacting an ordinance to that effect. The idea, that because they may prohibit a nuisance, that therefore they must not only pass a prohibitory law, but must also enforce it at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city in this respect stands upon the same footing within its own jurisdiction as the State Government does in respect to the State at large." 1 Sandf. (N. Y.), 465. "Such an obligation as to the enforcement of laws has never been assumed by our governments, National, State, or municipal. The ordinance in question does not partake of the nature of a contract, but it is a part of the laws passed for the good government of the inhabitants of the city. The city is no more liable for its non-execution than would be the county, if the ordinance were a State statute, and its enforcement left to the county officers and inhabitants. Hence, it has often been held that a municipal corporation is not liable in damages for a failure to abate a nuisance existing upon private property, and not created by its agents, though it has the power so to do." *Kiley v. City of Kansas,* 87 Mo., 103. "The idea, that because the city of St. Louis has the right by virtue of its authority to make by-laws and pass ordinances relating to the public safety of its inhabitants, and has exercised that right by passing an ordinance prohibiting structures of a certain character to be built within certain districts therein defined, that therefore it must enforce the observance of said ordinances at the hazard of being subject to all damages which may ensue from its violation, is certainly as novel as it is startling." *Harman v. St. Louis,* 137 Mo., 494. "When a public nuisance is created (459) by a private citizen in carrying on his business or trade within a city or other municipality, unless the municipality by express license authorizes such business to be carried on at the place and in the manner the same is conducted by such private citizen, the municipality cannot he held responsible for any damages which may result to another citizen from the existence or maintenance of such nuisance.' *Hubbell v. Viroqua,* 67 Wis., 343.

The great publicist, Judge Cooley, had this to say about the general principle: "As no State does or can undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or non-action can be made the basis of a legal claim against a municipal corporation. If, therefore, a city

temporarily suspends useful legislation; or in any other manner, through the exercise or failure to exercise its political authority, causes incidental injury to individuals, an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints." Cooley Const. Lim. (7 Ed.), 300. To the same effect is the law stated in 1 Smith Mod. Law Mun. Corp., secs. 269, 270 and 271, where the liability and non-liability of municipal corporations, in the exercise of their dual powers, are fully and ably discussed by the author with fine discrimination and the citation of all the controlling authorities.

The result is that, in its dual capacities, a municipal corporation is liable or not for injuries resulting from its action or inaction according as, in the particular case, it is representing the State and (460) exercising its functions of government in the locality assigned to it, which are necessarily legislative and therefore discretionary in their character, or is representing its own interests and exercising powers conferred for its own benefit, which are therefore ministerial.

The cases decided by this Court which have a more or less direct bearing upon the question are *Moffitt v. Asheville,* 103 N. C., 237 (in which *Avery, J.,* clearly states the law in respect to municipal powers and the responsibility for their exercise); *Hill v. Charlotte, supra; Lewis v. Raleigh,* 77 N. C., 229; *Coley v. Statesville,* 121 N. C., 301; *Prichard v. Commissioners,* 126 N. C., 908; *McIlhenny v. Wilmington, supra; Levin v. Burlington,* 129 N. C., 184. The cases of *Bunch v. Edenton,* 90 N. C., 431; *Downs v. High Point,* 115 N. C., 182; *Threadgill v. Commissioners,* 99 N. C., 352, and *Williams v. Greenville,* 130 N. C., 93, furnish examples of the liability of such corporations for the failure to exercise or for the improper exercise of ministerial duties imposed by law, either expressly or by clear implication, and they distinctly negative the existence of any such liability as that claimed to have arisen in this case. When such corporations are about the government's business, they are not liable; but when about their own, they must be careful, for they will be held accountable for nonfeasance or misfeasance in respect thereto in the same manner and to the same extent as a private individual, as they then act in their private capacity. The general rule in reference to the particular question herein involved, therefore, is that where injuries are incidentally committed by

the officers or agents of a public corporation, in the exercise of those discretionary or legislative powers which are delegated to them by the Legislature, or when, by reason of any failure to exercise them, the same result follows, the municipality is wholly free from liability. 1 Beach Pub. Corp., secs. 258, 773, 752.

Let us now briefflly consider the facts of this case in the light of the foregoing principles. Assuming that the nuisance described in the complaint is public in its nature, and produced special injury to the plaintiff, or is a private one, it was erected and main- (461) tained on private premises, without any license from or consent of the municipality. The city was not bound to enforce the ordinances for the protection of the plaintiff, under the penalty of being responsible to him in damages if they were not obeyed to his injury. Indeed, the ordinances merely inflicted punishment for their infraction, by way of fines or penalities imposed for such violations of them, and did not in terms require the nuisance to be abated. The plaintiff could have prosecuted his neighbor for any breach of the city laws, as well as the city or its officers could have done so. The courts were open to him in all their branches, and his injury, in the eye of the law, has resulted not from the defendant's supineness, but from his own. If he was injured by an unneighborly and unlawful act, alleged by him to have been committed, he also had, in addition to the right of criminal prosecution, a remedy either preventive by injunction or remedial by abatement. Eaton Eq., sec. 289, p. 587, *et seq.; Evans v. R. R.,* 96 N. C., 45; *Forsyth v. Atlanta,* 45 Ga., 152. The law aids the vigilant, not those who sleep upon their rights. The plaintiff had equal opportunity with the defendant to take the initiative and suppress the nuisance. Shall he be permitted to allege its default in failing to do what he himself might just as well have done, but did not do, especially when the defendant, as it appears, was under no legal obligation to act, and therefore not liable for omitting to do so? We must not be understood to mean that if the plaintiff's neighbor is liable, that fact acquits the defendant, if it is otherwise liable, but that the injury to the plaintiff would seem to be the result of his own inaction.

The Court below ruled correctly upon the point presented, and we affirm the judgment dismissing the action.

No Error.

Cited: Jones v. Henderson, 147 N. C., 125; *Metz v. Asheville,* 150 N. C., 750; *Little v. Lenoir,* 151 N. C., 418; *Light Co. v. Comrs,* 151 N. C., 560; *Jeffress v. Greenville,* 154 N. C., 498; *Graded School*

v. McDowell, 157 N. C., 319; *Harrington v. Greenville,* 159 N. C., 635; *Goodwin v. Reidsville,* 160 N. C., 412.

(462)

JOHNSON v. JOHNSON.

(Filed 30 October, 1906.)

Motion to Vacate Judgment—Right of One not a Party—Action to Annul Marriage—Jurisdiction—Affidavit.

1. Upon a motion by the plaintiff to set aside a decree of the Superior Court upon the ground that the Court had acquired no jurisdiction, one who was not a party to the action, but claims that his title will be affected if the decree is set aside, has no right to be heard upon this motion.
2. An action to annul a marriage contract on the ground of incapacity, is a proceeding for divorce, and the affidavit required in divorce cases being jurisdictional, in the absence of it the Court is powerless to make a decree invalidating the marriage, and the plaintiff's motion to set it aside was properly allowed.

ACTION by Adella V. Johnson against W. Mangum Johnson, heard by *Moore, J.,* at the May Term, 1906, of CHATHAM.

This was a motion by the plaintiff to set aside a decree invalidating her marriage to the defendant. At the same time, J. A. Dark (the appellant) made application to be allowed to intervene and oppose said motion. The motion and application were heard by *Moore, J.,* who denied the application of Dark and granted the plaintiff's motion, from which judgment the said Dark appealed, and assigns as error, first, that the Court erred in refusing the said application to intervene, and second, that the Court erred in granting the plaintiff's motion.

The case is reported in 141 N. C., 91, which is referred to for the facts.

H. A. London & Son, R. H. Hayes and *W. D. Siler* for the appellant.

N. Y. Gulley and *R. H. Dixon, contra.*

BROWN, J. The petitioner, Dark, bases his right to inter-
(463) vene upon the ground that "the affiant is the owner of certain real property, which is a part of the propety described in the complaint in this action, having paid a full and fair price for the same and taken a deed therefor from H. A. London, W. D. Siler, and R. H. Hayes, who, as he is informed and believes, had purchased the same

from the plaintiff, and that as such owner he desires to interplead in this cause and set up his rights." His Honor denied Dark's application to intervene on the hearing of the plaintiff's motion, and then adjudged "that so much of the decree made at May Term, 1905, as declares the marriage of Adella V. Johnson and W. Mangum Johnson to be null and void, to be set aside, the same being irregular and void, the pleadings not being verified as required by statute, the Court had no jurisdiction to make such decree, and the parties are allowed to resume their former relation as husband and wife."

The petitioner, Dark, had no right to be heard upon this motion. Pomeroy Code Rem., secs. 320 and 321. He was not a party to the action, and cannot be heard on a motion to set aside the decree made by the plaintiff upon the ground that the Superior Court had acquired no jurisdiction. If it should turn out upon a trial that his title is affected because the Court set aside a decree it had no jurisdiction to render, it is his misfortune.

This is a proceeding for divorce. *Lea v. Lea,* 104 N. C., 603. It is so held in this case in the concurring opinion on the former appeal, which the writer approves. The affidavit required in divorce cases being jurisidctional, it follows that in the absence of it the Court was powerless to make the decree, which has therefore been properly set aside. *Hopkins v. Hopkins,* 132 N. C., 22.

Appeal Dismissed.

Cited: Cook v. Cook, 159 N. C., 50; *Grant v. Grant, Ib.,* 531.

(464)

DAVIS v. EVANS.

(Filed 30 October, 1906.)

Justices of the Peace—Note for Purchase-Money of Land—Jurisdiction—Consideration—Description of Land—Parol Evidence—Issues.

1. In an action on a note for $75 given for the purchase-money of land, a justice of the peace had jurisdiction, as the title of the land was not in issue.
2. In an action on a note alleged to have been given for the purchase-money of land, it is competent to prove by parol evidence that the note was given for the purchase-money of the land, and it is not necessary that the note should contain a description of the land or refer on its face to the deed.
3. In an action on a note alleged to have been given for the purchase-money of land, the defendant, if he demands it in apt time and tenders an appropriate issue, has the right to have the question submitted to the jury as to whether or not the note was given for the purchase-money of the land.

DAVIS *v.* EVANS.

ACTION by S. E. Davis against M. E. Evans, administrator of A. M. Evans, heard upon appeal from a justice of the peace, by *Ferguson, J.*, and a jury, at April Term, 1906, of GRANVILLE.

The Court submitted one issue to the jury: "Has the note sued on or any part thereof been paid; and if so, what part? Ans.: No." From the judgment rendered, the defendant appealed.

Graham & Devin for the plaintiff.
B. S. Royster for the defendant.

BROWN, J. The plaintiff sued on a note for $75 alleged to have been given for the purchase-money of the land described in a deed executed 7 November, 1898, by the plaintiff to the defendant's intestate. The defendant contends:

"1. That under the pleadings and evidence the plaintiff was (465) not entitled to have judgment declared to be for the balance of the purchase-money of the tract of land described in said judgment.

"2. That there was no evidence before the Court that the note sued on was for a balance of the purchase-price of the land described in said judgment.

"3. That the note contained no description of the land for which it purported to be given in part or in whole of the purchase-price.

"4. That parol evidence could not be introduced as to the land for which the note was given in part of the purchase-price, because there is no sufficient description of the land in said note which could be aided by parol evidence."

The justice of the peace had jurisdiction, as the title to the land was not in issue. It is competent to prove by parol evidence that the note was given for the purchase-money of the land. *Buie v. Scott,* 112 N. C., 375; *Durham v. Wilson,* 104 N. C., 595. It is not necessary that the note should contain a description of the land or refer on its face to the deed. *Durham v. Wilson, supra.*

The testimony of the witness Davis tended to prove most conclusively (and it was uncontradicted that the note sued on was executed at the same time the deed was, and that he wrote and witnessed both the note and the deed, and that the note was given for the unpaid part of the purchase-money). Had the defendant demanded it in apt time and tendered an appropriate isue, he had the right to have the question submitted to the jury as to whether or not the note was given for the purchase-money of the land described in the deed. *Durham v. Wilson, supra.*

The defendant tendered no issues and failed to except to the one submitted, but tried the case solely on the plea of payment.

No Error.

(466)

JARRETT v. TRUNK COMPANY.

(Filed 30 October, 1906.)

Verdicts, When Set Aside—Duty of Judge—Discretion—Case on Appeal.

1. Where the defendant appealed from the refusal of the trial Judge to render judgment on the verdict and from his order setting aside the verdict on the ground that it is not stated in the record whether or not it was made in the exercise of his discretion, and where the only entries on the record were: "It is ordered by the Court that the verdict be set aside," and "The defendant appealed from the order setting aside the verdict," but the case on appeal settled by the Judge upon disagreement of counsel states that the defendant moved for judgment on the verdict, which was denied, and that the Judge set aside the verdict in the exercise of his discretion (stating the grounds): *Held*, there was no error.
2. The rule adopted in *Abernethy v. Yount*, 138 N. C., 337, that the Judge, when he sets aside a verdict, should state whether or not it is done in the exercise of his discretion, is reaffirmed.
3. While the necessity for exercising the discretion to set aside a verdict, in any given case, is not to be determined by the mere inclination of the Judge, but by a sound and enlightened judgment, in an effort to do even and exact justice, this Court will not supervise it, except, perhaps, in extreme circumstances not at all likely to arise, and it is therefore practically unlimited.

ACTION by Causey Jarrett by his next friend against High Point Trunk and Bag Company, heard by *Ferguson, J.*, and a jury, at the June Term, 1906, of GUILFORD.

Action was brought to recover damages for injuries alleged to have been caused by the negligence of the defendant while the plaintiff was working in its factory at High Point, as its employee. The issues, with the answers of the jury thereto, are as follows: "1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: Yes. 2. Did the plaintiff by his own negligence contribute to the injury complained of, as alleged in the answer? Ans.: Yes. 3. What damage, if any, is the plaintiff entitled to recover? (467) Ans.: $3,000."

The following entry was made upon the record of the Court below: "It is ordered by the Court that the verdict be set aside." Then follows this entry: "The defendant by its attorney appealed this day

from the order setting aside the verdict. 18 June, 1906." No other entry was made on the record.

The defendant tendered a case on appeal and the plaintiff's counsel a counter-case. The Judge, upon disagreement of counsel, settled the case on appeal, and from it is made the following extract: "Upon the return of the verdict, the Court of its own motion set aside the verdict in the exercise of its discretion. The discretion was exercised upon the following grounds: 1. The findings on the issues were conflicting, and in the opinion of the Court the jury either ignored or did not understand the charge of the Court, which was, 'if they answer the second issue No they would consider the question of damages, and answer the third issue; but if they answered the second issue Yes, they need not answer the third issue.' The jury having answered the second issue 'Yes,' and the third issue '$3,000,' the Court could not understand the finding of the jury. 2. The Court thought the finding on the second issue was against the weight of the evidence, and the damages assessed were not adequate to the injury received by the plaintiff. The defendant insisted that it was entitled to judgment on the verdict, and so moved. The motion was made after the Court had directed the verdict to be set aside, but before the verdict and order were recorded. The Court being of the opinion that the verdict should be set aside, declined the defendant's motion: not because it was not in apt time, but because the Court felt it to be its duty, in the exercise of a sound discretion, to set aside the verdict. Defendant excepted."

The defendant assigned the following errors: 1. The refusal (468) of the Court to render judgment in its favor. 2. The order of the Court setting aside the verdict. For the purpose of correcting the errors so assigned, this appeal was taken.

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

J. T. Morehead and *King & Kimball* for the defendant.

WALKER, J., after stating the case: The defendant's counsel contended that the order of the Judge setting aside the verdict was improper because there was no apparent error in law committed at the trial, and it is not stated in the record whether or not it was made in the exercise of his judicial discretion, and for this position they rely on the recent decision of this Court in *Abernethy v. Yount,* 138 N. C., 337. It is held in that case that the Judge, when he sets aside a verdict, should state whether or not it is done in the exercise of his dis-

cretion; and, after mature reflection, we reaffirm that principle, which still commends itself to our judgment as the only safe and fair procedure in such cases. It is so easy to do, and so manifestly in the interest of common justice to the party against whom the ruling is made, and, too, it will meet with such favor and cheerful acquiescence on the part of the judges who preside at trials, as we are persuaded to believe, that we can now perceive no good reason why the rule should be disturbed. The reasons for its adoption have been so well stated by *Mr. Justice Connor* in the case cited, which now appear to us as conclusive, that we will not undertake any elaboration of them in further vindication of what we there decided. One sufficient ground upon which the rule can well rest is that the defeated party is entitled to know whether he lost by reason of some error in law committed during the trial or merely by the exercise of the Judge's discretion, to the end that, in the former case, he may proceed to test the validity of the ruling as it involves a matter of law or legal inference and, in the (469) latter, that he may submit to the ruling and avoid any further useless contests, as it is not a reviewable matter.

The discretion of the Judge to set aside a verdict is not an arbitrary one, to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. *Bird v. Bradburn,* 131 N. C., 488. Judicial discretion, said Coke, is never exercised to give effect to the mere will of the Judge, but to the will of the law. The Judge's proper function, when using it, is to discern according to law what is just in the premises. *"Discernere per legem quid sit justum." Osborn v. Bank,* 9 Wheat., 738. When applied to a court of justice, said *Lord Mansfield,* discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the Judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

In this case the defendant can derive no benefit from the decision in *Abernethy v. Yount,* as the question raised by its exception is not

presented on the record alone, but a case on appeal has been settled by the Judge upon disagreement of counsel, and it appears therefrom that the Judge exercised his discretion in a perfectly proper manner.

The findings of the jury, it is true, may not be conflicting, and, (470) in legal effect, they may amount to a verdict for the defendant, as contended by the defendant's counsel; but his Honor thought they sufficiently indicated that the jury must have misunderstood the charge, or the case, and for that reason, or in some other way, there had been a miscarriage of justice. Besides, he found that the verdict as to the second issue was against the weight of the evidence and that the damages were insufficient. This was nothing but the exercise of the legitimate power of the Court to set aside a verdict. The discretion confided to the Judge, when thus used, is, of course, not reviewable. But if it could be revised, we can discover nothing reversible in the ruling upon the facts, as stated in the record and in the case, treating the latter as supplementing the record entries. The case contains a full statement of the reasons which induced the action of the Court, and we find them amply sufficient to justify the order. Unless we looked into the case on appeal, it would not appear that the defendant ever moved for judgment upon the verdict as rendered, for the record does not show it.

One of the most delicate and responsible duties of all those the Judge must perform is the use of his discretion in passing upon the rights of litigants, when he has no fixed and certain rule for his guidance, but is left, as *Judge Gaston* once expressed it, "to his own notions of fitness and expediency;" and while, perhaps, discretion should always be exercised sparingly, and surely not unnecessarily, yet the duty of using it is one the law requires of him, and which he should perform with firmness and without hestitation, in all cases where he deems it necessary to execute justice and maintain the right.

No Error.

(471)

PRODUCT COMPANY v. DUNN.

(Filed 30 October, 1906.)

Lease—Option to Renew—Landlord and Tenant—Termination—Improvements—Possession.

1. Where the plaintiff held a five years' lease from defendant expiring 1 April, rent payable yearly in advance, with an option to continue the lease at the same yearly rental at the end of the first term of five years for another term of five years, and with a right to purchase at any

time during the continuance of the lease at a stipulated price, and with a proviso that if plaintiff failed to pay the rent in advance the defendant had the right to enter and take possession, the lease terminated by the failure of the plaintiff to exercise his option to renew on the day of its expiration, or before, by giving notice and paying one year's rent in advance, and the defendant was not required to acknowledge its renewal afterwards nor to accept tender either of rent or purchase-money thereafter.

2. The fact that a tenant, under a five years' lease with option to renew, made some improvements upon the land, did not entitle him to the option which he had forfeited by failure to exercise it in time; and where the landlord demanded possession after the expiration of the lease, the tenant cannot take any advantage of his own wrong in remaining in possession till he was turned out by the landlord.

CONTROVERSY without action, by Atlantic Product Company against William Dunn, submitted to *Long, J.*, at the May Term, 1906, of CRAVEN.

The following are substantially the facts agreed: On 10 March, 1899, the defendant leased the premises for one year, beginning 1 April, 1899, to the plaintiff in consideration of $125, payable yearly in advance, with this further agreement: "The party of the second part, upon the expiration of the said term of one year, shall have the right at its option to continue this agreement and lease for another full term of five years, beginning 1 April, 1900, at the same yearly rental, *i. e.*, $125, payable as aforesaid, with the right and option to have an extension and continuance hereof at the same yearly rental at the end of said first term of five years for another full term of (472) five years." There was also a further proviso that the plaintiff herein (party of the second part) "at any time during the continuance hereof shall have the right to purchase said leased property in fee-simple at the price of $1,550."

The plaintiff, exercising its option, renewed the lease 1 April, 1900, for five years. On 3 April, 1905, the defendant notified the plaintiff that its lease had "expired 1 April, 1905, and with said expiration the right of renewal," and inquired if the plaintiff wished to make a new lease; if not, he wished it "to give up the property." On 5 April the president of the plaintiff company replied that he did not have the lease at hand, but thought it was for eleven years, and had five more years to run. He made no reference to the demand for surrender of the premises, nor any to offer to pay rent. On 26 April he offered to continue the lease; but the defendant, while willing to enter into a new lease declined to renew or extend the terms of the old lease or revive or renew the option to purchase contained in the old lease. On 24 June the agent of the plaintiff offered to pay the rent, but the defendant de-

clined to receive it. The plaintiff continued in possession till 2 August, 1905, when the defendant turned the plaintiff's watchman out and took possession of the property, and still holds the same. On 15 July, 1905, the plaintiff offered to pay defendant $1,550 and all accrued rent upon execution of a fee-simple deed, which offer the defendant refused to accept.

The plaintiff did not give the defendant any notice, either verbally or in writng, that it would exercise the option to continue said lease and agreement before or on 1 April, 1905, nor afterwards, except as above stated. The Court held with defendant. The plaintiff excepted and appealed.

A. D. Ward, M. DeW. Stevenson and *H. C. Whitehurst* for (473) the plaintiff.

Guion & Dunn for the defendant.

CLARK, C. J., after stating the facts: Besides the facts above recited, the lease (which is set out in full) also contained the following further agreement: "Should the party of the second part make default herein and fail to perform the agreements entered into herein on its part, or any of them, or fail to pay said rent when the same is due, then and in that case the party of the first part shall have the right to enter said premises and take possession thereof as of his former estate."

If the plaintiff had failed to pay the annual rent in advance, at or before 1 April of any year, the defendant, under the above clause, had the right to enter and take possession. But the defendant is in still better case here, for the five years' lease expired 1 April, 1905, by its terms, and the plaintiff not having exercised its "right and option" and made payment of the annual rental on or before that day, the lease expired by its own terms, and the defendant on 3 April notified him thereof and demanded possession.

The defendant was within his rights in refusing, on 26 April, to renew the old lease, and subsequently refusing, on 24 June, the tender of rent and, on 15 July, declining to accept $1,550 purchase-money.

In *Meroney v. Wright,* 81 N. C., 390, there was simply a stipulation for payment of rent, without any provision for re-entry upon default. Here, not only was there such provision, but the lease expired by its limitation, unless the plaintiff had on the day of its expiration, or before, exercised his option to renew by giving notice and paying one year's rent in advance. This was a condition precedent, and not having been complied with, the lease then and there terminated on 1 April,

1905. The option to renew, and the option to purchase must have been exercised during the existence of the contract. *Alston* (474) *v. Connell,* 140 N. C., 491; 21 A. and E. (2 Ed.), 931, and authorities there cited. The tender of rent after the expiration of the lease did not restore the plaintiff's option. *Vanderford v. Foreman,* 129 N. C., 217. Nor did the fact that plaintiff has made some improvements upon the land entitle plaintiff to the option which he had forfeited by failure to exercise it in time. *Blanchard v. Jackson,* 55 Kan., 239. Where there is a renting from year to year, remaining in possession is an election to continue, and non-payment of rent is merely ground for entry by lessor, if stipulated for. Indeed, in such case, the lessor must give the lessee one month's notice to quit in a lease from year to year. Rev., 1984. The authorities cited by plaintiff sustain that proposition. But here the five years' lease expired 1 April, 1905, and the plaintiff had a stipulated "right and option" for extension and continuance, and also purchase at the price specified. These options could be exercised by plaintiff only while the lease was in force. Not having exercised the option before the lease expired, on 1 April, the defendant was not required to acknowledge its renewal afterwards; and the lease not being in force, he was not bound to accept the tender either of rent or purchase-money thereafter. The defendant having demanded possession, 3 April, the plaintiff cannot take any advantage of its own wrong in remaining in possession till 2 August, when it was turned out by defendant.

No Error.

Cited: Barbee v. Greenberg, 144 N. C., 435; *Bateman v. Lumber Co.,* 154 N. C., 251.

(475)

BROADWELL v. MORGAN.

(Filed 30 October, 1906.)

Grants and Patents—Registration—Seal—Description—"A Pine" as Beginning Point—Ejectment—Evidence to Locate Land—Declarations as to Beginning Point—Adverse Possession—Harmless Error.

1. Grants and patents issued by the sovereign are proven by the seal, and are entitled to enrollment, and thereby become public records.
2. The fact that it does not appear of record that a scroll or imitation of the Great Seal of State was copied thereon, does not invalidate the registry of the grant. The recital in the body of the grant, as recorded, of the affixing of the seal is sufficient evidence of its regularity.
3. A description in a grant or deed, "Beginning at a pine on the east side of Gum Swamp," etc., is a sufficiently definite beginning to admit parol evidence to locate it.

4. A pine is a natural object, and when called for in a deed as a corner or beginning point is understood to be permanent evidence of where the boundary is.

5. In an action of ejectment, an objection that the beginning corner (a pine) of the land is not proven, and therefore it cannot be located, is without merit where a witness testified that he had known the land in controversy and the beginning corner for fifty years; that he knew where the beginning corner was and had started surveyors there "a time or two"; that there is nothing there now to show the corner but a slab in the ground; that a person, now dead, and an old man at the time, who was disinterested and who lived about half a mile from the place, pointed out this corner; that the stub is where he pointed the corner of the boundary, and there is evidence that the surveyor started at that point and found chopped and blazed pines along the line.

6. In an action of ejectment, an objection to the declaration of a person made long ago, who is now dead, and who was disinterested and lived about half a mile from the land, as to the beginning point of the land, cannot be sustained.

7. In an action of ejectment, where the title is shown to be out of the State and there is ample evidence to go to the jury that plaintiffs and those under whom they claim acquired title by color and seven years' actual possession, a charge to the effect that "there is evidence that plaintiffs
(476) were in possession of the land for twenty-five years or more before the commencement of this action," is not material.

ACTION by W. L. Broadwell and others against Mark Morgan, tried by *Moore, J.*, and a jury, at the March Term, 1906, of SCOTLAND. From a verdict and judgment for plaintiff, defendant appealed.

J. A. Lockhart for the plaintiff.
M. L. John, J. D. Shaw and *E. H. Gibson* for the defendant.

BROWN, J. The plaintiff claims title to a certain tract of land described in the complaint and known as "Bill Place." In making out title plaintiff offered in evidence a grant to John MacDonald, dated 30 June, 1797, containing one hundred acres, described as follows: Beginning at a pine on the east side of Gum Swamp and runs north 30 degrees west, 80 poles to a pine near the Log Branch, then south 60 degrees west 200 poles, crossing said swamp to a corner, then south 30 degrees east 80 poles to a corner, then north 60 east 200 poles to the beginning." The plaintiff also offered several deeds in his proof of title containing practically the same description. The defendant in apt time objected to the introduction of the grant because it does not appear of record that it had been properly probated and ordered recorded. Grants and patents issued by the sovereign are proven by the seal and are entitled to enrollment and thereby become public records. Malone on Real Prop-

erty Trials, p. 154. We do not understand that it is contended there is no seal to the grant or that it was omitted from the registry. But if it does not appear of record that a scroll or imitation of the Great Seal of State was copied thereon, that does not invalidate the registry of the grant. The recital in the body of the grant, as recorded, of the affixing of the seal is sufficient evidence of its regularity. (477) *Aycock v. R. R.*, 89 N. C., 323.

The defendant further contends that the grant and deeds are void for insufficient description; that "beginning at a pine on the east side of Gum Swamp" is such an indefinite beginning that parol evidence is inadmissible to locate it. For this position the defendant relies on *Holmes v. Sapphire Company,* 121 N. C., 411, and *Hinchey v. Nichols,* 72 N. C., 66. The headnote of the former case seems to support the contention of the defendant, but upon a careful examination of the opinion we find the headnote to be misleading. In that case the beginning corner was at "a large chestnut, runs thence S. 25 W.," etc. It is evident that if the large chestnut could be located, the entire grant could. While the Court says the description in the grant is not as definite as it ought to be, it does not declare it void on that account. The decision is based solely upon the ground that the evidence is insufficient to locate the beginning or other calls of the grant. An examination of the evidence in that case sustains the view of the Court, for there seems to have been an utter failure of testimony tending to prove the beginning corner of the land in controversy.

We think *Hinchey v. Nichols* falls far short of supporting defendant's position. In that case the land was described as on a big branch of Luke Lee's Creek, beginning at or near the path that crosses the branch *on a stake,* etc. The Court held that the grant was void, and could not be located by parol evidence. It is a settled rule of construction in this State that when "stakes" are called for in a deed, with no other added description than course and distance, they are intended by the parties as imaginary points. They are not natural objects, and have no permanency. *Massey v. Belisle,* 24 N. C., 170; *Mann v. Taylor,* 49 N. C., 272. A pine is a natural object, and, when called for in a deed as a corner or beginning point, is understood to be permanent evidence of where the boundary is. We know of no authority, (478) and have been cited to none, which renders the description in MacDonald's grant void because the pine was not described by marks or other designation. On the other hand, this Court has held quite the contrary. In *Allen v. Sallenger,* 108 N. C., 160, the description in the grant is: "Begins at a pine in Rolach line, thence," etc. In the

opinion it is said: "It is needless to cite authority to prove that evidence *aliunde* would have been competent to loocate the pine at the beginning."

It is further contended that the beginning of the tract is not proven, and therefore it cannot be located. The witness, Alex McIntyre, testified that he had known the land in controversy and the beginning corner for fifty years; that he knew where the beginning corner was, and had started surveyors there "a time or two;" that there is nothing there now to show the corner but a stub in the ground; that Neil Leach, now dead, and an old man at the time, who was disinterested and who lived about half a mile from the place, pointed out this corner; that the stub is where Leach pointed the corner as the beginning of the boundary. There is evidence that the surveyor started at that point and found chopped and blazed pines along the line. Upon an examination of the plaintiff's evidence, we think it amply sufficient, if believed by the jury, to locate the land.

The objection to the declarations of Leach, made long ago to the witness McIntyre, as to the beginning point of the land, cannot be sustained. *Hill v. Dalton,* 140 N. C., 9; *Bland v. Beasley,* 140 N. C., 628.

The Court, in charging the jury, said: "There is evidence that plaintiffs were in possession of the land for twenty-five years or more before the commencement of this action." This is not material. The title being out of the State, as shown by the grant to MacDonald, there is ample evidence in the record to go to the jury that plaintiffs (479) and those under whom they claim acquired title by color and seven years' actual possession. *Mobley v. Griffin,* 104 N. C., 115, and cases cited.

We have examined carefully all the exceptions in the record, and find

No Error.

WEEKS, Trustee, v. SPOONER.

(Filed 30 October, 1906.)

Bankruptcy—Preference—Consideration.

1. In an action by a trustee in bankruptcy to recover certain cross-ties, or their value, received by defendant within four months prior to the bankruptcy, where at the time the ties were paid for and shipped, the defendant had no knowledge of the insolvency of the bankrupt, and he paid a present consideration for them, the plaintiff is not entitled to recover, though the ties had still to be inspected, and those not coming up to specifications could be rejected.

2. In an action by a trustee in bankruptcy to recover certain cross-ties, or their value, received by defendant within four months prior to the bankruptcy, where the ties were cut for the defendant under contract for which he paid a present consideration, the ties having been billed to him and paid for by draft drawn for the amount, the plaintiff is not entitled to recover, though the defendant knew at the time he took possession of them that the bankrupt was insolvent and contemplated bankruptcy, as the title passed to him when he took possession.
3. A preference within four months prior to bankruptcy is held invalid, because it diminishes the common fund by the sum or property given the preferred creditor. But when there is a full and fair present consideration, it is not a preference, for the sum is not diminished, the debtor receiving in exchange the value of the property transferred.

ACTION by C. D. Weeks, trustee in bankruptcy of G. T. Flynn & Co., against H. J. Spooner, Jr., heard by *Webb, J.*, and a jury, at the May Term, 1906, of NEW HANOVER. From a judgment sus- (480) taining a demurrer to the evidence, the plaintiff appealed.

Davis & Davis and *E. K. Bryan* for the plaintiff.
Rountree & Carr and *H. McClammy* for the defendant.

CLARK, C. J. This action is brought by the plaintiff as trustee in bankruptcy of Flynn & Co., against the defendant to recover certain cross-ties, or their value, received or taken possession of by the defendant within four months prior to the bankruptcy of Flynn & Co., and therefore alleged to be a preference within the bankrupt law. Flynn & Co. contracted with the defendant, who lived in Rhode Island, to furnish him "not less than 60,000 nor more than 75,000 cross-ties," of specified description, at 28 cents apiece, said ties to be delivered on vessel at Wilmington; that when as many as 2,000 at any time were asesmbled at Wilmington, Flynn & Co. were to notify the defendant and could send him a bill or invoice of the same, and draw therefor 25 cents for each tie; that the ties were to be inspected and counted by the defendant, and the number accepted should be settled for at 25 cents each. Forty-eight thousand cross-ties were billed to the defendant, on which invoices he paid 25 cents each, *i. e.*, $12,000.

Of the ties which the defendant received, 8,879 were shipped to him on the schooner "W. P. Hood" without being inspected or counted, and were still at sea *en route* to Rhode Island when the bankruptcy occurred. When these were shipped the defendant had no knowledge of the insolvency of Flynn & Co. Another lot of 3,744 ties were in the swamp in Brunswick County when the defendant, learning that Flynn & Co. were about to go into banksuptcy, went over and took possession of the same before the petition in bankruptcy was filed, and shipped

the cross-ties. All these cross-ties, and more, had been invoiced
(481) to the defendant and drafts at the rate of 25 cents for each tie invoiced had been paid. After allowing for these two lots (and those shipped previously), it was found that Flynn & Co. had invoiced more ties than they had shipped and had been paid some $5,000 more than was due them. The defendant filed his claim in bankruptcy for said amount overpaid by him.

There can be no question as to the first lot of ties. The evidence is uncontradicted that when these ties were paid for and shipped, the defendant had no knowledge of the insolvency of Flynn & Co., if they were then insolvent, and that he paid a present consideration. It is true, the ties had still to be inspected, and those not coming up to specifications could be rejected; but that only affected the amount to be paid, and did not prevent the title passing to the defendant on delivery to the carrier.

As to the second lot, also, the defendant paid a present consideration, the ties having been billed to him and paid for by draft drawn for the amount. The title passed to him when he took possession of them. Though he knew at that time that Flynn & Co. were insolvent and contemplated bankruptcy, he took only his own property which he had paid for. *Chase v. Denny,* 130 Mass., 566. The requirement that the ties should be delivered on vessel in Wilmington was a stipulation which could be waived by the defendant.

A preference within four months prior to bankruptcy is held invalid, because it diminishes the common fund by the sum or property given the preferred creditor. But when there is a full and fair present consideration, it is not a preference, for the fund is not diminished, the debtor receiving in exchange the value of the property transferred. Here, the defendant's case is still stronger, for he not only paid the present consideration, but by virtue of the invoice and draft drawn against it which he paid, the right to possession of the ties had passed to him, and of course the title when he actually took possession.
(482) The cross-ties were cut for the defendant under his contract. These specific ties were invoiced and paid for; certainly those shipped and those taken possession of were identified.

In nonsuiting the plaintiff there was

No Error.

WALKER, J., concurs in result.

LEVIN v. GLADSTEIN.

(Filed 7 November, 1906.)

Judgment of Sister State—Fraud as a Defense—Justice's Jurisdiction—Equitable Defenses.

1. While a judgment when sued upon in another State cannot be impeached nor attacked for fraud by any plea known to the common-law system of pleading, yet upon sufficient allegation and proof, defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.
2. The judgment of a sister State will be given the *same faith* and credit which is given domestic judgments.
3. In an action upon a judgment of a sister State the defendant may set up in his answer the defense that the judgment was obtained by fraud practiced upon him and such equitable defense may be interposed in a justice's court.
4. While a justice's court has no jurisdiction to administer or enforce an equitable cause of action, a defendant may interpose an equitable defense in that court.

ACTION by Philip Levin and another against M. Gladstein, heard by *Ferguson, J.*, and a jury, at the March Term, 1906, of DURHAM.

This was a suit upon a judgment obtained in the Superior Court of Baltimore City, Maryland. Personal service was had upon defendant while in Baltimore. Action was instituted upon said judgment before a justice of the peace of Durham County, and from a judg- (483) ment therein, defendant appealed to the Superior Court.

At the beginning of the trial in the Superior Court counsel for defendant stated he admitted the regularity of the judgment sued upon and withdrew all pleas and defenses to said action, save and except that the judgment upon which the action was brought was procured by a fraud practiced by plaintiffs upon the defendant, and that he insisted upon that plea alone. Thereupon the plaintiffs moved for judgment for that the judgment rendered by the court of Maryland was not open to attack in this action for fraud. Motion overruled, and plaintiffs excepted.

His Honor held that the burden of proof was upon the defendant, and he proceeded to introduce testimony. Mr. Gladstein testified that he was the defendant in the case; that he knew Philip Levin and Simon Levin, and had bought goods of them. That some time prior to his going to Baltimore he bought a bill of goods of plaintiffs, but had shipped some of them back to Baltimore because they were not up to the sample. That plaintiffs had refused to take the goods out of the depot in

Baltimore. That upon his visit to Baltimore summons was served upon him in the action brought there by the plaintiffs; but after said summons was served upon him, and before the return day, he saw one of the plaintiffs and had an interview with him at the store of L. Singer & Son, during which interview the plaintiffs agreed with him to withdraw said suit and return the goods to him at Durham, provided he would, upon their receipt, pay the plaintiffs a sum of money which they agreed upon, to-wit, $133, and freight and storage not to exceed $3. That relying upon this agreement he returned to Durham and made no defense to the action. Plaintiffs never returned the goods to him at Durham. That the first time he knew of the judgment was when called upon by attorneys for plaintiffs to pay said judgment.

There was testimony contradicting defendant. After hearing (484) testimony from both parties, the Court submitted the following issue to the jury: "Was the alleged judgment rendered for $143, bearing date 27 April, 1904, in the Superior Court of Baltimore City, in favor of Philip Levin and Simon Levin, copartners, trading as P. Levin & Co., against M. Gladstein, obtained by the fraud of plaintiffs?" To which the jury responded "Yes." Judgment was thereupon rendered that the plaintiffs take nothing by their action, and that the defendant go without day, etc. Plaintiffs excepted and appealed.

Biggs & Reade for the plaintiffs.
Winston & Bryant for the defendant.

CONNOR, J., after stating the case: Two questions are presented upon the plaintiff's appeal: First. Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? Second. If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the Constitution of the United States, Art. IV, sec. 1, that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," earnestly contend that the defense is not open to the courts of this State. That the remedy for the fraud in procuring the judgment, if any, must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one State based upon a judgment obtained in a sister State."

When a judgment rendered by the court of one State becomes the

cause of action in the court of another State, and the transcript made in such State, duly certified, as prescribed by the act of (485) Congress, is produced, it imports verity and can be attacked for only one purpose: The defendant may deny that the Court had jurisdiction of his person or of the subject-matter, and for this purpose may attack the recitals in the record. Bailey on Jurisdiction, secs. 198-9. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of *nil debit*. This was held in *Mills v. Duryee*, 7 Cranch. (11 U. S.), 480, and has been uniformly followed by both State and Federal courts. 2 Am. Lead. Cases, 538.

In *Christmas v. Russell*, 72 U. S., 290, *Mr. Justice Clifford* said: "Substance of the second objection of the present defendant to the fourth plea is that, inasmuch as the judgment is conclusive between the parties, in the State where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee* was whether *nil debit* was a good plea to an action founded on a judgment of another State. Much consideration was given to the case, and the decision was that the record of a State court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the State court from whence it was taken, and that *nil debit* was not a good plea to such an action." The learned Justice proceeds to say: "Domestic judgment, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial, or *by bill in chancery*."

It will be found upon careful examination of *Hanley v. Donoghue*, 116 U. S., 1 (59 Md., 239), that the question under consideration here was not involved. It is true that, in the discussion, *Mr. Justice Gray* uses the language cited by counsel, which excludes the (486) right of the defendant to impeach the judgment "for fraud in obtaining it." So, in *Cole v. Cunningham*, 133 U. S., 107, *Chief Justice Fuller*, after quoting the language of the Constitution, says: "This does not prevent an inquiry into the jurisdition of the court, in which judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise the authority over the parties of the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowl-

edged jurisdiction over persons and things within their admitted territory." The learned *Chief Justice* relies upon the same line of cases cited by *Judge Gray*. Neither of them was discussing the question here presented, nor was it presented by the record in these cases.

Dobson v. Pearce, 12 N. Y., 156, was cited in *Cole v. Cunningham*— and, as we shall see later, was approved. In *Maxwell v. Stewart,* 89 U. S., 77, the Court simply reiterated the doctrine announced in *Mills v. Duryee, supra,* that the plea of *nil debit* could not be interposed in an action upon a judgment. *Bissell v. Briggs,* 9 Mass., 462; Bailey on Jurisdiction, 191, 192. This Court in *Miller v. Leach,* 95 N. C., 229, by *Ashe, J.,* said that the judgment of a sister State was put by the Constitution upon the same footing as domestic judgments, precluding all inquiry into the merits of the subject-matter, "'but leaving the questions of jurisdiction, *fraud in the procurement,* and whether the parties were properly before the Court, open to objection," citing *Mills v. Duryee, supra.* See, also, *Coleman v. Howell,* 131 N. C., 125. It is elementary learning that this plea was not proper in actions founded upon a specialty or a record. Shipman Com. Law Pl., 196. But if plaintiff, in an action on a record, instead of demurring to the plea, accepts it and joins issue, the defendant is at liberty to prove (487) any and every special matter of defense which might be proved under the same plea in debt. For the plaintiff, by accepting the plea, founds his demand solely upon the defendant being indebted, and thus waives the estoppel, or conclusive evidnce of the facts, etc. *Overman v. Clemmons,* 19 N. C., 185; Gould's Pl., 287. Hence, we find that in all of the cases in which the plea of *nil debit* was entered, the defendant demurred, and the decision was on the demurrer, which was uniformly sustained. *Mills v. Duryee, supra; Maxwell v. Stewart, supra; Benton v. Burgot,* 25 Pa., 240; *Carter v. Wilson,* 18 N. C., 362; *Knight v. Wall,* 19 N. C., 125. In *Allison v. Chapman,* 19 Fed. 488, *Nixon, J.,* says: "The subject is fully discussed, * * * and the conclusion is reached that the allegation, *in a plea,* that a judgment was procured through fraud, is not a good common law defense to a suit brought upon it in the same or a sister State." This conclusion is fully supported by all of the authorities, and in this we concur with the learned counsel for the plaintiff. Notwithstanding the well-settled rule that the judgment when sued upon in another State cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.

Pearce v. Olney, 20 Conn., 544, was "a bill in chancery praying for an injunction against the *further prosecution of an action at law.*" Defendant sued plaintiff in the Superior Court of New York City and obtained service upon him. Plaintiff saw and made an arrangement with defendant's attorney by which it was agreed that no further action would be taken in the case until plaintiff should receive further notice from him. Relying upon said agreement, plaintiff did not employ any counsel and did not appear before said court, believing that said suit was to be no further prosecuted against him. Defendant, in (488) violation of said agreement, procured judgment against plaintiff. Defendant, some time thereafter, brought suit in the court having jurisdiction in Connecticut, and at the time of filing the bill said suit was pending in said court. Defendant relied upon the constitutional provision, insisting that to enjoin him from prosecuting his action on the judgment, would be to deny "full faith and credit to the judicial proceeding" in New York. The Court said: "It is insisted that under the Constitution of the United States * * * it is not competent for the Court to impeach the judgment of the Superior Court of New York; it being shown that the Court had jurisdiction of the cause, by the regular service of process on the defendant in that suit. And cases are cited to sustain this position. This doctrine is correct enough, no doubt, properly understood and applied; but it has no application here. There is no attempt to impeach the validity of the New York judgment. In granting an injunction against proceeding at law, whether in a foreign or domestic court, there is no difference; the court of equity does not presume to direct or control the court of law; but it considers the equities between the parties and restrains him from prosecuting an action." A perpetual injunction was granted. The case had a further history. The defendant in the equity suit and plaintiff in the judgment assigned the judgment to one Dobson, who brought suit on it in the Superior Court of New York against Pearce, the defendant in the judgment. Defendant set up by way of defense, the record of the equity suit in Connecticut and the injunction granted therein. Dobson sought to avoid the injunction. The cause was ably argued and carefully considered by the Court. It was said: "So, fraud and imposition invalidate a judgment as they do all acts; and it is not without semblance of authority that it has been suggested that, at law, the fraud may be alleged whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, fruits (489) of his graud. But whether this is so or not, it is unquestionable that a court of chancery has power to grant relief against judgments

when obtained by fraud." The Court proceeded to say that under the judiciary system in New York, permitting equitable defenses to be set up in the answer, whether the fraud could have been pleaded or not in an action at law, it could be set up, as an equitable defense to defeat a recovery upon a fraudulent judgment. The Court held that the injunction granted in Connecticut established the fraud, and the plaintiffs could not recover. As we have seen, this case was cited with approval in *Cole v. Cunningham, supra.* It is cited with approval by the Chancellor in *Davis v. Headley,* 22 N. J. Eq., 123, in which it is said: "That the courts of equity will set aside judgments of their own, and other States, for fraud practised in procuring them. * * * It will not lend its aid to enforce a judgment obtained by fraud, when the fraud is shown. Complainant must come with clean hands in the matter on which relief is sought." The doctrine is well stated in *Payne v. O'Shea,* 84 Mo., 129 (cited in Black on Judgts., sec. 919): "A proceeding in the nature of a bill in equity will lie to enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other States, when sued on in this State. The fraud, however, for which a judgment will be enjoined must be in the procurement of the judgment." Nor does the constitutional provision stand in the way of such proceeding. Usually, the power of a court of equity to interfere in the enforcement of judgments obtained by fraud, is invoked to restrain the plaintiff, in such judgments, from issuing or enforcing execution. The theory was, as we have seen, that the Court of Equity did not call into question the integrity of the judgment, but by its decree operated *in personam* upon the plaintiff, enforcing the decree by punishing for contempt
(490) disobedience to it. But when the judgment, as in *Olney v. Pearce, supra,* was made the cause of action at law, equity enjoined the plaintiff, shown to be guilty of the fraud, from prosecuting the action. Our Equity Reports contain many illustrations of the practice. *Hadley v. Rountree,* 59 N. C., 107.

The underlying principle is that the judgment of a sister State will be given the *same faith* and credit which is given domestic judgments. It is contended, however, and with force, that the "faith and credit" to be given such judgment is measured by the law of the State in which it is rendered. We find upon examining the decisions made by the Maryland Court that in that State a court of equity will enjoin the enforcement of a judgment obtained by fraud. We had no doubt that such was the law in that State. In *Little v. Price,* 1 Md. Ch., 182, the Chancellor says: "The object of an injunction to stay proceedings at

law, either before or after judgment, is to prevent the party against whom it issues from availing himself of an unfair advantage resulting from accident, mistake, *fraud* or otherwise, and which would, therefore, be against conscience. In such cases the Court will interfere and restrain him from using the advantage which he has improperly gained." Citing Story Eq., sec. 885, *et seq.* In *Wagner v. Shank,* 59 Md., 313, it appears that when the complainants were summoned in the original actions, they employed counsel to defend them. The counsel saw plaintiff in the actions, and he concluded to dismiss the cases and executed an agreement to do so. Counsel notified his clients of the agreement and "they supposed the matter was finally disposed of and gave themselves no further concern about it." The plaintiff, without notice to counsel or parties, had the magistrate to enter judgments, in one thousand and two hundred and ninety-six cases, amounting to $127,836, and $2,386 cost. *Miller, J.,* after reciting the facts, says: "These facts alone make a plain case for relief in equity. * * * As to the jurisdiction of a court of equity to pass the decrees, (491) appealed from, we entertain no doubt. There are prayers in most of these bills, not only that these judgments may be perpetually enjoined, but that they may be cancelled." After citing authorities sustaining the right of complainant to have the relief prayed, he concludes: "And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice." Concluding a very able opinion, he says: "The strong arm of a court of equity has protected the complainants, and the decrees in their favor will be affirmed." It is thus apparent that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the Courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the Courts of this State, and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that State. Mr. Bailey, in his work on Jurisdiction, 202-203, notes the language of *Judge Gray* in *Christmas v. Russell, supra,* and *Chief Justice Fuller* in *Cole v. Cunningham, supra,* saying: "However, it should be conceded that whatever may have been the rule in the Court prior to the decision in *Cole v. Cunningham,* that the rule there stated must be taken as the present doctrine of that Court." He notes the diversity in the several States, saying that in Maryland the Court has not followed the rule in *Cunningham's case,* citing *Hambleton v. Glenn,* 72 Md., 351. In that case the question was whether in that State the judgment rendered in Virginia could be *collaterally attacked* for fraud. That is not the question

here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud; and, as we have seen, it may be. We are not seeking to know what the courts of Maryland would permit to be done if a North Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon and attacked for fraud.

The plaintiff says, however this may be, the defendant can (492) have this relief only in Maryland; that he must go into that State and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another State. Notwithstanding expressions to the contrary, we apprehend that in bringing an action in another State, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the State in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other States. * * * It is true that two of the decisions of the Supreme Court of the United States contain the general statement that the plea of fraud is not avaiable as an answer to an action on a judgment (citing *Christmas v. Russell* and *Maxwell v. Stewart, supra*). We apprehend, however, that these decisions are inapplicable in those States in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law." Freeman on Judgments, sec. 576. If those States, in which equitable remedies were administered only by courts of equity, enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court, and one form of action, the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by *Gray v. Bicycle Co.*, 167 N. Y., 348. The action was brought on a note which the Court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured by fraud. *Vann, J.*, said that it was admitted that (493) "even a foreign judgment may be successfully assailed for fraud in its procurement. * * * It was not necessary to go into the State of Indiana to obtain relief from the judgment throught its courts, for, as we have held, a court from one State may, when it has

jurisdiction of the parties, determine the question whether a judgment between them, rendered in another State, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other State. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly, and it was the duty of the trial Court to send the case to the jury with the instruction that if they found the judgment was procurred by fraud, it could not be asserted as a bar in this State." *Davis v. Cornue,* 151 N. Y., 172 (179). The same rule is laid down by Black. In some of the States, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those States, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now when the same judgment is made the basis of an action of another State, he ought to be allowed the same latitude of defense. For if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the Constitution does not require. Black on Judgments, sec. 918. That the defense made by defendant may, under our Code, be set up by way of answer, is well settled. The cases in point are collected in Clark Code (3 Ed.), p. 238.

The remaining question is whether the defense is available to defendant in a justice's court. It is said that the remedy of defendant being an injunction against proceeding with the action, resort must be had to the Superior Court having equitable jurisdiction. The question is not free from difficulty. It would seem, however, that (494) in view of the frequent decisions of this Court that while a justice's court has no jurisdiction to administer or enforce an equitable cause of action, a defendant may interpose an equitable defense in that Court, his Honor correctly submitted the issue raised by the defense. In *Lutz v. Thompson,* 87 N. C., 334, the defendants sought to prevent a recovery upon a bond by showing that it had been executed in accordance with certain agreements, and that by reason thereof it would be inequitable to enforce one part of it and leave the other part unfulfilled. The objection was made that this defense, being equitable in its character, could not be interposed in a justice's court. *Ruffin, J.,* said: "Whenever such a court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper deter-

mination. And though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense."

In *McAdoo v. Callum,* 86 N. C., 419, originating in a justice's court for the purpose of ousting defendants, tenants of the plaintiff, the defendants set up by way of defense a contract for a renewal of the lease, etc. To the objection that the Justice had no jurisdiction to hear such defense, *Smith C. J.,* said: "While this provision is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejectment of the defendants." *Hurst v. Everett,* 91 N. C., 399. We can see no good reason why the defendant may not set up, by way of defense, the facts which show that the judgment, plaintiff's cause of action, was obtained by fraud practiced upon him. *Bell v. Howerton,* 111 N. C., 73; *Holden v. Warren,* 118 N. C., 326; *Vance v. Vance,* 118 N. C., 865. These and other cases in our reports (495) illustrate the rule of practice, that equitable defenses may be set up in the court of a justice of the peace.

In *Earp v. Minton,* 138 N. C., 202, the suit was not upon a judgment, but the judgment, in an action between the plaintiff and another party, one Cranor, was offered in evidence to sustain plaintiff's title. The judgment when so offered could not be attacked collaterally, as shown both upon reason and the authorities cited. In our case, the defendant, if in the Superior Court, would have pleaded the fraud in bar of plaintiff's recovery, just as if the suit had been upon a bond under seal obtained by fraud. We can see no good reason why he may not, for the same purpose, set it up in the justice's court. It would be incompatible with our conception of remedial justice under The Code system, to require the defendant to submit to a judgment and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the Constitution and the adoption of The Code practice. We but follow the line marked by *Ruffin, J.,* when he announced the general principal in *Lutz v. Thompson, supra.*

We find no error in the ruling of his Honor in regard to the burden of proof or probative force of the testimony required to establish the defense.

We have examined the authorities by plaintiffs' counsel, and, while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority and those best sustained by reason.

No Error.

Cited: Barbee v. Greenberg, 144 N. C., 432; *Mottu v. Davis,* 151 N. C., 246; *Unitype Co. v. Ashcraft,* 155 N. C., 72; *Wilson v. Ins. Co., Ib.,* 177.

(496)

DAVIS v. KEEN.

(Filed 7 November, 1906.)

Issues—Harmless Error—Slander of Title—Exceptions—Statement of Evidence—Instructions—Deeds—Cancellation—Mortgage Sale—False Representations as to Title—Deterring Bidders—Inadequacy of Price—Evidence of Fraud.

1. Where the verdict on an issue was in the appellant's favor, no harm was done by the Court's amendment to the form of the issue, even if it was improper.
2. Where an issue as submitted substantially followed the allegation of the complaint, an exception to the refusal of the Court to add thereto the words "as alleged in the complaint" is without merit.
3. Where the plaintiffs claim no damages for any injury done by smirching their title, but ask for equitable relief, in that they seek to set aside a mortgage sale and to cancel the deed to the defendant because of his fraudulent conduct in suppressing the bidding, it is not an action for slander of title.
4. An exception "That the Court failed to state in a plain and correct manner the evidence in the case and to declare and explain the law arising thereon" is too general and cannot be sustained.
5. Any omission to state the evidence or to charge in any particular way, should be called to the attention of the Court before verdict, so that the Judge may have opportunity to correct the oversight. A party's silence will be adjudged a waiver of his right to object.
6. In an action to set aside a deed to the defendant where it appeared that plaintiff's ancestor owned the land which he mortgaged, and that the sale was under the mortgage and that the defendant by false representations as to the state of the title, induced others to desist from bidding so that he could buy the land at an inadequate price, which he did, a court of equity will grant relief.
7. Inadequacy of price when coupled with any other equitable element, even though neither, when considered alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice (497) between the parties.
8. A sale at auction is a sale to the highest bidder, its object a fair price, its means competition. Any conduct practiced for the purpose of stifling competition or deterring others from bidding, or any means such as false representations or deception employed to acquire the property at less than its value is a fraud, and vitiates the sale.
9. While it is not required that the mortgagee should be present at the sale, yet his absence, as well as any other relevant fact which tends to show the true situation at the time the bid and purchase were made and the circumstances under which they were made, may be considered by the jury upon the question of fraud.

DAVIS *v.* KEEN.

ACTION by Sylvester Davis and others against J. R. Keen, heard by *Ferguson, J.*, and a jury, at the August Term, 1906, of DAVIDSON.

The plaintiffs seek in this action to set aside a sale made under the power contained in a mortgage from Calvin Davis to Beek & Foust, at which sale the defendant Keen became the purchaser. The plaintiffs attacked the sale on several grounds, but in this appeal only one need be considered, as the appellant's assignment of error is confined to the second issue. The allegation of the complaint, with respect to that ground of attack, is that "the defendant Keen slandered the title of the said Calvin Davis, the mortgagor, and of the plaintiffs and his co-defendants, Matthew and George Henry Davis, by publicly announcing to the purchasers gathered for the sale that Calvin Davis and the plaintiffs and Matthew and George Henry Davis (his co-defendants) had no deed for the property being sold at the time, and that, thereby, the said tract of land, now claimed by him, and which is well worth the sum of $300, brought only the sum of $45, which was bid by the said Keen, and for which sum a deed was made to him." The plaintiffs and the defendants Matthew and George Henry Davis are the heirs of Calvin Davis, the deceased mortgagor. The issues, with the answers thereto, are as follows: "1. In advertising and selling the lands of Calvin Davis under the mortgage described in the complaint, did the defendant Keen (498) act as agent for the mortgagees, R. L. Beek and T. W. S. Grimes, administrator of T. W. Frost? Ans.: No. 2. On the day of sale under the mortgage of Calvin Davis, described in the complaint, did the defendant Keen slander the title of plaintiffs and of their deceased ancestor to the lands in dispute, and thereby cause it to bring a less price than its real value? Ans.: Yes. 3. What price did the land bring on the day of sale? Ans.: $45. 4. What was the true value of the land on the day of sale? Ans.: $250. 5. Did the defendants Beek and Grimes, in their deed to defendant Keen, follow the description and boundaries set out in the mortgage from Calvin Davis to Beek & Foust? Ans.: Yes. 6. At the time of the execution of the mortgage from Calvin Davis to Beek & Foust, or at any time afterwards, was Calvin Davis the owner of the lands described in the deed from defendants Beek and Grimes to defendant Keen? Ans.: Yes." The defendant Keen objected to the form of the second issue upon the ground that the Court should added thereto the words "as alleged in the complaint." The issue, if thus amended, would be identical with the second issue tendered by the said defendant. The Court refused so to amend the issue, and the defendant Keen excepted. The evidence pertinent to the second issue was as follows: T. E. Dorsett testified: "As I recollect,

Keen came and asked me to sell the land; that it was a little sale and he wanted me to auction it. After the sale he paid me twenty-five cents and I gave him a receipt. I asked him (at the sale) to read the advertisement, as it was in his writing. Cannot say whether I had the notice of sale in my hands or not. T. W. S. Grimes, admistrator of the deceased mortgagee, lives in Thomasville, and R. L. Beek, the surviving mortgagee, lives in the country. Don't recollect that he told me that Grimes and Beek wanted me to sell the land. I sold to the highest bidder, and Keen bid it in at $45. Don't remember number of people present."

T. W. S. Grimes testified: "That mortgage was given by Calvin Davis to Beek & Foust in 1901 to secure $5, and it was in the (499) handwriting of Keen. We could not collect the debt and decided to foreclose. Asked Keen to write the advertisement, and he did so. Saw him on Saturday before the sale and asked him if it was necessary for me and Beek to go to the sale, and he replied that he did not know, that he was going on some business. I asked him to see the Sheriff and have him sell the land for us, and he said he supposed he could. I told him to bring the report of the sale when he came back and we would make the deed to the purchaser. He brought back a statement showing the amount bid and different items of expense, among the amount which is a charge of one dollar for advertising sale and also one dollar for writing the deed, retained by himself out of the proceeds of the sale. Keen wrote the deed after the sale."

W. O. Burgin testified: "I spoke to Keen that morning about the sale, and he told me that there was something wrong with the title. I reckon what he said kept me away from the sale. If the title was all right I thought the lot was worth $100. If there was an acre it was worth $200. I wanted to buy it for speculation, and would have gone to the sale if Keen had not told me the title might not be good. My recollection is that he said he was going to see about the sale. I think I asked him about the title and he said the title might not cover the lot. I had looked at the lot. There has been litigation about the title ever since the sale."

Z. B. Morris testified: "I was at the sale. Dorsett and Keen came out on the courthouse steps. Keen read a paper, and, to the best of my recollection, handed it back to the Sheriff. Some one in the crowd asked about the title, and, as I recollect, Keen said there was no deed to the land, or something to that effect. I went to the sale expecting to bid, but did not bid, as I was afraid of the title, after Keen's statement was made."

M. P. Murphy testified: "I was at the sale and heard Keen
(500) talking in the Sheriff's office before the sale. He talked like it might be a good while before one could get title and might be a long while. I went there to bid, but after hearing what Keen said, I did not bid. The deed to Keen from the mortgagee covers all the land. Keen said he reckoned the mortgagees would make such title as they could, and added, that sometimes you could get a good title and sometimes you couldn't."

The value of the lot was shown, and there was evidence that the heirs of Calvin Davis did not know of the sale.

The defendant Keen testified in his own behalf, and the material part of his testimony was as follows: "Some one asked me if the parties would make a warranty deed, and I said I supposed they would make as good a deed as they could. They asked me about the title, and I told them I understood some one claimed part of the lot and that I had never seen any deed. It was the truth that I had never seen any deed, and I had heard parties claimed part of the land. At the depot on the morning of the sale Burgin asked me about the land and title, and I told him the title was uncertain to part of the land. So I understood it was, and I only gave the rumor." It was admitted that Calvin Davis was the owner of the land described in the pleadings at the time the mortgage was made to Beek & Foust. The Court charged the jury as follows: "As to the second issue, plaintiffs allege that defendant Keen, at the sale, slandered the title to the land, and thereby caused the land to bring less than its true value; that said Keen stated at the sale that Calvin Davis had no deed for the land. Defendant Keen denies that he slandered the title or made the statement alleged. Now it is for you to say from the evidence how this is. [Did defendant Keen falsely and with the purpose of deterring others from bidding at the sale, state that Calvin Davis had no title to said land and thereby cause it to bring,
at the sale, less than its true value? If you so find from the
(501) evidence, by the greater weight of the evidence, you will answer the second issue 'Yes.' If you fail to find from the evidence, by its greater weight, that he did so state and thereby cause the land to bring less than its value at the sale, then you will answer this issue 'No.']." Defendant Keen excepted to that part of the charge in brackets. The Court also charged the jury as to the other issues, and no exception is made to his charge as to them. The defendant Keen moved for a new trial upon the following exceptions: "1. The failure of the Court to submit the issues proposed by this defendant. 2. The submission of the second issue in the form adopted by the Court. 3. That the

Court failed to state in a plain and correct manner the evidence in the case and to declare and explain the law arising thereon. 4. There was no evidence that the statements made by the defendant J. R. Keen at the sale about the title were false, and the Court therefore erred in instructing the jury that if Keen falsely stated that Calvin Davis had no title to the said land, and thereby caused it to bring less than its real value, they will answer the second issue 'Yes.'" The motion was overruled and the defendant Keen excepted. Judgment was entered upon the verdict and an appeal taken by the said defendant.

J. R. McCrary for the plaintiffs.
E. E. Raper for the defendant.

WALKER, J., after stating the case: The Court submitted the first issue in practically the same form as the one proposed by the appellant, the introduction of the word "advertising" being proper under the circumstances. The verdict on that issue was in his favor, so no harm was done by the Court's amendment, even if it was improper.

The addition of the words "as alleged in the complaint" to the second issue, would not have essentially altered its meaning, as issues in contemplation of the law have reference to the pleadings (502) and are based upon them. The issue as submitted substantially followed the allegation of the complaint, as the effect of the latter is to charge that the appellant disparaged the title for the purpose of deterring bidders and preventing fair competition. It can make no difference what particular words are used to express the idea, for it all comes to this, that the appellant has committed a fraudulent act, so that he has secured an advantage to which he is not fairly entitled, and the law will not stop to inquire by what name it should be called.

The case was argued before us as if it were an action for slander of title; but it is not. The plaintiffs claim no damages for any injury done by smirching their title; they ask, on the contrary, for equitable relief, in that they seek to set aside the sale and to cancel the deed because of the fraudulent conduct of the appellant in suppressing the bidding. The assertion of the appellant at the sale, that there was no deed, could imply nothing else than that the title was defective, and that evidently was the construction placed upon it by those who intended to bid at the sale. He intended to impugn the title by insinuation if not by a direct attack upon it. *Cardon v. McConnell,* 120 N. C., 461, does not, therefore, apply.

The third assignment of error is too general and cannot be sustained.

Besides, any omission to state the evidence or to charge in any particular way, should be called to the attention of the Court before verdict, so that the Judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object. The subject is fully discussed in *Simmons v. Davenport,* 140 N. C., 407.

The first three assignments of error are therefore overruled.

(503) The fourth and principal assignment is equally untenable. It was admitted that Calvin Davis owned the land which he mortgaged to Beek & Foust. The sale was made under the power contained in the mortgage, and the substance of the evidence is that the appellant, by false representations as to the state of the title, induced others to desist from bidding, so that he could buy the land at a grossly inadequate price, which he did. It is impossible to read the testimony without coming to the conclusion that the appellant intended what he said to those who proposed to buy should have the effect that it did, so that the sale would be chilled or the bidding stifled and he thereby would be enabled to get the land for little or nothing. This was a clear attempt to perpetrate a fraud, as the law views it, and a court of equity will not permit it to go unrebuked. It may be said generally that mere inadequacy of price, independent of other grounds for relief, will not invalidate a sale, but it is a cogent circumstance to be considered by the jury when it appears, in connection with it, that there has been unfairness or that an undue advantage has been taken or that there has been any other inequitable conduct, and a court of equity will readily seize upon any such incident as a ground of relief when the property has sold for a price so low as to result in hardship. It is plainly just that it should interpose in such a case. Whether in any case, if the inequality between the price and the real value of the land be so great "as to shock the conscience and confound the judgment of any man of common sense," the Court will interpose, we need not inquire. *Judge Nash* in *Potter v. Everitt,* 42 N. C., 152, says that "mere undervalue is no ground for setting aside a contract, unless it be such as amounts to apparent fraud, or the situation of the parties be so unequal as to give one of them an opportunity of making his own terms." In more recent cases this Court has expressed a doubt as to whether inadequacy of price, nothing else appearing, is sufficient ground upon which to in-

(504) voke the aid of a court of equity. *Trust Co. v. Forbes,* 120 N. C., 355; *Monroe v. Fuchtler,* 121 N. C., 101; *Osborne v.*

Wilkes, 108 N. C., 651. See, also, 28 A. & E., 813; *Meath v. Porter,* 9 Heisk., 224; 2 Jones Mortgages (6 Ed.), sec. 1915. But we do not have to go far to find abundant authority for the position that such inadequacy, when coupled with any other inequitable element, even though neither, when considered alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. 17 A. & E. (2 Ed.), 1003. As, for example, when there has been a resort to any method for the purpose of unduly inflating or depressing the price. "A sale at auction is a sale to the highest bidder, its object a fair price, its means competition. Any agreement to stifle competition is a fraud upon the principles on which the sale is founded." *Smith v. Greenlee,* 13 N. C., 126. Free and fair competition being the very essence of such a sale, the principle just stated must necessarily apply to all cases where any means, such as false representations or deception, have been unduly employed to subvert this principle and acquire the property upon unjust terms. The reports are full of analogous cases. *Brodie v. Seagraves,* 1 N. C., 96; *Morehead v. Hunt,* 16 N. C., 35; *Goode v. Hawkins,* 17 N. C., 393; *McDowell v. Simms,* 41 N. C., 278; *S. c.,* 45 N. C., 130; *Ingram v. Ingram,* 49 N. C., 188; *Dover v. Kennerly,* 44 Mo., 145. "In all public sales, whether made by a private individual as an auctioneer, or by an officer of the law as a sheriff, under an execution, the object is to secure to the person whose property is sold, a fair price, and to the creditor satisfaction of his debt. Puffing or by-bidding is a fraud on the vendee, as it has the effect of enhancing the price upon him, and any agreement not to bid, made for the purpose of paralyzing competition, is a fraud on the vendor, and vitiates the sale." *Bailey v. Morgan,* 44 N. C., 356. Sugden puts a case like ours and says, if a purchaser by his conduct deters others from bidding, the sale will not be binding, and cites the (505) barges case, *Fuller v. Abrahams,* 3 Broad. & Bing. (7 E. C. L.), 116, which is in principle similar to the case under consideration. 1 Sugden Vend. and P., p. 30. Still more like this case is *Fenner v. Tucker,* 6 R. I., 551. See, also, 2 Jones on Mort. (6 Ed.), secs. 1912, 1910, 1911. "A purchaser who is guilty of any fraud, trick or device, the object of which is to get the property at less than its value, will not be permitted to enjoy the fruits of his purchase so obtained." Sec. 1912. It is not required that the mortgagees should be present at the sale, for they can execute the power by an attorney duly appointed for the purpose of making the sale. *Parker v. Banks,* 79 N. C., 480; but their absence, as well as any other relevant fact which tends to show the true situation at the time the bid and purchase were made and the circum-

stances under which they were made, may be considered by the jury upon the question of fraud.

When we examine the facts of this case, even those that are not seriously controverted, we find little or no difficulty in discerning the true nature of this transaction. It appears that the mortgage was made to secure a debt of five dollars; that the sale, though it may have been duly advertised, was made without the actual knowledge of the beneficial owners of the property, who are the heirs of the mortgagor. The mortgagees, themselves, were not present at the sale; the defendant Keen, while he did not represent them as agent, in the sense that he was authorized to act for them at the sale, and therefore their *alter ego,* seems to have taken a very active part in the conduct of the sale, and the jury have found, as will appear by the verdict, when construed in the light of the evidence and the charge of the Court, that he falsely impeached the title of Calvin Davis for the purpose of stifling competition and buying the land at a price below its real value. There can be no doubt that he looked upon this land with a covetous eye, (506) and was willing to seize the opportunity presented of gratifying his cupidity. It is of little or no importance whether he said enough to make him liable in damages for slander of title, for if he accomplished his purpose by other evil means or by artifice just as effective, it is quite sufficient for a court of equity to require a restoration by him of what he has thus wrongfully obtained. The sale was anything but a fair one, and it would be a reproach to the administration of justice if it were permitted to stand. One of the most important functions of a court of equity is to afford relief in just such cases. Everything in the case strongly appeals to the conscience of the Court in behalf of the plaintiffs and clearly entitles them to its protection.

We think the case was in all respects correctly tried.

No Error.

Cited: Henderson v. Polk, 149 N. C., 108; *S. v. Yates,* 155 N. C., 456; *Jackson v. Lumber Co.,* 158 N. C., 320.

EAMES v. ARMSTRONG.

(Filed 7 November, 1906.)

Covenant of Seizin—Burden of Proof—Pleadings—Admissions—Confession and Avoidance—Measure of Damages for Breach of Covenant.

1. In an action for damages for breach of a covenant or seizin, where the defendant denies the breach and there are no admissions to the contrary, the burden of proof to show the breach is upon the plaintiff under our code system of pleading.
2. Where the complaint, in an action upon a covenant of seizin, alleged a breach in regard to two tracts of land, and the answer admitted the execution of the deed, containing the covenant as to both tracts, and denied the breach, but the further defense, which set up new matter, expressly admitted the fact which established the breach (507) as to one of the tracts, this admission removed from the plaintiff the necessity of proving a breach as to that tract.
3. When the answer clearly admits facts which, as a matter of law, show plaintiff's right to recover, it is immaterial how or in what manner the admission is made. If it be by way of confession and avoidance, the issue arises upon the new matter alleged in avoidance, the burden being upon defendant to show the truth of the new matter.
4. A covenant of seizin is broken, if at all, immediately upon the delivery of the deed, and the cause of action accrues at once, and the covenantee may maintain a suit upon the covenant although at the time of bringing it he had parted with his title to the land.
5. The contention that the covenant of seizin in a deed conveying two tracts by metes and bounds does not include one of the tracts, but that it is confined to the "entire property known as the Russell Gold Mine," a descriptive phrase used in the *habendum*, is without merit, where neither tract is so designated in the descriptive language of the deed and the *habendum* refers to the "aforesaid tracts" and the covenant is a continuation of the *habendum*.
6. The measure of damage for breach of a covenant of seizin is the purchase-money and interest.
7. In an action for a breach of a covenant of seizin, it is not necessary to aver either eviction or threatened litigation.
8. *Quære:* In an action for damages for breach of a covenant of seizin, what is the rule for measuring the damages when the covenantee or his grantee is, at the time of bringing the action, in possession and no action has been taken or claim asserted against them?

ACTION by Richard Eames, Jr., against C. A. Armstrong and others, heard by *Justice, J.*, and a jury, at the June (Special) Term, 1906, of ROWAN.

Plaintiff alleges that on 7 May, 1903, defendants executed a deed conveying to him two tracts or parcels of land; one containing 356 acres, the description of which is set forth by metes and bounds; the other, known as the "Coggins Meeting House" lot, described by proper

calls, containing three acres. A copy of the deed is attached to and made a part of the complaint. That the deed contained a covenant in the following words, to-wit: "To have and to hold the aforesaid tracts of land and all privileges and appurtenances thereto belonging, to the said party of the second part, his heirs and assigns, to his only (508) use and behoof forever, together with any and all rights, interests, titles, which the said parties of the first part may have, in law and in equity, in and to any and all lands belonging to or forming and constituting the entire property known as the Russell Gold Mine, to his heirs and assigns in fee; and the said parties of the first part covenant that they are seized of said premises in fee, and have right to convey the same in fee-simply; that the same are free and clear from all encumbrances." That at the time of making the said deed defendants were not the true and lawful owners of said lands, and were not seized of the same in fee-simple, nor did they have a right to convey the same. That by reason thereof there was a breach of said covenant, and thereby plaintiff has sustained damages to the amount of two thousand three hundred dollars, being the purchase-price paid therefor, and for this sum he demanded judgment, etc.

Defendants answered: "That the allegations contained in paragraph one are admitted, except as hereinafter explained in defendants' second and third separate defenses." They admitted that the copy of the deed attached to the complaint is correct. They deny the breach of the covenants. For a second defense defendants say that immediately upon the execution of the deed plaintiff took possession of the premises conveyed, and 13 May, 1904, conveyed same to one George T. Whitney for a profit of $2,700. That neither plaintiff nor his grantee have been evicted from the premises or in any was damaged; that said grantee is now in the peaceable possession of the lands conveyed, nor has any one threatened to sue them on account of any alleged breach of said covenant.

For a third defense defendants allege: "1. That the deed set out in paragraph one of the plaintiff's complaint and attached thereto does not constitute the entire contract between plaintiff and defendants, part of said contract being in writing as evidenced by said deed, and part by parol, namely: That in order to induce defendants to execute (509) said deed that plaintiff made a contemporaneous agreement with defendants in parol that if defendants would execute said deed and insert in the same the covenants of seizin, right to convey and freedom from encumbrances, that defendants should in no way be injured thereby, as it was necessary to insert these covenants in order to effect

the advantageous sale which plaintiff then had in view and which he was anxious to make, stating that he had a purchaser who was willing to pay five thousand dollars in cash for said lands, but would not do so unless the deed was executed in this form, and that if defendant would so execute the deed in such form that he would become a co-partner with defendants, the plaintiff receiving twenty-seven hundred dollars of the purchase-money and defendants twenty-three hundred dollars of said five thousand dollars, to be paid for the land, and that defendants could and should in no event be injured or damaged by the insertion of said covenants in said deed, the only reason for their insertion being to induce the purchaser to take the property at the price named, the plaintiff and defendants sharing therein as above set forth. That by reason of said importunities and assurances of plaintiff and at his urgent request in order to effect the sale, and upon plaintiff's assurances that the defendants should not be damaged or injured thereby, defendants were induced to include in said deed the second tract of land described therein as the 'Coggins Meeting-House' lot, containing three acres, more or less, to which defendants had no title, and so informed plaintiff, who insisted upon its being included, saying he, plaintiff, already had title to this tract, and that defendants could not and should not be damaged by including the same in the deed, and that he could not effectuate the sale to his proposed purchaser unless the same was included in the deed, the plaintiff at the same time agreeing with defendants that in case he realized more than five thousand dollars as the purchase-price of said lands, that then plaintiff and defendants should share in said excess in the proportion above set forth. (510)

"That plaintiff induced defendants to execute two deeds for said lands, one to the plaintiff, Richard Eames, and the other to George I. Whitney or E. B. C. Hambley, the expected purchaser, and caused the same to be deposited in the Davis and Wiley Bank in Salisbury, N. C., in escrow, one or the other to be delieverd at the option of the purchaser, and that upon payment of the purchase-money the deed to plaintiff was delivered, plaintiff executing a deed to said George I. Whitney and the sum of twenty-three hundred dollars paid to defendants by the purchaser, George I. Whitney, and twenty-seven hundred dollars, as defendants are informed and believe, to plaintiff."

When the cause came on for trial before the jury, plaintiff introduced the deed, showed the payment of the purchase-money, and rested. Defendants offered no evidence, demurring to plaintiff's evidence and demanding judgment of non-suit. His Honor being of opinion that

plaintiff was not entitled to recover, rendered judgment of non-suit. Plaintiff excepted and appealed.

J. S. Henderson for the plaintiff.

T. F. Kluttz, Adams, Jerome & Armfield and *L. H. Clement* for the defendants.

CONNOR, J., after stating the case: The record in this presents several interesting questions of practice. The learned counsel for plaintiff insisted and cited authorities which sustain his position that, upon showing his deed with covenant of seizin, he was entitled to judgment. That the burden of showing that there had been no breach of the covenant was cast upon the defendants. That by reason of the familiar rule of practice, when one has peculiar opportunity of knowing, and is in possession of the evidence showing how the fact in issue is, (511) he will be called upon to do so, although it result in requiring him to prove a negative. That such was the rule, in actions upon covenants of seizin, in courts proceeding under the common-law practice, is shown by uniform authority. 4 Kent. Com., 479; 2 Devlin on Deeds, sec. 892; Rawle on Cov., sec. 65. Mr. Rawle, after stating the rule, says: "If, under statutory systems of pleading, the defendant is not required to set forth his title in his answer, but may rest upon a mere general denial of the plaintiff's right to recover, the burden of proof is upon the plaintiff; and unless, at the trial, he establishes by evidence a *prima facie* case, the judgment will be for the defendant."

In *Ingalls v. Eaton,* 25 Mich., 32, it was held that when the defendant made a general denial of a breach of his covenant of seizin, the burden of proof to show the breach was upon the plaintiff. With the exception hereafter noted, this is the only case cited by the text-books which holds contrary to the common-law rule. The Court rests its conclusion upon the statute which entitled the defendant to rely upon the general issue. Plaintiff relies, among other authorities, upon *Abbott v. Allen,* 14 Johns (N. Y.), 248. The law was held in that case in accordance with plaintiff's contention. In *Wooley v. Newcombe,* 87 N. Y., 605, it was held that, since the adoption of the Code of Civil Procedure, the rule of practice in respect to the burden of proof in an action upon a covenant of seizin had been changed. The facts in that case were very much as in the one before us. Plaintiff sued for breach of covenant of seizin and, after introducing his deed showing the covenant and the amount of the purchase-money, rested his case. The defendant introduced no evidence and moved for a dis-

missal of the complaint. The Court dismissed the complaint, and on appeal the judgment was affirmed.

Rapallo, J., referring to *Abbott v. Allen, supra,* says: "The case last cited involved only the question of pleading, but the (512) matter of proof was also referred to, and *Platt, J.*, in delivering the opinion of the Court, says that the marked distinction between a covenant of seizin and those for quiet enjoyment and general warranty, consists in this: that the covenant of seizin, if broken at all, must be so at the very instant it is made; whereas, in the latter covenants the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged and proved by the party complaining of the breach. A grantor who gives either of these covenants is not bound to deliver to his grantee the title deeds and evidences of his title. Here the defendants covenanted that they had a good title. The legal presumption, therefore, is that they retain, or can produce, the evidence of that title, if any. The grantee relied on that covenant, and, until the grantors disclose their title, he holds the negative, and is not bound to aver or prove any fact in regard to an outstanding title. The rule of pleading sanctioned by this case, and which carried with it the rule as to the proofs, is very ancient, and was that the plaintiff might assign the breach by simply negativing the words of the covenant. The defendant might plead that he was seized, etc., and in this particular kind of action issue might be joined by a replication simply reiterating the denial of seizin, without setting up that any other person was seized, or specifying any defect in the title. The plaintiff could, if he chose, assume the burden of attacking the title, but was not bound to do so."

The Court proceeded to give an interesting history of the method of pleading and proof in actions upon covenants of seizin based upon the right of the defendant, making such covenant, to retain his title-deeds to enable him to make good his covenant. There being then no statute requiring the registration of deeds, so that the state of the title should be made public, the covenantor was allowed to retain such deeds for the very purpose of answering to the covenants. In *Buckhurst's case,* 1 Co. Rep., 1, it was held that if the grantor sold (513) with warranty, he had a right to retain all deeds and evidences necessary to maintain his title. It was upon these reasons, and the peculiar rules of practice prevailing at common law in such actions, that the burden of proof, in actions upon a covenant of seizin, was cast upon the defendant. It was held, however, that under the Code of Civil Procedure, the defendant not being required to set up in his answer

performance of the covenant, could rely upon a general denial and put in issue the allegation of the breach of the covenant, casting upon the plaintiff the burden of proving it. *Abbott v. Allen, supra,* was practically overruled, or, at least, it was held that the doctrine therein announced was changed by The Code practice.

Plaintiff cites *Britton v. Ruffin,* 123 N. C., 70, to sustain his contention. We do not find that the Court there discussed the question as to burden of proof. It was simply held that the covenant was broken if the covenantors had no title at the time the deed was executed. We are of the opinion that, for the reasons so clearly stated by the Court in *Wooley v. Newcombe, supra,* the burden of proof, in the absence of any admission showing a breach, is upon the plaintiff. This rule is in harmony with our Code system of pleading, which permits the defendant to deny any material averment in the complaint, avoiding the technical niceties often obstructing and sometimes defeating justice. Under our registration acts, it is always within the power of the grantee to make or require an abstract of the title of his grantor, and to show if there be any outstanding paramount title; hence, the reason of the ancient rule, wise enough when unrecorded title-deeds and muniments of title were concealed in trunks, tin-boxes and "family chests:" *"Cessante ratione legis, cessat ipsa lex."*

(514) The plaintiff contends that, however this may be, the defendants have, in their answer, admitted that in regard to the "Coggins Meeting-House" lot they had no title at the time of executing the deed, thereby, admitting the breach of the covenant.

Defendants say that the admission, in that respect, must be taken in connection with and as explained by the matter set up in the third defense, and that, when thus considered, they show a perfect defense to the action.

It is clear that the defendants in responding to the allegations of the complaint expressly deny the breach of the covenant. It is elementary that the issues are made by the pleadings and arise out of allegations made by the plaintiff and denied by the defendant. In order to settle the issues, the Court must examine the pleadings to ascertain what allegations of fact are controverted. It is an idle thing to submit an issue in respect to an admitted fact. When the answer clearly admits facts which, as a matter of law, show plaintiff's right to recover, it is immaterial how or in what manner the admission is made. If it be by way of confession and avoidance, the issue arises upon the new matter alleged in avoidance, the burden being upon defendant to show the truth of the new matter. *Williamson v. Bryan,* 142 N. C., 81.

In *Reed v. Reed,* 93 N. C., 462, the defendant denied the execution of the bond sued upon, and "for further defense" said that "the alleged bond" sued on, etc. The Court held that in the "further defense" the execution of the bond was not admitted. In our case the answer admits the execution of the deed, containing the covenant, and denies the breach. This was entirely proper, because the complaint alleged that two tracts of land were conveyed. It alleged a breach generally, that is, in regard to both tracts. The defendants properly denied the allegation as made, and could, if so advised, have rested their defense upon such denial. As we have seen, the plaintiff would have been compelled to show the breach, not necessarily to the extent charged, but to either of the tracts. The defendants, however, in their (515) further defense, expressly admit the fact which establishes the breach as to the "Coggins Meeting-House" lot—thus removing from the plaintiff the necessity of proving it. The only issue, therefore, in respect to that lot was upon the new matter set up in avoidance of the plaintiff's right of action. If plaintiff had so desired, he could have tendered an issue as to the breach of the covenant in regard to the other tract. It appears that, if such issue was submitted, he offered no testimony, hence the action was tried, so far as the record shows, only as to the small lot. In this condition of the case, the defendants offering no evidence in support of the defense, we are of the opinion that the plaintiff was entitled to judgment. Whether the new matter alleged, if established, would have been available as a defense to the action, or only in diminution of damages, we express no opinion.

The defendants insist that plaintiff cannot maintain the action, because it is alleged he sold the land before bringing the action. It is sufficient to say that, although alleged, it is not admitted or proven. It is well settled, however, "both upon reason and authority," that a covenant of seizin is broken, if at all, immediately upon the delivery of the deed, and the cause of action accrues at once. *Markland v. Crump,* 18 N. C., 94; *Wilder v. Ireland,* 53 N. C., 85 (90); *Britton v. Ruffin,* 123 N. C., 67. It is for this reason that the covenant of seizin, unlike a covenant for quiet enjoyment, wherein the cause of action does not accrue until eviction under a paramount title, does not run with the land. The grantee of the covenantee, therefore, cannot sue upon the covenant. The doctrine and the reason upon which it is founded is thus stated in Jones on Cov., sec. 851; "A covenantee may maintain a suit upon the covenant of seizin, although, at the time of bringing it, he had parted with his title to the land. The covenant, if broken at all, was broken at the time of the con-

veyance. The covenantee is the only person who can maintain
(516) an action for a breach of the covenant, which is a nonassignable chose in action."

The defendants further insist that the covenant of seizin does not include the "Coggins Meeting-House" lot; that it is confined to the "entire property known as the Russell Gold Mine." It will be noted that neither tract is so designated in the descriptive language of the deed. The *habendum* refers to "the aforesaid tracts," and the covenant, rather inartificially drawn, is a continuation of the *habendum*. We cannot concur with defendants' construction of the deed in this respect.

Plaintiff insists that when he showed a breach of the covenant, and the amount of the purchase-money, he was entitled to judgment therefor. It is true that the measure of damage for breach of a covenant of seizin is the purchase-money and interest. This is well settled. The plaintiff does not allege that by reason of the breach he has been disturbed in his possession or called upon to pay out any money to perfect his title. It is clear that it is not necessary to aver either eviction or threatened litigation. The right of action is complete immediately upon the delivery of the deed. The same rule in regard to the measure of damages applies when there is a breach of a covenant of quiet enjoyment. Because the right of action accrues only upon an eviction under paramount title, but little difficulty is found in administering the remedy. *Williams v. Beeman,* 13 N. C., 483, cited by plaintiff, was an action upon a covenant of quiet enjoyment. It was there held that when there was an eviction from the whole estate, the purchase-money and interest was the measure of the recovery. It was also said by *Henderson, C. J.,* that no rule had been prescribed by the Court as to the measure of damages when there was a partial eviction of the estate, or when the eviction was upon a life-estate or smaller interest than the fee. The only decisions of this Court in which any suggestion
(517) is made in regard to any other measure of damages for breach of a covenant of seizin are *Bank v. Glenn,* 68 N. C., 35, and *Price v. Deal,* 90 N. C., 290, in both of which it is held that when the covenantee has purchased the outstanding title for less than the purchase price, he will recover only the amount paid therefor. When the covenantee has lost the land or any part thereof, either in quantity or estate, there is no difficulty in applying the rule for measuring his damage. When he, or his grantee, is, at the time of bringing the action, in possession, and no action has been taken or claim asserted against them, the courts have met with difficulty in adjusting the rights of the parties. An interesting discussion of the question will be found in

Rawle on Cov., 176, *et seq.*, and note; 2 Sutherland on Damages, sec. 597, *et seq.*

This case being before us on the exception to the judgment of non-suit, we are not called upon, nor would it be proper for us, to enter into a discussion of the question of damages. We have considered and decided only those questions discussed by counsel bearing upon the exception. For the reasons given, we are of opinion that in directing a non-suit there was error. There must be a

New Trial.

Cited: *S. c.* 146 N. C., 4, 9.

HARRINGTON v. HARRINGTON.

(Filed 7 November, 1906.)

Dower, How Assigned—Land Conveyed with Joinder of Wife—Rights of Purchasers.

1. Where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of the lands descended and according to the provisions of the statute (Rev., sec. 3084), the purchasers have a right to require that dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved of the widow's claim.
2. Where the husband died seized and possessed of the dwelling-house in which he last usually resided, and this, with the other lands retained, are ample in quantity to allot to the widow one-third in value, as the statute provides, estimating for this purpose the land conveyed without joinder of his wife, an order allotting the widow's dower out of the lands other than those conveyed was proper.

(518)

PETITION for dower by Lucy Ann Harrington, widow of A. J. Harrington, against A. O. Harrington and others, heard on appeal from the Clerk of CHATHAM by *Webb, J.*

The petition was filed by the widow against the heirs at law of A. J. Harrington, deceased; and, on application duly made, T. A. Yarborough and A. D. Judd, purchasers of certain lands conveyed to them by said A. J. Harrington during his life, were made parties defendant.

On the hearing before the Clerk, he found the facts pertinent to the inquiry and gave judgment as follows:

"The Court finds, as a fact, that this is a proceeding for dower in the lands of the late A. J. Harrington; that some time prior to his death he had sold land claimed by T. A. Yarborough, to-wit, fifteen acres to the said Yarborough, and that he had sold the land claimed by A. D. Judd to N. G. Yarborough, who had sold and conveyed by proper deed the same to A. D. Judd, of all which property the said A. J. Harrington was seized during coverture, and that his wife, the plaintiff in this action, did not join in the execution of either of said deeds, but they were executed by A. J. Harrington alone. The Court further finds as a fact that the report of the jury herein filed covers and embraces all the said lots of the said Yarborough and Judd as a part of the dower they allot; that there is a sufficiency of land outside of the said lots to constitute said dower, there being something like 150 acres, and
(519) that the dwelling-house and improvements are not on either of the lots of said intervenors.

"The Court being of the opinion that it is proper and right for the value of the lots of the said Yarborough and Judd to be considered in estimating the value of the property out of which dower is to be allotted, is also of the opinion, and so adjudges, that the said Yarborough and Judd have the right to require the dower to be allotted elsewhere than on their property so long as there is a sufficiency to make up same.

"The Court further finds that the said T. A. Yarborough has put certain improvements on his lots and that it would be inequitable to permit the same to pass to the widow in dower. It is therefore considered, ordered, and adjudged that the exceptions filed by the intervenors be and they are hereby sustained and the report is remanded to the jury, and they are instructed to proceed to value the real property of the late A. J. Harrington, including the lots of the intervenors, and to allow one-third thereof in value, including the dwelling-house, to the plaintiff, but they will allot the same on the lands other than the said two lots of the said intervenors and make their report to this Court."

These facts, at the hearing before the Judge below, were admitted to be true; and thereupon the Judge approved and confirmed the ruling of the Clerk and ordered that petitioner's dower be assigned as therein directed.

From this judgment, petitioner excepted and appealed.

Seawell & McIver for the plaintiff.
Womack, Hayes & Bynum for the defendants.

HOKE, J., after stating the facts: Our statute on the subject, Revisal,

sec. 3084, enacts that a widow, entitled thereto, shall be endowed of one-third in value of all the lands, tenements and hereditaments whereof her husband was seized at any time during coverture; (520) in which third part shall be included the dwelling-house in which her husband last usually resided, together with offices, outhouses, etc.

Another clause of this section provides that the jury summed for the purpose of assigning dower to a widow "shall not be restricted to assign the same in every separate and distinct tract of land, but may allow her dower in one or more tracts, having a due regard to the interests of the heirs as well as the rights of the widow."

Where a decedent dies, seized and possessed of lands in counties other than that in which the petition is filed, sec. 3089 provides a method by which the jury in such county, charged with the duty of assigning dower, shall be informed of the value of the lands lying in the other counties, to the end that this value may be considered in determining the dower to be allotted.

In construing this statute our Court has held:

1. That the entire dower must be allotted in a single action.

2. That the dwelling-house in which the husband last usually resided, if the right of dower attaches thereto, or so much of it as the dower interest will cover, shall be included in the allotment.

3. That subject to this direction as to the dwelling-house, the jury, according to the express terms of the statute, is not required to allot the dower in each and every tract, but may assign the entire dower in one or more of the tracts, having a due regard to the rights and interests of the parties concerned. *Askew v. Bynum,* 81 N. C., 350; *Howell v. Parker,* 136 N. C., 373.

While the question does not seem to have been directly presented in this State, the better considered authorities elsewhere have established the principle that where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a (521) kind and quantity which permit that dower to be assigned out of the lands descended and according to the provisions of the statute, the purchasers have a right to require that dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved of the widow's claim.

This is so held in *Wood v. Keys,* 6 Paige (N. Y.), 478, and *Lawson v. Morton,* 6 Dana (Ky.), 471.

And these cases are cited as law in 2 Scribner on Dower, 597.

In *Howell v. Parker, supra,* decided intimation is given that, under

certain circumstances, equity would require that the widow's dower should be assigned in lands descended and the purchaser for value be protected.

In the case before us, the widow's dower can be so assigned, and every requirement of the statute be complied with.

The husband died seized and possessed of the dwelling-house in which he last usually resided, and this with the other lands retained are ample in quantity to allot to the widow one-third in value as the statute provides, estimating for this purpose the land conveyed as a part of the estate.

There are decisions in other jurisdictions which may seem to uphold a contrary view; but they will be found, no doubt, to rest on the position that after the death of the husband, the widow's claim for dower is an estate which attaches to each and every separate parcel of land, and to be so allotted, and where no statute exists, as it does with us, permitting that dower be assigned in all or any one of the tracts as may be deemed best for the interest of the parties.

We are of opinion, and so hold, that, on the facts stated, the judgment of the Court below awarding the dower in the lands descended, is in accord with the statute, and with sound principles of equity, and the same is

Affirmed.

---

(522)

COZART v. ASSURANCE COMPANY.

(Filed 7 November, 1906.)

Statute Regulating Appeals—Case on Appeal—Agreement of Counsel—Custom of Local Bar—Negligence of Counsel.

1. The courts have no power to extend the statutory time for serving the case on appeal and counter-case, and where the parties have agreed upon the time, this is a substitute for the statutory time, and the courts cannot further exend it.
2. The custom and general understanding of the bar in the county where the case was tried cannot prevail against the terms of the statute regulating appeals nor against the agreement of the parties.
3. Compliance with the statutory regulations as to appeals nor against the agreement of the parties.
3. Compliance with the statutory regulation as to appeals is a *condition precedent*, without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is negligence of counsel and not negligence of the party.

ACTION by Cozart, Eagles & Carr against Assurance Company of

America, heard by *Jones, J.*, and a jury, at the February Term, 1906, of WILSON. This is a petition by the plaintiff for *certiorari.*

Aycock & Daniels for the petitioners.
Busbee & Busbee in opposition.

CLARK, C. J. At the time the appeal was taken counsel made the following agreement in open court, which the Judge caused to be entered on the docket: "Plaintiffs allowed ninety days to serve case, and defendants allowed sixty days thereafter to serve counter-case." The plaintiffs did not serve their case within the time agreed, and when it was served several days thereafter the defendants ignored it, as they had a right to do, and on their motion the appeal was affirmed in this Court—there being no error upon the face of the record proper. This is a motion to reinstate and for a *certiorari* that the case may be "settled" by the trial Judge. (523)

If the parties had not agreed upon an extension of the statutory time, the Court had no power to extend it. *Pipin v. McArtan,* 122 N. C., 194, and cases cited. The time agreed is a substitute for the statutory time, and the courts cannot further extend it. If the trial Judge had settled the case on appeal, it would not have cured the failure to serve the case in apt time. *Barrus v. R. R.,* 121 N. C., 504, and cases cited.

This matter has been recently reviewed and the authorities reaffirmed in a case "on all fours" with this, *Barber v. Justice,* 138 N. C., 20. Counsel for appellants strenuously insist that the custom and general understanding of the bar, in the county where this case was tried, has been for years that no advantage will be taken of the failure to serve case or counter-case on appeal in apt time.

In *Wilson v. Hutchinson,* 74 N. C., 432, this Court held that such understanding or custom among lawyers could not prevail against the terms of the statute regulating appeals, and of course it cannot prevail against the agreement of the parties. Besides, if they were relying on such custom, why was this agreement made and entered on the docket? As this Court has often said: "Counsel are the best, indeed, the sole, judges as to what courtesies they will extend to each other. The courts administer rights."

The appellant contends that the neglect being the neglect of counsel, the client should not be hurt by it. This, if held, would simply repeal all legislative regulation of appeal. The more careless and disregardful counsel could be of the law regulating appeals, the more certain

clients would be of delay and postponement, if desired. In truth, compliance with the statutory regulations as to appeals is a *condition precedent,* without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is negligence of counsel and not negligence of the party. The (524) action which under the statute is necessary to be taken in apt time to save the right of appeal, was not taken, and there is no legal "case on appeal."

In such cases the remedy of the client is by action against the counsel for the damages sustained, if any. In *Ice Co. v. R. R.,* 125 N. C., 17, all of appellant's counsel were insolvent, and there were other exceptional circumstances. In the later case of *Barber v. Justice,* 138 N. C., 20, the Court said that *Ice Co. v. R. R.* was a precedent which could rarely be followed, and only in a like unusual combination of circumstances.

We have, however, looked into the appellant's petition, and taking his allegations to be true, even in the most favorable light for him, we think that substantial justice has been done, and that the appeal could not have availed the plaintiff if it had been duly perfected.

Motion Denied.

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

Cited: Vivian v. Mitchell, 144 N. C., 477; *Truelove v. Norris,* 152 N. C., 756; *Hewitt v. Beck, Ib.,* 759; *Gupton v. Sledge,* 161 N. C., 215.

---

(525)

ALLEN v. BURCH.

(Filed 7 November, 1906.)

Deeds—Probate—Registration—Affidavit Under Rev., Sec. 981—Nonsuit.

1. Under Laws 1885, ch. 147, sec. 2 (Connor Act), as amended by Laws 1905, ch. 277, Rev., 981, the probate of a deed dated in 1845 upon an affidavit that affiant claims title under said deed and that the maker of said deed and the witnesses thereto are dead, and that he cannot make proof of their handwriting, is defective, in that it does not appear by the affidavit that "affiant believes such a deed to be a *bona fide* deed and executed by the grantor therein named," as required by the amended statute.
2. The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title.

3. Where the plaintiff submitted to a non-suit, in deference to the Court's ruling that the execution of the deed was not properly proven, in order that this ruling might be reviewed, the deed upon a proper probate being had, if properly registered, would be competent in another action.

ACTION by E. C. Allen and others against Joe Burch and others, heard by *Moore, J.*, and a jury, at the August Term, 1906, of PERSON.

Plaintiffs alleged that they were the owners of a tract of land described in the complaint, and that defendants were in the unlawful possession. Defendants denied plaintiffs' title, and the cause went to hearing upon the usual issues in actions for the recovery of real estate. For the purpose of showing title, plaintiffs offered to introduce a deed from William L. Allen to James H. Harris and wife bearing date 8 November, 1845. The certificate of probate on the deed was in the following words, to-wit:

Personally appeared before me, D. W. Bradsher, C. S. C., Joe Burch, who, being duly sworn, says that he claims title under a deed from William L. Allen to J. H. Harris, said deed being dated 8 November, 1845, and same hereto attached, and that the maker of said deed and the witness thereto are dead, and that he cannot make proof of their handwriting.

HIS
JOE× BURCH.
MARK.

Sworn to and subscribed before me, this 15 November, 1905.
D. W. BRADSHER, C. S. C.

The annexed deed was this day proven before me by the affidavit of Joe Burch, hereto annexed. Therefore, let the said deed and affidavit, with this certificate, be registered.

Witness my hand, this 15 November, 1905.

Thereupon the Clerk adjudged the execution of the deed to be duly proven, and ordered it to registration, which was done 15 (526) November, 1905.

Defendants objected to the introduction of the deed for that its execution was not proven in accordance with the provisions of the statute, Revisal 1905, sec. 981. The objection was sustained. Plaintiffs excepted, and in deference to his Honor's ruling, "elected to take a nonsuit and appealed." Judgment of nonsuit was entered.

Graham & Devin and *John W. Graham* for the plaintiffs.
Manning & Foushee and *Kitchin & Carlton* for the defendants.

CONNOR, J., after stating the case: A single question is presented by the record: Was the deed properly proven? Prior to the Act of 1885, ch. 147, where the grantor and witnesses to a deed were dead, the statute required satisfactory proof of the handwriting of the witness, and, if there was no subscribing witness, then proof of the handwriting of the grantor. Code of 1883, ch. 27, sec. 1246, subsec. 10. When the act requiring the registration of deeds, Laws, 1885, ch. 147, was passed to enable persons holding old deeds, the grantor and witnesses to which were dead, to more easily have them probated, it was enacted (sec. 2) that persons holding unregistered deeds, executed prior to 1 January, 1855, could have the same registered by making affidavit that the grantor and witnesses were dead, or could not be found, and that such person could not make proof of their handwriting. This section was amended by the Act of 1905, ch. 277, which amendment was carried into sec. 981 of the Revisal, as follows: *"Provided,* that it shall also be made to appear by affidavit that affiant believes such deed to be a *bona fide* deed and executed by the grantor therein named."

The probate of the deed offered in evidence by the plaintiffs is defective in that it does not conform to the amended statute. It was the evident purpose of the Legislature to make this additional
(527) prerequisite to the registration of a deed to which the grantor and witnesses were dead. We concur with his Honor's opinion that the deed was not properly probated under the amended statute and not entitled to registration.

Counsel for plaintiffs call to our attention a line of cases in which it is held that if the probate substantially conforms to the statute it is sufficient, and that the words found in the certificate, "he claims title under said deed," are sufficient.

In *Young v. Jackson,* 92 N. C., 144, *Merrimon, J.,* says: "When the instrument is proven, and the probate is certified as prescribed by law, and it is registered in the proper county, the essential purpose of registration and the law is served, and this is sufficient, notwithstanding some of the non-essential yet helpful forms to be observed between the probate and registration of the instrument have been omitted. The Legislature certainly has power to make forms essential; but unless it shall do so in plain terms, the failure to observe them, especially where they appear from their nature or terms to be directory, will not be allowed to defeat the chief purpose of a salutary statute."

Conceding this to be the correct statement of the law, we think that the requirement that the person offering the deed for probate shall make affidavit that he "believes such deed to be a *bona fide* deed and

executed by the grantor therein named," is of the substance of the affidavit, and in view of the fact that it was inserted by way of amendment to the Act of 1885, it is evidence that the Legislature intended that it be given effect. We cannot disregard so essential a requirement. It is well settled and conceded that the registration had upon an unauthorized probate is invalid. *Todd v. Outlaw,* 79 N. C., 235; *Turner v. Connelly,* 105 N. C., 65; *Lance v. Tainter,* 137 N. C., 249, and many other cases. While it is true that an unregistered deed may be introduced for the purpose of showing color of title, (528) it is evident that plaintiffs did not offer this deed for that purpose. They regarded it as an essential link in their chain of title, and it is so alleged in their answer, wherein notice was given plaintiffs that defendants would insist that the probate was defective.

The plaintiffs, in accordance with the well-settled practice, and to prevent an estoppel upon them in a future action, submitted to a nonsuit in order that his Honor's ruling might be reviewed. Upon a proper probate being had, the deed, if properly registered, would be competent in another action.

The judgment of his Honor must be
Affirmed.

Cited: Wood v. Lewey, 153 N. C., 402.

COTTON v. MANUFACTURING COMPANY.

(Filed 7 November, 1906.)

Master and Servant—Defective Appliances—Knowledge of Master—Negligence—Instructions.

1. In an action for personal injuries alleged to have been sustained by reason of the defective character of defendant's machine, a charge that if the jury found "that the machine at which plaintiff was injured was defective and that the defective condition of the machine was the proximate cause of the injury," they would answer the first issue "Yes," was not erroneous because it left out of consideration the question as to whether the defendant knew, or by the exercise of reasonable care could have known, of its defective condition, where the plaintiff did not even suggest on the trial that if the machine was defective it should not be charged with constructive knowledge of its condition.
2. Instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties.

PETITION to rehear this case by defendant, which was heard
(529) at the Spring Term, 1906, of this Court and a *per curiam* judgment rendered. 141 N. C., 876.

This was an action to recover damages for injury received in defendant's mill while working at a calendar-machine. The cause was tried upon the following issues: 1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: Yes. 2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Ans.: No. 3. What damages, if any, is plaintiff entitled to recover? Ans.: $425.

Petition dismissed.

Tillett & Guthrie for the petitioner.
Stewart & McRae in opposition.

BROWN, J. This appeal was considered by the Court at the last term and a *per curiam* judgment rendered, affirming the judgment without filing an opinion. There was no new question presented arising upon the law of negligence nor any novel application of an old principle. We regarded the case as involving largely questions of fact which we thought had been fully and correctly presented to the jury. We think so still; but in deference to the earnestness of the learned counsel for the defendant we give our reasons why the petition to rehear is dismissed.

The plaintiff contends that his hand was hurt while in the discharge of his duties in operating a calendar-machine. It seems that the machine suddenly started up while plaintiff was cramming the cloth in between the rollers with his fingers, and crushed them. The plaintiff had called one Fautkinberry to start the machine while he threaded it. The cloth slipped, and in obedience to plaintiff's orders Fautkinberry stopped the machine and plaintiff began to cram the cloth in the rollers. The machine suddenly started up and injured plaintiff's hand. Defendant contends that Fautkinberry started it up. Plaintiff con-
(530) tends it started up itself because of its worn and defective character. Defendant denies that said machine was defective in any way, but contends it was in perfect condition. There was evidence introduced on both sides as to why the machine started up and to its condition.

The defendant bases its petition to rehear upon the following portion of the charge: "The Court charges you that if you find from the greater weight of the evidence that the machine at which the plaintiff was injured was defective, and that the defective condition of the

machine was the proximate cause of the injury, you will answer the first issue 'Yes.'"

The petitioner contends that the charge of the Court was erroneous in that it directed the jury to find the issue in favor of the plaintiff if the jury should find that the machine was defective and the defective condition of the machine was the proximate cause of the injury, and thus left out of consideration the essential question as to whether the defendant knew, or by the exercise of reasonable care could have known, of its defective condition. It is apparent upon the record that only three issuable facts were presented by the defendant upon the trial below and considered by the Court, viz.: 1. That plaintiff was injured by the act of Fautkinberry, his fellow-servant. 2. That the machine was not defective. 3. That plaintiff was guilty of contributory negligence.

There is absolutely no evidence upon which to charge plaintiff with negligence; and as to the injury being due to the negligence of his co-servant, that was put to the jury fairly and fully by the Court, and they were specifically instructed to find for defendant, if the machine was started up by Fautkinberry, whereby plaintiff was hurt.

The plaintiff offered evidence tending to prove that the calendar-machine was old and defective; that the gearing was worn and in bad repair, so that the machine when thrown out of gear would unexpectedly fly in gear, causing an unlooked-for start of the (531) calendar. This was denied by the defendant, and evidence offered to prove that the machine was of a kind in general use and in perfect order. The defendant did not even suggest, much less contend, that if the machine was defective it should not be charged with constructive knowledge of its condition, doubtless for the reason that if plaintiff's version of the evidence should be adopted by the jury, the defects were of such a character, were so manifest, and had continued for so long, that defendant as a matter of law would be held to knowledge of them. This is perfectly manifest from reading the defendant's prayers for instruction, as well as the Judge's statement of the contentions of the parties. The Court gave all of defendant's instructions, as we gather from the record, as there is no exception for failure to give any of defendant's prayers.

Instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties. Says *Chief Justice Ruffin:* "The language of the Judge is to be read with reference to the evidence and the point disputed on trial, and of course is to be construed with the con-

texts." *S. v. Tilly,* 25 N. C., 424. We did not overlook the principles laid down in *Hudson v. R. R.,* 104 N. C., 491, and we fully approve them; but we do not think the third proposition in the first paragraph of the syllabus in that case was contended for or even suggested by defendant on the trial of this case. As defendant did not think the proposition worth contending for, we think his Honor was excusable in not presenting it to the jury.

Petition Dismissed.

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

Cited: Pritchett v. R. R., 157 N. C., 100.

(532)

MOTT v. TELEGRAPH COMPANY.

(Filed 7 November, 1906.)

Telegraphs—Prima Facie Case of Negligence—Free Delivery Limits—Extra Charges—Joint Agent—Plaintiff's Son, Messenger.

1. In an action against a telegraph company for delay in the delivery of a message, an exception to the charge, that it being admitted that the message, charges prepaid, was received at the receiving office at 8:55 A. M., and was not delivered until 11:30, and that the operator then knew that the plaintiff lived a mile away, a *prima facie* case of negligence was made out, nothing else appearing, is unfounded.
2. In an action against a telegraph company for delay in the delivery of a message, the Court did not err in telling the jury that "it was the duty of the defendant, knowing where the plaintiff lived, not to hold the message, but to deliver the same promptly, whether the guarantee charges for delivery beyond the free delivery limits were paid or not, especially if the operator at the sending office had told the sender that no extra charges were required when the message was handed to him."
3. The Court properly charged that giving the message to the plaintiff's son at its office, who came by riding a wheel, with request to deliver to his father, made him the defendant's agent, and it is responsible for the delays of its messenger.
4. Contradictory instructions to the jury are only ground for reversal when the instruction adverse to the appellant is erroneous.
5. An exception to the charge, that if the operator at the sending office told the sender's agent, in reply to his inquiry, that there would be no extra charges, it was negligence to fail to make prompt delivery because such extra charges were not prepaid, is without merit.
6. The Court properly charged the jury should not take into consideration as an excuse for delay in the delivery of the telegram, any time consumed by the agent at the receiving office in attending to his duties as railroad agent or in handling the mail.

ACTION, by Charles D. Mott against Western Union Telegraph Com-

pany, heard by *Ferguson, J.*, and a jury, at the July Term, 1906, of IREDELL.

On 22 June, 1906, the following message, charges prepaid, was delivered to defendant at Winston, N. C.: "To Charles (533) Mott, Elmwood, N. C.: W. M. Young killed in W. Va. Funeral here, three o'clock. Can you come? Delia Young." The sender was the widow and the sendee a half-brother of the deceased. Hoosier, a witness for plaintiff, testified that he delivered the message to the operator at Winston about 7 A. M., and told him that the sendee lived a mile from Elmwood, and that if there was any extra charge for delivery that he was ready to pay it, and asked if there was any such charge. The operator replied that the 29 cents which he paid was sufficient. This conversation was corroborated by another witness, and the defendant did not contradict it by the testimony of its operator, nor show any cause why it did not produce him. It was in evidence that he was still living, though no longer in defendant's service. The operator at Elmwood testified that he knew the sendee, who lived one mile from Elmwood and a half mile beyond the free delivery limit; that this message was delayed half an hour by a grounded wire, and was received at Elmwood at 8:55 A. M.; that at 9:31 he sent a service message to Winston that 25 cents was needed to secure delivery, and that at 11:11 he received a reply to make the delivery; that in the meantime the plaintiff's son, a boy 15 to 16 years of age, came by riding a wheel, going in the direction of his father's house, and he gave him the message at 10:30 A. M. for immediate delivery. It appeared that the train going to Winston stopped at Elmwood at 9:08 A. M., and that the next train, and the only one after that, which could have gotten the plaintiff to Winston in time for the funeral, did not stop at Elmwood, but stopped at Barber's Junction, 8 mile from the plaintiff's house, who testified that he did not receive the message till 11:30. He testified as to the efforts he made to catch the train at Barber's Junction, and that he failed to do so. The plaintiff's son being dead, his testimony as to the time he received and when he delivered the message and whether there was any delay, is not obtainable. De- (534) fendant appealed from the judgment rendered.

L. C. Caldwell and *W. G. Lewis* for the plaintiff.

F. H. Busbee & Son and *Armfield & Turner* for the defendant.

CLARK, C. J., after stating the case: The defendant's brief relies solely upon exceptions to the Judge's charge. After telling the jury that the plaintiff did not rely upon any delay in the transmission of

the message, but only on the delay to deliver after its receipt at Elmwood, that the defendant had a right to restrict its free delivery limits and to charge for delivery beyond, that unless the jury found that the extra compensation was offered and refused when the message was handed in, the receiving office could wire back therefor, and that any reasonable time necessary for this purpose and getting a reply should not be counted by the jury, and that if the agent at Elmwood did what a prudent man should under existing circumstances in entrusting the message to the defendant's son, it was not negligence, further charged the jury as to the evidence of what efforts the plaintiff made after receiving the message to catch the train at Barber's Junction, and that the defendant was not liable if the plaintiff could have done so by reasonable promptness and diligence, and a correct charge as to the assessment of damages for mental suffering—to all which is no exception—the Court further charged:

1. That it being admitted that the message, charges prepaid, was received at Elmwood at 8:55 A. M., and that the operator then knew that the plaintiff lived a mile away, a *prima facie* case of negligence was made out, nothing else appearing.

2. That it was the duty of the defendant, knowing where the plaintiff lived, not to hold the message, but to deliver the same promptly whether the guarantee charge for delivery beyond the free de-
(535) livery limits were paid or not, especially if the operator at Winston had told the sender that no extra charges were required when the mesasge was handed him.

3. That by giving the mesage to the plaintiff's son for delivery, the defendant made the son its messenger, and any negligence by him in delaying delivery was the negligence of the defendant.

4. That if the operator at Winston told the sender's agent in reply to his inquiry, that there would be no extra charges, it was negligence to fail to make prompt delivery because such extra charges were not prepaid.

5. That the jury could not take into consideration, as an excuse for delay, any time consumed by the agent at Elmwood in attending to his other duties as railroad agent or in handling the mail.

6. That if, as the defendant's agent testified, delivery could have been made in 15 to 20 minutes, *i. e.*, by 9:15 A. M., but in fact, as the plaintiff testified, the message was not delivered till 11:30 A. M., and the plaintiff immediately made preparations to catch the train at Barber's Station and failed to do so because of the aforesaid delay of the defendant to deliver the telegram, then the defendant is liable.

The exceptions to paragraphs 1, 4 and 6 are unfounded and need no discussion.

Paragraph 5 is justified by what is said in *Kernodle v. Telegraph Co.*, 141 N. C., 438, where *Brown, J.*, well says: "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." The contract of the telegraph company is for prompt delivery. It is no defense that its agent had other duties to attend to as agent for another company, any more than it would be an excuse that it had so much business of its own that one agent or the messengers it had could not promptly and properly handle it. In both cases the defendant is negligent if it does not have sufficient employees to discharge (536) properly the duty it contracts to do and is chartered and paid to do.

As to paragraph 3, the Court properly charged that giving the message to the plaintiff's son at its office, with request to deliver to his father, made him the defendant's agent, and it is responsible for the delays of its messenger. It would be otherwise if the message had been delivered at the plaintiff's house to a person of reasonable age and discretion, the father not being at home, or if the father had sent his son to the telegraph office for a message and it had been deliverd to him as his father's agent.

The defendant complains that this charge is contradictory to one given on the same point, as above set out. But contradictory charges are only ground for reversal when the instruction adverse to the appellant is erroneous. If the jury followed the other instruction, which was given at the request of the appellant, it certainly could not complain.

As to the only remaining paragraph of the charge excepted to (number 2 above), the delay to send the service message from 8:55 till 9:31 and the delay of a reply thereto till 11:11 A. M., was left to the jury on the question of negligence; but disregarding that, the Court did not err in telling the jury that "it was the duty of the defendant, knowing where the plaintiff lived, not to hold the message, but to deliver the same promptly, whether the guarantee charges for delivery beyond the free delivery limits were paid or not, especially if the operator at Winston had told the sender that no extra charges were required when the message was handed him." *Telegraph Co. v. Snodgrass,* 86 Am. St., 851; *Telegraph Co. v. Moore,* 54 *Ib.,* 515; 12 Ind. App., 136. In this last case, already cited by us with approval, 133 N. C., 606, it is said: "If there be any additional sum due, the company may require its payment

before it surrenders the message to the sendee, if it prefers to do so, rather than rely upon the sender for its payment. The company (537) will thus be furnished ample protection and the expectations and purposes of the sender of the message will not be disappointed. * * * If, however, the company might occasionally lose a delivery charge, the loss of it would be trifling and inconsiderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon its delivery of the message." *Hendricks v. Telegraph Co.*, 126 N. C., 310; *Bryan v. Telegraph Co.*, 133 N. C., 605. The company need not surrender the message till the sendee pays the extra charges for the special delivery. In *Hendrick's case, Douglas, J.*, says that the clause in the telegraph blanks that for delivery beyond free delivery limits "a special charge will be made to cover the cost of such delivery," by its very terms "does not apply to the office from which the message is sent." It does not say that the message will *not* be delivered beyond such limits, but that "a special charge will be made to cover the cost thereof," which clearly implies that it will be delivered. There may, of course, be cases where by reason of the distance and cost the company should wire back and require the extra cost to be guaranteed by the sender, but such would be unusual, and are not the facts of this case. Here the uncontradicted evidence is that the sending office was told where the sendee lived, and assured the sender that the message would be delivered for the sum charged and paid. The sendee did not refuse to pay the extra 25 cents.

No Error.

Cited: Helms v. Tel. Co., 143 N. C., 395; *Edwards v. Tel. Co.*, 147 N. C., 131.

---

(538)

PARDON v. PASCHAL.

(Filed 7 November, 1906).

Ejectment—Abandonment—Deed by Wife Alone—Exception as to no Evidence.

1. In an action of ejectment, where the plaintiff claimed title under the will of his wife, and the defendant claimed under a deed executed by the wife alone, a charge that "if the plaintiff had permanently abandoned his wife prior to and at the time of the execution of the deed to the defendant, it was a valid conveyance under Revisal, sec. 2117, and the plaintiff would not be entitled to recover," is correct.
2. Where it does not appear in the record that the appellant requested the Court to charge the jury that there was no sufficient evidence of abandonment, or that he handed up any prayer for instructions, he cannot be heard to raise that question by motion to set aside the verdict.

EJECTMENT, by Thomas Pardon against Rachel Paschal, heard by *Ferguson, J.*, and a jury, at the June Term, 1906, of GUILFORD. From a judgment for the defendant, the plaintiff appealed.

Scott & McLean for the plaintiff.
G. S. Bradshaw for the defendant.

CLARK, C. J. The plaintiff claims title to the land in controversy under the will of his wife, Sarah Yates Pardon. The defendant claims under a deed executed by the wife alone, 4 January, 1904. The Court charged the jury that if the plaintiff had permanently abandoned his wife prior to and at the time of the execution of the deed to the defendant, it was a valid conveyance under Revisal, sec. 2117, and the plaintiff would not be entitled to recover. The charge of the Court is clear and free from error upon this, the only question at issue on the trial, and presents fully the contentions of both parties.

The only exception presented in the brief of the appellant is that there is no sufficient evidence of abandonment, and that (539) the Judge should have so instructed the jury. It nowhere appears in the record that the plaintiff requested the Court so to charge, or that the plaintiff handed up any prayer for instructions to the jury. He cannot be heard, therefore, to raise that question by motion to set aside the verdict. "If he is silent when he would speak, he ought not to be heard when he should be silent." *Boon v. Murphy,* 108 N. C., 192, and cases cited. If it is any satisfaction to the plaintiff to know it, we will state that an examination of the record discloses ample evidence to justify the Court in submitting the matter to the jury.

No Error.

MERRIMON v. PAVING COMPANY.

(Filed 7 November, 1906).

Municipal Corporations—Right of Citizen to Enjoin Corporation—Necessity for Demand—Complaint—Necessary Allegations—Fraud—Demurrer.

1. A citizen, in his own behalf and that of all other tax-payers, may maintain a suit in the nature of a bill of equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the tax-payers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.

2. But the citizen cannot call upon the courts to interfere with the control of corporate property or the performance of corporate contracts, until he has first applied to the corporation, or the governing body, to take action, and they have refused, and he has exhausted all the means within his reach to obtain redress within the corporation, unless there
(540) is fraud or the threatened action is *ultra vires.*

3. In an action by a citizen against a municipal corporation to enjoin its governing authorities from making further payments on a contract with a paving company for paving the streets, on the ground that the paving company was not complying with the contract, where the complaint does not allege any demand upon the governing authorities and refusal by them to sue, and there is no charge of fraud nor any averment that any of the officers are acting in the matter "for their own interest," or that their action is "destructive of the corporation," or that they are acting "oppressively or illegally," except in that they differ in opinion from the plaintiffs in respect to the character of the work, the demurrer was properly sustained.

4. When a plaintiff intends to charge fraud, he must do so clearly and directly, by either setting forth facts which in law constitute fraud or by charging that conduct not fraudulent in law is rendered so in fact by a corrupt or dishonest intent.

5. The request to the Mayor not to pay the amount then due was not a compliance with the rule which requires a demand upon the Board of Aldermen and a refusal by them before the citizen can sue; nor was the necessity of a demand dispensed with by reason of the fact that "there was no meeting of the Board," where it does not appear that the plaintiffs exhausted all means in their power to submit their grievances to a regular or a special meeting called for this purpose.

6. Every demurrer directed to the incapacity of the plaintiff, to sue, the misjoinder of parties or causes of action, or jurisdiction, admits the facts alleged, for the purpose of the demurrer, but does call into question the merits of the case.

ACTION by B. H. Merrimon and others against Southern Paving and Construction Company and others, heard by *Ferguson, J.,* April Term, 1906, of GUILFORD, upon demurrer to the complaint.

The plaintiffs, citizens and tax-payers of the city of Greensboro, instituted this action on 13 March, 1906, against the defendants, The Southern Paving and Construction Company, the City of Greensboro, T. A. Hunter, a member of the Board of Aldermen and Chairman of Street Committee; W. G. Potter, city engineer, and T. J. Murphy, Mayor of said city. They allege that the city of Greensboro was duly incorporated by an act of the General Assemby of the State,
(541) Private Laws 1901, ch. 333. That pursuant to power vested in said city of Greensboro, acting through the Mayor and Board of Aldermen, it entered into a contract, a copy of which is made a part of the complaint, with the defendant Construction Company, on 20 September, 1905, by which, upon the terms and for the prices named, the said company undertook to furnish all materials, implements, labor,

and everything necessary and perform all of the work and labor required to grade, improve and pave, complete in all respects, certain streets in said city. The specifications, plans, etc., by which the materials were to be furnished and the work to be performed were made a part of the contract. The portions of the contract material to the decision of the appeal are that the materials furnished and work done were to be inspected and approved by the city engineer, and in case of disagreement his decision was to be final and binding upon all of the parties. Approximate estimates of the work done were to be made by the engineer, and payment made upon his approval semi-monthly; ten per cent of each estimate to be retained until the work was completed; warrants for the amounts due upon the semi-monthly estimates to be issued by the Mayor.

The plaintiffs allege that the defendant company began the work as provided by the said contract, "but in numerous and material respects failed and neglected to perform the obligations imposed upon it by the terms of said contract and specifications, and failed and neglected to give to the city as good pavement as was called for." The complaint set out eleven respects in which the company failed to furnish good material and properly perform the work. They further allege that defendants Hunter and Potter have failed to discharge their duty in seeing to it that defendant company was complying with its contract. That on 24 November, 1905, defendant Potter, city engineer, approved an estimate, and semi-monthly thereafter approved other estimates, upon which warrants were drawn and payments (542) made aggregating $26,652.85. It appears from said estimates set out that 10 per cent of the amount due was retained by the city. That said amount was about four-fifths of the entire sum to be paid on account of the contract. That the amount already paid defendant company is more than it is entitled to receive by reason of the defective character of the materials and work. That after the plaintiffs came into possession fully of the facts with respect to the manner of doing the work on Elm Street and were prepared, with information they had gathered, to establish the defects in the work herein alleged and complained of up to the time of the bringing of this action, they were informed and believe that a payment of the city's money by the defendant T. J. Murphy, Mayor, upon the certificate of the defendant W. G. Potter, city engineer, would be made unless action was taken to prevent it. That the plaintiffs had no opportunity, after this information was so obtained and collected, to lay the matter before the Board of

Aldermen of the city of Greensboro, as there was no meeting of the board, and as they are advised and believe, it was unnecessary for them to do so; but they did, through their attorney, communicate with the defendant T. J. Murphy, Mayor, that there were material and serious defects in the work done by the defendant company in paving South Elm Street, and that the defendant company had already received more money than it was entitled to receive, or would be entitled to receive when it had paved the remainder of Elm Street to Church Street, which had not been paved between Lee and Church Streets, and that he ought not to make payments or issue warrants for money to the defendant company, but should withhold any further payments or warrants until an investigation was made as to what the facts were, and request further that such payments and warrants be withheld until Friday, 17 March, 1906; but the defendant T. J. Murphy de-
(543) clined to agree to withhold the payments and showed no disposition or indication that he would make any investigation whatsoever; and on 16 March, 1906, was in the act of issuing, or had issued and afterwards recalled, a warrant of $2,626 in addition to the $26,652.85 which had already been paid to the defendant company, or to the Southern Life and Trust Company for it; and as plaintiffs are informed and believe, the defendant T. J. Murphy, Mayor, was stopped from issuing said warrant upon which said amount of $2,626 would have been paid of the city's treasury, only by the commencement of this action and the proceedings had herein.

That the representations of the defendant company that it had done work entitling it to $26,652.85 was approved by the defendant W. G. Potter, when the same should not have been approved, and if the said Potter had complied with the obligations resting upon him in the contract hereto attached and marked Exhibit "A," he would not have so approved the said accounts and claims of the defendant company, as plaintiffs are informed and believe.

That no order, direction or warrant, or any action whatever, with respect to the acceptance of said work done by the defendant company, or any payment therefor, has been taken, made or done by the Board of Aldermen of the city of Greensboro since the contract entered into with the defendant company on 20 September, 1905, and whatever action is taken by the defendant T. J. Murphy, by the defendant T. A. Hunter, or by the defendant W. G. Potter, in approving or paying for any such work, is unauthorized except it be authorized by the terms and conditions and stipulations of the said contract.

Plaintiffs allege that it would be a fraud upon themselves and the

other tax-payers of said city to permit further payments to be made to defendant company out of the funds of the city. They demand judgment that a perpetual injunction issue against the defendant company receiving, or the other defendants paying, any (544) money on account of the said contract, etc. Defendants demur to the complaint, and for cause of demurrer say:

"That said complaint does not state facts sufficient to constitute a cause of action against said defendants, in that it appears from said complaint that any cause of action that may arise from the breach of the contract therein mentioned on the part of the defendant, the Southern Paving and Construction Company, is vested in and accrues to, primarily, the said city of Greensboro and not in or to the plaintiffs, and it is not alleged in said complaint that plaintiffs or either of them ever requested or demanded of the governing body of the said city, to-wit, the Board of Aldermen, that they proceed to enforce said contract, and that said Board of Aldermen refused so to do. And further, that it does not appear from said complaint that said plaintiffs or either of them ever gave said Board of Aldermen to understand or be informed that the said Southern Paving and Construction Company was violating its said contract, or that defendant T. A. Hunter, chairman of the street committee, or defendant W. G. Potter, city engineer, had been guilty of dereliction of duty, and requested that said board take action in the premises, and that said board had refused so to do.

"That it is not alleged in said complaint that the city authorities and the city of Greensboro in carrying on the improvement and paving of Elm Street, pursuant to the contract therein mentioned are or have been acting fraudulently and in bad faith in allowing the variations from the contract specified in the complaint and not *bona fide* and in the exercise of the discretion vested in them by law and by the terms of said contract."

His Honor sustained the demurrer and rendered judgment dismissing the action. Plaintiffs excepted and appealed.

J. T. Morehead and *E. J. Justice* for the plaintiffs. (545)

W. P. Bynum, Jr., and *G. S. Ferguson, Jr.,* for the Paving Company.

R. C. Strudwick and *Stedman & Cooke* for the City of Greensboro.

CONNOR, J., after stating the case: The demurrer raises three questions, all of which are clearly presented in the briefs and were ably argued in this Court: 1. Does the citizen, in respect to his right to

invoke the equitable powers of the Court to control the action of a municipal corporation regarding its property, occupy the same relation to the corporation as a shareholder in a private corporation, and is his right to bring such suit governed by the rules applicable to such shareholder? 2. What are the limitations upon the right of a shareholder to bring suits regarding the control of the corporate property? 3. Do the facts set out in the complaint, and for the purpose of the demurrer admitted to be true, entitle the plaintiffs to maintain the suit, under the restrictions imposed by such rules?

That a citizen, in his own behalf and that of all other tax-payers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the tax-payers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.—is well settled. Dillon Mun. Corp., 914; High on Inj., 1236, *et seq.; Carthan v. Lang,* 69 Iowa, 384; *Loder v. McGovern,* 48 N. J. Eq., 275 (27 Am. St., 446); *Leibstein v. Mayor,* 24 N. J. Eq., 200; *Bond v. Mayor,* 19 N. J. Eq., 376; *Roper v. Laurinburg,* 90 N. C., 427. *Judge Dillon* says that the right to maintain such action is sustained by analogy to the principle applicable to the rights of shareholders in private corporations. "In these the ultimate
(546) *cestuis que trust* are the stockholders. In municipal corporations the *cestuis que trust* are, in a substantial sense, the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting *ultra vires* or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid

the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations; and if it be denied to exist, they are liable to be plundered, and the tax-payers and property-owners on whom the loss will eventually fall are without effectual remedy." Mun. Corp., 915. The author cites numerous cases showing that this most wholesome doctrine is generally recognized.

The defendants, not denying this, say that the principle upon which the right of the citizen to sue, being the same as that which entitles the shareholder to sue, must be governed by the same limitations in regard to when and under what circumstances the suit may be brought.

The plaintiffs insist that the citizen may sue without first applying to the governing body to take action. It is conceded (547) that in some cases he may do so—just as in some cases the shareholder may.

What is the general rule as to the right of shareholders to sue in cases where the right of action primarily vests in the corporation? The subject is treated, with his usual force and with much learning, by *Mr. Justice Miller* in Hawes v. Oakland, 104 U. S., 450. The English and American cases are reviewed and the doctrine announced in that case has been adopted and followed by this and all other courts. The basic principle is that the corporation is a distinct entity, and not a mere copartnership composed of individuals. That by its charter certain powers are conferred upon this legal person or entity to be exercised by the board of directors and other officers and agents provided for and elected in the manner prescribed. That when contracts are made by such boards or agencies they are the acts of the corporation, and the duties assumed and rights acquired are corporate. That so long as the corporate acts are *intra vires* and the officers are in the execution or discharge of such duties exercising an honest judgment and discretion, the courts will not, except within the limitations prescribed, interfere at the suit of one or more stockholders. The reason and policy upon which these limitations are based are so just and necessary to the existence and efficient operation of corporate powers and functions that they require no vindication; certainly, nothing can be added in that regard to what is so clearly and forcibly said in *Hawes v. Oakland, supra,* and the quotations there made from opinions of other judges. The opinion in that case became the basis of the ninety-fourth rule in equity by which the Federal courts are governed in taking jurisdiction in such cases.

In *Loder v. McGovern, supra,* the plaintiff sued in equity to enjoin the governing body of the city from paying out funds on account

porate action if, without notice to the corporation or its governing body, courts entertained such suits. The contract to pave the streets was strictly within the power of the corporation. It appears to have carefully guarded the rights of the city. The engineer was made the sole arbitrator and his judgment final. Ten per cent of his estimates are retained by the city until the work is completed. It is stipulated that even after his approval, the contractors are to be responsible for defective work. Assuming that there were defects in the work as it progressed, it does not follow necessarily that the city or its governing body was compelled to enjoin the further construction of the pavement. Many reasons occur to the mind, based upon observation and experience, which would control the sound discretion of the Mayor and Aldermen in permitting the work to go on. We know nothing of these matters save as disclosed in the record, and refer to them only to vindicate the wisdom of the law, which requires that a demand be made upon the authorities before the city is forced into litigation. Both upon reason and authority, we are of the opinion that the rule which protects private corporations from suits of this character applies to municipal corporations. Of course, as we shall see, when there is fraud or the threatened action is *ultra vires,* the rule does not apply. *Judge Miller* in *Hawes v. Oakland, supra,* thus lays down the rule: (550)

"We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded upon a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other sources of organization.

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation or to the interests of the other shareholders.

"Or when a board of directors, or a majority or them, are acting for their own interests, in a manner destructive of the corporation itself or of the rights of the other shareholders.

"Or where a majority of shareholders are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders and which can only be restrained by the aid of a court of equity."

This Court in a well-considered opinion by *Mr. Justice Merrimon* in *Moore v. Mining Co.,* 104 N. C., 534, cites with approval and adopts the doctrine of *Hawes v. Oakland, supra,* saying: "The right to bring and the occasion of bringing such actions, arises only when and because the proper corporate officers will not, for some improper consideration, discharge their duties as they should do. But stockholders, as such, may not bring such actions at their pleasure and have their rights, as individuals growing out of the corporation, settled and administered. * * * The case just cited (*Hawes v. Oakland*) (551) was afterwards cited and fully approved by the same Court in *Dimpfel v. R. R.,* 110 U. S., 202, and it was therein further held that it must appear that the plaintiffs had exhausted all the means in their power to obtain redress or their grievances, within the corporation itself." The learned Justice further says: "It is not alleged, nor does it appear in any way, that the plaintiff had ever taken steps, within the company last mentioned, to correct the grievances of which he complained, although he had known of them for years; nor does it appear that he has ever demanded and required of its officers that they take proper action to prevent them or obtain redress on account of the same."

Mr. Clark in his excellent work on Corporations, pp. 389-90, states the doctrine as laid down by *Judge Miller,* and adds: "In addition to the existence of grievances calling for equitable relief, it must appear that the complainant has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances. He must apply to the managing officers to take action in the corporate name; and if he fails with them, he must, if the matter will admit of the delay, seek to obtain action by the stockholders as a body, unless for some reason such attempt would be useless. *Brewer v. Boston Theatre,* 104 Mass., 378.

The plaintiffs earnestly insist that, conceding the full force and extent of the doctrine of Hawes v. Oakland, and that it applies to suits in equity by citizens and tax-payers of municipal corporations, the complaint contains allegations sufficient to entitle them to maintain the action. In *Loder v. McGovern, supra,* while, as we have shown, the Court held the averment necessary, that the Common Council had been called on and refused to bring the suit, the opinion concludes with the statement that "in view of the answer and proofs, it sufficiently appears that the Common Council was antagonistic to the plaintiffs' position, and that consequently the objection cannot prevail on (552) final hearing." What the answer and proofs were are not set

forth in the opinion or statement of the case; hence, in that respect, we have no information to enable us to see what facts controlled the Court. In *Carthan v. Lang, supra,* the question raised by the demurrer was not presented or discussed for the obvious reason that, "It is alleged that the directors and Adams (the contractor) confederated together to defraud the district by the erection by the contractor of a house of a character inferior to the building required by the contract, and the acceptance and payment therefor by the directors. Other charges of fraud are made in the petition."

The plaintiffs do not charge fraud on the part of the engineer, the Mayor, or the Aldermen, unless the allegation, "that it would be a fraud on the plaintiffs' rights as property-owners and tax-payers for the city to make the defendant paving company further payments," is so construed. This language is hardly capable of such construction. Plaintiffs' counsel, on the argument, frankly conceded that he did not intend to charge that the city authorities were acting from corrupt or dishonest motives. The cases all hold that the jurisdictional facts must be stated "with particularity." *Mr. Justice Merrimon* in *Moore v. Mining Co., supra,* says: "It is alleged that certain officers of the company were the authors of and participants in the alleged frauds and mismanagement, and that they refused to take action. But this allegation is indefinite, unsatisfactory and evasive. * * * This is not sufficient." The plaintiffs negative the suggestion of fraud by saying that the defendants Potter, Hunter and Murphy maintain that the work is being done according to specifications of the contract. It is a fundamental rule of pleading that when a plaintiff intends to charge fraud he must do so clearly and directly, by either setting forth facts which in law constitute fraud or by charging the conduct not fraudulent in law is rendered so in fact by the corrupt or dishonest intent with which it is done. Certainly, it cannot be contended that because of an honest difference of opinion in respect to the char- (553) acter of work done and materials used in paving a street, the officers whose duty it is to have and act upon their opinion are guilty of fraud. It is not so contended. We find no averment that any of the officers are acting in the manner "for their own interest," or that their action is "destructive of the corporation," or that they are acting "oppressively or illegally," except in that they differ in opinion from the plaintiffs in respect to the character of the work.

As we have seen, the action of the city authorities is *intra vires* and in accordance with the charter of the city. We conclude, therefore, that the complaint contains no averment bringing the plaintiffs, in respect

to their right to bring the suit, within any of the exceptions to the general rule which requires a demand upon the corporate authorities or governing board of the corporation and refusal by them to sue. Does the complaint allege any such demand? It is conceded that no demand was made upon the Board of Alderman. Two reasons are assigned for not doing so. The first, that they were not required to do so, we have discussed and decided by what we have heretofore said. The second, "that there was no meeting of the board." It will be noted that there is no allegation as to the time within which there was no meeting of the board. By sec. 26, ch. 333, Private Laws 1901, being the charter of the city of Greensboro, it is provided that the Board of Aldermen shall meet at stated times to be fixed at their first meeting, and "shall be as often, at least, as once in every calendar month." It is further provided that special meetings shall be called by the Mayor, or a majority of the Aldermen. A penalty of four dollars is imposed upon any Alderman for failure to attend unless good cause therefor is shown. It will be observed that the work was begun the fall of 1905, and from the estimate submitted semi-monthly considerable progress was (554) made; plaintiffs say that on 13 March, 1906, as much as four-fifths had been completed. "That about this time plaintiffs came into possession of the facts with respect to the defects in the paving," etc. In *Moore v. Mining Co., supra, Merrimon, J.,* says: "It should be alleged frankly, plainly, and with particularity that the plaintiff had demanded and required of such officers that they should correct the grievances alleged and take steps to obtain redress, and that they thereupon refused to do so." It is evident from the character of the specifications made by plaintiffs in the several particulars in which the work and materials were defective, that they had knowledge thereof for some time. The allegation in that respect is far from the standard fixed by the law. They could, it would seem, have attended the monthly meeting of the board preceding the maturity of the March payment, or, if time did not permit this, call on the Mayor, and, if he refused, a majority of the Aldermen to call a special meeting. They would thus have "exhausted all the means within their reach to obtain, within the corporation, redress of their grievances," and this, all of the authorities say, must be done. The request to the Mayor not to pay the money was not, by any means, a compliance with the rule. The Mayor was, in respect to paying the money, the agent of the Board of Aldermen, as was the engineer in making the estimates and passing upon the work. Neither of these officers had any discretion or power to institute suit against the contractor. They would have incurred heavy responsibilities

if, without instruction from the governing body, they committed a breach of the contract upon the request of the plaintiffs. It would be impossible to conduct the affairs of a municipal or private corporation if ministerial officers were permitted to assume the powers of the governing body. No one except the Aldermen had the power to act in the matter. If they had refused to act, after being called upon, and the plaintiffs' views in regard to the conduct of the paving company and the character of the material and work laid before them, (555) and demand made that they take such action as was necessary to protect the interests of the plaintiffs, tax-payers, there can be no question that the plaintiffs would have been entitled to apply to a court of equity for relief. The allegation in regard to the request to the Mayor to refuse to pay the amount then due was not a compliance with the law, and did not entitle plaintiffs to sue and enjoin the city and other defendants.

The plaintiffs say that to sustain the demurrer would be to permit the revenues to be misapplied, wasted, and "graft" to be practised. This is a misconception of the rule and its exceptions. As we understand the term, "graft" is but another name for dishonesty, corruption, fraud. If the plaintiffs will allege either of these, the Court will be swift to come to their aid and protection. So far as this complaint shows, a valid contract has been made for paving the streets of Greensboro. The plaintiffs honestly think that the paving company are not complying with their contract. Without mentioning their views and opinions to the Board of Aldermen, or alleging that they are acting improperly, or that they even know that plaintiffs think the work is not being properly done, they are sued and enjoined; the work is stopped, and a city of several thousand inhabitants thrust into a lawsuit by the action of three citizens. The result of permitting this course of procedure is manifest.

The plaintiffs say that the defendants by their demurrer admit all of the grievances set forth in the complaint. The answer is, they admit them for the purpose of the demurrer. That is, they say, assuming them *pro hac vice* to be true, plaintiffs are not the proper party to sue. They have shown no such conduct on the part of the corporation, or its governing body, as gives them a right of action or *locus standi* in a court of equity.

Every demurrer directed to the incapacity of the plaintiff to sue, the misjoinder of parties or causes of action, or jurisdiction, (556) admits the facts alleged, for the purpose of the demurrer. Any other construction of a demurrer which did not reach the merits of the

controversy would make it a vain thing. The doctrine, which we have discussed, is confined, of course, to the right of citizens of municipal, or shareholders in private, corporations to sue on account of right of action existing in the corporation itself. For corporate acts by the governing board, or other officers, injurious to the citizens or stockholders, as illustrated in numerous cases, the right of action accrues directly to the citizen or shareholder. Here, whatever injury was sustained by the failure of the paving company to perform its contract accrued to the city. No action at law could be brought by the citizen. It is only in a court of equitable jurisdiction that he may sue, and then only by conforming to its rules of practice and procedure. Until his trustee has refused to protect the trust property, or has so acted as to relieve him of the duty of demanding performance, he has no status in a court of equity. The demurrer does not call into question the merits of the case. It simply denies their right to maintain the action, in the present condition of the pleadings. If they had so desired, the Court would have permitted an amendment if they wished to allege compliance with the law, or, if so advised, they can put themselves in a position to have their grievances redressed and their rights, as taxpayers, protected.

The suggestion of the plaintiffs that the injunction should be continued to the hearing only applies to those cases in which the facts constituting the cause of action are in controversy. Here, as we have said, the demurrer goes to the right of the plaintiffs to sue in the present condition of the record. No proof in the absence of allegation could remedy this fatal defect; hence, it would be an idle thing to continue the investigation to the hearing, when the plaintiffs are confronted at the outset with this insurmounted difficulty. The general prop-
(557) osition in plaintiffs' brief is correct and supported by the authorities, but not applicable to this case.

Upon an examination of the entire record, we concur with his Honor in sustaining the demurrer. The judgment must be

Affirmed.

Cited: Staton v. R. R., 147 N. C., 436; *Jones v. North Wilkesboro*, 150 N. C., 649; *Quarry Co. v. Construction Co.*, 151 N. C., 346; *Brewer v. Wynne*, 154 N. C., 471.

MARABLE v. RAILROAD.

(Filed 7 November, 1906).

Carriers—Passengers—Liability—Degree of Care—Negligence—Clergyman's Permit—Harmless Error—Passenger on Freight Train—Assumption of Risks—Instructions—Rules Regulating Appeals.

1. A carrier of passenegers is not an insurer, as is a carrier of goods. His liability is based on negligence, and not on a warranty of the passenger's freedom from all the accidents and vicissitudes of the journey.
2. The admission of evidence that the plaintiff in purchasing his ticket used an "Annual Clergyman's Reduced Permit," which contained the following contract: "In consideration of the reduced rate granted by this permit, the owner assumes all risk of damage and accident to person or property while using the same," was harmless.
3. The carrier is required to use that high degree of care for the safety of the passenger which a prudent person would use in view of the nature and risks of the business.
4. In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner.
5. Where a charge covers the entire case and submits it fairly and correctly to the jury under all the circumstances, parties have no just ground of complaint, or for asking anything more, especially if they have failed to request more definite instructions. (558)
6. The attention of the profession is specially directed to the rules of this Court, and to the decision in *Davis v. Wall*, at this term, as being very proper for their careful consideration when preparing cases on appeal.

ACTION by M. V. Marable against Southern Railway Company, heard by *Ferguson, J.*, and a jury, at the July Term, 1906, of IREDELL.

This is an action brought to recover damages for injuries alleged to have been caused by the negligence of the defendant. The plaintiff was a passenger on one of defendant's local freight trains in September, 1904. The train was composed of about 35 cars and a caboose, in which the plaintiff was sitting on a seat with his feet on a box having tools in it, a stove being near and in front of him. There were cushioned seats in the car. He took passage at Charlotte for Landis and presented to the ticket agent an "Annual Clergyman's Reduced Permit" which contained the following contract: "In consideration of the reduced rate granted by this permit, the owner assumes all risk of damage and accident to person or property while using the same." The plaintiff testified that his name was on the permit, but that he had refused to sign it, though he used it for the purpose of securing a reduced rate, and was allowed the reduced rate by the agent. The plaintiff objected to the introduction of the permit; the objection was overruled,

and he excepted. The conductor took up his ticket after he got on the train. When between Concord and Glass the train came to a sudden and violent stop, throwing the plaintiff from his seat on the end of the bench against the stove and bruised and otherwise injured his right forearm. His nervous system was affected and his health failed. The engineer, not now in the service of the company, testified that there were 35 cars in the train, which were fully equipped with automatic air-brakes and all necessary appliances. Everything was in first-class condition. When the train was approaching Glass he got an order to stop there, and did stop the train in the usual manner. The train
(559) was on an upgrade all the way to Glass from Concord, and there could have been no unusual jar or jolt of the train when it stopped. There was a jar, and always is, when such a train is stopped. It comes from the slack in the cars. There is more jolting in a freight than in a passenger train. The train was running from 6 to 8 miles an hour. There was evidence tending to show that the plaintiff occupied a dangerous position, and one likely to cause his fall from the seat if the train should make the usual stop, and that a person not used to riding on a freight train of 35 cars is very apt to get a good bump if he is not careful, and that almost any one will be jolted some. There was much other evidence substantially to the same effect as that already stated.

The Court, at the request of the plaintiff, charged the jury that a carrier cannot stipulate for exemption from liability for negligence, and the permit held by the plaintiff and used by him to get a reduced rate of fare would not exonerate the defendant, if the plaintiff was injured by its negligence, and that it is no bar to his recovery. That where one is injured in a public conveyance and the injury resulted from something over which the carrier had control, the law raises a presumption of negligence which extends to the occurrence, regardless of the party who is injured. If the jury found that the plaintiff was injured as described by him, the law raised a presumption of negligence, and he is entitled to recover, unless the defendant has shown by the greater weight of the evidence that the sudden and violent stoppage of the train was caused by something not within its control; and unless this has been shown by the defendant, they will answer the first issue (as to defendant's negligence) "Yes." That in such a case and under such facts and circumstances the doctrine of *res ipsa loquitur* applies and casts the burden on defendant to show that the injury was unavoidable; and if it has failed so to do, they will answer the first issue

"Yes." These were all the instructions requested by the plain- (560) tiff on the first issue, and all were given.

The Court, at defendant's request, charged the jury that the common law made the defendant an insurer of the plaintiff's safety, and that the permit had the effect of relieving the defendant of the said common law liability, and that defendant would only be liable for negligence if there was any. That negligence must be shown to have caused the injury, which must have proceeded from some fault of the defendant. That the plaintiff assumed the ordinary risks incident to the running of a freight train, such as the one in question was, if it was managed in a prudent and careful manner, and the jerking of the train which is alleged to have caused the injury was unavoidable and such as ordinarily occurs in the operation of a freight train; and if the train was so managed and the jolting or jarring which caused the injury was unavoidable and only incidental to the running of such trains, even when prudently and carefully managed, they should answer the first issue "No."

The Court in its general charge, which was elaborate, explained to the jury the contention of the parties and the bearing of the testimony upon the issues in the case, and then substantially instructed the jury that while the burden of the issue is upon the plaintiff, and he must show negligence, yet if there was such a sudden and violent stopping of the train that plaintiff was thrown from his seat, it would require explanation from the defendant, and the inquiry naturally arises, Why was the train so suddenly stopped? The answer should naturally come from the defendant, as the plaintiff was in the caboose and the defendant's servants were in charge of the train. The jury answered the first issue, as to defendant's negligence, "No." Judgment was entered for the defendant, and the plaintiff appealed.

G. B. Nicholson, Furches & Coble and *J. B. Connelly* for (561) the plaintiff.

L. C. Caldwell for the defendant.

WALKER, J., after stating the case: We can find no fault with the instructions given by the Court to the jury, when they are considered together and construed in the light of the facts which the evidence tended to establish. The Judge gave the plaintiff the full benefit of the circumstances attending the injury as evidence of negligence and charged the jury that the defendant must show that the jolting of the train was unavoidable in order to acquit itself of negligence.

A carrier of passenger is not an insurer, as is a carrier of goods. He is therefore not absolutely liable for the safety of the passenger, as the carrier of goods is for the safety of the goods intrusted to his care. His liability is based on negligence, and not on a warranty of the passenger's freedom from all the accidents and vicissitudes of the journey.

The doctrine that the carrier of goods is an insurer was adopted for reasons peculiar to the undertaking, and because of the unlimited control of the carrier over the property. It was first announced, we believe, by *Lord Holt* in the famous case of *Coggs v. Bernard,* 2 Ld. Raymond, 909 (1 Smith's L. C., 369), in these words: "The law charges the person thus intrusted to carry goods as against all events but the act of God and the enemies of the King," and this *dictum* of his was formally accepted as a principle of the common law by solemn decision in *Forward v. Pittard.,* 1 Term Rep., 29; *Christie v. Griggs,* 2 Camp., 79. In the latter case *Lord Mansfield* drew the distinction between the two classes of carriers when he tersely said: "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of passengers." The distinction was recognized in

Aston v. Heaven, 2 Esp., 532; *Crofts v. Waterhouse,* 3 Bing.,
(562) 319; and *Harris v. Costar,* 1 Car & P., 636, and finally settled in the leading case of *Readhead v. R. R.,* L. R., 4 Q. B., 379; *Bridgers v. R. R.,* L. R., 7 H. L., 231.

In this country the measure of liability of the two kinds of carriers has been practically settled according to the English rule. *Ingalls v. Bills,* 9 Metc., 1; *Stokes v. Saltonstall,* 9 Peters, 181; *R. R. v. Ball,* 53 N. J. Law, 283; *Palmer v. Canal Co.,* 120 N. Y., 170; *Gilbert v. R. R.,* 160 Mass., 405; *Meier v. R. R.,* 64 Pa. St., 225. This Court has recognized the distinction and erected different standards of duty for the two classes, in *Hollingsworth v. Skelding* (ante 246, this term); *McNeill v. R. R.,* 135 N. C., 682 (*s. c.,* 132 N. C., 510), and *Everett v. R. R.,* 138 N. C., 68.

A carrier of goods can only relieve himself of his common-law liability as an insurer for loss or damage not resulting from his negligence by a contract reasonable in its terms and founded upon a valuable consideration: *Everett v. R. R., supra;* but this principle does not apply to the carrier of passengers, because he is under no such liability. 1 Fetter on Carriers, sec. 2; 6 Cyc. of Law, 590-594. In this view of the law, the evidence as to the permit was harmless.

The exceptions of the defendant are so placed in the charge that we are at a loss to know the particular proposition of law as laid down by

the Court, which was considered objectionable. If it was supposed that the defendant was bound to exercise the highest degree of care, and that the Court failed to raise the degree to the required maximum, it is sufficient to say that there was no request for such a special instruction, and the omission, if there was one, is not therefore available to the defendant. The many different forms of expression used in stating the rule of liability all recognize substantially the same test, the difference in statement being for the purpose of applying the rule to different states of facts. Thus it has been said that the carrier is required to exercise that high degree of care for the safety of the passenger which a prudent person would use in view of the nature and (563) risks of the business, or, in general, the highest degree of care, prudence and foresight to prevent injury to the passenger which the situation and circumstances demand in view of the character and mode of conveyance, and which a prudent man engaged in the business, as usually conducted, would employ, and which is reasonably practicable and consistent with the efficient conduct of the particular business and the free use of all proper means and appliances. The standard of duty should be according to the consequences that may ensue from carelessness. 6 Cyc., 591-593; *R. R. v. Horst,* 93 U. S., 291.

Whatever the rule may be, the plaintiff has no right to complain of its misapplication in this case, as the Court gave all of the instructions he asked for, and, besides, the presiding Judge finally brought the liability of the defendant to the true test, which is negligence or the failure to exercise proper care, under the circumstances; and he told the jury that the defendant would be liable unless the injury was unavoidable.

In taking passage on a freight train, the plaintiff assumed the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner. While life and limb are as valuable, and the right to safety may, perhaps, be the same in the caboose as in the palace-car, yet it must be remembered that in the operation of freight trains the primary object is the transportation of freight, and the means and appliances used, are, and are known by the passenger to be, adapted to that special business; and therefore one who travels on such trains must expect that jolts and jars will occur, and he necessarily takes the risk of those which are not caused by the negligence of the carrier's servants, but which are usual and consequent on such mode of transportation. 1 Fetter on Carriers, sec. 17; *R. R. v. Horst,* 93 U. S., 291. (564)

It seems to us that the charge of the Court covered the entire case and, when properly construed, submitted it fairly and correctly

to the jury under all the circumstances; and when this is done the parties have no just ground of complaint, or for asking anything more, especially if they have failed to request more definite instructions. The charge appears to be in accordance with the law as stated by this Court in *Wallace v. R. R.*, 98 N. C., 494; *S. c.*, 101 N. C., 454; *Smith v. R. R.*, 99 N. C., 241; and his Honor perhaps was guided by those cases.

The defendant moved in this Court to dismiss the appeal under Rule 20, for failure to comply with the requirements of Rule 19. A similar motion was made at this term, based upon substantially the same grounds, in *Davis v. Wall,* and we enforced the rules to the extent of dismissing the appeal in that case. We again specially direct the attention of the profession to those rules and to that decision, as being very proper for their careful consideration when preparing cases on appeal. We have discussed this case at some length, because the principles involved are of vital importance, and as the practical result will be the same, we prefer to decide it on the merits, instead of dismissing the appeal.

No Error.

Cited: Miller v. R. R., 143 N. C., 124; *Lee v. Baird,* 146 N. C., 364; *Suttle v. R. R.,* 150 N. C., 673; *Smith v. Mfg. Co.,* 151 N. C., 262; *Pegram v. Hester,* 152 N. C., 766; *Usury v. Watkins,* 152 N. C., 761; *Jones v. R. R.,* 153 N. C., 421, 423; *Kearney v. R. R.,* 158 N. C., 426, 540, 553.

(565)

STATE v. BARRETT.

(Filed 18 September, 1906).

Severance—Homicide—Murder in First Degree—Premeditation.

1. Defendants indicted in a joint bill for an offense have no legal right to a separate trial. The granting of such a motion is a matter within the sound discretion of the trial Judge, which is unreviewable.
2. In an indictment for murder, where it appears that about sunset of the day of the homicide a serious affray occurred, in which the prisoner participated; that a warrant was issued for his arrest; that the prisoner armed himself after the affray, and that the deceased, an officer, and his posse, met the prisoner; and the deceased, with a warrant in his possession, told the prisoner that he had a warrant for his arrest and to consider himself under arrest, and that immediately, without inquiry, the prisoner shot the officer, who had presented no weapon, nor attempted to seize the prisoner: *Held*, that there was sufficient evidence of premeditation.

3. Where the prisoner weighs the purpose to kill long enough to form a fixed design, and then puts it into execution, it is murder in the first degree. But where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree.

INDICTMENT for murder, against Sylvester Barrett, heard by *Long, J.*, and a jury, at the January Term, 1906, of PITT.

Prisoners Sylvester Barrett and Jerry Cobb were convicted of the murder of Walter Lovett; Barrett in the first degree and Cobb in the second degree. From the judgment and sentence of death, prisoner Barrett appealed.

Robert D. Gilmer, Attorney-General for the State.
F. C. Harding and *Julius Brown* for the prisoner.

BROWN, J. The evidence tends to show that the homicide occurred near Farmville in the county of Pitt, some time between 10 and 11 o'clock on the night of 20 January, 1906. The deceased was (566) constable in Farmville Township and had a warrant for several parties, including the prisoners, for an affray which occurred about sunset on 20 January, near Farmville, the circumstances of which are substantially as follows: One J. C. Case left Farmville in a wagon accompanied by three others, and about one mile out of Farmville these parties overtook a crowd on the road. The prisoners, Cobb and Barrett, were among the number. Case said, "Get out of the road, boys," and they replied in profane language. An altercation ensued, during which the prisoner Cobb, after having first approached the wagon "with a knife or some kind of a blade in his hand," wrested from Case a shovel with which he assaulted Smith, one of the parties in the wagon, and broke his arm. The prisoner Barrett was present when this difficulty occurred. Upon complaint of Smith immediately made, a justice of the peace issued a warrant for the parties, including the prisoners, Cobb and Barrett. The warrant was placed in the hands of the deceased, Walter Lovett, the constable for Farmville Township. Several parties were summoned to aid in the arrest. Some of these parties went to Cobb's house and also to Barrett's, but did not find the prisoners at home. The homicide occurred near the house of one Watt Parker. Dr. Joyner and Lovett, the father of the deceased, were in a buggy, and Walter Lovett, the deceased, was standing on the rear axle. Dr. Joyner testified that when they were within about 20 yards of Parker's house he saw two persons in front of the house. Lovett, the deceased, said: "Halt, we have a warrant for you; consider yourselves under arrest." As the deceased stepped down, a gun fired.

There was abundant evidence tending to prove that the shot was fired by Barrett, or that at the moment he was present aiding and abetting Cobb. If evidence tends to prove anything, the uncontradicted evidence in this case tends to prove that the death of Lovett was
(567) brought about by the joint act of Barrett and Cobb. Upon the trial the prisoner moved for a severance. His Honor, after hearing the motion, declined to grant it, and the prisoner excepted. We find nothing in the record to take this case out of the rule, repeatedly laid down, that defendants indicted in a joint bill for an offense have no legal right to a separate trial. The granting of such a motion is a matter within the sound discretion of the trial Judge. His discretion is unreviewable. *S. v. Smith,* 24 N. C., 402; *S. v. Collins,* 70 N. C., 241.

We note in examining the record of the trial that the Judge below carefully separated the evidence bearing upon the guilt of each prisoner and instructed the jury as to what was competent and incompetent against each. It also appears that the Judge explained to the jury that the declarations made by Cobb were admitted, and should be considered only as against Cobb and not against Barrett, and so limited the argument.

We think that the only real question of importance presented is, whether there is sufficient evidence of premeditation to justify the Court in submitting to the jury an aspect of murder in the first degree. About sundown on 20 January an affray occurred in which Cobb and Barrett participated; it was serious in its result. A warrant was issued for the prisoners, and they must have known the constable and his posse were in search. They were not at home, but were on the highway in the immediate neighborhood of where the difficulty, at sunset, occurred. The evidence tends to show that Barret had armed himself after the affray. The constable and his party met the prisoners. Lovett, the deceased, with a warrant in his possession, ordered the prisoners to halt, and as Lovett stepped down off the axle of the buggy, the fatal shot was fired without a moment's warning. The very precipitancy of the act tends to prove that the prisoners were expecting arrest and had determined to resist it in the manner they did, by taking the
(568) life of the officer. The rule laid down in this State is that where the prisoner weighs the purpose to kill long enough to form a fixed design and then puts it into execution, it is murder in the first degree. But where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. *S. v. Dowden,* 118 N. C., 1153, and cases cited.

Tested by the rule laid down in other States, that the definite design to kill must have been formed on some occasion previous to the meeting of the prisoner and the deceased when the killing took place, and that it must have been cherished up to and at the time of putting it into execution, the evidence justifies the verdict of the jury.

It is evident that the prisoner expected arrest after the affray with Case; that the prisoner, shortly after, armed himself with his gun, with the intent to resist at all hazards. The constable, Lovett, had presented no weapon at the prisoner nor even attempted to seize him. He had told the prisoner simply that he had a warrant for him and to consider himself under arrest. Immediately, without inquiry or parley, the prisoner shot him down. This could scarcely have been the result of other than a premediated purpose to kill to prevent arrest. The acts and conduct of the prisoner, after the affray with Case, display thought, preparation and the design to kill if arrested. *S. v. Daniel,* 139 N. C., 549.

No Error.

Cited: S. v. Holder, 153 N. C., 607.

---

(569)

STATE v. SULTAN.

(Filed 18 September, 1906.)

Trial at First Term—Continuance—Abuse of Discretion—Indictments—Motion to Quash—Witnesses not Sworn Before Grand Jury—Endorsements on Bill—Challenges—Anti-Saloon League—Qualification of Jurors—Excessive Punishment.

1. There is no rule of law or practice that where a bill of indictment is found at one term the trial cannot be had till the next. Whether the case should be tried at that term or go over to the next term is a matter necessarily in the discretion of the trial Judge and not reviewable, cercertainly in the absence of gross abuse.
2. There was no abuse of discretion in refusing a continuance because the defendant was put on trial in four hours after an indictment for illegal sale of liquor was returned, where the defendant had been arrested six months before on the same charge and had paid the prosecuting witness to leave the State, and the offense was committed in the town in which the Court was held and it does not appear that any material witness was absent nor that the defendant was prejudiced, and the trial closed two days after the bill was found, and he was represented by the same counsel who represented him before the magistrate, and three other counsel.

3. A motion to quash an indictment, on the ground that it did not appear that any of the witnesses before the grand jury were sworn, was properly refused, where there was no evidence that the witnesses were not sworn, and the only defect alleged was that the blank space after "thus" in the certificate, "witnesses whose names are marked thus.... were sworn and examined," was not filled in with a cross-mark or check.

4. No endorsement on a bill of indictment by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. *S. v. McBroom*, 127 N. C., 528, overruled.

5. A defendant's exception for a refusal of his challenges for cause to four jurors, when he relieved himself of them by the use of his peremptory challenges, is not open to review where he, after exhausting his per-
(570) emptory challenges, did not challenge any other juror.

6. In an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant.

7. An exception that the punishment in excess of that allowable upon conviction on the first count need not be considered, where the charge makes it clear that the case was submitted to the jury upon only the last count, the others having been *nol. prossed.*

INDICTMENT for illegal sale of spirituous liquors, against William Sultan, heard by *Long, J.,* and a jury, at the April Term, 1906, of CRAVEN. From a verdict of guilty and judgment thereon, the defendant appealed.

W. D. McIver, W. W. Clark and *M. deW. Stevenson* for the defendant.

A. D. Ward and *D. L. Ward,* with *Attorney-General* for the State.

CLARK, C. J. The defendant had been arrested in October, 1905, under a justice's warrant for the same illegal act herein charged, but procuring a continuance, gave the prosecuting witness $135 to depart the State, in consequence whereof the proceeding before the justice was dismissed. On 12 April, 1906, the witness having returned, the grand jury found a true bill. The defendant had just been tried that day upon another charge of like nature—the illegal sale of intoxicating liquor—and was in court awaiting the verdict therein, when the bill in this case was returned. The defendant had been represented by counsel when before the justice of the peace on this charge, and when this bill was returned counsel appeared for him and asked for a continuance. The Court told the defendant and his counsel that the case

would be called for trial later during the day, and gave him time to arrange for counsel and for his defense. He was represented by his original counsel and three others. Affidavits for and against the continuance were filed, and "after a review of all the affidavits the Court denied the motion to continue, and permitted the defend- (571) ant, after bill found, to have opportunity to prepare his defense for about four hours before the selection of the jury was begun." The case on appeal further states: "The case was called for trial in the forenoon of one day and terminated at a night session on the day following. The Court gave the defendant every opportunity in its power to get his witnesses and to have counsel, in order to insure a trial at this term."

The defendant's claim, that he was entitled, as a matter of right, to a continuance, is without foundation. There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had till the next. Whether the case should be tried at that term, which is often done, and, in many cases, is required in the public interest and the orderly and economical administration of justice, or whether the case shall go over to the next term depends upon the nature of each case, of the charge and the evidence, the facility of procuring witnesses and the legal preparation necessary. In short, "the granting or refusal of a continuance is a matter necessarily in the discretion of the trial Judge and not reviewable, certainly in the absence of gross abuse of such discretion." *S. v. Dewey,* 139 N. C., 560, and many cases there cited. Abuse of discretion is more apt to be shown in granting continuances and in the dilatory administration of justice. His Honor thought this case was one in which there should be a speedy trial. He knew all the attendant circumstances, and what was required by the public interest, more fully than this Court can know them. There is nothing to indicate that the defendant was prejudiced. He knew this charge. He had been arrested on it six months before, and had paid the witness to leave. The offense was committed in the very town in which the Court was held. It does not appear that any material witness was absent. From the nature of the charge and of the defense, it is not likely that any other witness could have materially (572) added to the testimony of the many witnesses he produced. The trial closed two court days after the bill was found, and any other witness could have been obtained within that time, if needed. The charge was simple and required little preparation on the law and the defendant was represented by four able counsel. We cannot see that the dis-

cretion vested in the trial Court as to continuances was abused by the learned and just Judge.

The defendant moved to quash the indictment on the ground that it did not appear that any of the witnesses before the grand jury were sworn. The bill was typewritten on one sheet, with no writing on the reverse. A second sheet was attached by paper-fasteners, and on that the usual endorsements were written. The Judge found as a fact "the two sheets constituted one paper, and that they were fastened together before being sent to the grand jury and treated as one sheet." The endorsements on that sheet set out the names of witnesses, the names of two of whom have a crossmark opposite them, and below is the usual certificate that "Witnesses who names are marked thus . . . . were sworn and examined," signed by the foreman, and the return, "A true bill," also signed by him. The only defect alleged is that the blank space after "thus" is not filled in with a cross-mark or check. There is no evidence that witnesses were not sworn. This informality is cured by Revisal, sec. 3254. Besides, as *Ashe, J.*, said in *S. v. Hines*, 84 N. C., 811, "The omission to designate the witnesses, who may have been sworn, with a mark, was not sufficient to quash the bill. The fact that they were not sworn must have been established by proof offered by the defendant—which was not done in this case."

In *S. v. Hollingsworth*, 100 N. C., 537, it is said that "the endorsements on the bill form no part of the indictment, and it has been held that the Act of 1879, Code, sec. 1742, requiring the foreman of (573) the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the jury, is merely directory, and a non-compliance therewith is no ground for quashing the indictment." *S. v. Hines*, 84 N. C., 810. It constitutes neither ground for a motion to quash nor in arrest of judgment. *S. v. Sheppard*, 97 N. C., 401; *S. v. Baldwin*, 18 N. C., 195; *S. v. Roberts*, 19 N. C., 540; Code, sec. 1183. In fact, no endorsement by the grand jury is necessary. The record that it was presented by the grand jury is sufficient in the absence of evidence to impeach it. *Pearson, J.*, in *S. v. Guilford*, 49 N. C., 83; *Manly, J.*, in *S. v. Harwood*, 60 N. C., 226; *Ruffin, C. J.*, in *S. v. Roberts*, 19 N. C., 540; *Ruffin, C. J.*, in *S. v. Calhoon*, 18 N. C., 374. All four of these cases were indictments for murder. To same effect, *S. v. Cain*, 8 N. C., 352; *S. v. Cox*, 28 N. C., 440; *S. v. Mace*, 86 N. C., 668, and many others. The English practice did not require the foreman to sign his name or make an endorsement, 4 Blk. Com., 306 (cited by *Ruffin, C. J.* in *S. v. Calhoon, supra*), and the same is held as to the United State Courts in

Frisbie v. United States, 157 U. S., 160, quoted in 127 N. C., at p. 537. This uniform current of the decisions in this and other courts is controverted only by *S. v. McBroom,* 127 N. C., 528, which held (by a divided Court) that the endorsement, "A true bill," was essential, and which in the face of the precedents cannot be deemed authority, and is overruled. The motion to quash was properly refused.

The defendant challenged four jurors for cause, in that they belonged or had belonged to the Anti-Saloon League. They testified that they had not contributed to the prosecution in this case nor taken any part in it. The challenges for cause being disallowed, they were each peremptorily challenged. The defendant, after exhausting his peremptory challenges, did not challenge any other juror. No juror sat on the trial to whom he offered any objection. As he has a right to reject, not a right to select, his exception for a refusal of his (574) challenges for cause to jurors, when he relieved himself of them by the use of his peremptory challenges, is not open to review. Having been tried by twelve jurors who were unobjectionable to him, he has no ground to urge that he has been prejudiced by the composition of the jury. *S. v. Brady,* 107 N. C., 827.

But as the point has been earnestly argued, it may not be amiss to say that the authorities upon it are quite clear that the challenges for cause were properly disallowed, the jurors having taken no part in prosecuting or aiding in the prosecution of the defendant. In *Music v. People,* 40 Ill., 268, it is said: "But does the fact that persons belong to an association whose object is to detect crime raise a presumption that they are prejudiced against a person charged with a criminal offense, or that they would not be able to give him a fair and impartial trial? We think that it raises no such presumption." In *S. v. Wilson,* 8 Iowa, 407, the rule is laid down that "the fact that a person called as a petit juror on the trial of an indictment, in which the defendant is charged with stealing a horse, was a member of an association or organized company for the prosecution of persons generally, arrested for horse-stealing, will not disqualify the juror." *S. v. Flack,* 48 Kan., 146; *Scott v. Chope,* 33 Neb., 41, 82, 94. In *Koch v. State,* 32 Ohio St., 353, which was an indictment for selling intoxicating liquor in violation of law, the Court held "that a person has subscribed funds for legitimately suppressing crime, does not disqualify him from sitting on the grand jury, nor is it ground of disqualification that he has evinced a desire or purpose to enforce the laws." See, also, *Heacock v. State,* 13 Texas App., 97.

The charge makes it clear that the case was submitted to the jury

upon only the last count, the others having been *nol. prossed,* and the exception that the punishment is in excess of that allowable upon
(575) conviction on the first count, need not be considered; and besides, in no aspect could be sustained. *S. v. Toole,* 106 N. C., 736. There was evidence of long continued and habitual violation of the statute by the defendant, which his Honor properly took into consideration in fixing the sentence.

No Error.

Cited: S. v. Bohanon, 142 N. C., 697; *S. v. Long,* 143 N. C., 676.

STATE v. CARRAWAN.

(Filed 18 September, 1906.)

Severance—Comments of Counsel—Larceny of Raft of Logs—Evidence—Instructions.

1. The refusal of the Court to grant a severance in a criminal case is not reviewable except in case of gross abuse.
2. The refusal of the Court to interfere with the comments of counsel, is not reviewable, except in case of gross abuse.
3. In an indictment for stealing a raft of logs where the evidence tended to show that the raft of logs had been stolen and that the logs which the defendants had sold had been a part of the stolen raft, a prayer that it would not be sufficient to show that the defendants took some logs floating on the river and unrafted, was properly refused as not applicable to the evidence.

INDICTMENT against J. T. Carrawan and others, heard by *Shaw, J.,* and a jury, at the July Term, 1906, of CRAVEN.

Defendants were indicted for stealing a raft of timber, the property of the Pine Lumber Company. There was a verdict of guilty as to six of the defendants, and from the judgment on the verdict, they appealed.

W. D. McIver, with the *Attorney-General* for the State.
D. L. Ward for the defendants.

HOKE, J. We find no error in the record or case on appeal which requires or permits that a new trial be awarded the defendants
(576) or either of them. The refusal of the Court to grant them a severance is not reviewable except in case of gross abuse, and no such abuse appears in the present case. *S. v. Oxendine,* 107 N. C.,

783. And the same may be said as to the exception noted in response to the comments of counsel. *S. v. Horton,* 139 N. C., 608.

It was chiefly urged for error on the part of the defendants that the trial Court had refused the following prayer for instructions: "In order to support an indictment for stealing a raft of logs, it must appear that the logs were rafted and taken, and it will not be sufficient to show that the defendants or any of them took some logs floating on the river, and unrafted." The case on appeal states that the Court below "declined the prayer as not being applicable to the case and the evidence therein;" and in this ruling we concur.

It may be a correct position that on an indictment for stealing a raft of timber a defendant should not be convicted on proof that he had taken certain separate logs, there being no testimony to show that a raft of logs had been stolen or none tending to connect these separated logs with the raft. But no such question arises here. There was strong evidence tending to show that a raft of logs belonging to the Pine Lumber Company had been stolen at a point on the river known as "Pitch Kettle Bend," and at some time between the 3d and 12th of March, 1905; that from March 13 to April 1, at different times, five of the defendants had sold numbers of logs to the agent and buyer of the Elm City Lumber Company at a point on the river known as "Cowpen Landing," somewhere in the neighborhood of Pitch Kettle Bend; that the logs were later floated to the ponds of the Elm City Lumber Company at New Bern, and there numbers of them were identified as logs which had formed part of the stolen raft.

There was other testimony tending to inculpate these five defendants, and also the sixth defendant, Job Holmes. Thus, in the testimony of Lewis Wiggins: "I was at Pitch Kettle last March. Hugh Pate (defendant) asked me to help him roll some logs. (577) Job Holmes (sixth defendant) was there with them. I do not know who else was present. When we were rolling in the logs a steamboat came up the river. All the men there quit work and hid as the steamboat passed, and I was standing alone." It had been proved that the stolen raft had been tied up at Pitch Kettle Bend on account of high water, and when the water subsided part of the raft rested on the bank of the river and would have to be rolled in the water before the logs could be floated.

It would be incorrect to hold, as the defendants' prayer would indicate, that this testimony only tended to show the taking of separated and unrafted logs. Such an interpretation is entirely too restricted. As heretofore stated, there was evidence tending to show that the

raft of logs had been stolen, and this testimony, tending as it did to show that the logs which these defendants had sold to the agent of the Elm City Lumber Company had been a part of the stolen raft, bore directly on their guilt of theft of a raft of timber as charged in the bill of indictment.

No Error.

Cited: S. v. Holder, 153 N. C., 607; *S. v. Millican,* 158 N. C., 620.

STATE v. BURNETT.

(Filed 25 September, 1906.)

Indictments—Motion to Quash—Joinder of Offenses—Election by Solicitor—Duplicity—Waiver—Abduction—Elements of Offense—Defenses—Burden of Proof—Instructions.

1. A motion to quash an indictment after plea of not guilty is allowable only in the discretion of the Court.
2. An indictment for abduction, containing two counts, one under Rev., sec. 3358, which makes it a felony to abduct or by any means induce any
(578) child under the age of 14 years to leave the father, and the second count under Rev., sec. 3620, which makes it a misdemeanor to entice any minor to go beyond the State without the written consent of the parent, etc., cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof.
3. When an indictment charges several distinct offenses in different counts, whether felonies or misdemeanors, the bill is not defective, though the Court may in its discretion compel the Solicitor to elect, if the offenses are *actually* distinct and separate; but there is no ground to require the Solicitor to elect when the indictment charges the same act "under different modifications, so as to correspond with the precise proofs that might be adduced."
4. To charge two separate and distinct offenses in the same count is bad for duplicity, and the bill may be quashed on motion in apt time, but the objection is waived by failing to move in apt time and is cured by a *nol. pros.* as to all but one charge, or by verdict.
5. Abduction under Rev., sec. 3358, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction.
6. If the charge substantially embraces the prayers of the appellant so far as they are correct, it is sufficient. It is not necessary to give them *verbatim.*

7. In an indictment for abduction under Rev., sec. 3358, an allegation or proof that the taking of the child was "against the father's will and without his consent" is not required. That the carrying away was with the father's consent is a defense, the burden of which is upon the defendant.

INDICTMENT for abduction against W. E. Burnett, heard by *Ward, J.*, and a jury, at the May Term, 1906, of VANCE.

From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

F. S. Spruill, T. M. Pittman and *J. C. Kittrell* for the defendant.

CLARK, C. J. The defendant was convicted of abduction. There are two counts in the bill, one based upon Revisal, sec. (579) 3358, which makes it a felony to "abduct or by any means induce any child under the age of fourteen years, who shall reside with the father * * * to leave such person * * *." The second count is under Rev., sec. 3630, which makes it a misdemeanor to entice any minor to go beyond the limits of the State for the purpose of employment without the consent in writing "of the parent, guardian or other person having authority over such minor." The jury found the defendant guilty on the first count and not guilty on the second. After the indictment was read to the jury, the defendant asked leave to withdraw his plea of not guilty and moved to quash the indictment for misjoinder of two different offenses. This was denied, and defendant excepted. A motion to quash after plea of not guilty is allowable only in the discretion of the Court. *S. v. DeGraff,* 113 N. C., 688; *S. v. Flowers,* 109 N. C., 845; *S. v. Miller,* 100 N. C., 543; *S. v. Jones,* 88 N. C., 671.

We may note, however, that if the motion had been made in apt time, when the several counts are, as in this case, merely statements of the same transaction varied to meet the different phases of proof, the bill cannot be quashed. *S. v. Harris,* 106 N. C., 682; *S. v. Parish,* 104 N. C., 679; *S. v. Morrison,* 85 N. C., 561; *S. v. Eason,* 70 N. C. 88. An indictment containing several counts describing the same transaction in different ways is unobjectionable. *S. v. Haney,* 19 N. C., 390; *S. v. Eason, supra; S. v. Reel,* 80 N. C., 442; *S. v. Morrison, supra; S. v. Parish, supra; S. v. Howard,* 129 N. C., 656; *S. v. Morgan,* 133 N. C., 743.

To charge two separate and distinct offenses in the same count is bad for duplicity, *S. v. Cooper,* 101 N. C., 684, and the bill may be

quashed on motion in apt time, but the objection is waived by failing to move in apt time and is cured by a *nol. pros.* as to all but one (580) charge, or by verdict. *S. v. Cooper, supra.* When an indictment charges several distinct offenses in different counts whether felonies or misdemeanors, the bill is not defective, though the Court in its discretion may compel the Solicitor to elect, if the offenses are *actually* distinct and separate, lest the prisoner be confused in his defense or embarrassed in his challenges; but there is no ground to require the Solicitor to elect when the indictment charges the same act "under different modifications, so as to correspond with the precise proofs that might be adduced." *S. v. Haney,* 19 N. C., 394; *S. v. Barber,* 113 N. C., 714; *Gold Brick case,* 129 N. C., 656, and cases there cited. Besides, duplicity is ground only for a motion to quash, made in apt time, and is cured by verdict. *S. v. Wilson,* 121 N. C., 655; *S. v. Hart,* 116 N. C., 978; *S. v. Cooper, supra; S. v. Haney, supra; S. v. Simons,* 70 N. C., 336; *S. v. Locklear,* 44 N. C., 205.

The Court charged the jury on the first count that they "must be satisfied beyond a reasonable doubt that the girl was under fourteen years, that she was residing with her father, and that the defendant took and carried her away, not only against his will and without his consent, but that the taking and carrying of the child was by the defendant's force, fraud, persuasion or other inducement, exercising a controlling influence upon her conduct; that if he merely permitted her to go with him and his family and gave her his active assistance, that of itself would not make him guilty; that abduction is the taking and carrying of a child, ward, etc., either by fraud, persuasion or open violence; that the consent of the child is no defense; but if there was no inducement nor force and the child departed from her father entirely voluntarily on her part, the defendant was not guilty of abduction; that should the jury find that the girl was taken away by the defendant against her father's will and without his consent, the defendant cannot be convicted unless the jury should go further and (581) find beyond a reasonable doubt that the girl was carried away by the force or fraud or induced to go by the persuasion of the defendant." This charge substantially embraced the prayers of the defendant so far as they were correct. It was not necessary to give them *verbatim.* See numerous cases cited in Clark's Code (3 Ed.), sec. 415.

In *S. v. Chisenhall,* 106 N. C., 679, the Court adopts Webster's definition of abduction, "The taking and carrying away of a child, a ward, a wife, etc., either by fraud, *persuasion* or open violence," and adds:

"It is clear that the consent of the child, obtained by means of persuasion, is no defense, since the result of such persuasion is just as great an evil as if it had been accomplished by other means. Even under the English statutes where a 'taking' is required, it was said by *Wightman, J.* (in *Rex v. Handley,* 1 F. and F., 648), that 'a taking by force is not necessary; it is sufficient if such *moral* force was used as to create a willingness on the girl's part to leave her father's home.' " The Court then further added that "the true spirit of the statute is for the protection of the parent." Of course, if there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. The defendant has no cause to object to his Honor's charge. Indeed, it may be here noted that an allegation or proof that the taking was "against the father's will and without his consent" is not required by the statute as to the first count. *S. v. George,* 93 N. C., 567. That the carrying away was with the father's consent is a defense, the burden of which is upon the defendant. *S. v. Chisenhall, supra.*

No Error.

(582)

STATE v. J. F. SCOTT.

(Filed 25 September, 1906.)

Assaults—Defense of Property—Excessive Force—Pointing Pistol.

1. A person may lawfully use so much force as is reasonably necessary to protect his property or to retake it when it has been wrongfully taken by another or is withheld without authority; but if he use more force than is required for the purpose, he will be guilty of an assault.
2. The right to protect person or property by the use of such force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except, perhaps, in urgent cases. The person whose right is assailed must first use moderate means before resorting to extreme measures.
3. Where the defendant's mule had been attached by the Sheriff and delivered to the plaintiff in the civil action as his agent, and while the prosecutor was using the team in hauling under the orders of the plaintiff, the defendant suddenly appeared on the scene and pointed a pistol at the prosecutor without demanding possession of his property, or that he desist from using it, but merely asked him what he was doing there the defendant was guilty of an assault at common law, if not under sec. 3622 of the Revisal.

INDICTMENT against J. F. Scott, heard by *Long, J.,* and a jury, at the August Term, 1906, of FRANKLIN.

The defendant was indicted for an assault on Johnson Smith. It appears that two mules had been attached by the Sheriff in the suit of

I. H. Kearney v. J. F. Scott, and by him delivered to Kearney as his agent or bailee. The jury returned a special verdict, from which we make the following extract: "In July, 1906, Richard Perry, by order of Kearney, harnessed the mules to a wagon, and together with Johnson Smith started to haul lumber. The wife and sister of the defendant went out and told them to carry the mules back to the stable and let them stay there. In a few minutes John Conyers came back (583) driving the same team, and with the said Johnson Smith was preparing to load the wagon with lumber, the lumber being near the house of the prisoner. The prisoner went to the place with a pistol in his hand, pointed at the driver, the said John Conyers, and ordered him to turn loose the reins, which he did, leaving the team standing. The prisoner turned to Johnson Smith and asked him what he was doing there. Upon being informed that he was there helping to haul the lumber, the prisoner pointed the pistol at him and ordered him to leave, which he also did, the prisoner still having the pistol in his hand. The mules and wagon were then sent back to the stables of Kearney. No shot was fired from the pistol. The parties in charge of the mules were acting under orders of Kearney." Upon this verdict, the defendant was adjudged guilty, and from the sentence of the Court he appealed.

Robert D. Gilmer, Attorney-General, for the State.
N. Y. Gulley for the defendant.

WALKER, J., after stating the case: Whether Kearney, as bailee of the Sheriff, had the right to use the property, and if he did use it or permit it to be used in the manner described in the special verdict, whether the officer thereby lost his special property in the mules so that the defendant could thereafter retake them, are questions we prefer not discuss, as the case can well be decided upon another ground which clearly sustains the judgment of the Court. The rights and duties of a sheriff with respect to property in his custody by virtue of a levy under attachment are considered in 1 Shinn on Attachment, 392. See, also, *S. v. Black,* 109 N. C., 856.

A person may lawfully use so much force as is reasonably necessary to protect his property or to retake it, when it has wrongfully been taken by another or is withheld without authority; but if he (584) use more force than is required for the purpose, he will be guilty of an assault. So if one deliberately and at the outset kills another with a deadly weapon in order to prevent a mere trespass, it is

murder; and if he offers to strike with a deadly weapon or to shoot with a pistol, under the same circumstances, before resorting to a milder mode of prevention, he shows ruthlessness and a wanton disregard of human life and social duty. *S. v. Myerfield,* 61 N. C., 108.

The right to protect person or property by the use of such force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except, perhaps, in urgent cases. The person whose right is assailed must first use moderate means before resorting to extreme measures. Clark's Cr. Law (2 Ed.), 241, 242; *S. v. Crook,* 133 N. C., 672. Ordinarily, whether excessive force has been used is a question for the jury. *S. v. Goode,* 130 N. C., 651; *S. v. Taylor,* 82 N. C., 554. In *S. v. Morgan,* 25 N. C., 186, speaking of an assault with a deadly weapon to prevent a trespass, the Court, by *Gaston, J.,* says: "It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may be rightfully redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow-being in order to save one's self from a comparatively slight wrong, which is essentially wicked and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty." It is said in *S. v. McDonald,* 49 N. C., 19: "Whether the deceased was in fact committing a trespass upon the property of the prisoner at the time when he was killed, and if he were, whether the prisoner could avail himself of it, as he assigned a different cause for the killing, it is unnecessary for us to decide. Admitting both of these inquiries to be decided in favor (585) of the prisoner, the homicide is still, according to the highest authorities, murder, and murder only. To extenuate the offense in such a case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and to deter the offender from repeating the like, and it must so appear." To the same effect is *S. v. Brandon,* 53 N. C., 463.

Those are the leading cases and are considered as having settled the law in this State upon the subject. When they are tested by the principle there announced, and it is commended both by common sense and a just regard for the public peace and private security, we find no difficulty in adjudging the facts found in the special verdict sufficient to establish the defendant's guilt. John Conyers and his companion, Johnson Smith, who is the prosecutor, were putting lumber on the wagon

when the defendant suddenly appears on the scene and points a pistol, presumably loaded (*S. v. Cherry,* 33 N. C., 475), at the prosecutor, without demanding the possession of his property or that he desist from using it, but merely asking him what he was doing there. The return by him of the mules to Kearney shows that he at least did not think he was entitled to the possession of them. If he pointed the pistol at Conyers and Johnson in resentment for using the mules, his act was none the less criminal, but was an aggravated assault, first on Coyners and then on Johnson. In any view of the case, he was guilty of an assault at common law (*S. v. Daniel,* 136 N. C., 571), of not under section 3622 of the Revisal.

No Error.

(586)

STATE v. SHEPPARD.

(Filed 2 October, 1906.)

Indictment—Several Counts—General Verdict—Effect—Lightning Rods—Business of Putting Up.

1. A general verdict of guilty on an indictment containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count; and if the verdict on either count is free from valid objection, there being evidence tending to support it, the conviction and sentence for that offense will be upheld.
2. Where an indictment in the first count charges the defendant with unlawfully carrying on the business of putting up lightning-rods without license, etc., and in the second count with unlawfully carrying on the business of selling lightning-rods under like circumstances, and there was ample evidence to support a conviction on the first count, which is an intrastate business, and the charge shows that the conviction was had for this offense, a general verdict of guilty will be sustained, even though a conviction on the second count could not be upheld by reason of the Interstate Commerce clause of the Federal Constitution.

INDICTMENT against A. J. Sheppard, heard by *Jones, J.,* and a jury, at the April Term, 1906, of NASH.

The defendant was convicted under the following bill of indictment: "The jurors for the State, upon their oath, present: That A. J. Sheppard, late of the county of Nash, on 30 April, 1906, and for twelve months prior thereto, with force and arms, at and in the county aforesaid, was then and there unlawfully and wilfully engaged in carrying on the business of putting up lightning-rods, without first having paid the license tax and obtained the license required by law, contrary to the form of the statute in such case made and provided, and against the

peace and dignity of the State. And the jurors upon their oath aforesaid, do further present: That the said A. J. Sheppard afterward, to-wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, was then and there unlawfully engaged (587) in carrying on the business of selling lightning-rods without first having paid the license tax and obtained the license required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. Daniels, Solicitor." "A true bill. Miles Bobbitt, Foreman of the Grand Jury."

There was evidence on the part of the State tending to show that within two years prior to finding the bill indictment, the defendant had engaged in the business of putting up lightning-rods, at and in said county of Nash, without having obtained a license or paid the license tax as required by law. The evidence for defendant was as follows:

A. J. Sheppard, the defendant, testified: "I am agent for Cole Bros., of St. Louis, Mo., with factory in Greencastle, Ind. I only solicit orders for future delivery. I carry no rods for sale or delivery, but only samples for exhibition, and deliver none except such as have been sold before they left the factory. This is the contract under which I made sale of rods to Mr. Yarborough. (Here contract introduced and read in evidence, and attached as a part of this case on appeal.) (Contract has not been filed. T. A. Sills, C. S. C.) I did business in no other way than that specified in this contract with Yarborough. The delivery is not complete until the rods are put up. The sale and delivery of the rods under the contract includes the putting up of rods whenever the purchaser requests, for which no extra charge was to be made."

Cross-examination: "I am in the lightning-rod business as agent. I have put up rods on half dozen houses or more. I was in different parts of the county. I got the rods from Cole Bros. that I put on Mr. Yarborough's house. They were delivered to me in the station at Tarboro; I took them by wagon to Springhope. There were other rods in the assignment—900 feet in all. This shipment was sent to Day & Hodges, Tarboro, N. C. They charged me up with what I got and gave me credit with what I put up. The rods were (588) shipped from the factory in Indiana to fill the orders. As soon as I signed contract with Mr. Yarborough I sent it to Cole Bros., and they sent it back to me at Springhope. There were no shipments of rods made to me except upon contracts already taken, in form the same as in this case."

Counsel for the defendant requested the Court to instruct the jury that the defendant was not guilty upon the foregoing evidence, which request was declined by the Court, and to which the defendant excepted.

His Honor charged the jury as follows: "If you find from the evidence that this man was in the buisness of putting up lightning-rods, carrying on the business of putting up rods in Nash County; that he made contracts with peopele to rod their houses, and the rods were shipped to him, and he personally superintended and had the rods put on, after having made contracts for that purpose, it makes no difference where the rods came from; if he carried on the business of putting up rods, then he would be guilty; otherwise, not." To the above charge the defendant excepted. Verdict of guilty, and the defendant fined two hundred ($200) dollars and the costs of the action. The defendant moved for a new trial for errors of the Court in refusing the instruction as above stated, and in the instructions given to the jury as above set forth; motion denied; notice of appeal to the Supreme Court given in open court; appeal granted.

F. S. Spruill with the *Attorney-General* for the State.
Gilliam & Gilliam for the defendant.

HOKE, J., after stating the case: The bill of indictment charges the defendant with unlawfully carrying on the business of putting up lightning-rods in the county of Nash without having obtained license and paid the tax as required by law. There is also a count in (589) the bill for unlawfully carrying on the business of selling lightning-rods under like circumstances. Both acts are made criminal offenses of the grade of misdemeanors by the State Revenue Law in force at the time of the transaction, and on this bill of indictment there was a general verdict of guilty. It is well established that such a verdict on an indictment containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count; and if the verdict on either count is free from valid objection, there being evidence tending to support it, the conviction and sentence for that offense will be upheld. It was accordingly held for law in this State that: "When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testi-

mony or erroneous instruction, the sentence will be supported by the verdict on the other count, unless the error was such as might or could have affected the verdict on them." *S. v. Toole,* 106 N. C., 736.

If it should be conceded, therefore, that a conviction on the second count for an unlawful sale could not be upheld by reason of the Interstate Commerce clause of the Federal Constitution, this would in nowise invalidate a conviction on the first count, to-wit, for unlawfully carrying on the business of putting up lightning-rods in Nash County, which was, undoubtedly, a domestic or intrastate business. This was charged in the first count as a distinct and separate offense. There was ample evidence to support it, and the charge of the Court excepted to shows clearly that the conviction was had for this offense, and for this alone. In this aspect of the case the conviction of the defendant is sustained and controlled by the decision of this Court in *S. v. Gorham,* 115 N. C., 721, and we do not consider that further discussion or citation of authority is required.

There is no error and the judgment of the Court below is affirmed.

No Error.

Cited: S. v. Dowdy, 145 N. C., 435.

STATE v. WELLS.

(Filed 16 October, 1906.)

Railroads—Eminent Domain—Condemnation Proceedings—Serving Maps and Profiles—Amendments—Rights-of-Way—Right of Entry—Payment of Appraisement—Willful Trespass—Defenses—Evidence—Waiver of Jury in Criminal Cases.

1. The failure to serve a map and profile with the summons in condemnation proceedings as required by Rev., sec. 2599, may be cured by amendment.
2. The right of entry granted a railroad company under Rev., sec. 2575, is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right (Rev., sec. 2587) to enter for the purpose of constructing the road until the amount of the appraisement has been paid into Court.
3. An indictment for wilful trespass under Rev., sec. 3688, will lie against an employee of a railroad company for an entry after being forbidden

on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisement has been made, although a restraining order against such a trespass would be refused.

4. In an indictment under Rev., sec. 3688, which makes it a misdemeanor to enter on the lands of another after being forbidden, etc., a defend-
(591) ant can not be convicted if he enters, having right or under a *bona fide* claim of right.

5. In an indictment for a willful trespass under Rev., sec. 3688, where the Judge on appeal (a trial by jury being waived) finds that the defendant entered without right, but the question of whether he entered under a *bona fide* claim of right does not appear in the facts and has never been determined, the defendant's guilt has not been established and the judgment against him must be set aside.

6. *Quære:* Whether the principle that on indictments originating in the Superior Court trials by jury cannot be waived by the accused, applies to appeals in criminal actions of which justices of the peace have final jurisdiction.

INDICTMENT against D. Wells, heard before *Jones, J.*, at the August Term, 1906, of DUPLIN.

Defendant, having been convicted before a justice of the peace for a wilful trespass, under Rev., sec. 3688, appealed to the Superior Court, where, at August Term, it was agreed that the Judge might find the facts and enter judgment accordingly. The Court found the facts, and thereon adjudged defendant guilty and imposed a fine of one dollar. Defendant excepted and appealed, assigning for error that the Court adjudged defendant guilty on the facts as found.

From the findings of facts it appears that the charter of the Hilton Railroad and Logging Company (ch. 42, Private Laws 1901) confers upon it the right to condemn lands according to the regulations and procedure established by the general law, Rev., ch. 61, secs. 2575, *et seq.*

Pursuant to the power so conferred, condemnation proceedings were instituted by the company against one F. H. Carter. A demurrer was filed to the petition made in the cause, which was heard 28 May, 1906, when the demurrer was sustained by the Clerk, and an appeal was taken to the Judge holding the courts of the district, who ordered an amended petition, map and profile to be served on defendant F. H. Carter on 29 May.

Pending the proceedings before any appraisement made, and without any money having been paid into court by the petitioner, the
(592) defendant, an employee of the road, after being forbidden by the owner, entered on the lands for the purpose of constructing the road; and for this entry said defendant was adjudged guilty of criminal trespass, and excepted and appealed, as heretofore noted.

Walter Clark, Jr. and *H. L. Stevens* with the *Attorney-General* for the State.

Rountree & Carr for the defendant.

HOKE, J., after stating the case: The question intended to be presented in this appeal is whether, under the statute referred to, conferring power to condemn land, and on the facts as found by the Court, the railroad corporation, by its agent and employees, had the right to enter on the lands of F. H. Carter, the prosecutor, for the purpose of constructing their road before an appraisement made and before paying into court the sum appraised by the commissioners appointed for the purpose.

The statute, ch. 61 of the Rev., sec. 2575, provides that the company may enter on land for the "purpose of laying out the road;" and the same action says that "they may also enter on any contiguous lands along the route which may be necessary for depots, warehouses, and other buildings required; and shall pay to the proprietors such sum as may be agreed upon." This right of entry is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. Another reason for granting the company a right of entry at this stage and for this purpose, is that sec. 2599 requires that in case condemnation proceedings become necessary the company is required to file with their petition, or rather to have served with their summons, a map, showing how the line is located through the land, and a profile showing the depths of the cuts and length of embankments, etc. Under sec. 2575, no right of property passes, unless by agreement of the parties, and no right or interest in or upon the land is given as against the donor except to lay out the line (593) and designate the sites required for the necessary and proper construction of the road as proposed. In case the parties cannot agree, then the company may proceed to condemn the land, as directed in other sections of the act. As stated, a map and profile must be served with the summons, though a failure to do this may be cured by amendment, as was done here, *R. R. v. Newton,* 133 N. C., 137; and on petition filed, if no sufficient cause is shown *contra,* commissioners are to be appointed, who shall view the premises, determine the amount of compensation, and duly report their proceedings, etc., etc.

When the appraisal is made by the commissioners the statute, sec. 2587, provides: "That if said company, at the time of appraisal, shall pay into court the sum assessed by the commissioners, then, and in

that event, the said company may enter, take possession of and hold said land, notwithstanding the proceedings on appeal."

While it is the generally accepted construction of the section that the payment of the amount assessed by the commissioners, when this assessment has been made in compliance with the statute, is, *prima facie,* sufficient protection to the land owner, and will authorize the company to enter on the land for the purpose of building their road according to the plans and specifications considered and passed upon, it is also true that prepayment of the amount into court is a condition precedent, and, until such payment, no right of entry exists for such purpose. The right given by sec. 2575 is for laying out and making a map and profile of the route, and to enable the parties to agree as to proper compensation. When this agreement cannot be made and condemnation proceedings are instituted, the right given under sec. 2587 is to enter when the amount of the appraisement has been paid into court, and not before.

(594) Considering the two sections together, the meaning is too plain for misconstruction. We are clearly of opinion, therefore, that the defendant, as employee of the company, had no right to enter on the land of the prosecutor. We are referred by counsel to several decisions where a restraining order against entries of this character have been refused by the courts; and it is argued that because a restraining order would be refused, no indictment would lie. This position is not well considered. It is neither an ordinary nor usual exercise of the equitable powers of the Court to grant injunctive relief for the prevention or punishment of crime. This process, as a rule, is only issued in such cases when the acts complained of involve an invasion of property rights which causes or threatens irreparable damages and the remedies at law are inadequate to afford protection or redress. High on Injunctions (4 Ed.), secs. 20, 20a; *Henry v. Jewett,* 90 N. Y., 64; *Moore v. R. R.,* 108 N. Y., 98.

It does not follow, therefore, that because in certain cases the courts have refused an injunction, an indictment will not be upheld.

In one of the cases cited by counsel, *R. R. v. Lumber Co.,* 116 N. C., 924, the decision proceeds on the suppostion that defendant was a trespasser, and injunction was denied because a bond had been filed sufficient to cover all damages which might ensue by reason of the entry. And, in another, *R. R. v. Newton,* 133 N. C., 132, it is expressly stated for law: "That formerly payment of the compensation was not required before entry; citing *R. R. v. Davis,* 19 N. C., 452; *R. R. v. Parker,* 105 N. C., 246; *S. v. Lyle,* 100 N. C., 501. The Code,

sec. 1946 (Rev., sec. 2587), changed this as to railroads, by requiring the company to pay into court the sum assessed before entry on the right-of-way."

While we are of opinion, and so hold, that the defendant had no right to enter on the prosecutor's lands for the purpose of constructing the road, we do not at all hold that, on the facts as found by the Court, the judgment of guilty entered against him is valid or (595) can be allowed to stand. Defendant is prosecuted under sec. 3688, Rev., 1905, which makes it a misdemeanor for one to enter on the land of another after being forbidden, without license, etc., etc. The uniform construction put upon this statute has been that a defendant who enters, after having been forbidden, cannot be convicted if he enters having right or under a *bona fide* claim of right. *S. v. Crosset,* 81 N. C., 579; *S. v. Whitener,* 93 N. C., 590; *S. v. Winslow,* 95 N. C., 649.

True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such relief. *S. v. Glenn,* 118 N. C., 1194; *S. v. Durham,* 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted.

The Judge finds, and we agree with him, that the defendant entered without right, but the question of whether he entered under a *bona fide* claim of right does not appear in the facts, and has never been determined. The defendant's guilt, therefore, has not been established, and the judgment against him must be set aside.

While we have expressed our opinion on the main question, the right of the defendant to enter on the land, because the parties desired to present it, and in the hope that this opinion will end the controversy, we must not be understood as approving the method of procedure by which the guilt of the defendant was determined upon in the Court below—a trial by a Judge without the aid of a jury. (596) Two decisions of this Court—*S. v. Stewart,* 89 N. C., 564; *S. v. Holt,* 90 N. C., 749—have held that, in the Superior Court, on indict-

ment originating therein, trials by jury in a criminal action could not be waived by the accused.

We do not decide whether this principle applies in the present case, but, for the error pointed out, we direct that a new trial be granted, to the end that the facts found by the Judge be set aside as insufficient to present the question of defendant's guilt or innocence, and defendant be tried in accordance with the law.

New Trial.

WALKER and CONNOR, JJ., concur in result.

Cited: Street R. R. v. R. R., 142 N. C., 438; *S. v. Mallard,* 143 N. C., 666; *S. v. Raynor,* 145 N. C., 475; *Comrs. v. Bonner,* 153 N. C., 71; *S. v. Davis,* 159 N. C., 459.

STATE v. RING.

(Filed 16 October, 1906.)

Seduction Under Promise of Marriage—Evidence—Sufficiency.

1. In an indictment for seduction under promise of marriage, it is not necessary for the State to show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces, but it is sufficient if the jury, under the evidence, can fairly infer that the seduction was accomplished by reason of the promise, giving the defendant the benefit of any reasonable doubt.
2. In an indictment for seduction under promise of marriage, where the evidence shows that the prosecutrix trusted to the defendant's pledge that he would never forsake her and to his promise of marriage when she permitted him to accomplish her ruin, a conviction was proper, and the mere fact that the promise existed long before the seduction can make no difference, if he afterwards took advantage of it to effect
(597) his purpose.

INDICTMENT against E. L. Ring, heard by *Justice, J.,* and a jury, at the February Term, 1906, of COLUMBUS.

The defendant was indicted for seduction under promise of marriage. The prosecutrix testified that she first knew the defendant in 1901, when he made love to her, and they became sweathearts; that she went with him two years. He courted her and she promised to marry him. She did not go with any one else. He made a request of her a year before she yielded, which was in August, 1904, and she became pregnant in November of that year. He said it was his right to do as he wanted to with her under the circumstances, and to prove her love she

yielded to him. The defendant left the State in April, 1905. The child was born the following August. He said he loved her and would not believe she loved him unless she yielded to his wishes. She yielded to his wishes, and she still loved him and believed everything he said. He said further that he would never forsake her, but would stick to her forever. They had been engaged over a year when she yielded to his approaches the first time, but before that he had promised her that he would never forsake her, that he intended to marry her anyhow, and that it was his right to have his way with her, and that he would not believe that she loved him unless she yielded, and she did so to prove her love for him. There was also evidence tending to support the testimony of the prosecutrix. Letters from the defendant to her were read as evidence. In these he admitted having promised to marry her, and that he had sexual intercourse with her. He requested her not to tell any more than she had to tell, and not to have a lawsuit, as it would make things worse. In one of the letters he states that he is deeply sensible of the great wrong he had done. He inquires if either of them was to blame, as one could not help it more than the other, and wants to know if a satisfactory settlement cannot be made. Several times he warns her against being deceived, and insists that she should say as little about it as possible. He further says that (598) while it is an unfortunate affair, it is no more than others have done; that he had been caught, and that is all, but that the affair had not caused him to leave home, but other circumstances forced him to leave. In one letter is this expression: "You have trusted in my honor in the past. I now trust in yours to do all that you can to prevent so much publicity by having a lawsuit, which will not bring to light anything that will be to our credit or in our favor. I cannot see what good it will do you or any one else if you convict me." He then threatens that, if the matter is prosecuted, he will disclose something that will not be to her credit or to that of her people, and adds: "I know that you are not the one who is prosecuting (implying that her brother is), but it depends on what you say. I am not uneasy about being convicted, but it is on your account that I want this settled without going to Court. I want to see you first chance." In still another letter he says: "You have sacrificed your virtue for the gratification of the passion of a man who is worthy of a letter from you. Will you be kind enough to write something and tell me what you expect of me, and what you hope to accomplish by going to law?" There was evidence to the effect that the prosecutrix had been a chaste, virtuous, and innocent woman before the time of the alleged seduction.

The defendant's counsel requested the Court to charge the jury: "That under all the evidence in the case, the defendant is not guilty." The Court refused so to charge and the defendant excepted. The jury convicted the defendant, and from the judgment upon the verdict, he appealed.

Robert D. Gilmer, Attorney-General, and *Walter Clark, Jr.,* for the State.

D. J. Lewis and *J. B. Schulken* for the defendant.

(599) WALKER, J., after stating the case: The defendant's counsel, in their brief, contend that there was no evidence in the case that the prosecutrix was seduced under a promise of marriage. The gravaman of this offense is seduction, induced by the promise which the defendant has failed to keep. There are other essential elements, but this is the principal one, and if there was no evidence of it, the defendant should have been acquitted. We think that there was not only some, but abundant evidence to warrant the verdict of the jury. It is not necessary to a conviction under this law that the State should show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces. It is quite sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt.

But in this case, the defendant admits in one of his letters to the prosecutrix that she had trusted in his honor and that he was deeply sensible of the great wrong that he had done her, and that she had sacrified her virtue at his solicitation when they were engaged to be married. While under a promise of marriage to her, he told her that he would not believe that she loved him if she did not comply with his request, and she yielded to prove her love for him. Just before she did so, he promised never to forsake her, and boldly and shamelessly asserted that he did not ask her consent as a favor, but as something to which he was of right entitled by reason of their engagement. Is it possible for evidence to be stronger for the purpose of showing a seduction accomplished by a promise of marriage? The mere fact that the promise existed long before the seduction can make no difference, if he afterwards took advantage of it in order to effect his nefarious purpose. His conduct, in such a case, would be the more reprehensible as showing a studied and deliberate purpose, first to engage her affections and then by taking advantage of her weak and confiding

nature and the truthfulness he had inspired by his perfidy to insidiously ensnare her with his wicked and faithless promises (600) of love and constancy. Such base conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue. If he made his promise to her in good faith, why did he not keep it when he found that he had ruined her and when she most needed the protection of his name? It being admitted that he made the promise, his gross betrayal of her was surely a fact to be considered by the jury in determining his guilt. It is against the wily arts of the seducer that the law would protect the innocent woman, and he can effect his purpose just as well by first gaining the confidence and affection of his intended victim and then inducing her to surrender her chastity and finally debauching her by means of persistent appeals to her supposed sense of duty and obligation to him as her lover.

The evidence in the case forces the conviction upon us that this unfortunate woman trusted to his pledge that he would never forsake her, and to his promise of marriage, when in an evil moment she permitted him to accomplish her ruin.

The defendant's counsel relied on *S. v. Ferguson,* 107 N. C., 841, and quotes this passage from the opinion of the Court by *Justice Davis:* "If she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a promise of marriage, she is *in pari delicto,* and there is no crime committed under the statute." That is very true. But the principle there stated does not fit the facts of this case. If the evidence is trust-worthy, there is hardly anything in it to indicate that she sacrified her chastity in order to gratify her own lascivious desires. At least, the jury could well have found that she did not do so, but, on the contrary, that in the trustful and abiding belief that the defendant would not betray her, but fulfill his promise of marriage, she yielded at last to his urgent appeals. The case is rather to be governed by another principle stated in that case: "The purpose of this statute is to protect (601) innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage," in return.

S. v. Horton, 100 N. C., 443, is authority for the position that the State is not required to show that the defendant, in so many words, promised to marry the woman if she would agree to submit to carnal intercourse with him, or, in other words, to show the causal relation

between the promise of marriage and the seduction by any set form of words; but it is sufficient if the evidence is such as to convince the jury to the exclusion of all reasonable doubt that the woman was influenced by the promise and the man intended that she should be, or so purposely acted as to produce the impression on her mind that he would keep his promise if she would comply with his request. The jury are to draw their own deduction from the testimony, provided there is even inferentially any evidence of a purpose to violate the statute. Besides all this, what the defendant said in his letters is, of course, evidence against him as to what his purpose or intention was and as to what he actually said and did. "I am deeply sensible of the great wrong that I have done. Don't be deceived, and be sure that you know your friends. Have as little to say about it as possible. You have trusted to my honor in the past. While this is a very unfortunate affair, it is no worse than others have done." These expressions, taken from the evidence, are much stronger in their tendency to establish the guilt of the defendant, or his vicious purpose throughout his intimate association with the prosecutrix, than were the words used by the defendant in his conversation with the woman's father, which were held to be sufficient to sustain the verdict in the *Horton case.*

No Error.

Cited: S. v. Malonee, 154 N. C., 203.

---

(602)

STATE v. ROBERT SCOTT.

(Filed 23 October, 1906.)

Intoxicating Liquors—Repeal of Statutes—Effect—Special Verdict—Form—Sufficiency.

1. Where an act of the Legislature, forbidding the sale of liquor without license, repealed all laws in conflict with it, an earlier act forbidding such sale is repealed, but only as to offenses committed after the passage of the later one, and, as to all offenses committed before that time it has its contemplated force and effect.
2. Where in a special verdict the jury stated the facts essential to the defendant's conviction, and upon them found him guilty, adding that "upon their opinion of the law, of which they were ignorant, they rendered a verdict of not guilty," this the Judge properly ignored as surplusage, or at least as erroneous, and adjudged the defendant guilty upon the facts.

INDICTMENT against Robert Scott, heard by *Justice, J.,* and a jury,

at the July Term, 1906, of UNION. The defendant was convicted, and appealed.

Robert D. Gilmer, Attorney-General, and *Walter Clark, Jr.,* for the State.

Williams & Lemmond for the defendant.

PER CURIAM. The defendant was indicted for selling liquor without a license in July, 1902, when there was a law forbidding the sale of liquor without a license in Union County. His counsel contends that this law was repealed by subsequent enactments, which still made it an offense to sell liquor without a license, but which repealed all laws in conflict with them. It seems to us clear that the question raised in this case is the same as that which was presented in *S. v. Perkins,* 141 N. C., 797. There is really no substantial difference between the two cases, and that case must govern this one. The later act repeals the earlier one only in so far as they are in conflict. It cannot (603) retroact so as to affect offenses committed prior to its passage, and the earlier act cannot operate prospectively, so as to affect offenses committed in the future. Their respective fields of operation are bounded by a line drawn at the date of the later act, the earlier act applying to offenses committed before, and the later to those committed after, that date. As neither can trench upon the legitimate province of the other, there is no necessary repugnancy between them. The earlier act, therefore, is repealed, but only as to offenses committed after the passage of the later one, and, as to all offenses committed before that time, it has its contemplated force and effect. In this way, the two acts are brought into harmony and the intention of the Legislature is not only effectuated, but given full play.

The form of the special verdict was, it is true, a little unusual, but the jury stated the facts essential to the defendant's conviction, and upon them found him guilty, adding that "upon their opinion of the law, of which they were ignorant, they rendered a verdict of not guilty." This the Judge properly ignored as surplusage, or, at least, as erroneous, and adjudged the defendant guilty upon the facts (*"utile per inutitle non vitiatur"*). Indeed, it would seem that the jury meant to submit the question of guilt to the Court upon the facts, though they expressed their intention to do so somewhat awkwardly. The result of the case was the correct one.

No Error.

Cited: Parker v. Griffith, 151 N. C., 601.

(604)

STATE v. CANTWELL.

(Filed 23, October, 1906.)

Jury Duty—Exemptions—Repeal—Impairment of Contract.

1. The exemption from jury duty claimed by defendant under ch. 55, Private Laws 1868, providing that five years' active service in the fire company incorporated by that act shall exempt its members from jury and militia duty during life, is directly in conflict with Rev., sec. 1957; which directs the County Commissioners to place the name of *all* tax-payers of good moral character, etc., on the list for jury duty, the exemptions being stated in sec. 1980, which does not exempt the defendant: *Held*, that the Act of 1868, if public in its nature, is repealed by Rev., sec. 5453, or, if it is a private act, by sec. 5458.
2. Exemption from jury duty claimed by virtue of services in a fire company for five years, as prescribed in its charter, is not a contract, but a mere privilege, and may be revoked by the Legislature at any time.

APPEAL by Robert C. Cantwell from *W. R. Allen, J.*, at April Term, 1906, of NEW HANOVER.

Robert D. Gilmer, Attorney-General, and *Walter Clark, Jr.,* for the State.

Davis & Davis and *E. S. Martin* for the defendant.

CLARK, C. J. The defendant regularly drawn and summoned as a juror for that term of court declined to serve, and was fined $10, and appealed. He claimed to be exempt under ch. 55, Private Laws 1868-'69, ratified 8 March, 1869, which incorporated the Wilmington Steam Fire Engine Company and contains the provision that its "members shall, during membership, be exempt from all jury and militia duty, and in case of active service in said company for five suc-
(605) cessive years, said exemption shall continue during the life of the member rendering such active service." The defendant served actively five successive years.

The exemptions under this and other private acts (passed usually, as is common knowledge, upon the motion of the members from the county in which each locality lies, and without scrutiny or opposition) became so numerous as to impair, often, the supply of good jurors. The General Assembly thereupon passed Rev., 1957, which directs the County Commissioners to select the names of *"all such persons* as have paid all the taxes assessed against them for the preceding year, and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the Clerk of the Board

of Commissioners and shall *constitute the jury-list,* and shall be preserved as such." To this sweeping clause, Rev., 1980, adds the exemptions to be allowed, which are much fewer than those formerly allowed, even in the general law, and contains this item: "No *active* member of a fire company shall be required to serve as a juror." Wilmington, in 1897, adopted a paid fire department, and the defendant's company ceased its active service. The County Commissioners having found that the defendant was liable to jury duty under Rev., 1957, and not exempt under Rev., 1980, placed his name on the jury-list.

Revisal, 1957, is broad and succinctly prescribes what citizens shall be liable to jury duty, subject only to the exemptions set out in Rev., 1980. This is a matter solely within legislative control, subject to change in the judgment of any succeeding Legislature. If the provision in the aforesaid act of 8 March, 1869, under which the defendant claims exemption from rendering jury service to his State is public in its nature, it is clearly repealed by Rev., 5453: "All public and general statutes not contained in this Revisal are hereby repealed, with the exemptions and limitations hereinafter mentioned." If, however, it is a private act, it is not less repealed by Rev., 5458: "No (606) act of a private nature, unless in conflict with the provisions of this Revisal * * * shall be construed to be repealed by any section of this Revisal." The exemption claimed by defendant under ch. 55, Private Laws 1868, is directly in conflict with Rev., 1957, which directs the County Commissioners to place the names of *all* tax-payers of good moral character, etc., on the list for jury duty, the exemptions being stated in sec. 1980, which does not exempt the defendant. It will be noted that this repealing clause is radically different from sec. 3873 of The Code, which provides: "No act of a private or local nature * * * shall be construed to be repealed by any section of this Code." The General Assembly had seen the inconveniences of this section, and the radical change of language in Rev., 5458, shows a clear intention to repeal all private acts inconsistent with the provisions of the Revisal; language could not be clearer.

The defendant contends, however, that the Act of 1869 was a contract between the fire company and the State and is protected by the principles laid down in the *Dartmouth College case.* Whatever may be said of the correctness or incorrectness of that decision (and very much has been said) the inconveniences proved so great that this State, like most, if not all others, has since inserted in its Constitution the following provision, Art. VIII, sec. 1: "Corporations may be formed under general laws, but shall not be created by special act except for municipal

purposes and in cases where, in the judgment of the Legisuature, the object of the corporations cannot be attained under general laws. *All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed.*" The Constitution was adopted 18 April, 1868, and if the exemption in the charter of the Wilmington Fire Company, ratified 8 March, 1869, was a contract, there was
(607) written into that contract, as a part of it, that the Legislature had a right to amend or repeal from time to time any and all rights thereby conferred.

But, in truth, independent of that constitutional provision, exemptions from military and jury and other public duties were never at any time contracts by which one Legislature could irrevocably sell, or give away, the right of the State to command the service of its citizens for public and governmental duties. Such exemptions were adjudged to be mere privileges, revocable by subsequent Legislatures, and were so held in all the States (except in one case in Missouri) in which the contention was raised, even prior to the incorporation into their respective Constitutions of the provision above quoted from the North Carolina Constitution.

"It has been generally held that the right of exemption from jury service is not a vested right, but a mere gratuity which may be withdrawn at the pleasure of the Legislature." 17 A. & E. (2 Ed.), 1177. Judge Cooley Const. Lim. (7 Ed.), 329 and 546, says: "The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned: exemptions from the performance of public duties upon juries, or in the militia and the like, exemptions of persons and property from assessment for the purpose of taxation, * * * exemptions from highway labor and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require; * * * the privilege of exemption might be recalled, without violation of any constitutional principle. The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require it."

"Exemption from service on juries is always subject to legis-
(608) tive repeal, even as to persons who, by the performance of specified services, have earned an exemption under its provisions." *Dunlap v. State,* 76 Ala., 460. That case was exactly "on all fours" with this, the exemption from jury duty being claimed by virtue of services in a fire company for five years as prescribed in its charter. *Clopton, C. J.,* in a very able opinion quotes with approval from *Bragg v.*

People, 78 Ill., 328: "It is impossible for the State to protect life, liberty and property without the aid of juries. The system is a vital part of the machinery of government. It is the undoubted duty of the legislative department to provide for the selection of jurors in such way as shall best subserve the public welfare. Of this, of course, it must necessarily be the judge, and may provide that for the time being, certain classes, by reason of what shall be deemed sufficient public considerations, shall be exempt; but to say that such exemption shall be perpetual, whatever may be the public necessities, would be to authorize one Legislature, by unwise legislation, to tie the hands of its successors, even to the extent of destroying the government"—citing many authorities, a few only of which we will quote.

In *Rust, ex-parte,* 43 Ga., 209, *Lochrane, C. J.,* holds that a general statute providing for jury service repeals all previous exemptions not found therein, and that an exemption previously conferred in the charter of a fire company upon its members is not a contract, but a privilege, revocable by any subsequent Legislature. Though a fireman had served the five years, provided in the charter, the exemption is "not a contract, but a mere privilege, and may be revoked by the Legislature at any time." *Beamish v. State,* 65 Tenn., 532.

"The duty of serving on juries is one of the inseparable incidents of citizenship, and all exemptions from such service (in that case for service in a fire company) are mere gratuities, revocable at the pleasure of any succeeding Legislature, and are revoked by a general law, prescribing those subject to jury duty, without excepting those (609) claiming exemption under prior local or general acts." *In re Scranton,* 74 Ill., 161. But the subject is most fully and conclusively discussed and the same conclusion reached in *Bragg v. People,* 78 Ill., 328. In that case the plaintiff had served seven years in a fire company, whose charter provided that such length of service should exempt from jury duty. The Court held that no Legislature can sell, or give, or bargain away, irrevocably, the sovereign right of the State to command the service of its citizens for military, jury, road or other public duty, and adds: "Service performed in the fire department can, by no fiction, be made to take the place of the man in the jury-box." There are other cases to the same purport as above.

The sole case to be found to the contrary is *In re Goodwin,* 67 Mo., 637, which is based upon the ground that an exemption from jury duty is a contract and protected by the decision in the *Dartmouth College case,* 4 Wheaton, 518. If that decision could overbalance the uniform precedents to the contrary, it could not be authority here in view of the

provision in our Constitution, above quoted, making all charters subject to repeal or amendment at the will of the Legislature. Indeed, in *R. R. v. Alsbrook,* 110 N. C., 145, this Court held that, independent of and prior to the adoption of that provision, the Legislature could not irrevocably grant or bargain away, even for a consideration, an exemption of property from taxation. For a stronger reason, the State could not permit one Legislature to confer a release of its right to call for the discharge of public duty by its citizens in the public defense, in the jury-box or elsewhere, irrevocable by a subsequent Legislature.

In *S. v. Womble,* 112 N. C., 863, the exemption was sustained solely upon the ground that the local act conferring it was saved from repeal by sec. 3873 of The Code. This, as we have already seen, is (610) otherwise under the provisions of Rev., 5458.

Affirmed.

WALKER, J., dissenting: It is impossible for me to assent either to the conclusion or to the reasoning of the majority. On both points involved in the case, I entertain an opinion different from that which has been delivered by the *Chief Justice* for the Court. In the first place, I do not think the statute under which the defendant claims exemption from jury service has been repealed by the Revisal. The rule is well settled that repeals by implication are not favored. *S. v. Perkins,* 141 N. C., 797. The two statutes should be irreconcilable with each other before such an implication can arise, and when any fair construction will prevent a conflict between them it should be adopted. *S. v. Massey,* 103 N. C., 356; *S. v. Womble,* 112 N. C., 864. The Rev., sec. 1980, simply provides that no *active* member of a fire company shall be required to serve as a juror. There is no express repeal here of any clause of exemption inserted in the charter of a fire company by prior legislation, and there is no necessary repugnancy between the two provisions of the law. If there is, in what does it consist? The exemption of *active* members of fire companies does not by any means imply that those who have once been active members for a sufficient length of time to entitle them to a permanent exemption shall no longer be entitled to the immunity which they have thus earned. Merely adding to the list of exemptions does not produce a conflict with a statute under which an exemption had accrued by reason of former active service for a series of years. It would not have this effect, even if the Revisal had provided that none but active members shall be exempt, as this would merely distinglish between active and honorary members of existing organizations. The use of the term "active members" implies, of course, that

there are members who are not active, otherwise it would have been sufficient to declare that all members of fire companies shall (611) be exempt, without special reference to whether or not they are in active service, as they would all be active members if there is no such classification in the membership. It appears in this case that the defendant is not now a member of the fire company at all, active or inactive, as it has been disbanded, and a paid department has been substituted in the place of the former voluntary system for fire protection. How the inclusion of active members in an exemption can have the effect to repeal a law under which an exemption has already been vested, I am unable to see. It will be observed that there are no negative words used in the Revisal, so as to exclude the exemption contained in the clause of the charter just mentioned, but only the granting of an exemption to a specified class which they did not before possess under the general law, but which was conferred only, as to some of them, in certain private charters, and that was merely a revocable grant, and not an irrevocable grant of exemption as is the one claimed by the defendant. The exemption allowed under the Rev., sec. 1980, was clearly intended to apply to a class of persons who never enjoyed such an immunity before its enactment, and not to one protected by prior legislation and in whose favor there was an existing right of exemption. This is apparent from the phraseology of that section. The provision of the Revisal is plainly cumulative and not revocatory. Nor does sec. 1957 of the Revisal give any color to the claim that the Legislature has taken away all existing exemptions. That section only requires the Commissioners to prepare a list of all persons having certain prescribed qualifications, and to exclude therefrom persons who are disqualified, such as those who have removed from the county, or who are dead (sec. 1961), but not those who are exempt from jury service. They do not even strike off those who have suits pending and at issue, but return their names to Box No. 1, when they are drawing jurors to serve at a court.

Sec. 1960. There is a vast difference between a disqualified (612) and an exempted juror. The exemption is but a privilege, personal to the juror, and he may serve, even if objected to on the ground of the exemption, unless he insists upon his privilege. He may waive it, and when he does, he is as much qualified as if the exemption had never existed. His name properly goes upon the list, not only because he is a qualified juror, but because the Commissioners are not presumed to know of his exemption, and if they were informed of it, they are not presumed to know that he will avail himself of it when called to sit in the box, for, as I have said, he may then forego the privilege and

agree to serve. The argument drawn from sec. 1957 as to preparing the list of jurors would just as well apply to exemptions of practising physicians and others, under sec. 1980, as to those under existing charters.

There, is, therefore, nothing in the Revisal which conflicts with the clause of exemption in the charter of the fire company, or which manifests any purpose to repeal it, and we should lean to this view, because, as said by a Court of high authority, in a like case, the opposite interpretation of the law would disclose bad faith, and, "if possible, we should give such a construction to the act of the Legislature as will relieve the State from such an interpretation." *Red Rock v. Henry,* 106 U. S., at p. 604. And in another case, also upon a question of like kind, it was said that we should presume an intention, on the part of the State, to keep and observe her promises consistently with good faith, for to presume otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants. *Broughton v. Pensacola,* 93 U. S., 266; 26 A. & E., (2 Ed.), pp. 646 and 661; Lewis' Suth. Stat. Constr. (2 Ed.), secs. 267 and 488. The mind of the Legislature is presumed to be consistent, and it must also be presumed that the Legislature never intends an injustice, or to disregard its own agreements, or to work private hardship. If (613) a statute, therefore, is ambiguous or doubtful, or fairly open to more than one construction, that one should be adopted which will avoid such results as those indicated, as the Legislature should not be presumed to intend a wrong in the absence of explicit language expressing that intention. These are elementary principles of construction, it is said in Black on Interpretation of Laws, pp. 98 to 101, secs. 44 and 46.

Before I can assent to the proposition that the State has repudiated a solemn promise of exemption, after having received the full consideration thereof in public service, language will be required more explicit and convincing than any Legislature has yet used, and reasons and arguments more persuasive than any which have yet been advanced in support of such a position. The State, in my opinion, has done no such thing, and the Legislature did not intend to commit her to any such policy, but, on the contrary, it was the purpose to recognize and confirm existing exemptions.

But there is another and more serious question involved in this case, which relates to the power of the Legislature thus to destroy a vested right or to impair the obligation of its contract. In my opinion it has no such power. It is argued that the State cannot bargain away its right to require the citizen to perform jury service, such a service being

essential to the very preservation of the State. The deduction from this premise is that a sovereign right of such vital importance is not the subject of contract. Let us see how this is. If I am able to demonstrate that a sovereign right much more essential to the existence of the government than that of requiring the citizen to serve as a juror has been parted with by exempting persons or corporations from its exercise, not for a limited term, but forever, and that such an exemption has been sustained as being within the legislative power, and as irrevocably binding on the State, it must be admitted that the exemption now in question by the same token must be a lawful exercise of (614) that power and equally obligatory.

The Constitution forbids the granting of hereditary emoluments, privileges or honors, and also perpetuities and monopolies, as being contrary to the genius of a free State, and as such should not be allowed. Art. I, secs. 30 and 31. But by Art. I, sec. 7, it is expressly provided that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." It is clearly implied here that for public services rendered the State, a privilege may be granted in return, and there is no restriction as to its nature or extent. A privilege is said to be a particular or peculiar benefit enjoyed by a person, company or class beyond the common advantages of other citizens—an exceptional or extraordinary exemption or an immunity held beyond the course of the law. And again, it is defined to be an exemption from some burden or attendance, with which certain persons are indulged, from a suppostion of the law that their public duties or services, or the offices in which they are engaged, are such as require all their time and care, and that, therefore, without this indulgence those duties could not be performed to that advantage which the public good demands. Black's Law Dictionary, p. 941; 1 Pin., 118. These approved definitions show clearly that the exemption here claimed is within the meaning of the word "privilege," as used in the Constitution, which may be conferred in consideration of public services. Indeed, this Court has expressly held, in cases just like this one, that the Legislature may grant such an exemption. *S. v. Hogg,* 6 N. C., 319; *S. v. Williams,* 18 N. C., 372; *S. v. Whitford,* 34 N. C., 99; *S. v. Womble,* 112 N. C., 862. In *S. v. Willard,* 79 N. C., 660, the very exemption granted by the charter in question was sustained as within the power of the Legislature to grant, and the only point made was as to its true construction and the extent of the exemption in its application to the different kinds or classes of jurors. (615)

In *R. R. v. Alsbrook,* 110 N. C., at p. 145, this Court (by

Clark, J.) says: "The right of taxation is the highest prerogative of sovereignty. Its exercise is necessary to the very life and existence of the State. Its possession marks—regardless of the nominal form of government—its real nature, whether republican, monarchical or aristocratic. It is the power of the purse to which the power of the sword is a mere sequence," and I venture to add, to which all other governmental powers are practically subordinate, because upon it they are dependent for their continuance. It is, if anything, the supreme prerogative power of sovereignty, and absolutely essential to the existence of government in any form. And yet this, the highest power of the sovereign State, has been held to be the subject of contract, and any agreement based upon a sufficient consideration, such as public services rendered, by which the State exempts the citizen or a corporation from taxation, is valid and binding and is within the protection of the contract clause of the Federal Constitution. This principle was announced in a case decided otherwise by this Court, but which was reversed in the Supreme Court of the United States upon a writ of error, *R. R. v. Reid,* 13 Wall., 264 and 269. In that case the Court said: "If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the Court to give effect to it, the same as if it were a contract between private persons, without regard to its supported injurious effects upon the public interests. It may be conceded that it were better for the interests of the State that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things the necessities of the government cannot always be foreseen, and in the changes of time the ability to raise revenue from every species of property may be of vital importance to the State, but the courts (616) of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the Legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power." That case has been approved by innumerable decisions since made, and is recognized as settling the doctrine therein stated. Indeed, the general principle had been thoroughly well established long before it was reiterated and applied in that case. *Dartmouth College v. Woodard,* 4 Wheat., 518; *New Jersey v. Wilson,* 7 Cranch., 164; *Jefferson Bank v. Kelly,* 1 Black, 436; *R. R. v. Tenn.,* 153 U. S., 486; *Fletcher v. Peck,* 6 Cranch., 77; *Bank v. Knopp,* 10 Howard, 389; *Pawlet v. Clark,* 9 Cranch., 292; *Terrell v. Taylor, Ib.,* 43; *Bank v. Billings,* 4 Peters,

514; *Mills v. Williams,* 33 N. C., 558; *Bank v. Bank,* 35 N. C., 75; *Attorney-General v. Bank,* 57 N. C., 287; *S. v. Petway,* 55 N. C., 396. See, also, the later case of *Tomlinson v. Jessup,* 15 Wall., 454. Where there is such a stipulation, it is entitled to a sensible and reasonable construction, so as to effect its obvious purpose, and should be regarded as a contract if it appears to have been so intended by the parties. *Insurance Co. v. Debolt,* 16 How., 416, 427; *Bank v. Edwards,* 27 N. C., 516; *Gordon v. Appeal Tax Court,* 3 How., 148; *House of the Friendless v. Rouse,* 8 Wall., 430. Thus far I have referred to exemptions or other privileges conferred, which are not revocable by the terms of the grant. For example, the provision in the Revisal exempting active members from jury duty is revocable, because it is not given for any definite time; and even in the case of the exemption now under consideration, it may be that it was within the power of the Legislature to have revoked it at any time before the period of five years had expired. The continuance of such exemptions being subject to the will and pleasure of the Legislature, the laws conferring them do not fall within (617) the class of legislation which give to them the character of contracts, or imparts to them the qualities and protection of vested rights. But all the best considered authorities hold that where the exemption is granted perpetually for a consideration, such as public services to be rendered for a definite time, and the services have been performed and the requirement of the law fully complied with, so that the agreement has been actually consummated and fully executed on both sides, it becomes an inviolable right, within the meaning and protection of the contract clause of the Constitution. *Salt Co. v. East Saginaw,* 13 Wall., 373. Even where, as by our Constitution (Art. VIII, sec. 1), the power is reserved to alter or repeal the charters of private corporations, the exercise of this power cannot interfere with rights already vested under the charter; it cannot undo what has already been done, nor can it unmake contracts already made, but its operation will be confined to the future. *People v. O'Brien,* 111 N. Y., 1; *R. R. v. United States,* 99 U. S., 700; *Red Rock v. Henry,* 106 U. S., 604; *Salt Co. v. East Saginaw, supra; People v. Auditor,* 9 Mich., 134. This Court so held in *Smathers v. Bank,* 135 N. C., 418.

As there is no subject over which it is of greater moment for the State to preserve its power than that of taxation, and as it has been settled that the State may irrevocably part with this power in favor of a particular person or corporation, with much greater reason (*a fortiori*) it may exempt a citizen perpetually from jury duty for a sufficient consideration moving to the public in the way of services. This

follows logically and inevitably from the other proposition and cannot be resisted as a conclusion to be legitimately drawn from it. If the highest power of sovereignty can be bargained away, that which is of a lower grade, and is dependent upon it for existence, must be equally subject to alienation, unless we deny the truth of the axiom that
(618) the greater includes the less. This view has been taken in regard to a mere bounty which had been earned according to the terms of the legislation conferring it. *People v. Auditor,* 9 Mich., 134; *Montgomery v. Kasson,* 16 Cal., 189; *Salt Co. v. East Saginaw,* 19 Mich., 259 (*s. c.,* 13 Wall., 373). The same principle was adopted and held to apply to a case precisely like this one in every respect, in *Ex parte Goodin,* 67 Mo., 637, by a unaninmous Court, in a well-considered opinion by *Chief Justice Sherwood,* and it was so held notwithstanding there was a reserved power of amendment or repeal residing in the Legislature. So that case has met and answered every point now urged by the State, except the one as to the actual repeal of the provision of the charter which confers the exemption. In the opinion of this Court it is said that the Missouri decision cannot be accepted as authority by this Court, because of the power reserved to the Legislature in the Constitution of our State to amend or repeal charters. This is an inadvertence, for even a cursory reading of that case will show that the same power existed in the Legislature of Missouri, as it is expressly mentioned and held not to change the result. *R. R. v. Alsbrook,* 110 N. C., 145, which is cited by the Court in this case, does not decide that an exemption from taxation cannot be irrevocably granted, but only that the right there claimed did not extend to a certain class of property, as it was not clearly expressed in the charter of the company that it should. *R. R. v. Alsbrook,* 146 U. S., 279. But that such a power does exist is decisively determined by a multitude of cases. *Manufacturing Co. v. East Saginaw,* 80 U. S., (13 Wall.), 373, where the authorities are collected by *Justice Bradley,* including among them *R. R. v. Reid,* 80 U. S., (13 Wall.), 264 and 269. The Court in the latter case, as I have said, reversed the decision of this Court, holding the contrary doctrine. Besides, it was said in *R. R. v. Alsbrook,* 146 U. S., 279, that if this Court had decided in the same case, when
(619) before it, that no such power of exemption could exist, it would have been erroneous, and the decision in that case was affirmed only because it was held therein that the exemption did not apply to the railroad's branches, but only to its main line, and that was the entire scope of the decision.

I have cited copiously the cases in the Supreme Court of the United

State, because such questions as the one we now have under consideration must ultimately be adjudicated there and its decisions are therefore controlling. The authorities cited to sustain the decision of the Court in this case are squarely opposed to the doctrine as laid down by that supreme tribunal, and therefore should not be entitled to any weight as precedents with us, while the case from Missouri is directly in line with that doctrine and in perfect harmony with the decisions of the highest Court having jurisdiction to finally and authoritatively settle the law, so far as it relates to the question herein involved.

If the superior and sovereign power of taxation can be permanently relinquished in favor of an individual or of a corporation, why not the inferior and less important one under which the citizen may be compelled to perform jury service? The former power should no more be impaired to the detriment of the public than the latter one by giving such exemptions, and the power of compelling persons to attend at the courts for jury duty would be little or nothing to the State if there is no money in the Treasury to sustain the government. The possession of the power of taxation is therefore not only essential, but a condition precedent to the exercise of the other power. You cannot put jurors on the panel, or in the box, without the money to provide for the necessary governmental machinery, of which the courts are a part.

The government, it is true, was not organized merely for the purpose of exercising the power of taxation, yet it was one of the extraordinary powers contemplated, as much so as any other, because the government could not exist without it. The question is not (602) for what purpose did we form our government, but what are its essential functions. I may admit that if the State cannot perpetually exempt from taxation, she cannot give a permanent exemption from jury service; but it is inconsistent and illogical, it seems to me, to affirm the right in the one case and deny it in the other. If either of the powers is inalienable, then the other must needs be so. No ingenious or subtle argument can explain why the reasons which justify the right of alienation in the one case do not also justify it in the other.

While the impolicy of exempting jurors perpetually may be conceded, it is not for me to decide that it is unwise, that being a matter solely within the cognizance of the Legislature. Although I may condemn the law as impolitic, my conviction is that it is perfectly valid, and binding on the State. A right to the exemption having become vested by the performance of the services for the stipulated period, it could not be divested by State action. There is no evidence before us, and no

suggestion can well be supported by actual proof, that the supply of competent jurors is about to be exhausted by reason of statutory exemptions such as this one. Indeed, the contrary appears in this case, for we are informed that the voluntary fire departments are gradually giving place to the paid departments, the members of which are compensated for their services by the municipalities of the State in money, and not by way of exemption from jury duty, as was the case with volunteer associations.

It must not be supposed that I am attempting, by this opinion, to vindicate solely the right of the defendant in this case. The question involved is more far-reaching than the mere acquittal of one individual, even upon the charge of unlawfully refusing to do service which, by the law, as heretofore settled, he is not bound to render, though that is a sufficient reason for fully discussing the matter. The real significance of the case is revealed when we consider that the principle, as
(621) herein declared, will be recorded as a precedent and by so much impair, if it does not seriously jeopardize, the constitutional rights of the citizen in other cases involving more serious consequences.

Cited: McIver v. Hardware Co., 144 N. C., 493.

STATE v. MATTHEWS.

(Filed 30 October, 1906.)

New Trial in Criminal Cases—Exceptions Abandoned—Homicide—Motion in Arrest of Judgment—Case on Appeal—Murder by Poisoning—Presumption of First Degree—Verdict For Lesser Offense.

1. Upon appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill.
2. It is in the election of an appellant to abandon in this Court any exceptions which out of abundant caution he may have taken below, and which upon reflection he thinks he should not press in this Court.
3. Where the record shows an indictment for murder in the form prescribed by Revisal, 3245 (which does not set out the means used), and a verdict thereon of murder in the second degree, as authorized by the statute, there is no ground in the record on which to base the prisoner's motion to arrest the judgment.
4. The "case on appeal" is a part of the transcript on appeal, and is a narrative of such matters which took place at the trial as are pertinent to the exceptions taken. It is no part of the record proper.
5. Rev., sec. 3269, authorizing a jury to return a verdict for a lesser degree of any offense on an indictment for a greater, and sec. 3271, empower-

ing a jury to determine in their verdict whether the prisoner is guilty of murder in the first or second degree, apply equally to all indictments for murder, whether perpetrated by means of (622) poisoning, lying in wait, imprisonment, starving, torture, or otherwise.

6. In an indictment for murder, when the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torture, the law raises the presumption of murder in the first degree, but none the less if the jury convict of a less offense, it is within their power so to do under the statute, and the prisoner has no cause to complain that he was not convicted of the higher offense.

7. Intentional homicide by poisoning is not necessarily always murder in the first degree. The presumption may be rebutted.

INDICTMENT for murder, against J. B. Matthews, heard by *Ferguson, J.*, and a jury, at the February Term, 1906, of GUILFORD. From a verdict of murder in the second degree, and sentence thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, with whom was *Walter Clark, Jr.,* for the State.

Guthrie & Guthrie and *Stedman & Cooke* for the prisoner.

CLARK, C. J. The prisoner, indicted for the murder of his wife, was convicted of murder in the second degree. His counsel quote as the settled ruling of this Court that, "Upon appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill," and cite the cases to that effect, beginning with *S. v. Stanton,* 23 N. C., 424, and later *S. v. Grady,* 83 N. C., 643; *S. v. Craine,* 120 N. C., 601; *S. v. Groves,* 121 N. C., 568; *S. v. Freeman,* 122 N. C., 1012; *S. v. Gentry,* 125 N. C., 733, and say that the prisoner abandons all exceptions for which a new trial may be asked and "confines his appeal solely to a motion in arrest of judgment for matters appearing of record."

The statement of law, as to the rulings of this Court, is correct. The Supreme Court of the United States in a very recent case (*Trono v. United States,* 199 U. S., 521) has reviewed the authorities and sustained the principle that a new trial in a capital case goes to the whole case regardless of the former verdict. (623)

It is in the election of an appellant to abandon here any exceptions which out of abundant caution he may have taken below, and which upon reflection he thinks he should not press in this Court. This course has been often suggested and recommended by this Court, that counsel should "sift out and abandon those (exceptions) which on deliberation they find trivial and untenable. This would aid the Court

to a just consideration of the appeal by directing its attention to what counsel deem the fatal errors only, which in the vast majority of cases can be presented by a very few exceptions." *Pretzfelder v. Insurance Co.*, 123 N. C., 167.

The record shows simply an indictment for murder in the form prescribed by Rev., 3245 (which does not set out the means used), and a verdict thereon of murder in the second degree. Rev., 3269, provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged or of an attempt to commit a less degree of the same crime." Rev., 3271, provides that "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." Upon the record there is an indictment for murder and a conviction of murder in the second degree, as authorized by statute. There is no ground in the record on which to base the prisoner's motion to arrest the judgment.

The prisoner contends, however, that it appears from the case on appeal and the evidence sent up therein that the indictment was for murder by poisoning, and that from the nature of the case this must be murder in the first degree. The "case on appeal" is a part of the transcript on appeal, and is a narrative of such matters which took place at the trial as are pertinent to the exceptions taken. It is no part of the record proper. *Thornton v. Brady*, 100 N. C., 38 (which (624) has been often approved), defines the "record" as embracing only the summons or indictment, pleadings (in civil cases), verdict, and judgment.

But if the indictment had charged "poisoning" as the means by which the prisoner had committed the murder, the motion to arrest the judgment would be no better founded. Rev., 3631, enumerates the instances of murder in the first degree as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate, and premeditated killing or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree." The above-cited sections of Rev., 3269, authorizing a jury to return a verdict for a lesser degree of any offense on an indictment for a greater, and sec. 3271 empowering a jury to determine in their verdict whether the prisoner is guilty of murder in the first or second degree, apply equally to all indictments for murder, whether perpetrated by means of poisoning, lying in wait, imprisonment, starving, torture or otherwise. In *S. v.*

Freeman, 122 N. C., 1016, the Court held that the Judge erred in telling the jury that in their discretion they could return a verdict of murder in either the first or second degree, but should have told them that they should find the prisoner guilty of that degree proved by the evidence (*S. v. Covington,* 117 N. C., 834; *S. v. Norwood,* 115 N. C., 791), and added: "This instruction was erroneous and not warranted by any decision of this Court, but it is an error in favor of the prisoners and one which cannot be complained of by them." To same effect *S. v. Hunt,* 128 N. C., 586; *S. v. Caldwell,* 129 N. C., 684; *S. v. Locklear,* 118 N. C., 1158; *S. v. Gilchrist,* 113 N. C., 676 (these last two cases were for murder by lying in wait), and there are others.

At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and (625) the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse, devolved upon the prisoner. The statute dividing murder into two degrees (now Rev., 3631) contains no reference to this rule, but this Court in *S. v. Fuller,* 114 N. C., 885, held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggravate the offense to murder in the first degree, as it was on the prisoner to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to these, when intentionally done the law still raises the presumption of murder in the first degree, as the prisoner justly contends. But none the less if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. At common law there might be a conviction of manslaughter on an indictment for homicide by poisoning, and in this case the Judge charged: "If, however, at the time he took the dose of morphine the prisoner had no thought or purpose to take the life of his wife, and afterwards, while under its influence, he administered the poison with intent to kill her, and at the time, from the effect of such morphine so taken, he was unconscious of the character of the crime he was committing, he would not be guilty of murder in the first degree for want of power to deliberate and act with premeditation and deliberation, but could not be excused because of the temporary insanity brought on himself voluntarily, and he would be guilty of murder in the second degree." There is no

exception to this charge and we do not pass upon it, but the jury
(626) may have taken that view of the evidence. But whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense.

No Error.

Cited: Sheppard v. Tel. Co., 143 N. C., 246; *S. v. Casey*, 159 N. C., 474; *S. v. Jernigan, Ib.*, 475.

STATE v. LEWIS.

(Filed 21 November, 1906.)

Lynching—Statute Split up in Revisal—Indictment—Venue—Grand Jury—Legislative Power—Motion to Quash—Plea in Abatement.

1. The force and effect of ch. 461, Laws 1893, in regard to lynching is not impaired by the fact that it has been split and the different sections placed under appropriate heads in the Revisal, and its provisions as incorporated in the Revisal fully define the offense intended to be repressed, and designate the punishment and procedure.
2. In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county.
3. Rev., sec. 3233, providing "The Superior Court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county" is a constitutional exercise of legislative power.
4. The Legislature of North Carolina has full legislative power which the people of this State can exercise as completely and fully as the Parliament of England or any other legislative body of a free people, save only as there are restrictions imposed upon the Legislature by the State and Federal Constitutions.
5. A plea in abatement, and not a motion to quash, is the proper remedy
(627) for a defective venue.
6. It was error to quash a bill of indictment under Rev., sec. 3698, which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown.

BROWN, J., dissenting.

INDICTMENT against Zeke Lewis, heard by *Shaw, J.*, at the July Spe-

cial Term, 1906, of UNION. The defendant was indicted in the following bill:

NORTH CAROLINA—Union County.

Superior Court, July Special Term, 1906.

The jurors for the State upon their oaths present: That Zeke Lewis and others, late of the county of Anson, on the 28th day of May, in the year of our Lord one thousand nine hundred and six, with force and arms, at and in the county aforesaid, unlawfully, wickedly, wilfully and feloniously did conspire together to break and enter the common jail of Anson County, the place of confinement of prisoners charged with crime, for the purpose of lynching, injuring and killing one John V. Johnson, a prisoner confined in said jail, charged with the crime of murder, against the form of the statute in such case made and against the peace and dignity of the State.

And the jurors for the State, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to-wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did engage in breaking and entering the common jail of Anson County, the place of confinement of prisoners charged with crime, with intent to injure, lynch, and kill one John V. Johnson, a prisoner confined in said jail charged with the crime of murder, against the form of the statute in such case made and provided and against the peace and dignity of the State.

And the jurors for the State, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to-wit (628) on the day and year aforesaid, with force and arms, at and in the county aforesaid, unlawfully, wilfully, wickedly, and feloniously did injure, lynch and kill one John V. Johnson, a prisoner confined in the common jail of Anson County, charged with the crime of murder, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

ROBINSON, *Solicitor.*

The defendant moved to quash the bill "for the reason that it appears upon the face of the bill that the offenses charged were committed, if at all, in Anson County, and there is no warrant or authority of law for finding the indictment or trying him in Union County;" and also to quash the first count in the bill because it charges that "the defendant conspired with others," without naming or charging "and others

to the jurors unknown." Both motions were allowed, and the State excepted and appealed.

Walter Clark, Jr., and *R. B. Redwine,* with the *Attorney-General* for the State.

J. A. Lockhart, H. H. McLendon and *F. J. Coxe* for the defendant.

CLARK, J. C. The first statute passed in this State in regard to lynching was ch. 461, Laws 1893. Each provision in that act has been brought forward and incorporated, with very slight verbal changes, under appropriate heads in the Revisal. Sec. 1 of said act, defining lynching and imposing the penalty, is now Rev., 3698, and is in the chapter on "Crimes," under the subhead Public Justice, and is as follows:

"3698. *Lynching.* If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime
(629) or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisonment in the State's Prison or the county jail not less than two nor more than fifteen years." 1893, ch. 461, sec. 1.

Sec. 2 is now Rev., 3200, and provides that the Solicitor shall prosecute and have the prisoners bound over to the Superior Court of an adjoining county.

Sec. 3 is as to witnesses testifying, and is Rev., 3699.

Sec. 4 of the Act of 1893 is Rev., 3233, in the chapter on "Criminal Proceedings," subhead Venue, and reads:

XI. VENUE.

"3233. *Lynching.* The Superior Court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender, to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the Solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed, from time to time, until the offenders are brought to justice." 1893, ch. 461, sec. 4.

Sec. 5, as to witnesses answering questions, is made Rev., secs. 3201 and 1638. Secs. 6 and 7 are the same as Rev., sec. 1288 and 2825. The whole of ch. 461, Laws 1893, is thus in the Revisal, and its force and effect is not impaired by the fact that it has been split up and its different sections placed under appropriate heads. It seems to us that the above provisions fully define the offense intended to be repressed, and designate the punishment and precedure. There are many (630) offenses in this chapter on Crimes which, though not common-law offenses, are not defined save by using a term of common knowledge, as "abandonment," "lynching," etc. It is not necessary to prescribe that an act is a misdemeanor or felony. The punishment affixed detemines that. Revisal, 3291; *S. v. Fesperman,* 108 N. C., 772.

It was error to quash the bill on the ground that the offense was not committed in Union County, which is an adjoining county of Anson. Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. Without some such provision an indictment could rarely be found in such cases. We cannot concur with the argument that such provision (Revisal, 3233) is beyond the scope of the law-making power and unconstiutional.

The Legislature of North Carolina has full legislative power, which the people of this State can exercise completely and as freely as the Parliament of England or any other legislative body of a free people, save only as there are restrictions imposed upon the Legislature by the State and Federal Constitutions. In the very nature of things there is no other power that can impose restrictions. When the Constitution uses the words "jury" and "grand jury" they are interpreted as being the same bodies, which were known and well recognized when the Constitution was adopted. But this is a rule of ascertaining the meaning of the words and not a restriction upon the power of the Legislature to make provisions as to venue and the like incidental matters, which in nowise affect the nature and composition of a jury and grand jury. Hence, the qualification of jurors, the number of challenges, venue, and other similar provisions as to procedure are in the discretion of the Legislature. (631)

The legislative power can be restrained only by constitutional provisions. It cannot be restricted and tied down by reference to the common law or statutory law of England. There is nothing in the common law or statute law of England which is not subject to repeal

by our Legislature, unless it has been re-enacted in some constitutional provision.

That the Federal Government is one of granted powers solely, and the State Government is one of the granted powers as to the Executive and Judicial Departments, but of full legislative powers except where it is restricted by the State or Federal Constitution, is elementary law. This is nowhere more clearly stated than by Black Const. Laws, secs. 100 and 101, as follows:

"Sec. 100. Under the system of government in the United States the people of each of the States possess the inherent power to make any and all laws for their own governance. But a portion of this plenary legislative power has been surrendered by each of the States to the United States. The remainder is confined by the people of the State, by their Constitution, to their representatives constituting the State Legislature. At the same time they impose, by that instrument, certain restrictions and limitations upon the legislative power thus delegated. But State Constitutions are not to be construed as grants of power (except in the most general sense), but rather as limitations upon the power of the State Legislature.

"Sec. 101. Consequently, the Legislature of a State may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the Constitution of the United States or by that of the State, or unless it improperly invades the separate province of one of the other departments of the government, and provided that the statute in question is designed to operate upon subjects within the territorial juris-
(632) diction of the State." To same purport *McPherson v. Blacker,* 146 U. S., 25; *Ins. Co. v. Riggs,* 203 U. S., 253.

That eminent authority, Cooley Const. Lim. (7 Ed.), 126 says: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the *full and complete* power as it rests in, and may be exercised by, the *sovereign power* of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion." On the next page he further says that "The American Legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed," by some inhibition in the State or Federal Constitution, but the Legislature cannot

exercise the judicial and executive functions of the British Parliament, which is supreme. This is a clear cut and very exact statement.

It is said by Judge Cooley, Cons. Lim. 128 (7 Ed.), quoting from *Chief Justice Redfield* in *Thorpe v. R. R.*, 27 Vt., 142: "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question."

In *S. v. Matthews*, 48 N. C., 458, *Judge Pearson* said: "With the exception of the powers surrendered to the United States, each State is absolutely sovereign. With the exception of the restraints imposed by the Constitution of the State and the Bill of Rights, all legislative power is vested in the General Assembly." This is quoted by *Bynum, J.*, with approval, *S. v. R. R.*, 73 N. C., 537.

Our Legislature has the same legislative power as the British Parliament, except where some legislative power is expressly denied it by the Constitution of the State or Union, but, unlike Parliament, it cannot exercise judicial or executive functions, and that only because the Constitution has bestowed those functions upon the other two departments. If the State had adopted no Constitution, as was the case in Rhode Island, till 1843, the Legislature would have been supreme, as in England, subject only to the Federal Constitution, and there (633) is now, and necessarily can be no limitations upon the Legislature, save those expressly imposed by the State and Federal Constitutions as Judge Cooley well says. Under the North Carolina Constitution of 1776 the Legislature elected all the executive officers of the State and created and modified at will the judicial department and chose its officers.

The subsequent changes in the State Constitution have put the other two departments upon a more independent footing, but have not added any other limitations upon the legislative power of the General Assembly.

It has long been the statute that in the interest of justice the Court

can remove any cause, civil or criminal, to some adjacent county for trial. Revisal, 426-428. If the trial before the petit jury can by legislative authority be transferred to another county, the far less important matter of the venue of the inquiry and finding by the grand jury can also be transferred. In fact, it has often been provided that the grand jury may find a true bill in certain cases where the offense was committed beyond the limits of the county, as will be seen by references to other sections of the subhead in which Revisal 3233 is found, *i. e.*, 3234: "When any offense is committed on waters dividing counties." 3235: "Where assault is in one county, death in another." 3236: "Assault in this State, death in another." 3238: Death in this State, mortal wound given elsewhere." 3237: "Person in this State injuring one in another." Also secs. 3403 and 3404 as to embezzlement and conspiracy by railroad officers, confer jurisdiction upon any county through which the railroad passes, and there are still other statutes giving the grand jury jurisdiction to inquire as to offenses committed out of their own county. The Legislature is not likely to increase needlessly the instances in which a grand jury can inquire into offenses committed out of its own county, but of the necessity of such statutes the General Assembly is sole judge.

(634) Up to 1739, indictments for offenses occurring anywhere in North Carolina were cognizable by a grand jury sitting in Chowan County, at Edenton. In that year the venue was changed to New Bern. From 1746 to 1806—for sixty years—indictments were found in district courts, though the grand jury did not sit in the county where the offense was committed, unless that happened to be the county in which the Court was held, and this is the case still with all indictments in the Federal Courts.

If it were possible to hold that the Legislature cannot shape the criminal procedure of this State to provide remedies required by the exigencies of the present time, unless the same remedies had been found to be necessary in England and had occurred to and been adopted by those administering its laws in years long gone by, we find that in fact this same necessity of providing for the investigation by the grand jury of another county had been there provided for as to many offenses. In 4 Bl. Com., 303, we find that while a grand jury could not usually inquire as to offenses committed out of their county, by legislative authority this could be done in very many instances, among others, "Offenses against the Black Act, 9 Geo. I., ch. 22, may be inquired of and tried in any county in England at the option of the prosecutor;" "So felonies in destroying turnpikes, etc. (8 Geo. II. and 13 Geo. III., ch.

84), may be inquired of and tried in any adjacent county;" and "murders, whether committed in England or foreign parts," may, by virtue of 33 Henry VIII, be inquired of and tried in any shire in England; "any felonies committed in Wales may be indicted in any adjoining county in England." 26 Henry VIII, ch. 6. And there are very many similar statutes there mentioned which were enacted, like the above, long prior to the American Revolution, thus showing that the venue of offenses cognizable before any grand jury is a matter of legislative enactment.

In 1 Stephen History Crim. Law in England, 277, it is pointed out that there are eighteen exceptions by statute to the (635) rule requiring an indictment to be found by a grand jury of the county (the first having been enacted as far back as 2 and 3 Edw. VI.), and he says their very number proves "that the general principle which requires so many exceptions is wrong." And on page 278 that distinguished Judge and author adds: "A rules which requires eighteen statutory exceptions and such an evasion as the one last-mentioned in the case of theft—the commonest one—is obviously indefensible. It is obvious that all courts otherwise competent to try an offense should be competent to try it, irrespectively of the place where it was committed, the place of trial being determined by the convenience of the Court, the witnesses, and the person accused. Of course, as a general rule, the county where the offense was committed would be the most convenient place for the purpose." England has about the same area as North Carolina, forty counties and a far denser population—now more than thirty millions. North Carolina has nearly two and a half times as many counties (97) and about two million people. The population of the average English county is therefore forty times that of an average county in this State. If, neverthless, the public interest requires that even in England the finding of an indictment shall not be restricted always to a grand jury in the county where an offense is committed, for a stronger reason the Legislature here must have power in its judgment to change the venue in the interest of justice, with our smaller counties and sparse population.

The venue of a grand jury "is a matter under the control of the Legislature." *S. v. Woodard,* 123 N. C., 710. *S. v. Patterson,* 5 N. C., 443, is put on the express ground that the statute did not give the grand jury jurisdiction of an offense committed in an adjacent county, as had been the case under the previous district system. Besides, if there had been a defective venue the remedy was by a plea in abatement (which is practically a motion to remove to the proper (636)

county) and not a motion to quash. Revisal, 3239; *S. v. Carter,* 126 N. C., 1012; *S. v. Lytle,* 117 N. C., 801.

It was also error to quash the first count. The indictment is against Lewis, and in charging that he "conspired with others" the bill complies with Revisal 3698, which simply provides that, "If any person shall conspire to break," etc. It was not required to name the others, or to charge that they were unknown. The words "with others" is tautology and mere surplusage. The "con" in the word "conspire" embraces the idea that it is an act done "with" another or others. Even if the statute had used the words "with others," it would have been sufficient to recite in the bill "with others" without charging their names, or that they were unknown. Revisal, 3250; *S. v. Hill,* 79 N. C., 658; *S. v. Capps,* 71 N. C., 96.

Reversed.

CONNOR, J. I concur in the opinion of the Court in this case with much hesitation. I do not concur in some of the reasons which are given to sustain it. The Court held, in a well-considered and able opinion by *Mr. Justice Shepherd* in *S. v. Barker,* 107 N. C., 913, that, although the term grand jury is not found in our Constitution, the section of the Bill of Rights guaranteeing immunity from criminal prosecutions, except upon "Presentment, Indictment, or Impeachment," must be construed to mean "Indictment by a grand jury," as defined by the common law, citing with approval the language of Judge Cooley in that connection. Const. Lim., 59. It was held, in that case, because, at common law, "the concurrence of twelve jurors was absolutely necessary" to find a bill of indictment, it was equally so in North Carolina, and that the Legislaure had no power to dispense with such "absolute necessity." *English v. State,* 31 Fla., 340. If my investigation (637) had led me to the conclusion that the *venue* entered into and was an essential element, in the term "indictment" at common law, at the time of the "separation from the Mother Country," I could not hestitate to declare that, in my opinion, it was not within the power of the Legislature to abrogate the common law in that respect. I cannot concur in the suggestion that such power is vested in the Legislature. The people, with whom alone is political sovereignty, have expressly declared that their governmental agencies must act and move within the orbit asigned to them by the Constitution. There is no place for arbitrary power in our governmental system of checks and balances. I do not sympathize with suggestion that no part of the common law is imbedded in our Constitution. Speaking of the common law, after noting

some of its defects, Judge Cooley wisely says: "But, on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought expressly to protect the rights and privileges of the individual man. Its maxims were those of a sturdy and independent race, accustomed, in an unusual degree, to freedom of thought and action, and to a share in the administration of public affairs, and arbitrary power and uncontrolled authority were not recognized in its principles, * * * and, if the criminal code was harsh, it, at least, escaped the inquisitorial features which were apparent in the criminal procedure of other civilized counties, and which have been ever fruitful of injustice, oppression and terror." That those who came to this colony and "builded" our institutions well knew and jealously guarded these great principles, every page of our early history illustrates. The language of Judge Cooley applies with special force to them. "From the first, the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and (638) circumstances in the new country, and those particulars they omitted as it was put in practice by them. * * * Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation and protested against the trampling under foot of that time-honored principle, that trials for crime must be by a jury of the vicinage." When the courts in this and others States have been called upon to approve departures from common-law principles and procedure, in criminal trials, they have steadily refused to do so. In *S. v. Branch,* 68 N. C., 186, it was shown that a Judge on the circuit had directed the witnesses to be examined by the grand jury in open court. *Chief Justice Pearson,* sustaining a motion to quash the bill for that reason, said: "This procedure is opposed to the principles of the common law, which means 'common sense.'" He further says: "There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever in force and in use in the colony of North Carolina; very certainly such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republican government." In *Lewis v. Comrs.,* 74 N. C., 194, *Bynum, J.,* in a very strong opinion, denying the right of a Solicitor to be present when the grand jury are discharging its duties, finds authority for the decision in the common law. After noticing the English practice, as described by

Blackstone and others, he says: "It is more consonant to justice and the principles of personal liberty. The powers of the grand jury, therefore, should not be extended further beyond these conservative and salutary principles than is clearly warranted by public necessity and the most approved precedents." In *S. v. Miller,* 18 N. C., 500, while the Judges differed in respect to the law, both the *Chief Justice* and *Judge Gaston* concurred that in considering questions pertaining
(639) to the rights of the accused, in trial by jury, recourse must be had to the ancient common law. The same is true in every case where the question has come into debate and the citizen has asserted his rights in respect to the manner in which he could be called to answer, and put upon trial, for a criminal offense. *Millingan, ex-parte,* 71 U. S., 2. In *Byrd v. State,* 1 How. (Miss.), 176, *Sharkey, C. J.,* said: "The right of trial by jury, being of the highest importance to the citizen, and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the Constitution of this and all other States as sacred and inviolable. The question naturally arises, How was it adopted by the Constitution? That instrument is silent as to the number and qualifications of jurors; we must, therefore, call in to our aid the common law for the purpose of ascertaining what was meant by the term 'jury.' It is a rule that when a statute of the Constitution contains terms used in the common law without defining particularly what is meant, then the rules of the common law must be applied in the explanation." *The Opinion of the Judges,* 41 N. H., 550, strongly states the law in this respect. *Brucker v. State,* 16 Wis., 356; *People v. Powell* (Cal.), 11 L. R. A., 75. I agree, of course, that there is much of the common law which is in force in this State by virtue of the Revisal 1905, ch. 15, sec. 932, which is but the re-enactment of the Acts of 1715 and 1778, and, as to this, the Legislature may, as it has in many instances done, repeal, or modify it.

In respect to those elementary principles and provisions upon which the security of life, liberty and property depend, guaranteed by Magna Charta, which was engrafted either in express terms or by necessary implication into our Bill of Rights, I do not concede that the power exists, in either department of the government, to abrogate or modify them. To do this is among "the reserved rights" to be exercised only by the people themselves, in convention. This is one of "the powers not delegated" to the legislative department of the government. I can-
(640) not, therefore, assent to the proposition, sometimes found in judicial opinions, that the Legislature has all of the powers of the British Parliament, except when expressly restricted. In the dis-

cussion of this very important and delicate question, Judge Cooley says: "But to guard against being misled by a comparison between the two, we must bear in mind the important distinction * * * that with the Parliament rests, practically, the sovereignty of the country, so that it may exercise all the powers of the government, if it will do so; while, on the other hand, the Legislatures of the American States are not the sovereign authority, and though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and *others by implications which are equally imperative.*" Const. Lim., 105. He further says: "So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American Legislatures, in regard to their ultimate powers, cannot be traced very far. The American Legislatures only exercise a certain portion of the sovereign power. The *sovereignty* is in the people; and the Legislatures which they have created are only to discharge a trust of which they have been made a depository, but which has been placed in their hands with well-defined restrictions." This, I think, the sound view. *Nicholas v. McKee,* 68 N. C., 430.

The difficutly which I have experienced in arriving at a conclusion in this case is to fix the line at which the Legislature may change or abrogate the procedure, venue, etc., in regard to indictment as they were by the common law recognized and administered by the courts in England. That it may not lessen the number required to concur in finding a bill or permit witnesses to be examined before the grand jury in public or to permit the prosecuting officer to remain with the grand jury while in session, is settled upon the ground that such (641) things were not permissible by the common law. The only decided case which was cited by counsel, or I have been able to find in this country, in point, is *Swart v. Kimball,* 43 Mich., 443. There, the statute provided that for cutting timber on the public lands the person charged could be proceeded against in the county where the offense was committed or such other county as the Attorney-General should direct. The defendant in error was prosecuted, under the act, in a county other than that in which the offense was committed. He was arrested upon a *capias* and upon *habeas corpus* was discharged. He brought the action against plaintiff in error who procured the information and arrest and recovered judgment for false imprisonent. Several irregularities in the proceedings were alleged.

In regard to the validity of the statute authorizing the change of

venue, *Cooley, J.*, said that the act was "manifestly in conflict with one of the plainest and most important provisions of the Constitution." Now, that in jury trials it is implied that the trial shall be by jury of the vicinage, is familiar law.

Blackstone says the jurors must be of the *visne* or neighborhood; which is interpreted to be of the county. 4 Black. Com., 350. This is an old rule of the common law, citing Hawk P. C., b., 2 c., 40; 2 Hale P. C., 264. He refers to certain statutory changes made by Parliament prior to the separation of the colonies, saying: "But it is well known that the existence of such statutes, with the threat to enforce them, was one of the grievances which led to the separation of the American Colonies from the British Empire. If they were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written constitutions of the American States, in which the utmost pains have been taken to preserve all the securities of in-
(642) dividual liberty. * * * But no one doubts that the right to a trial by jury of the vicinage is as complete and certain now as it ever was; and that, in America, it is indefeasible." After pointing out in strong language that injustice and oppression to which the citizen may be subjected, if compelled to answer an indictment in a county otherwise than that in which the offense was alleged to have been committed, he concludes: "We have not the slighest hesitation in declaring that the act, so far as it undertakes to authorize a trial in some other county than that of the alleged offense, is oppressive, unwarranted by the Constitution and utterly void."

I find a number of cases, cited by counsel, denying the right of the State to remove a criminal trial from the county of alleged offense for local prejudice. It is so held in a strong opinion by the Supreme Court of California, *People v. Powell, supra.* Judge Cooley says: "But this may be pressing the principle too far." It is so held in *Kirk v. State,* 41 Tenn., 344, and *Osborne v. State,* 24 Ark., 629. But in both these States the Constitution expressly guaranteed a trial in the county in which the offense was alleged to have been committed.

I have carefully examined the history of parliamentary legislation in England on the subject for the purpose of learning how far the venue in criminal proceedings has been regarded in that country, as fixed by Magna Charta. Fitz James Stephens in the "History of the Criminal Law," vol. 1, 274, gives an interesting account of the statutory changes made in the law in regard to venue. Some of them are pointed out in the opinion of the *Chief Justice.* See, also, 2 Mews' Fisher's Com. Law Dig., 2263.

In *Brucker v. State, supra, Dixon, C. J.*, discussing the right of the Legislature to provide that seventeen persons might compose the grand jury, said: "The foundation of the objection is, that this was the rule at common law (that the grand jury should consist of not more than twenty-three or less than twelve) recognized by the Consti- (643) tution, against which the Legislature had no power to provide. Upon an examination of the authorities, we find no such fixed common-law principle. The only inflexible rule, with respect to numbers, seems to have been that there could not be less than twelve nor more than twenty-three. The concurrence of twelve was necessary to find a bill, and there could not be more than twenty-three, in order that twelve might form a majority. * * * We are of the opinion, therefore, that it is competent for the Legislature, within the limits prescribed by the common law, to increase or diminish the number of grand jurors to be drawn and returned without infringing the rights of the accused granted by the Constitution." In *Byrd v. State, supra, Sharkey, C. J.*, discussing the subject, says: "The Legislature cannot abolish or change substantially the panel or jury, but it may, it is presumed, prescribe the qualifications of the individuals composing it."

I have noted these cases to show that it is held by courts adhering to the principle that the guarantee of immunity from criminal prosecutions, otherwise than by indictment, that the Legislature may change the law in particulars *non-essential,* such as qualification of jurors, etc., but in regard to essentials, such as number, etc., the constitutional provisions must be read and construed in the light of the common law, and are not subject to legislative change.

In the absence of express legislative enactment, there can be no question that the *venue* is the county in which the offense is alleged to have been committed. I incline to the opinion, at least to the extent of surrendering my doubts to the judgment of the majority of the Court, that the act is not violative of the right of the defendant. In doing so, I am also influenced by the wise and salutary principle so frequently announced by the greatest Judges who have sat upon the State and Federal benches, that every presumption should be made to support the constitutionality of a statute. While I am by no means certain (644) that the beneficial results anticipated by the Legislature will be realized, I sympathize so strongly with the desire and purpose to provide all possible means for detecting and, after trial and conviction, punishing those engaged in the crime of lynching, hoping to suppress it, that I am the more willing to surrender my doubts to its best judgment. It is the first time in our history that the question has been pre-

sented, because it was not until the Act of 1893 that the grand jury of any other county than that of the offense was given power to find a bill of indictment.

It would seem that in England it has been deemed necessary to change the venue and permit indictments to be found in counties other than those in which the offense was committed. For many years the statute permitting the Court, upon motion of the Solicitor, supported by affidavits, to remove a criminal case for trial to an adjoining county on account of local feeling, has been invoked without question. While the right to remove, after a judicial determination that a fair trial could not be had in the county of the offense, might be distinguished from the right to indict and try in the county of the Solicitor's selection, I concede that the recognition of the validity of the removal statutes weighs in my mind in favor of the Acts of 1893.

I have felt impelled to say this much, because of the importance of the subject and a desire to proceed with the utmost caution in experimental legislation of this kind. While it is not for the judiciary to trench upon the domain of the Legislature, I trust that I may, without impropriety, express the hope that the occasion and condition which, in its judgment, called for this act, may soon pass away; and that we may return to the common-law way of securing to every man immunity from being called to answer for violation of the law otherwise than by indictment preferred by a grand jury summoned from the county
(645) where the crime is supposed to have been committed. Cooley, 392; Story Const., sec. 1769. In addition to the humane policy which protected a man in his hour of trial from being carried away from his home, deprived of the opportunity to have his witnesses, and the benefit of such reputation and character as he had made among his neighbors, this ancient way placed upon the people of each county or neighborhood the responsibility for securing a fair, firm, and just administration of the law, detection and punishment of the guilty and protection of the innocent. How far removing from the people of each county this stimulus and by carrying their citizens into adjoining counties for trial, will promote the end desired, is not clear to my mind.

These are questions, however, committed to the wisdom of the Legislature. I disclaim any right to question the constitutionality of an act of the Legislature because it does not accord with my judgment. This would be to move out of the orbit assigned to the Judge. Judges must not be wiser than the law, but be content to construe and declare it in the light of principle, precedent and constitutional limitations.

WALKER, J. I concur in the result reached in this case and in the opinion of the *Chief Justice,* except in so far as it is therein impliedly stated that the powers reserved in the Constitution by the people may be exercised by their representatives in the General Assembly. My opinion is that the Legislature has only the powers delegated to it by the people, and all powers not so given are reserved to the people themselves, just as by the ninth and tenth articles of amendment of the Constitution of the general government it is provided that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people, but the powers not delegated to the United States by that instrument, or prohibited by it to the States, are reserved to the States respectively, or to the people. The Constitution is a grant of specific powers and not a restriction upon powers (646) granted, which, but for that restriction, would be general and plenary in their nature. The powers granted are to be exercised only as prescribed, and those of a legislative character by the General Assembly, but all not specially granted remain with the people to be afterwards granted or withheld by them as they may deem best for the public welfare. In this respect, the language of the Constituton of this State is substantially like that the Constitution of the United States, so far as they both confer power upon the three departments of government, and for this reason they should receive practically the same construction. The legislative power under neither is unlimited, except as it may be said that it is not to be restricted so long as the Legislature moves within its legitimate orbit. The words of Art. I, sec. 37, it seems to me, could have no force under any other construction. As we must ultimately construe that instrument and say what it means, we should be exceedingly careful to see that no power is taken from the people that they have not given in their Constitution, but confine each of the departments and every agency of government to the particular sphere of action assigned to it.

I do not care to enter upon a discussion of the question whether the Legislature had the power to pass the act under which the indictment was found in this case and thereby to authorize the laying of the venue in Union County. Such power existed, in my opinion, and I am content to rest my assent to the conclusion of the Court upon the reasoning and the authorities, as contained in the opinions of the *Chief Justice* and *Mr. Justice Connor.* This power should be confined within reasonable limits, and the Court should see that it is not exercised to the oppression of the citizen or in such manner as to seriously imperil his natural rights. There is no such case presented here. My only

purpose in giving expression to my views at all, is that I may
(647) refer to a matter which is not discussed in the opinion of the Court.

It is suggested that Laws 1893, ch. 461, as brought forward in The Revisal, secs. 3233 and 3698, does not cover this case, as sec. 3698 does not define the crime of lynching, and no statute can be found that creates such an offense. It is therefore argued from that premise, and I think erroneously, that as sec. 3233 confers jurisdiction upon the Court of any county adjoining that in which the crime is committed only in those cases where the offense charged is "lynching," it follows that the section is nugatory—a dead letter on the statute-book. It will be strange indeed if the Legislature had made so great a mistake, but I do not think it has. The first count of the indictment charges that the defendant conspired with others to break and enter the jail of Anson County for the purpose of lynching, injuring and killing John V. Johnson, a prisoner confined therein, and charged with the crime of murder; the second, that he actually did break and enter the jail for the same purpose, and the third, that, after so entering, he did lynch, injure and kill the said prisoner; and all the counts in the bill conclude against the statute and also at common law. When we examine The Revisal, we find several sections relating to the crimes charged in the bill, namely, secs. 1288, 2825, 3200, 3201, 3233 and 3698. The first (sec. 1288) relates to the costs incurred in the prosecution of persons conspiring to break and enter or for breaking and entering a jail for the purpose of killing or injuring a prisoner therein confined; the second (sec. 2825), to the duty of the sheriff to guard the jail and protect prisoners against persons who may threaten to break and enter it for the purpose aforesaid, and prescribes how he shall proceed; the third (sec. 3200), to the duty of the Solicitor, and provides that he shall cause immediate investigation to be made before a judge, or other proper officer, who shall bind the person found to be probably guilty
to the ensuing term of the Superior Court of some adjoining
(648) county or commit him to the jail of said county; the fourth (sec. 3201), to the testimony of witnesses, requiring all persons to give evidence in such cases, but pardoning those who participated in the crime; the fifth (sec. 3233), confers full and complete jurisdiction upon the Court of any adjoining county to indict and try offenders against the statute; the sixth (sec. 3698), makes it a felony to conspire to break or enter a jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or injuring any prisoner so confined, or to engage in breaking or entering any jail or

like place with intent to kill or injure any prisoner therein confined, and fixes the punishment.

These sections were all taken from Laws 1893, ch. 461, but they are not arranged consecutively in The Revisal, nor in the order in which they appear in said acts, but the sections are severally assigned to their appropriate titles or chapters in The Revisal. All of the sections except those numbered 2825 and 3698 have special reference to the crime of lynching, but there is no offense created by law and known or designated by that name, and when, therefore, secs. 3200 and 3233 require that persons guilty of that crime shall be bound to the Superior Court of an adjoining county and indicted and tried in that county, we are unable to know what the Legislature means, unless we refer to the original act, which makes everything plain. We are at liberty to make this reference because the statute will otherwise be incapable of any intelligent construction. It is not only obscurely worded and of doubtful import, but it can have no meaning at all; whereas, it plainly appears that it was intended to have some meaning and to secure the detection and prosecution of a very dangerous class of offenders. Shall we close our eyes to the only source from which we can secure light, and by which the meaning and intent will be made manifest and thus defeat the Legislative will, or shall we turn the light on that we may see and know what was meant? The law in such a case, I (649 think, permits and, indeed, enjoins that the latter course should be taken. *United States v. Lacher,* 134 U. S., 624; *The Conqueror,* 166 U. S., at 122.

It is a general rule in the construction of statutes that when a provision of a Revision or a Code is plain and unambiguous the Court can not refer to the original statute for the purpose of ascertaining its meaning; but if it is of doubtful import, or, without such reference, the provision is meaningless, it is proper to resort to the prior act which had been codified or revised, for the purpose of solving the ambiguity; and especially should this be the rule where the provision is so worded as to be incapable of a fair construction without considering the original statute. Endlich Int. Statutes, secs. 50 and 51; Black Int. of Laws, sec. 136, pp. 365, 366, 367; Lewis Suth. Stat. Const. (2 Ed.), secs. 450-453 and 271. "But if it were conceded that the statute be somewhat ambiguous, we are authorized to refer to the original statutes from which the section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply." *The Conqueror, supra; United States v. Lacher, supra.*

If the headings or marginal notes of the different sections of The

Revisal can not be used to explain their meaning, then the introduction of the words, "the crime of lynching," into sec. 3233 renders it not only ambiguous, but insensible, as there is then no such crime created by the law, and there was no crime known by that name at the common law; and in that event we are clearly permitted by all the authorities to look at the original statute, although it may have been repealed by The Revisal, in order to ascertain what particular crime the Legislature intended to describe when it used those words.

When the original statute, Laws 1893, ch. 461, is examined we find that sec. 4 of that act, which corresponds with sec. 3233 of The
(650) Revisal, refers to sec. 1, which is sec. 3698 of The Revisal; so it appears from this comparison that the words, "the crime of lynching," were used by the revisers as a convenient form of expression in view of the fact that they had placed headings, titles or marginal references to each section, indicating what was meant by the term "lynching," under express authority given to them by the Act of 1903, ch. 314, which provided for a compilation and revision of the statutes of the State and by which commissioners were appointed for that purpose. This being so, sec. 3233 should be held to refer to sec. 3698; and this is also true of sec. 3200 and the other sections above enumerated, as they all were taken from the same act, and by the same rule of construction are to be taken as referring to each other.

When these several sections of The Revisal are thus considered, we find that the Superior Court of the county of Union had jurisdiction to indict through a grand jury in that court, and the power to hear, try and determine the indictment when found, at least so far as the two offenses mentioned in sec. 3698 are concerned; and these are the two offenses described in the first two counts of the bill.

The same result may be reached by applying to The Revisal another rule of construction. It is generally held that the title of an act is a part of the same, but not in the sense that it can be used to construe it, unless the meaning of the act is ambiguous, in which case we may consider it for the purpose of ascertaining the true meaning. *S. v. Patterson,* 134 N. C., 612. But this rule does not apply to revisions of statutes where the revisers have been authorized to insert marginal references to the original statutes and to distribute the statutes under appropriate titles, divisions and subjects, as was done by the Act of 1903, ch. 314, sec. 1. Endlich Int. of Stat., secs. 51 and 69; Bishop Written Laws, sec. 46; for, as the eminent writer last mentioned says, such headings and the like in revisions and codes are deemed to be of somewhat greater effect than the ordinary titles to legislative acts, and to indicate at

least the nature of the enactment. If this rule is applied, we (651) find that the intent that sec. 3233 should refer to the jurisdiction of offenses described in sec. 3698 is made perfectly clear and manifest. As to the right to construe the several sections with reference to each other, see *Fortune v. Comrs.*, 140 N. C., 322.

My conclusion is that the indictment sufficiently charges the commission of an offense made criminal by sec. 3698, and that secs. 3200 and 3233 refer to the crimes described in that section when they authorize the indictment to be found and the trial to be had in an adjoining county. This makes it unnecessary to inquire whether the indictment is otherwise sufficient to show jurisdiction in the Court, under secs. 3200 and 3233, or, to speak more generally, whether the jurisdiction of the Court can be sustained on other grounds.

As there is at least one offense, if not more than one, charged in the bill of which the Court has jurisdiction, the motion to quash should be denied and the defendant required to plead to the indictment.

BROWN, J., dissenting: I concur in so much of the opinion of the Court as upholds the power of the General Assembly generally to provide for the removal of criminal actions to an *adjoining county,* either before bill found or after. I know of no clause of our Constitution, Federal or State, which prohibits it. Assuming that the jurors must be summoned from the "vicinage," as at common law, I think an adjoining county might well be held to be within the "neighborhood," for that is what the term signifies, although in England, where the counties are very large, it is held to be a jury from the county. I would hestitate to hold that the Legislature has the power to enact that one who commits a crime in Cherokee may be indicted and tried in Currituck. My convictions, however, compel me to dissent, upon other grounds, from the judgment of my brethren that the grand jurors of Union County had jurisdiction over the offense charged in the bill (652) of indictment. The Act of 1893, ch. 461, together with its title, was as effectually effaced and blotted out from the statute-law of the State by The Revisal of 1905, as if it had never been enacted. Revisal, sec. 5453. Therefore, at the time of the commission of the alleged offense and the finding of the bill, the only statute law which, it is contended, gives jurisdiction to the grand jurors of Union County, is sec. 3233 of The Revisal. The bill alleges that the offenses therein charged were committed in Anson County. A plea in abatement is not, therefore, necessary. This Court can see on the face of the bill that the Superior Court of Union had no jurisdiction, unless the statute confers

it. It is familiar learning that a motion to quash may be made at any time where it is apparent upon the face of the record that the Court was without jurisdiction.

The bill of indictment is drawn under sec. 3698 of The Revisal, which is copied in the opinion of the Court. The first count charges a conspiracy to break into the common jail of Anson County, entered into within said county, and the second charges the actual breaking into said jail. The third count charges no offense, either against common law or statute.

In order to give the Superior Court of Union County jurisdiction under the terms of sec. 3233 it must plainly appear that sec. 3698 creates an offense and defines it as "lynching," for sec. 3233 confines the exercise of jurisdiction by the Superior Court of the adjoining county to the "crime of lynching," and to that alone. Now, does sec. 3698 create and define in terms a crime known as lynching? That is the *crux* of this case. Being a criminal statute, it must be construed strictly, as the sacred right of the liberty of the citizen forbids a liberal construction and a reading into the statute of words that are not there. The word "lynching" is nowhere used in the body of the statute, and (653) no such distinct offense is named and created by it. Had the statute, sec. 3698, declared in express terms that the acts therein denounced shall constitute the "crime of lynching," or that any person committing such acts "shall be guilty of lynching," I should say the Superior Court of Union County had jurisdiction under sec. 3233. But the body of the statute fails to so declare. It is attempted, however, to "piece out" the statute by bringing in a so-called title. It must be admitted that the title to the Act of 1893 can not be looked to, for that is as dead as the body of the act, as I have shown. The only title that can be looked to is the one word "Lynching," which is printed in large letters between the number and the body of sec. 3698. If that can be called a title, then, according to the authorities, it does not help the contention of the State. It has been established in England since Lord Coke's time, by an unbroken line of judicial decisions, that the title of a statute is not a part of it, and is, therefore, excluded from consideration in construing it. Endlich on Statutes, 73; *Powell's case,* 11 Rep., 336. In this country, while the title of a staute, in the absence of a constitutional provision, is not regarded as a part of the statute, it is legitimate to resort to it as an aid in ascertaining the meaning of the statute, but only when the language and provisions in the body of the act are ambiguous and of doubtful meaning. Endlich on Statutes, p. 74,

and cases cited. Such is the ruling of this Court. *Hines v. R. R.*, 95 N. C., 434.

In *S. v. Patterson,* 134 N. C., 612, *Clark, C. J.,* says: "The caption of an act was not at all considered to any extent whatever in construing it, for reasons given in *S. v. Woolard,* 119 N. C., 779, but the modern doctrine is that when the language of the statute is ambiguous, the courts can resort to the title as aid in giving such act its true meaning, but that this can not be done when the language used is clear and unambiguous." The statute construed in that case was, like the one under consideration, free from abiguity, but in conflict with its title. The title was disregarded and the body of the statute (654) followed. The title of a statute can not control or vary the meaning of the enacting part, if the latter is plain and unambiguous, as the statute in the present case is, nor can the title be used for the purpose of adding to the statute or extending or restraining any of its provisions. Black on Interpretation of Laws, p. 173. "Cases which are clearly not within the contemplation of the enacting clause can not be brought into it merely because the title appears to include them." *Ib.*, p. 173.

"Lynching" is a word of much more general and extended meaning and significance than any words contained in the body of sec. 3698, and being a penal statute especially the term ought not to be read into it. Black, p. 173; *United States v. Briggs,* 9 Howard, 351. There is no such crime as lynching known to our law, and if the body of this statute does not create it, then it does not exist. The word in its well-known significance and generally accepted meaning embraces many illegal acts which do not come within the purview of this statute and does not embrace those mentioned in it. The acts made illegal by it constituted indictable offenses before its enactment, and, were it repealed, would still be indictable in the counties where committed.

While no statute of this State defines what is lynching, the lexicographers and historians have given it a well-defined and perfectly understood meaning, which excludes any of the crimes denounced in the act. The great Scotch novelist refers to a species of lynching when he refers to what was called Jedwood justice—"hang in haste and try at leisure." Again, the same versatile author, in his introduction to the Border Minstrelsy, speaks of a sort of lynching called "Lydford Law," quoted by *Mr. Justice Connor* in *Daniels v. Homer,* 139 N. C., 239. A most interesting writer in the American Law Register, Mr. John Marshall Gest, says that "the Lynch law of our country has a very ancient and respectable pedigree." He refers to the Vermic tribunals, (655)

originating in Westphalia, which executed thieves and murderers caught in the act, without trial or delay, and speaks of them as "Judge Lynch's cousin German."

The word "lynching" has been defined by legal as well as other lexicographers, and according to such definitions, and as the term is generally understood, the illegal acts commonly termed "lynching" can not be committed by a single individual; yet one person alone could be guilty of breaking and entering a jail with intent to kill, under this statute. "Lynching" is defined by Rapalje & Lawrence as "Mob vengeance upon a person suspected of crime." Law Dictionary, 778. It is "a term descriptive of the action of unofficial persons, organized bands, or mobs, who seize persons charged with or suspected of crimes, or take them out of the csutody of the law, and inflict summary punishment on them, without legal trial, and without warrant or authority of law." Black's Law Dictionary, p. 737. "A common phrase used to express the vengeance of a mob inflicting injury and committing an outrage upon a person suspected of some crime." Bouvier's Law Distionary, 287. See, also, *S. v. Aler,* 39 W. Va., 558.

Worcester and Webster define the word as the infliction of punishment without legal trial by a mob or by unauthorized persons. The word derives its origin, according to Worcester, from a Virginia farmer named Lynch, who, having caught a thief, instead of delivering him to the officers of the law, tied him to a tree and flogged him with his own hands. Lynching has no technical legal meaning. It is merely a descriptive phrase used to signify the lawless acts of persons who violate established law at the time they commit the acts, and is universally understood to signify the illegal infliction of punishment by a combination of persons for an alleged crime.

As I have said before, the offense of lynching was not known
(656) to the common law, and is unknown to the laws of North Carolina, because we have no statute creating and defining the offense. We are, therefore, in the anomalous situation of having a statute fixing the venue for the trial of persons charged with lynching, and yet there is no such crime known to our law, or created by the act. The statute not only fails to declare that the acts therein set out shall constitute the crime of lynching, but those acts do not come within any known definition of the term, as I think I have plainly shown.

A conspiracy to break or enter a jail for the purpose of killing a prisoner has never yet been called "lynching." Neither has the breaking into jail with the intent to kill or injure a prisoner been so denominated. Such acts were recognized indictable offenses before the passage

of the act, and are now indictable independent of it. But nowhere have they ever been termed "lynching." This phrase, by common usage, is applied only when the unlawful act is consummated and the illegal punishment actually inflicted. It is plain to me that the so-called title not only is no aid to a proper construction of the act, but the title, tested by every known definition of it, bears no relation to and does not embrace the crimes set out in the act. There is nothing in the statute open to construction. Its words are as simple and unambiguous as any that could have been used, and their meaning free from doubt. It is not "construing" that the statute needs, but amendment. That is what, with all deference, in my opinion, this Court has done to it.

For the reasons given, I do not think that sec. 3233 of The Revisal can reasonably be held to give to the Superior Court of Union County jurisdiction over persons charged with offenses committed in Anson County and indicted in Union under sec. 3698. I am of opinion that his Honor, *Judge Shaw*, was correct in quashing the bill.

Cited: S. v. Long, 143 N. C., 675; *S. v. Bossee*, 145 N. C., 581; *Bridge Co. v. Comrs.*, 151 N. C., 217; *Rodgers v. Bell*, 156 N. C., 386; *Hardwood Co. v. Waldo*, 161 N. C., 197.

---

(657)

STATE v. KINCAID.

(Filed 4 December, 1906.)

Seduction Under Promise of Marriage—Evidence—Corroborating Testimony—Comments of Counsel.

1. In an indictment for seduction under promise of marriage, evidence offered by the State before the defendant had become a witness, of his declarations to the prosecutrix acknowledging the obligation to marry her, but in giving his relations with another woman as an excuse for postponing the ceremony, was competent.
2. For the purpose of corroborating the prosecutrix, it was competent for her mother to testify that the prosecutrix told her that she was going to marry the defendant, but that he could not marry her then, as he was in trouble with another woman.
3. In an indictment for seduction under promise of marriage, the defendant's illicit relations with another woman, proved by his declarations to the prosecutrix, were properly the subject of comment by counsel.
4. In an indictment for seduction under promise of marriage, it is competent to ask the defendant on cross-examination if he had not transferred his property to avoid the result of the indictment.

CONNOR and WALKER, JJ., dissenting.

STATE *v.* KINCAID.

INDICTMENT against S. A. Kincaid, heard by *Justice, J.,* and a jury, at the March Term, 1906, of BURKE.

The defendant was convicted of the crime of seducing one Ethel Hood under promise of marriage, and from the sentence imposed he appealed.

Robert D. Gilmer, Attorney-General, and *Isaac T. Avery* for the State.

Self & Whitener and *S. J. Erwin* for the defendant.

BROWN, J. The defendant contends that the Court erred in admitting testimony that he was living in fornication and adultery with Lillian Davis, and the brief of the defendant's counsel points (658) out the pages of the record alleged to contain such evidence.

It is contended that such evidence is collateral to the issue and that it constitutes an attack on the defendant's character before he had become a witness and put his character in issue. Many authorities are cited in support of such contention, which it is unnecessary to review, as we think the counsel for the defendant have misconceived the purport and character of this evidence. It was brought out by the State, in chief, in the examination of the prosecutrix, who testified as to her seduction by the defendant, under promise of marriage, and the sexual intercourse with him had continued for some time. She says: "When I became pregnant I mentioned his promise to marry me. * * * He would say, 'Wait;' and said he was in a mess with a Davis girl. * * * He said he would stop off from the Davis girl and come in a month or so or as soon as he could, * * * and that the Davis girl had broken open a letter I wrote him."

For the purpose of corroborating Ethel Hood, Mrs. Jennie Hood, her aunt, was permitted over the defendant's objection to testify: "Ethel told me she was going to marry Sidney Kincaid. I asked her when, and she said, 'He says he can't marry now; that he was in trouble with the Davis girl.'" All this evidence was received before the defendant was offered as a witness. It was perfectly competent at the time it was offered, and the fact that the defendant afterwards, when examined in his own behalf, denied all relations with Lillian Davis, did not make it incompetent. These are declarations of the defendant to Ethel Hood; conversations with her, in which he gives his relations with Lillian Davis as an excuse for postponing the promised marriage with the prosecutrix. These declarations are a part of the *res gestæ,* so to speak, acknowledging and renewing the obligation to marry, but at the same time offering his relations with Lillian Davis as a reason for

putting off the performance of the promise. It is elementary (659) learning that declarations of a defendant pertinent to the issue, made in the hearing of a witness, are always admissible against him. *S. v. Lawhorn,* 88 N. C., 634.

The testimony of Mrs. Jennie Hood was not offered in any sense as "character evidence" against the defendant, but solely as corroborative evidence, tending to corroborate Ethel Hood's testimony as to the promise of marriage and why its performance was so long delayed. The record fails to disclose any testimony whatever as to the relations of the defendant with Lillian Davis, except the declarations of the defendant made to the prosecutrix, offered in chief by the State, as evidence of a promise to marry and as an excuse for postponing the ceremony.

During the argument before the jury, one of the counsel for the State was arguing that the defendant was now living in fornication and adultery with Lillian Davis, after debauching Myrtle Sudderth and seducing the prosecutrix. The defendant objected to the argument as to the defendant's living in fornication and adultery with Lillian Davis. The Court overruled the objection and allowed counsel for the State to proceed with his argument as to the adultery of the defendant with Lillian Davis, and the defendant excepted. We see no reason why the Court should have stopped counsel from commenting upon the defendant's relations with Lillian Davis and Myrtle Sudderth. He practically admitted his illicit relations with the latter, and that he left the State on account of them. His relations with Lillian Davis, proved by his declarations to the prosecutrix, were properly the subject of comment, and we can not see from the record that the counsel overstepped the bounds of legitimate criticism. *S. v. Horner,* 139 N. C., 603.

The defendant, being examined in his own behalf, was asked by the Solicitor of the State, if he had not transferred his property to avoid the result of this indictment. The defendant objected to (660) the question, and the objection was overruled. The witness said that he had done so, and the defendant excepted. We see as little merit in this exception as in the others in the record. It was competent to ask the defendant on cross-examination concerning his acts in reference to this charge against him. It would have been equally as competent to ask him if he had not fled from the charge.

We have examined each exception and find them all without merit. The case seems to have been fairly tried and we find

No Error.

CONNOR, J., dissenting: I concur in the opinion that the declarations

of the defendant made to the prosecutrix were competent for the purpose of supporting or corroborating her testimony in regard to the promise of marriage. It was not competent to prove that, either at the time they were made or at the trial, the defendant was living in adultery with the "Davis girl." The only controverted question in the case was whether, prior, and as an inducement to the prosecutrix to surrender her person to the defendant, he promised to marry her. This, if made at all, was some seven years before the trial, and several years before the alleged declaration. I concur with *Mr. Justice Brown* that "the record fails to disclose any testimony whatever as to the relations of the defendant with Lillian Davis, made to the prosecutrix." This being true, I do not think that the counsel for the prosectuion should have been permitted to argue to the jury "that he was then living in fornication and adultery with Lillian Davis," after the defendant's objection. After his Honor had correctly and clearly stated that the declaration was admitted for the sole purpose of corroboration, he was not called upon to introduce evidence to show that he was not living with Lillian Davis, except for the purpose of showing (661) the improbability of his having made the declaration. Whether he was or was not so living was not relevant to the issue. He did, however, expressly deny that he had illicit relations with her, and it is well settled that, being collateral, his denial was conclusive. *S. v. Cagle,* 114 N. C., 835. To permit the attorney for the State to use his declaration, admitted and competent for one purpose only, to persuade the jury that he was guilty of a separate and distinct crime, and draw therefrom prejudicial conclusions in regard to his guilt upon this issue, was error.

This is especially so after he had denied that he had such illicit relations with Lillian Davis. The testimony developed, on the part of the defendant and the prosecutrix, a course of lewd conduct well calculated to excite disgust and bring a jury to a verdict of guilty. It is in such case that the rules of procedure and of evidence, based upon experience and reflection, are in danger of being relaxed. The safety of the citizen, when charged with crime, depends upon at least a substantial enforcement of these rules. While the defendant may be guilty, he is entitled to be tried according to the "law of the land." I think that there should be a new trial.

WALKER, J., concurs in dissenting opinion.

Cited: *S. v. Malonee,* 154 N. C., 203; *S. v. Pace,* 159 N. C., 464.

(662)

STATE v. TROTMAN.

(Filed 4 December, 1906.)

License Taxes—Sale of Patent Medicines—Interstate Commerce.

In an indictment for selling patent medicine, etc., without license contrary to Rev., secs. 5150-1, where the jury by a special verdict found that certain citizens of this State gave orders for the medicines on a drug company in another State, which were forwarded to, received, and accepted by the company in that State, and the goods shipped from that State to the defendant, the drug company's agent in this State; that each package was wrapped in a separate parcel with the name of the purchaser marked thereon and then packed in one crate and shipped to defendant, who distributed same in the original form to the purchaser: *Held*, that the defendant was not guilty as he was at the time engaged in interstate commerce.

INDICTMENT against O. A. Trotman, heard by *Long, J.*, and a jury, at the August Term, 1906, of FRANKLIN.

From a judgment of not guilty, on a special verdict, the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. H. Yarborough, Jr., for the defendant.

HOKE, J. Defendant was indicted for unlawfully selling, and offering to sell, patent medicines and drugs without having obtained license so to do, contrary to the provisions of secs. 5150 and 5151 of The Revisal.

On the trial, the jury rendered a special verdict which established that certain citizens of Franklin County, each acting for himself, and within two years before finding the bill of indictment, gave certain orders for medicines on the Standard Drug Company of Spartanburg, S. C.; that orders were procured by H. S. Newman, an agent of the said drug company, and same were to be delivered to the parties at Youngsville, N. C.; that the orders were forwarded to the drug company, and received and accepted by them at their place (663) of business in Spartanburg, S. C., and were shipped by the company to O. A. Trotman, the defendant, and agent of the company at Wake Forest, N. C.; that each package was wrapped in separate parcel with the name of the purchaser marked on them for identification, and same were then packed in one crate and shipped to defendant, who distributed same to the purchasers; that each package was delivered in its original form to the party for whom it was intended; and that

defendant, at that time neither had, nor had applied for, license as required by the sections referred to.

Upon these facts the Court was of opinion that the defendant was not guilty, and so advised the jury, who thereupon rendered a verdict of not guilty, and the State excepted and appealed.

It has been frequently decided that these license taxes and the penalties imposed to secure their collection are inoperative against one who is at the time engaged in interstate commerce; and on the facts established by the special verdict, we think it clearly appears that the defendant was so engaged at the time, and that the Judge below correctly advised and directed the jury as to the law.

The case of *Caldwell v. North Carolina,* 187 U. S., 622, is decisive of the question presented and meets every suggestion that can be urged in support of the prosecution.

In this case, pictures, frames, etc., ordered by purchasers in Greensboro, N. C., from a house in Chicago, were sent by this house to their agent in Greensboro, who, after properly placing the pictures in the frames, delivered the same to the persons who had made the orders and for whom they were intended.

In holding a license tax, imposed by the Board of Aldermen of the city of Greensboro, unconstitutional, as prohibited by the commerce clause of the Federal Constitution, the Court said, quoting from (664) *Robbins v. Taxing District,* 120 U. S., 489:

"A State can not impose taxes on property imported from another State and not become a part of the common mass of property therein."

And, in reply to a position that the statute made no discrimination, as to the burden imposed, between dealers within or without the State, the Court said, qoting from *Brennan v. Titusville,* 153 U. S., 289:

"But that does not meet the difficulty. Interstate commerce can not be taxed at all, even though the same amount of tax should be laid on domestic commerce as on that which is carried on solely within the State."

And to a distinction suggested in the opinion of the State Supreme Court then under review, that the transaction had ceased to be interstate commerce because the shipment had been made to an agent of the non-resident company, who received the goods shipped to him in Greensboro, N. C., opened the boxes, assorted the pictures and frames, and, after putting them together, delivered then to the purchasers, the Court said:

"Nor does the fact that these articles were not shipped separately

and directly to each individual purchaser, but were sent to the agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself or by personal agent had carried and delivered the goods to the purchasers. That the articles were sent as freight by railroad and were received at the railroad station by the agent, who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate." (665)

This decision has been several times reaffirmed and applied to cases in this and other jurisdictions, and fully sustains the ruling of the Judge on the facts established by the verdict. *Kehrer v. Stewart,* 197 U. S., 60; *Range Co. v. Campen,* 135 N. C., 506; *Stone v. State,* 117 Ga., 292; *In re Spain,* 47 Fed. Rep., 208.

There is no error, and the judgment below is affirmed.

Affirmed.

Cited: S. v. Whisenant, 149 N. C., 517; *S. v. Allen,* 161 N. C., 232, 234; *Pfeifer v. Israel, Ib.,* 424.

STATE v. JOSEPH HODGE.

(Filed 4 December, 1906.)

Compounding a Felony—Form of Indictment.

In an indictment for compounding a felony, it must be alleged that the felony has been committed by the person with whom the corrupt agreement is made.

INDICTMENT against Joseph Hodge, heard by *Justice, J.,* and a jury, at the April Term, 1906, of RUTHERFORD.

The defendant was tried and convicted upon an indictment in the following words, towit: "The jurors for the State, upon their oaths, present that Joseph Hodge, late of the county of Rutherford, on the 4th day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at and in the county aforesaid, did unlawfully, wilfully and feloniously compound a felony, to-wit: Did

swear out a warrant before Squire H. S. Taylor, against Addie Yelton and William Yelton, charging them with the larceny of certain berries and cherries, and after they had been arrested on said warrant, and before they had their trial, proposed to said defendants and their friends, that if they would pay him ten ($10) dollars and pay (666) his lawyer five ($5), dollars that he would drop the matter and not appear against them. Said money was paid and said prosecution, abandoned, against the form of the statute in such case made and provided, and against the peace and dignity of the State." Upon the rendition of the verdict defendant moved in arrest of judgment. Motion denied. Judgment, and appeal by defendant.

Robert D. Gilmer, Attorney-General, for the State.
D. F. Morrow for the defendant.

CONNOR, J., after stating the case: Defendant in this Court assigns several grounds for his motion for arresting the judgment. We have found no difficulty in disposing of all save one: that the indictment does not aver that the persons with whom he is charged with entering into the agreement and from whom he received the money as the consideration for "dropping the matter and not appearing as a witness," on the trial, were guilty of the larceny charged against them. We have given the question anxious and careful examination and find the authorities unsatisfactory and conflicting.

In the absence of any statute, in this State, defining the offense of compounding a felony, we are compelled to look to common-law sources. Our Reports disclose but one indictment for the offense, and from this we derive no aid in the solution of the question presented here. There was no motion presenting the question respecting the sufficiency of the indictment. *S. v. Furr,* 121 N. C., 606. Blackstone (4 Com., 134), after discussing the crime of receiving stolen goods, knowing them to be stolen, and a kindred offense, says: "Of a nature somewhat similar to the two last is the offense of *theft bote,* which is, when a party robbed, not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding a (667) felony, and, formerly, was held to make a man an accessory, but is now punished by fine and imprisonment." Russel on Crimes, 194. Bishop defines the offense as "An agreement with the criminal not to prosecute him." Crim. Law, 648. "The offense committed by a person who, having been directly injured by a felony, agrees with the

criminal that he will not prosecute him, on condition of the latter's making reparation or on receipt of a reward or bribe not to prosecute." Bl. Law Dict., 240; 8 Cyc., 492, where several definitions are given. There is no substantial difference in the definitions given by the writers on criminal law and in well-considered cases. All of them concur with Blackstone, that to constitute the crime the agreement must be to not prosecute the person guilty of the felony, or, as said in some cases, "the guilty person" or "the criminal."

It would seem that, in the light of the language uniformly used, there could be no doubt that before a conviction can be had it must be made to appear that a felony has been committed by the person with whom the corrupt agreement was made. In the indictment before us, the Solicitor charges that defendant "did unlawfully, wilfully, and feloniously compound a felony."

His Honor, following the decision of this Court in *S. v. Furr, supra,* instructed the jury "that before they could convict they would have to find, beyond a reasonable doubt, that the Yeltons had committed a felony." The Editor of Cyc. (vol. 8, p. 495) says: "The actual commission of a preceding crime would seem to be essential to the offense of compounding the same, and, in the majority of jurisdictions, this is the view taken, although in some the rule is otherwise," citing *S. v. Leeds,* 68 N. J. L., 210. *Dixon, J.,* says: "It is generally held that, to sustain an indictment for compounding a crime, it must be shown that the crime alleged to have been committed had been committed," citing 1 Hale P. C., 619, wherein it is said: "If A hath his goods stolen by B, if A receives his goods again simply, without any (668) contract to favor him in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is *theft bote,* punishable by imprisonment and ransom, but yet it makes not A an accessory; but if he takes money to favor him, whereby he escapes, this makes him an accessory." *Judge Dixon* notes that in some States statutes have been enacted enlarging the scope of the offense, but he says: "The reason of the thing accords better with the common law, for it can not be held that the public is injured by the refusal of a private person to present or prosecute a charge of crime, if, in fact, no crime has been perpetrated."

In *Swope v. Insurance Co.,* 93 Pa. St., 251, it is said: The guilt of the party accused and the agreement not to prosecute are essential ingredients in the compounding of a felony." *Watt v. State,* 97 Ala., 72. In *S. v. Henning,* 33 Ind., 189, an indictment for compounding a crime

was held bad because it did not charge that the defendant had knowledge of the actual commission of the crime alleged to have been compounded. McClain treats that offense in connection with misprision of felony and accessories, as does Sir Matthew Hale, and in offenses of this class it is essential to show that a crime has been committed and that the felon is known to the defendant. Crim. Law, sec. 939. In *The Queen v. Burgess,* L. R., 1885, Q. B. Div., 141, the indictment charged the commission of the offense compounded, and that defendant "well knowing the said felony to have been done and committed by the said A. B.," etc. It was held in that case, *Coleridge, C. J.,* that the offense could be committed by one other than the owner of the goods.

Frilby v. State, 42 Ohio St., 205, is cited as holding that in an indictment for compounding a felony it is not necessary to aver or show that crime has been committed. The decision is based upon the (669) language of the statute, which is much more comprehensive in its terms than the definition of the offense at common law. The Court treats the case as coming within the language of the statute and cites no authorities. We can not regard the decision as controlling us in dealing with the common-law offense. We are not quite sure that we comprehend the import of the language in which the opinion concludes: "It is necessary to aver and prove that the prosecution was for what appeared by the charge to be a crime, but it is not necessary that the actual commission of such crime be either averred or proved." The statute includes "abandoning or agreeing to abandon any prosecution threatened or commenced for any crime or misdemeanor." If the charge was for the commission of the statutory offense, we can easily perceive the meaning of the language quoted. We conclude, therefore, that the common-law offense, as defined by all of the authorities, involves the charge that a felony had been committed and that the felon is known to the defendant. It would seem clear that this being an essential ingredient in the offense, it must be alleged in the indictment. In *Leed's case, supra,* it is said: "As the preceding crime is essential to the offense of compounding the crime, it should be distinctly averred in the indictment for compounding and should be set forth with such particularity as will enable the accused to make preparation for rebutting the charge." The precedents are uniform in this respect. 2 Wharton Prac., 895; Chitty Crim. Law, 221. An examination of the record in *S. v. Furr, supra,* shows that the bill is drawn according to the precedents. *People v. Bryon,* 103 Cal., 675.

There is a class of offenses involving an obstruction of public justice in which it is held that it is not necessary to charge, or prove, the com-

mission of the crime, the prosecution of which is interferred with. Persuading or inducing a witness not to attend Court, whether under subpœna or not, is indictable. Inducing one to absent himself from attending as a witness, before a justice, in an examination of a charge for violating the criminal law, is a high-handed offense. (670) Revisal, sec. 3696; *In re Young,* 137 N. C., 552. In *S. v. Keyes,* 8 Vt., 57, it was held that it was not necessary to allege or show that the person against whom the witness would have testified was guilty. *S. v. Carpenter,* 20 Vt., 9.

The form of the indictment for this offense is found in Chitty Crim. Law, 235. By Stat. 18 Eliz., it is made a misdemeanor to agree, for money, to compound or withdraw a suit for a penalty without the consent of the Court. Under this statute it is held that it is not necessary to allege or show the commission of the act for which the suit or prosecution is instituted. *Regina v. Best,* 38 Eng. Com. L., 159. It would seem that this statute is a part of the common law in force in this State. *S. v. Carver,* 69 N. H., 216, is not put upon that statute, although it is referred to in the opinion. In that case the indictment was in accordance with the precedents, except that after describing the offense in the concluding sentence of the bill, it is charged that defendant forbore to prosecute for "said supposed" offense. This was held sufficient.

A careful examination of every case at our command fails to discover any one in which an indictment is sustained which omits the averment that a crime had been committed. The judgment must be arrested.

It is but just to the learned Judge who tried the case to say that it does not appear that this objection was raised before him. As we have seen, he correctly instructed the jury. It may be well enough to suggest that the bill does not very clearly allege any agreement to forbear prosecution. It would conform more closely to the precedents to charge clearly the agreement which is the gist of the offense.

We also note that the indictment charges that defendant "proposed to said defendants and their friends," etc., whereas, the evidence was "that the father of the Yeltons, through his friends, compromised the case," etc. It is not clear that this was not a variance, en- (671) titling the defendant to an acquittal on this indictment. For the reasons given, the motion in arrest must be allowed.

Judgment Arrested.

STATE v. FRISBEE.

(Filed 11 December, 1906.)

Assaults—Malicious Misdemeanors—Statute of Limitations.

Under Revisal, sec. 3147, providing that all misdemeanors, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards, unless any of said misdemeanors shall have been committed in a secret manner, when it may be prosecuted within two years after the discovery of the offense, an indictment charging the defendant with maliciously assaulting another with a deadly weapon with intent to kill, is barred where the alleged assault was committed more than two years before the bill was found.

INDICTMENT against Lee Frisbee, heard by *Moore, J.*, and a jury, at April Term, 1906, of BUNCOMBE.

The defendant was charged in the indictment with unlawfully, wilfully, and maliciously assaulting Floyd Brown, on 1 May, 1903, with a deadly weapon, towit, a certain pistol and knife with a four-inch blade, with intent to kill and murder the said Floyd Brown and to his great damage, contrary to the form of the statute and against the peace and dignity of the State. The defendant moved to quash the indictment. Motion overruled, and he excepted. There was evidence that the assault was made more than two years before the finding of the indictment. The defendant, in apt time, requested the Judge to charge the jury that, if the assault was committed (672) more than two years before the bill was found, they should acquit. This instruction was refused, and the defendant excepted. The jury returned a special verdict to the effect that the assault occurred on 12 April, 1903, and the indictment was found 4 August, 1905, or more than two years after the offense was committed, and asked the opinion of the Court upon the facts so found. If the indictment is not barred by the statute of limitations, they found the defendant guilty; but if it is barred, they found him not guilty. The Court adjudged the defendant guilty, and from the judgment upon the verdict, the defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, and *Frank Carter* for the State.
J. S. Styles for the defendant.

WALKER, J., after stating the case: The Revisal, sec. 3147, provides

that all misdemeanors, except the offenses of perjury, forgery, malicious mischief and other malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards, unless any of said misdemeanors shall have been committed in a secret manner, when it may be prosecuted within two years after the discovery of the offense. If the crime alleged in the indictment to have been committed by the defendant is not a malicious misdmeanor, he was improperly convicted.

There was no such distinct offense at the common law as a malicious assault, for all assaults were but misdemeanors, punishable by fine and imprisonment, and the circumstances of aggravation could be taken into account by the Court only in fixing the punishment. Clark Cr. Law (2 Ed.), p. 229; 1 McClain Cr. Law, secs. 255, 262 and 280; 1 East Pl. of Crown, 436; *People v. Petit,* 3 Johns., 511; *Commonwealth v. Barlow,* 4 Mass., 439; *Bacon's case,* 1 Lev., 146, (673) and *Green v. People,* 3 Col., 68, where an interesting history is to be found of the origin and development of the law upon this subject. Referring to the common law as it existed in the early years of the reign of James I., it is there said that "at that early time Coke and Bacon were bitter rivals in politics and practice at the bar; neither Sir Matthew Hale nor Sergeant William Hawkins had then been born, nor had the star-chamber been abolished, and trial by wager of battle was lawful. The common law was then emerging from the gloom of black-letter, the mysteries of Norman-French, and the intricacies of the old feudal law, and beginning to assume, under Coke and Bacon, that system and symmetry which Hale and Hawkins afterwards assisted in developing, and Blackstone perfected, a hundred years later, in the king's English. The common law was not in the early days of James what enlightened jurists have since made it. The case of Sir Walter Raleigh furnishes an illustration of a difference in the application of the law, at least. Upon a written inquisition, uncorroborated by witness or circumstance, without being confronted with his accuser, Raleigh was convicted of high treason by the verdict of a jury, upon which he was consigned to prison, and finally brought to the block." The felonies of that day appear to have been numerous and peculiar, and much difficulty is experienced in ascertaining the law of ancient times so far as it relates to the grade of an aggravated or malicious assault. So anxious was the ancient common law for the safety of the subject, that every act done against another which might imperil his life was held to be felonious, as the Year-books will show. But the rigor of the law was relaxed in more modern times and as civilization and enlightenment

advanced, until the reign of Edward the IV., when the ancient maxim which required the intention to be taken for the deed (*voluntas* (674) *reputatur pro facto*) was not applied so strictly and began to grow obsolete, and the offense of assault with intent to murder was regarded as a high misdemeanor, punishable only at discretion, the intent being merely a circumstance of aggravation and not essential to impart criminality to the act. 1 Hawks P. C. (8 Ed.), 111; *Green v. People, supra.* East says that in the earliest ages of our law it seems to have been considered that the bare attempt to commit murder was felony; but that idea was soon exploded, though still the attempt is punishable as an aggravated misdemeanor at common law, and he cites, as an illustration, the case of Mr. Bacon, who was indicted for lying in wait to kill the Master of the Rolls, and convicted, whereupon he was sentenced to fine and imprisonment, and to find surety for his good behavior for life, and to acknowledge his offense at the bar of the Court of Chancery. 1 East P. C., p. 441. We have now a statute denouncing as a felony a malicious assault and battery committed with any deadly weapon upon another by waylaying or otherwise, in a secret manner, with intent to kill. Revisal, sec. 3621. In this State an assault with a deadly weapon and with intent to kill was never a felony. By the Act of 1868-'69, ch. 167, sec. 8, it was punishable infamously or by imprisonment in the penitentiary, but the doctrine that a crime is a felony, where the punishment is confinement in the State's Prison, did not obtain with us until Laws 1891, ch. 205, sec. 1 (Revisal, sec. 3291). Such an assault, therefore, was a misdemeanor, *S. v. Swann,* 65 N. C., 330, although, under the existing statutory definition, if it had then applied, it would have been a felony. *S. v. Clark,* 134 N. C., 710. The Act of 1868-'69 was repealed by Laws 1871, ch. 43, and since the passage of the latter act the crime of assault, even with a felonious or malicious intent, has been classed simply as a misdemeanor. The offense described in the indictment in this case can not be malicious michief, as suggested in the argument, for, that is, at common law, the (675) wilful destruction of some article of personal property belonging to another with malice toward the owner. *S. v. Robinson,* 20 N. C., 129; *S. v. Helms,* 27 N. C., 364; *S. v. Manuel,* 72 N. C., 201; and under the statute it is the wilful injury of personal property, whether it is destroyed or not, with malice to the owner. Revisal, sec. 2676. The law on this subject is explained in *S. v. Martin,* 141 N. C., 832. When, in The Revisal, sec. 3147, the Legislature used the words "other malicious misdemeanors," which immediately follow the words

"malicious michief," it evidently intended to describe offenses of which malice is a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the Court might consider in imposing the punishment. This, we think, is clear, and is in accordance with Blackstone's view of such misdemeanors as they existed at the common law. Speaking of assault, batteries, wounding, and like offenses, he says that taken in a public light, as a breach of the King's peace, an affront to his government and a damage to his subjects, they are indictable and punishable with fines and imprisonment, and more severely when committed with any very atrocious design, but that they are nevertheless mere misdemeanors, and the aggravation attending their commission does not change their nature as crimes, though it may increase the punishment. 4 Blk., 216.

It is to be noted that there are a class of malicious misdemeanors known to our law which will satisfy the words of the statute referring to them generally by that name. But assaults are not among them, even though they may be committed with malice.

Upon the special verdict, judgment should have been entered for the defendant, and he is entitled to an acquittal and dis- (676) charge, as the alleged crime was barred by the statute. *S. v. Morris,* 104 N. C., 837.

Error.

STATE v. J. H. HODGE.

(Filed 18 December, 1906.)

Homicide—Witnesses Separated and Sent Out of Courtroom—Refusal to Permit Witness to Testify—Practice.

In an indictment for murder, where the Court upon motion of the prisoner's counsel made an order that all the witnesses should be sent out of the courtroom and separated, the refusal to allow a witness for the prisoner to testify, who was kept in the courtroom contrary to the order of the Court and without its knowledge, is not ground for a new trial, where counsel merely stated that the witness's testimony was material, but did not state to the Court below nor to this Court in what particular it was material, or what he expected to prove by the witness.

CONNOR and WALKER, JJ., dissenting.

STATE *v.* J. H. HODGE.

INDICTMENT for murder against John H. Hodge, heard by *Ferguson, J.*, and a jury, at the May Term, 1906, of DURHAM.

From a verdict of guilty of murder in the first degree, and sentence thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
Guthrie & Guthrie and *Bramham & Brawley* for the prisoner.

CLARK, C. J. The prisoner was convicted in May last of the murder of his wife, on 24 February, 1906. The evidence was plenary. He came to the house of his wife between 11 and 12 o'clock at night,
(677) when she was in bed, as were her six children, the youngest five years old, four of them girls, and the oldest a girl about 17, and all sleeping in the same room. The oldest boy testified that he was waked up between 11 and 12 o'clock by his father's voice, who upbraided his mother about a deed he had made her for the property. When she refused to discuss the matter he ran to the bedside and attacked her in the presence of her children, who tried to shield her and to hold him back, but in vain. He threatened to shoot them, and when the terrified children relaxed their hold and were run out of the house by him, he dragged his wife out of bed and shot her. This boy was just 15 years old. The prisoner had beaten his wife before, and had been put under a peace bond. A neighbor who heard the screams and pistol shot, hurried over to the house, when the prisoner, who was standing in the room where his wife lay shot and dying, met him in the hallway, and, pointing his pistol at witness' head, told him not to come in. The children were all out in the yard in their night-clothes, screaming. The witness went to get an officer, and when he got back the prisoner had fled. The dead body of prisoner's wife, with the bedclothes wrapped around her waist, was then lying with her head on the hearth and feet on the floor. She had been shot in the side. The prisoner rode in a street car to the vicinity of his wife's house, got off and went in that direction, and soon the pistol shot was heard. Several testified that if the prisoner was then under the influence of liquor it was not perceptible; he seemed sober. After the homicide his employer, Mr. Houston, went to see him, told him he was sorry he had gotten into this trouble, and asked him "why he had done as he did. He said he had been treated wrong. I asked him if he was drinking. He said no, he had drunk nothing before he went there, but something after he left. I then asked is he was not sorry for what he had done. He said no, that he was glad of it, and that he had been treated wrong: his

property had been taken from him and he had been kicked out of doors; that he had studied over the matter and planned it (678) for some time." The same witness saw him again and asked, in the presence of the jailer, "if he regretted what he had done. He said no, that he was glad of it; that he had been treated wrong, his property had been taken from him, that he had been kicked out of his own house and that he could not stand it any longer." When asked if he was not afraid he might be hung, he said "he didn't care, and was ready to pay the penalty; that he hoped they would hang him; that he was ready to hang then." When the coroner went to see the prisoner he looked up and asked: "Is she dead?" When told she was, he said: "Then I am satisfied." W. T. Riggsbee, who was with the coroner, cautioned him to keep silent, that he would regret it, but he replied that "he would not, and that he had thought over the matter for five weeks." When asked when he got the pistol, he said a few days ago, and when asked if it was not since Thursday (the homicide was an Saturday night), he said "Yes"—said he got the pistol from a friend, but when asked the name of his friend, said he had forgotten.

Mr. Hamlet testified that about 10 o'clock the night of the homicide he saw the prisoner buy a pistol, who asked if the pistol would "shoot strong." When told that it would, he said he "would try it next day, and if it did not shoot strong he would bring it back."

The oldest daughter, aged 17 years, testified substantially to the same state of facts as her brother; that they were all asleep in the same room, she and one of her sisters in bed with her mother, when she was awakened by the prisoner's voice; he was standing in the floor, and told his wife to get up, that he "wanted to talk with her." He again told her to get up and said: "I am going to live in this house in spite of you and Lawyer Manning." He again told her to get up. She told him she was sick and to get away, she could not stand to talk to him. He was then sitting upon the side of the bed; he immediately pulled his pistol out and said: "You can't stand it? See if (679) you can stand this."

The witness tried to get between the pistol and her mother's head, when the prisoner told her to "Get up, or I will shoot you," whereupon the prisoner took hold of his wife's feet, jerked her out of bed and dragged her to the hearth. When his daughter started to them, prisoner pushed her to the door and then, with his wife in one of his arms, shot her in the side. She said her younger sister offered to fix her father a place to lie down, when they first woke up; he declined and said: "I wouldn't lay down in this house five minutes for $1,000." She says

that before she went to bed she fastened all the doors, except the back door, which her mother said that she had fastened.

The prisoner and his wife had separated and were not living together. The sole evidence introduced for prisoner was that of some witnesses who testified that he was drinking on his way to his wife's house that night. The only exception to be considered (for though there were others, they were merely formal and are without merit, and though not expressly abandoned, are not in the brief) is the following, as stated by the Judge: "The prisoner, when the jury were impaneled, through his counsel, moved that witnesses be sent out and separated. The motion was granted. The State's witnesses were sworn and sent out of the courtroom, and the witnesses were also sworn for the prisoner and sent out of the court-room. On the first day of the trial prisoner's counsel talked with the witness, W. T. Riggsbee, and learned of his testimony, but did not put him under subpœna until to-day, second day of the trial. Both before and after the witness was subpœnaed, counsel for prisoner permitted the witness to stay in the court-room, without having him sworn or calling the Court's attention to the matter, until they called him to the stand. The State objected to the witness; objection sustained, and prisoner excepted."

The Court adds: "The foregoing facts were found at the (680) time the witness (Riggsbee) was offered, upon statement of counsel then made, who stated that he had examined said Riggsbee on the first day and knew what his testimony would be, but did not put him under subpœna till the morning of the second day, and both before and after he was put under subpœna he permitted Riggsbee to remain in the court-room without calling the attention of the Court to the fact; counsel for the prisoner stated that the witness' testimony was material, but did not state to the Court *in what particular it was material or what he expected to prove* by said witness, and the objection was to the ruling of the Court in declining to allow the prisoner's counsel to examine the witness Riggsbee."

This was a mere abstract proposition, and could not be held error unless the prisoner had made known what the evidence would be. Had that been stated, and had been in anywise material, there can be no doubt the learned and just Judge who tried this case would have admitted it, notwithstanding the conduct of counsel and the undue advantage which might have been given the defense by permitting this witness to remain in the court-room during the whole trial in contempt of the order of the Court made at the instance of the defense, by which all witnesses were sent out of the court-room. At any rate, if counsel had

stated what he expected to prove, the question would be presented whether the defense had suffered any prejudice. It is elementary learning that the appellant must show error that prejudiced him. For all we know, the witness Riggsbee would not have given any evidence, the exclusion of which could be of any effect. Neither below, nor in this Court even, did the defense give the slightest inkling by affidavit or even a statement what it would be. He did not present it in either Court. The mere assertion that excluded evidence is material is not sufficient. The prisoner may be mistaken about it, and if so, its exclusion, even though erroneous, is not reversible rror. For that reason courts have always held that the excluded evidence must be material and (681) whether it is material or not is a question of law which must be decided by the Court and not by the bare suggestion of the prisoner, or his counsel. In all the evidence Riggsbee appears only once, and then not at the scene of the homicide, but at one of three confession, and if we should surmise (for we do not know) that he would materially contradict the coroner's account of the confession made to him, there are the other two fuller confessions, not offered to be contradicted, at which Riggsbee was not present. This doubtless accounts for the Court not being told what his evidence was.

The crime of which the prisoner has been convicted, and of which the above is a condensed synopsis, was proven in all its fullness of detail. The prisoner, living separated from his wife, had a grievance about property; he buys a pistol, inquiring if it will "shoot strong," goes down to her house near midnight, effects a burglarious entrance, rouses her with her children, attacks her, and when her little children try to shelter her, drives them out of the house by flourishing his pistol, drags his wife out of bed by the heels, holds her in his left arm and shoots her, drives a neighbor off at the muzzle of his pistol, and escapes. When taken he asks, "Is she dead?" and when told that she is, replies: "Then I am satisfied." On at least three different occasions he confesses the crime and declares that he does not regret it, and that he had contemplated it for five weeks. The only evidence offered in defense is to contradict the witnesses for the State who testified that the prisoner seemed entirely sober when on his fatal errand. There is not even the usual attempt to prove insanity, nor anything tending to suggest it. We are asked to give a new trial, not for any material evidence excluded, but because the defense states that there was material evidence excluded—and that by a witness who was kept in the courtroom contrary to the order of the Court, and without the knowledge of (682) the Court. To grant such motion would seem trifling with justice.

The evidence must be set forth before we can hold that it was material, and therefore that its exclusion was prejudicial. In an indictment for homicide in Massachusetts it was held, upon similar facts, that the exclusion of the witness was in the discretion of the Court, though there the evidence was disclosed. *Commonwealth v. Crowley,* 168 Mass., 121; and same was held in *S. v. Gesell,* 124 Mo., 531; Whart. Cr. Ev. (9 Ed.), 446; Greenl. Ev. (16 Ed.), 432c; *Holder v. United States,* 150 U. S., 91; *O'Bryan v. Allen,* 95 Mo., 75; *Jackson v. State,* 14 Ind., 327; *Bell v. State,* 44 Ala., 393; *Bird v. State,* 50 Ga., 589.

The conviction of the guilty and their punishment is commanded by the law. The Constitution guarantees security of life and person. This guarantee is a mockery if crime is not punished, for unless the punishment of crime deters from its commission, criminal courts with their heavy expense and consumption of time should be abolished. The sole object of a trial for murder is not the acquittal of the prisoner. It is to determine whether he is guilty or not, after giving him the advantage of requiring the unanimous verdict of a jury of twelve men, each of whom must be satisfied beyond a reasonable doubt of his guilt. There is no doubt here of the commission of the crime, of its revolting details, of the base motive, of the preparation for it, of the thinking over it, of the confessions of the prisoner. The mere assertion that a witness could have given material evidence, the purport of which was undisclosed below, and on the hearing here, can not justify a new trial.

The prisoner has been fairly tried and convicted. He gave his wife no postponement and no opportunity of defense, omitting no circumstance of horror. The law has given him nearly a year's delay, opportunity of defense, the aid of counsel, and his conviction, after a full hearing has been declared by the verdict of twelve men, beyond
(683) a reasonable doubt of his guilt—and, indeed, the evidence permits of none. The evidence of the crime and the attendant horrors are beyond denial. None was attempted. There was the fullest evidence of premeditation—his going with a pistol to the house where slept his defenseless wife and children, the burglarious entrance, the threat and then the assault with a pistol, the breaking down the feeble but zealous protection of the children, who sought to protect their mother with their own bodies, the terrifying the children and driving them out, dragging his wife by the heels out of the bed, holding her up on one arm while he shot her with the other, the shooting without provocation or excuse—all this shows a deliberate purpose to kill. Besides, there was the previous declaration, when buying the pistol, and three

voluntary confessions of having determined on the matter long before and his gratification at accomplishing his purpose.

Riggsbee was not present at the scene of the murder, nor at the buying of the pistol, and only at one of the confessions, the least important one, that made to the coroner. The defense has not vouchsafed to lay before the courts what Riggsbee would have said, but it is clear that it could not have called in question the circumstances of the homicide and the premeditation of the prisoner. He can still lay it before the Executive. He has been "informed of the accusation against him, has confronted his accusers and witnesses with other testimony, and has had counsel for his defense." Const., Art. I, sec. 11. It is not a restriction of the above rights to require, in the discretion of the Court and in the interest of justice the regulation of the order in which witnesses shall be examined, that they shall be sworn or that they shall be sworn and sent out of the court-room before being examined. It has been a long-observed practice in the administration of justice, and on this occasion the motion was made by the prisoner. His failure to observe the order called for such steps as were necessary to enforce it. He (684) has not, however, shown that any testimony excluded would have been useful to him. With every latitude possible for the prisoner, there is a point beyond which reverence for the administration of justice forbids us to go, lest justice be wounded in the house of her friends.

No Error.

HOKE, J., concurring: I do not think that the Judge below had the right, in his discretion, to deny the examination of the witness.

There are decisions which uphold this ruling. There is also strong authority to the contrary; and I would never agree to the proposition that in a prosecution of this character a prisoner could be deprived of testimony material to his defense because a witness, during the progress of the trial, had entered the court-room in violation of the Judge's order.

Holding this view, however, I think the judgment should be affirmed for the reason that it nowhere appears, nor can it be discovered, that any harm has come to the prisoner by this action of the trial Judge.

This is not a case where a prisoner was without counsel, and may have erred in ignorance of his rights; nor where the witness had refused to disclose the purport of his testimony. On the contrary, the case shows that the prisoner was represented by counsel, faithful, learned and capable, who had examined the witness and claimed to know what his testimony would disclose.

Neither at the trial nor at any other time nor in any way, has this testimony been stated in substance or tenor so that the Court can see

its materiality. On the contrary, as pointed out in the principal opinion, it appears, and almost conclusively, that if the witness was aware of any relevant fact or circumstance, the evidence was hardly of importance and could not possibly have affected the result.

(685) A perusal of the case leads to the conclusion that the counsel, in the presence of desperate circumstance, was not aggrieved by the denial of a substantial right or the rejection of evidence which he regards as of consequence, but was seeking for an exception upon which he could successfully maintain an appeal.

Such an exception so presented, is, to my mind, entirely too indefinite and speculative for serious regard in the administration of the practical affairs of life; and to hold it for reversible error would render the enforcement of the criminal law well-nigh impossible.

As said in *Cherry v. Canal Co.*, 140 N. C., 422, quoting from 2 A. & E., Pl. and Pr., 500:

"This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal or other objejctions, which the record shows could not have prejudiced the appellant's rights."

And from *Ashe, J.*, in *Butts v. Screws*, 95 N. C., 215:

"A new trial will not be granted when the action of the trial Judge, even if erroneous, could, by no possibility, injure the appellant."

This sound and salutary principle obtains in criminal as well as in civil causes, and, applied to this case, shows that the trial is free from reversible error.

I am of opinion that the judgment below should be affirmed.

CONNOR, J., dissenting: The testimony, as arrayed in the opinion of the *Chief Justice*, presents a case in which the enormity of the crime and the manifest guilt of the prisoner are well calculated to cause a Judge to hesitate to dissent from the judgment which brings merited punishment to the criminal. It is due to the learned and impartial Judge who tried the case, and I do not hesitate to say that he wisely exercised his discretion in declining to permit the witness Riggs-

(686) bee to be sworn, provided it was a matter of discretion and not of absolute right.

I am impressed with the conviction that the conclusion to which the Court has arrived establishes a precedent in our criminal jurisprudence, violative of an essential and a most valuable constitutional right secured to every person charged with crime. I am not inadvertent to the fact that notwithstanding the truth that a frequent recurrence to funda-

mental principles is essential to the preservation of liberty, we weary and become impatient of constitutional restraints upon government when invoked to secure to guilty persons trial according to "the law of the land." Notwithstanding all of this, I am compelled to dissent from several propositions announced in the opinion of the Court.

The Bill of Rights clearly and unmistakably declares that, "In all criminal prosecutions, every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony," etc. Without this guaranty to the citizen, when charged with crime, the right of trial by jury would be of no value, but rather a cunningly devised scheme for keeping the promise to the ear and breaking it to the sense.

I can not think that this right to confront his accusers with testimony is ever dependent upon the discretion of a Judge. The Court should seek to remove the decision of all questions involving the right of the citizen from the realm of discretion and place it upon the foundation of law—fixed, certain, and of universal application. One of the purposes which the people had in making written constitutions was that there should be a government of laws and not of men.

In regard to the question presented by the exception of the prisoner, we have a direct, and, I think, controlling authority in this Court. In *S. v. Sparrow,* 7 N. C., 487, the prisoner was upon trial for murder. After the jury was charged, the witnesses for the State and the prisoner "were sworn and sent out." After the evidence had been closed on the part of the State and the defendant, the Solicitor-General (687) moved for leave to swear another witness, who had been present in court during the whole trial, to prove that the prisoner had fled from persons who went to arrest him, after the deceased died. This motion was objected to on the part of the prisoner; but the objection was overruled by the Court, and the witness was sworn and examined. Prisoner excepted and, upon conviction, appealed.

Taylor, C. J., was of opinion that the exception was good, and that there was error in the action of the Court, entitling the prisoner to a new trial. *Judges Hall* and *Henderson* thought otherwise. The former said: "The Constitution of the State declares that every man has a right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony; and if the prisoner, when the proper time comes, has a right to introduce his witnesses, as the Constitution authorizes him to do, he would not forfeit that right if, *either through inadvertence or design,* he or the State omitted to

call their witnesses when directed to do so, in order that they might be separated."

Henderson, J., said: "Whatever may be the consequence of an omission or refusal to obey the order of the Court to name or send out the witnesses, I think the Court is not authorized to reject a witness offered at the proper time, because he was not sent out. This would add another objection on the score of incompetency, unknown in our law, as far as I can discover. For I have never yet heard of a witness being rejected on that account, and it must be admitted that this motion is predicated on the supposed existence of such a rule. Were a prisoner to refuse to name his witnesses in order that they might be sent out, a Judge would hesitate much before he would direct a jury to retire without hearing such witnesses, if offered by the prisoner when called upon to make his defense and offer his proofs. The law, and the Constitution which gives him a right to confront his accusers with (688) witnesses and other testimony, would be a dead letter."

This case has been cited but once by this Court. Then a witness who was not sent out was examined and the Court held that it was not error. *Worth v. Cox,* 89 N. C., 44.

Elliott Evidence, sec. 802, says that while there is some conflict among the authorities whether a witness remaining in the court-room should be permitted to give testimony, it is held in some jurisdictions that "where a party is without fault, and a witness disobeys an order for exclusion, the party ought not to be deprived of the testimony of his witness. This latter view would seem to be the better; that is, if the party calling the witness has been guilty of no misconduct, a Judge ought not to reject him. So then, in case of refusal by, or failure of, a witness to leave the room, the proper remedy would seem to be for the Court to admit his testimony and punish the witness for contempt of Court. Among many other authorities cited to sustain this proposition is *S. v. Sparrow, supra.*

In this connection it may be well to note that the case cited in the opinion of *Jackson v. State,* 14 Ind., 327, came under review by the same Court in *S. v. Thomas,* 111 Ind., 516, *Judge Elliott* saying: "Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility." Citing Taylor on Evidence. "But it seems to be now settled that the Judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence." Also citing

2 Phil. Ev., 744, saying: "But it may now be considered as settled that the circumstance of a witness having remained in court in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." *Thomas's case* was reaffirmed in *Taylor v. State,* 130 Ind., 66. (689)

I do not think that the cases cited in the opinion sustain the conclusion reached by the Court. In *Holder v. United States,* 150 U. S., 91, the Court directed the witnesses, except the one under examination, "to be excluded from the court-room." Bickford, who had remainded in the court-room, was examined without objection; other evidence intervened, and he was recalled, objection then being made for that he had not left the room. The objection was overruled, and defendant excepted. *Fuller, C. J.,* said: "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury, by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he can not be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the Court. Certainly the action of the Court in admitting the testimony will not, ordinarily, be open to revision." This falls far short of sustaining the right of the Court to exclude a defendant's witness.

In *S. v. Gesell,* 124 Mo., 531, an order for separation and withdrawal was made, when the jury was impaneled. The record states: "Furber, who had been a co-defendant and had been severed from him, remainded seated by the defendant Gesell in the court-room during the whole trial." The Court says that the authorities are in hopeless conflict as to whether the Court can reject the testimony of a contumacious witness. "The point has been decided both ways in this State," citing cases. The conclusion is reached, on the authority of *O'Bryan v. Allen,* 95 Mo., 68, that "If the party who desired the testimony of the disobedient witness has *participated in his* disobedience or has been guilty of *connivance* at the fault of the witness, he should not be allowed to testify." When we turn to *O'Bryan's case,* we find that it was held to be reversible error to exclude a witness who was not sent (690) out "unless the party or his attorney calling the witness has been party or privy to the violation of the order," "because," says the Court, "any other rule would put it in the power of a hostile witness to deprive a party of his evidence."

I respectfully submit that the authorities cited in the opinion in that case should have led the Court to hold that "a witness who disobeys such order is guilty of contempt; but the Judge can not refuse to hear

his evidence, although the circumstance is a matter of remark to the jury." 2 Best Ev., 636. The learned Justice says that this "may now be regarded as settled." In *Commonwealth v. Crowley,* 168 Mass., 121, the circumstances under which the witness was excluded were peculiar. I concede that the ruling in that case sustains the opinion in this.

It is worthy of note, however, that the question was not discussed by the Court, and *Holder's case, supra,* was relied upon. The value of that case as an authority for the purpose of sustaining the right to exclude the witness has been pointed out. Wharton Cr. Ev., sec. 446 (9 Ed.), is relied upon. The original text so states the law, but the note after citing many cases concludes: "But it may now be considered as settled that the circumstance of a witness remaining in court, in disobedience of an order of withdrawal, is not ground for rejecting his evidence." The old rule was always to exclude the testimony.

I have thus reviewed the authorities relied upon to sustain the ruling in this case. It is impracticable for me to comment upon the large number of cases cited in the excellent brief of prisoner's counsel, showing that, by the overwhelming weight of authority, the Court has no right to exclude the witness. The latest work on criminal procedure so states the law. Clark Crim. Proc., 548. The last deliverance of this Court is to the same effect. In *S. v. Hare,* 74 N. C., 591, (691) it is held error to refuse "to allow the defendant to examine a witness who was not present when the other witnesses were sworn and sent out, and who came in during the trial, but had not heard the examination of the other witnesses." No authorities are cited; the question is treated as settled. *Grimes v. Martin,* 10 Iowa, 347; *Dixon v. State,* 39 Ohio St., 73.

I can not better close the discussion of this question than by quoting the wise and noble words of one who drew inspiration and acquired knowledge by heredity, example and education, of the principles of constitutional liberty from an ancestry illustrating the highest virtues of citizenship and judicial service in our own State. In *Parker v. State,* 67 Md., 329, *Mr. Justice William Sheppard Bryan,* lately departed, after a long and honorable service on the Bench in his adopted State, said: "It was in the discretion of the Court to order the witnesses to leave the court-room; but it is not reasonable to take away from a prisoner on trial the benefit of testimony on which his life may depend, because of the misconduct of another person. The humanity of the law is shocked at the punishment of the innocent. It provides with the greatest solicitude that persons accused of crimes shall have fair and impartial trials. The object is considered of sufficient importance to

be guaranteed by the solemn and impressive declarations of our organic law. The scheme and theory of our legal system seek to provide that no man shall be adjudged guilty, unless the truth of the matter charged upon him has been established after a fair and full investigation. The ascertainment of the truth is the great end and object of all the proceedings in a judicial trial. But this object is pursued by general rules which experience has shown to be useful in guarding against erroneous conclusions. By the operation of these general rules, certain well-defined classes of persons are forbidden to testify. Subject to these well-known and distinctly marked exceptions, a person on trial has the right to prove the truth relating to the accusation against (692) him by the evidence of all witnesses who have any knowledge of it. And they are compelled to attend and deliver their testimony in his behalf. Since such great care has been taken to secure the right of an accused person to prove the truth relating to the accusation against him, it would be very strange if he should forfeit this most precious privilege by the misbehavior of a witness. Authorities were cited at the bar for the purpose of showing that in some jurisdictions it was within the discretion of the Judge to refuse to permit a witness to testify under the circumstances stated in the second exception. If the evidence of such witness would show the innocence of a prisoner on trial for his life, then the discretion of the Judge to admit or reject the testimony amounts to a discretion to take the prisoner's life, or to spare it. The wise, just and merciful provisions of our criminal law do not place human life on such an uncertain tenure. A man's life and liberty are protected by fixed rules prescribed by the law of the land, and are not enjoyed at the discretionary forbearance of any tribunal. All suggestions of this kind are alien to the spirit and genius of our jurisprudence." This language was used with the approval of *Justices Alvey, Stone,* and *Miller,* and leaves nothing more to be said.

When the constitutional right to confront his accusers is placed upon positive law, there is certainty and safety to the citizen. When made to depend upon variable and varying circumstances and conditions, ultimately vesting in the unreviewable discretion of a Judge, there is confusion, uncertainty, resulting in conflicting decisions, dependent upon the peculiar views of the Court, respecting the guilt or innocence of the defendant, which it is the province of the jury alone to decide.

We are not called upon to decide in this case whether, if the prisoner were in fault, in not swearing and sending his wit- (693) ness out of the court-room, he would forfeit his constitutional right. There is nothing in the record indicating that he knew that

Riggsbee was under subpœna, or would be called. The prisoner had been in jail and was of course in custody during the trial. Whatever may be said of the effect of his personal conduct upon his right, I find no authority holding that by the failure of his counsel to comply with the order of the Court his rights are forfeited. There are rights secured to a person on trial for a felony which he can not waive, while there are others which may be waived by him, but not by his counsel. I do not find any *decision* holding that the right to examine his witness is lost by any act of omission or commission of counsel. I am sure that, upon principle, no such decision could be sustained. Here there is no suggestion that the learned and honorable counsel connived at or, for any improper reason, permitted the witness to remain in the Court after he ascertained that his testimony would be of value to his client and had him subpœnaed. It is estirely consistent with our observation and experience that he overlooked the fact that the witness should retire. His uniform honorable and frank conduct in his relations to the Courts exclude any other explanation. But it is said that the prisoner has suffered no harm by the refusal of the Court to permit his witness to testify. If I were permitted to express my personal opinion in this respect, I should not dissent from the proposition. When, as a Judge, I am called upon to deal with a constitutional right of a citizen, I am not permitted to make the Constitution of "none effect" because of such reasons. I do not find that the Judges have heretofore done so. I find no case, and none is cited, to show that a Court may for such reason deal with their rights.

Our own reports, and many others, contain numerous cases in which new trials have been given because of the failure to accord constitutional rights to defendants, and in none of them is it suggested that (694) unless prejudice was shown it was not reversible error.

It is further said that the exception can not be sustained, because it does not appear what the prisoner proposed to show by the witness. I concede that where the exception is based upon the exclusion of *evidence* such is the rule. The distinction is well stated in *Thomas's case, supra,* where it is said: "The relatrix was not bound to state what she expected to prove by Johnson, because the question is not as to the competency of his testimony, but as to his right to testify at all. Where the matter complained of is the action of the Court, in refusing to permit a witness to testify at all, the grounds of the objection to the witness must be shown by a bill of exceptions, and this is all that need be shown in order to present the matter for our consideration. We can not say that the relatrix was not prejudiced by the refusal of the Court to

(548) of a contract made with the defendant Loder for paving streets, etc. The Court, by *Beasley, C. J.*, in an able and most satisfactory opinion, sustained the right of the plaintiff to bring the suit, but in discussing the form of the bill, said: "So we further think that it was necessary for the complainant to show distinctly in his bill that the Common Council had been called upon to perform its duty, the not doing of which formed the basis of the complaint." He further said that the averment in the bill was sufficient. We quote the above to show that in the opinion of that eminent Judge the averment was necessary. Evidently, *Judge Dillon* was of that opinion when he based the right to sue upon the same reason which entitled the stockholder to do so. The question has not been heretofore presented to or decided by this Court. It seems to us that the reason of the rule applies with equal force to the right of a citizen to sue. As said by Mr. Clark in his work on Corporations: "The will of the majority must govern, and the courts will not interfere merely because a minority of the stockholders object to the transaction and deem it injurious to the corporation" (p. 396.) *Hedges v. Dam,* 72 Cal., 540 (14 Pac., 133).

So one or more citizens of a town may not, until the corporation or its governing body has refused, or for some of the reasons hereafter noted bring themselves within the exception, call upon the courts to interfere with the control of corporate property, or the performance of corporate contracts. It would be quite impossible to carry out any plan or scheme of corporate work such as paving streets, opening streets, erecting systems of water, lights or other appropriate corporate enterprises, if any citizen of his own motion and without notice to the corporate agents can enjoin the work at any stage of its progress because he did not approve it or the manner in which it was being done. It is a matter of common observation that seldom, if ever, every individual in a town or city approves either the undertaking or manner of performance of municipal enterprises. Having become mem-
(549) bers of the corporation, with notice of its charter and governmental machinery, such citizen must, save in the excepted cases, be content to permit the will of the majority to prevail. As we shall see, his rights will be amply protected if it is shown that those who have assumed the duty fail or refuse to do so, after he has demanded the performance or otherwise brought himself within the reasonable rule prescribed by the law. Municipal corporations would find themselves embarrassed at every point of their corporate activity, unless protected by some such restraint upon suits by the citizens. Officious intermeddlers or interested competitors could easily prevent all cor-

permit Johnson to testify, and the judgment can not be sustained." This opinion is sustained by authority. I do not find in any of the cases which I have examined that the right of defendant to have his exception considered is dependent upon showing what he expected to prove.

I have with some labor and care considered and investigated the question presented because, with all possible deference to the opinion of the Court, both in respect to the law and the desire to see that guilty men are punished, I can not resist the conclusion that a dangerous innovation, of course unintentional, is being made upon a fundamental right of the citizen. If, perchance, the right is invoked by a guilty man, it is no reason that it should be denied or its value and certainty weakened. We can not tell how soon it will become a shield for the protection of an innocent man charged with crime. I concede, what I do not find anywhere doubted, "that the sole object of a trial for murder is not the acquittal of the prisoner. It is to determine whether he be guilty or not after giving him the advantage of requiring the unanimous verdict of a jury of twelve men, each of whom must (695) be satisfied beyond a reasonable doubt of his guilt." I only insist that unless he be permitted to confront his accusers with his witnesses, the right of trial by jury is of little value, and to refuse it to him is, as is said by *Chief Justice Henderson*, to make this provision of the Constitution "a dead letter."*

WALKER, J., concurs in the dissenting opinion.

STATE v. BOHANON.

(Filed 18 December, 1906.)

Jurors—Challenges—Findings of Fact—Homicide—Dying Declarations—Confessions.

1. An exception to the ruling of the Court as to the competency of a juror is without merit where he stated that notwithstanding he had formed and expressed an opinion that the defendant is guilty, he was yet satisfied that he could decide fairly and impartially as between the State and the defendant, and the Court found that he was indifferent, the finding as to indifferency not being reviewable.

*NOTE BY REPORTER.—In this case an application for a writ of error was refused by the Justices of the Supreme Court of the United States on the ground that no Federal question was involved. A similar application was also made and refused by the Court on the same ground, in *S. v. Daniels*, 134 N. C., 641.

2. Where a party did not exhaust his peremptory challenges, an objection to a juror, who could have been rejected peremptorily, is not available.
3. In an indictment for murder, the statement of the deceased after he was shot, that "I do not know what my wife and children will do. I begged Frank (defendant) to go along and let me alone," was competent as a dying declaration, where deceased said that he was dying and there was other sufficient evidence tending to show that he knew he was *in extremis* and he died within two hours after the conversation.
4. Evidence of confessions made by the prisoner, after he was arrested was competent, where the Court found that no promise was made to induce him to make the confessions, and that no threat was used to extort them and there is nothing to indicate that they were not entirely voluntary.
5. Where a defendant did not ask for any additional instructions, he cannot complain that the Court did not present to the jury his contentions.

INDICTMENT for murder against Frank Bohanon and others, heard by *Long, J.*, and a jury, at the September Special Term, 1906, of GUILFORD.

The defendant, with Kiser Crutchfield and Oscar Crutchfield, was indicted for the murder of R. E. Beacham, on 31 July, 1906. He and Kiser Crutchfield were convicted of murder in the first degree, and Oscar Crutchfield was acquitted. The defendant, Bohanon, alone appealed.

Robert D. Gilmer, Attorney-General, for the State.
G. S. Bradshaw for the defendant.

WALKER, J., after stating the case: We have carefully examined the testimony in this case and find it sufficient to sustain the conviction of the defendant, though no objection was distinctly made that there was no evidence to warrant the verdict. There are seven errors assigned as having been committed in the rulings of the Court at the trial, and they will be considered in their order.

The defendant objected to C. C. Townsend as a juror, upon the ground that he had formed and expressed the opinion that the defendant is guilty. The Court, after hearing the evidence bearing upon this objection, found that the juror was indifferent, and overruled it. The juror was sworn and served. We do not see how this ruling can now be made the subject of an exception. The juror stated that notwithstanding he had formed and expressed an opinion that the defend-
(697) ant is guilty, he was yet satisfied that he could decide fairly and impartially as between the State and the defendant, and the Court found upon the evidence that he was indifferent. The findings

of fact, as to indifferency, have been held not to be reviewable in this Court. *S. v. Ellington,* 29 N. C., 61; *S. v. Collins,* 70 N. C., 241; *S. v. Kilgore,* 93 N. C., 533; *S. v. Potts,* 100 N. C., 457; *S. v. DeGraff,* 113 N. C., 688; *S. v. Fuller,* 114 N. C., 885; *S. v. Kinsauls,* 126 N. C., 1096; *S. v. Register,* 133 N. C., 747. *S. v. Potts,* 100 N. C., 457, seems to be directly in point. But there is another familiar principle of the law which fully meets and answers this objection. The defendant did not exhaust his peremptory challenges, but there were many left to him when the panel was completed. When such is the case, the objection to a juror who could have been rejected peremptorily is not available. *S. v. Hensley,* 94 N. C., 1021; *S. v. Pritchett,* 106 N. C., 667; *S. v. Teachey,* 138 N. C., 587. The same rule has been affirmed three times at this term of the Court. *Ives v. R. R., ante* 131; *Hodgin v. R. R.,* 143 N. C., 697, and *S. v. Sultan, ante* 569.

The defendant next objected to the testimony of the witness W. T. Ausley, who stated that he was with Beacham after he was shot by the defendant, and that he told the witness that he was dying. There was other sufficient evidence tending to show that Beacham knew that he was *in extremis.* He died within two hours after the witness had the conversation with him to which the defendant objected. The Court permitted Ausley to testify that Beacham said to him: "I do not know what my wife and children will do. I begged Frank (Bohanon) to go along and let me along." This was competent as a dying declaration. It is evident that the deceased was referring to what had occurred at the time he was shot, so that what he told Ausley he had said to the defendant constituted a part of the *res gestæ* and was not the narration of a past event. It identified the defendant as the one who had committed the homicide. *S. v. Dixon,* 131 N. C., 808; *S. v.* (698) *Boggan,* 133 N. C., 761; *S. v. Teachey,* 138 N. C., 587. The reference he made to his family merely confirmed the finding that he was at that time aware of his critical condition, and well knew that he was fast approaching the supreme moment of his dissolution, when his words had more sanction and solemnity than is ever imparted by the ordinary tests the law applies to insure the accuracy and credibility of human testimony.

The third, fourth and fifth assignments of error are based on the admission of the testimony of the State's witnesses, W. J. Weatherly, D. H. Collins and C. F. Neely. Weatherly testified that the defendant was arrested in Danville, Va., and that on his way to Greensboro he asked him why he had killed Beacham. He replied that he was working under Beacham, who discharged him and mistreated him by tear-

ing down his tent. The witness chided him for having resorted to violent and serious measures in resentment of such a grievance, whereupon the defendant said that he would not have killed him if the Crutchfields had not made him drunk and provoked him to it by telling him that he ought not to submit to such a wrong. Collins testified that the defendant told him he had gone to Greensboro and bought a gun, and then went to the railroad camp to look for Beacham. That when he found Beacham the latter cursed him and told him to go away or he would kill him, or something like that, and the defendant replied that he came there for trouble, and he then shot Beacham. After the shooting occurred, he went to Kiser Crutchfield's, and then he lay in the pines all day, where he saw the officers searching for him. Neely testified that the defendant admitted to him he had killed Beacham, and added that he would not have done it if the Crutchfields had not persuaded and helped him to do it. He said, in a second statement, that Beacham had a pistol, and "that he had to shoot him to keep
(699) from being shot." There was evidence on the part of the State that Beacham did not have his pistol in his hands at the time he was shot, and that the act of the defendant was wilful and deliberate, and not done in self-defense. The testimony of the three witnesses, Weatherly, Collins and Neely, was competent and relevant. We have examined the preliminary proof taken by the Court to ascertain if the defendant's confessions were voluntary. There is nothing to be found there to indicate that they were not. No promise was made to induce him to make the confessions, nor was any threat used to extort them. So far as we are able to see, they were entirely voluntary. His Honor having so found, the testimony was admissible. *S. v. Bishop,* 98 N. C., 773; *S. v. DeGraff,* 113 N. C., 688; *S. v. Daniels,* 134 N. C., 641; *S. v. Exum,* 138 N. C., 599; *S. v. Smith,* 138 N. C., 700.

The sixth exception is without any merit, and if it were not for the gravity of the charge we would pass it by without comment. The defendant in that exception complains that his Honor did not present to the jury the contentions of his counsel. The charge of the Court in this respect was very full and explicit, and so clear in statement that the jury could not have failed to understand the defendant's theory in all its phases. Besides, the defendant did not ask for any additional instructions, if those already given were, in his opinion, not sufficient to cover the case. *Simmons v. Davenport,* 140 N. C., 407; *S. v. Martin,* 141 N. C., 832.

The seventh and last exception is also untenable. It appears that the Court not only instructed the jury clearly and fully as to the doctrine

of reasonable doubt, but repeated its instructions, as to that matter, more than once, and cautioned the jury that the burden was on the State, at all stages of the prosecution, and that they should not convict of any degree of homicide without being fully satisfied of the defendant's guilt to the exclusion of every reasonable doubt.

Upon a review of the whole record, we conclude that no error was committed by the Court in the trial of the case. (700)

No Error.

Cited: S. v. Jones, 145 N. C., 471.

STATE v. CONNOR.

(Filed 18 December, 1906.)

Elopement—Abduction—Proviso—Exception—Burden of Proof—Evidence—Character.

1. In an indictment under Rev., sec. 3360, providing that if any male person shall abduct or elope with the wife of another he shall be guilty of a felony, provided the woman since her marriage has been an innocent and virtuous woman, and provided no conviction shall be had upon the unsupported testimony of the woman, the Court erred in putting the burden of proving the facts of the first proviso on the defendant.
2. Where the words contained in a proviso or exception are descriptive of the offense and a part of its definition, it is necessary, in stating the crime charged, that they should be negatived in the indictment, and where the statute does not otherwise provide, and the qualifying facts do not relate to the defendant personally, and are not peculiarly within his knowledge, the allegation, being a part of the crime, must be proved by the State beyond a reasonable doubt.
3. In an indictment for abduction and elopement, under Rev., sec. 3360, where the character of the woman is by express terms of the statute, directly in question, evidence as to her general character for virtue was properly admitted.

CLARK, C. J., and BROWN, J., dissenting.

INDICTMENT for criminal elopement, heard by *Moore, J.,* and a jury, at April Term, 1906, of BUNCOMBE. There was a verdict of guilty and judgment, and defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State. (701)
Frank Carter and *H. C. Chedester* for the defendant.

HOKE, J. The statute under which the conviction was had, Revisal, sec. 3360, is as follows:

"If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: *Provided,* that the woman, since her marriage, has been an innocent and virtuous woman: *Provided,* that no conviction shall be had upon the unsupported testimony of any such married woman."

Defendant, by exceptions properly noted, assigns for error:

1. That the Judge erred in charging the jury that the burden was on the defendant to prove that the "woman in the case" was neither innocent nor virtuous.

It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negative in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.

In such circumstance, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same. *S. v. Heaton,* 81 N. C., 543; *S. v. Goulden,* 134 N. C., 743.

These limitations on the clause creating the offense being usually expressed under a proviso, we find the rule frequently stated: "That when a proviso in a statute withdraws a case from the operations of the body of the section, it need not be negatived in the indictment."

This statement is entirely correct so far as noted in cases where the same has been applied, and will be found generally sufficient for the determination of questions arising under statutes of this char-
(702) acter.

The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that the rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, "provided" or "except;" but rather on the nature, meaning and purpose of the words themselves.

And if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negatived in the bill of indictment.

In such case, this is necessary, in order to make a complete statement of the crime for which defendant is prosecuted.

In *S. v. Abbey,* 29 Vt., 60, it is said:

"Whether an exception in a statute is to be negatived in a pleading, or whether they are mere matters of defense, depends upon their nature, and not upon their placing or upon their being preceded by the words 'except' or 'provided.'"

And again:

"The exceptions in a penal statute required to be negatived are such as are so incorporated with and a part of the enactment, as to constitute a part of the definition or description of the offense."

Our own decisions are in support of this proposition. *S. v. Norman,* 13 N. C., 223; *S. v. Liles,* 78 N. C., 496; *S. v. Burton,* 138 N. C., 576. See, also, Clarks Criminal Procedure, pp. 272 and 273, which gives a very full and satisfactory statement of the doctrine.

This being the correct test, we think it clear that the words in the statute here considered and contained in the first proviso are, and were intended to be, a part of the description of the offense.

It does not withdraw a case from the operation of the body of the section in which a definite substantive offense is created, (703) but it adds a qualification to the offense itself.

As said by *Henderson, J.,* in *S. v. Norman, supra:*

"We find in the acts of our Legislature two kind of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act, the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind it is not necessary in an indictment, or other charge, founded upon the act, to negative the proviso; but if the case is within the proviso it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso. For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself."

This interpretation is confirmed by the highly penal nature of the statute, making the offense a felony, and imposing a punishment of not less than one or more than ten years imprisonment.

Such a penalty was never intended to be imposed on one who should elope with a wife separated from her husband, and who was an abandoned prostitute, and such a statute was in all probability only passed to protect women who had been innocent and virtuous, and to punish the criminal who had wronged and debauched them.

This view finds further support in the second exception, which provides that unsupported testimony of the woman herself should not war-

rant a conviction; evidently contemplating that the burden of the first proviso was on the State; for it is only as to facts included in the first that the testimony of the woman was likely to be important.

The words contained in the first proviso being descriptive of the offense and a part of its definition, it is necessary, in stating the crime charged, that they should be negatived in the bill of indictment.

And wherever this is required and the statute does not otherwise
(704) provide, and the qualifying facts do not relate to defendant personally and are not peculiarly within his knowledge, the allegation must be made good, by proof; and, being part of the crime, must be proved by the State, and beyond a reasonable doubt. *S. v. Crowder,* 97 N. C., 432; *S. v. Wilbourne,* 87 N. C., 529.

The correct doctrine as to the rule and the exceptions to it is well stated in Archbold's Criminal Pleading, as follows:

"In indictments upon statutes we have seen (*ante,* p. 53) that where an exception or proviso is mixed up with the description of the offense, in the same clause of the statute, the indictment must show, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. These negative averments seem formerly to have been proved in all cases by the prosecutor; but the correct rule upon the subject seems to be that in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defense; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative."

The general rule is that what is necessary to be charged as a descriptive part of the offense is required to be proved; and all of the decisions in this State which we have noted, or which have been called to our attention where the rule has been changed and the burden put on defendant, have been cases where the burden was changed by the statute, or the facts referred to in the exception or proviso related to the defendant personally, or were peculiarly within his knowledge.

(705) This was true in *S. v. Goulden, supra,* as to the proviso in indictments for bigamy; also in indictments for selling liquor without license, in criminal trespass on land, etc., etc.

The principle, we think, should not be extended or applied except in cases of like kind and based on reasons of like necessity.

As said by *Ruffin, J.,* in *S. v. Wilbourne, supra:*

"The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to con-

stitute the offense charged, must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principes of natural justice; and so forcibly has it commended itself by its wisdom and humanity to the consideration of this Court, that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it."

We hold, therefore, that the Judge erred in putting the burden of proving the facts of the first proviso on the defendant.

Defendant further excepted because the Judge below admitted evidence as to the general character of the woman for virtue.

In criminal prosecutions it is always open to defendant to offer evidence as to his character at the time of the alleged offense and have the same considered as substantive testimony in his favor. *S. v. Johnson,* 60 N. C., 151.

And, under certain circumstances, the character of other persons is relevant in like manner. This is generally true in prosecutions for criminal offenses against females, where, from the nature of the prosecution, the character of the woman is necessarily and directly (706) involved in the issue.

It is so in seduction and in indictments for rape or for assault with intent to commit rape. *S. v. Daniel,* 87 N. C., 507.

And it is so in abduction, when, as here, the character of the woman is, by express terms of the statute, directly in question. Am. and Eng. Ency., vol. 1, p. 181, and note.

It will be observed that in States which hold the contrary, on indictments for abduction, the decisions are put on the ground that the crime, by their statutes, in no way depends on the character of the person abducted. *People v. Demousset,* 71 Cal., 611.

His Honor was correct, therefore, in admitting the testimony as relevant to the inquiry.

For the error in the charge as to the burden of proof, the defendant is entitled to a new trial, and it is so ordered.

New Trial.

CLARK, C. J., dissenting: Revisal, 3360, makes it a felony "If any male person shall abduct or elope with the wife of another." That is a complete offense. No other description is added. The first *proviso* withdraws from the punishment, denounced upon a man who abducts or elopes with the wife of another, the case where such wife has not been "since her marriage an innocent and virtuous woman." When, therefore, the State has shown that the prisoner has "abducted or eloped with the wife of another," the prisoner may withdraw himself from criminal liability therefore, by showing, if he can, that she has not been a virtuous and innocent woman since her marriage. This is a matter

of defense, not a part of the offense, and the burden of proving it, in order to withdraw himself from criminal liability for abducting or eloping with the wife of another, is upon the prisoner. The Judge merely stated what is the language of the statute.

(707) The second proviso, that "no conviction shall be had upon the unsupported testimony of such married woman," necessarily referred to the offense, the "abduction or elopement." It could not possibly refer to the first proviso, for it needed no statutory provision to inform us that a man cannot be convicted of abduction or elopement upon the unsupported testimony of the woman that she was innocent and virtuous—the only purport of the first proviso. Whereas, but for this second proviso, her testimony of the abduction or elopement would be sufficient to convict, if believed by the jury.

The statute, Revisal, 3361, defines biagamy: "If any person, being married, shall marry any other person, during the life of the former husband or wife," and adds a proviso that the statute shall not apply (1) where the husband or wife of the prisoner shall have been absent seven years and not known to the prisoner to have been living within that time; (2) or, if the prisoner had been lawfully divorced; (3) or the former marriage had been declared void. It was held in *S. v. Goulden,* 134 N. C., 743, that the State having shown the second marriage of the husband during the lifetime of his wife, the burden was upon him to prove any of the above matters in defense. This is exactly in point. Just as here, the abduction of or elopement with the wife of another being shown, the burden was upon the prisoner, in order to deprive that act of liability to punishment, to show in exculpation and defense that this particular wife was such an one as eloping with or abducting her was not punishable. By proving that she came within the proviso, he can exempt himself, withdraw himself from coming within the statute.

This has been the uniform ruling of this Court as to provisos which withdraw the defendant, upon a certain state of facts, from liability under the broad general terms of the statute creating the offense. *S. v. Norman,* 13 N. C., 222; *S. v. Call,* 121 N. C., 649; *S. v. Welch,* 129 N. C., 580. A very similar case to this was *S. v. George,* 93 N. C., 570, upon the sections next preceding that on which this trial was

(708) had, for "abduction of a child," in which the Court held that the words of the proviso, "without the consent and against the will of the father," was not a part of the description of the offense. There are a number of instances where there is no proviso, but where a circumstance, which is a descriptive part of the offense and must be so charged, is nevertheless to be proved, not by the State, but by the defendant. This is on the ground that such circumstance being a matter peculiarly within the knowledge of the defendant, the burden is on him to prove it as a defense. As in an indictment for embezzlement,

Revisal, 3406, "not being an apprentice or other person under sixteen years of age," must be charged, but the defendant must show that he was under sixteen. *S. v. Blackley,* 138 N. C., 622, and cases there cited. In prosecutions for retailing spirituous liquor, Revisal, 3529, the bill must charge that it was done "without license," but the burden is upon the defendant to show that he had license. *S. v. Emery,* 98 N. C., 668; *S. v. Smith,* 117 N. C., 809; *S. v. Holmes,* 120 N. C., 576, and a long line of authorities. In an indictment for fornication and adultery, Revisal, 3350, the bill must allege "not being married to each other," but the burden is on the defendant to show that they are married as a matter in defense. *S. v. McDuffie,* 107 N. C., 888; *S. v. Peeples,* 108 N. C., 769; *S. v. Cutshall,* 109 N. C., 769. In an indictment for entering upon land without license, Revisal, 3688, the bill must allege that the entry was "without license," but the burden is on the defendant to prove license. *S. v. Glenn,* 118 N. C., 1194.

In these and other similar instances the burden of proving the opposite of the matter charged is on the defendant, because it is a matter peculiarly within his knowledge, though it is a part of the description of the offense, and, if proved, will relieve the defendant of the presumption raised by proof of selling liquor, appropriation of money, cohabitation, entry on land after being forbidden, etc. But when, as here, the offense is completely defined and a proviso sets out cir- (709) cumstances which, if shown, withdraws the defendant from liability, the burden is on him for that reason, and not because the matter is one peculiarly within his knowledge. *S. v. Norman, supra,* and other cases cited above.

Even where the statute, unlike ours, does not make the unchastity of the woman a proviso withdrawing the abductor from liability, but makes the chastity of the woman a part of the description of the offense, the courts hold that there is a presumption in favor of female virtue, and hence when the State has shown that the defendant has abducted or eloped with the wife of another man, the burden is on him to show that she was unchaste, as a matter of defense. In the absence of proof, the courts elsewhere will not presume that a woman, who is shown to have been abducted, was unchaste. *Bradshaw v. People,* 153 Ill., 159; *Slocumb v. People,* 90 Ill., 281; *Griffin v. State,* 109 Tenn., 32; *People v. Brewer,* 27 Mich., 138; *Andre v. State,* 5 Iowa, 389; *S. v. Higdon,* 32 Iowa, 264.

BROWN, J., concurs in the dissenting opinon.

Cited: S. v. Hicks, 143 N. C., 694; *S. v. R. R.,* 149 N. C., 474; *S. v. Smith,* 155 N. C., 477; *S. v. Smith,* 157 N. C., 583, 585.

(710)

STATE v. HALL.

(Filed 18 December, 1906.)

Plea Denying Existence of Court—Jurisdiction—Appeals.

1. The plea of the defendant that the Court was unlawfully called and organized because the Governor was absent from the State when he attempted to order the holding of the Court was properly overruled, as the plea is subversive of itself.
2. The legal existence of a Court cannot be drawn in question by a plea to the jurisdiction, for such a plea presupposes that the Court was regularly called and organized, as jurisdiction means the right to hear and determine causes between litigants, which nothing but a Court can do.
3. A plea denying the very existence of the Court before which the plea is filed is unknown to the science of pleading, for no Court can pass upon the validity of its own constitution and organization. It must always decide that it is a Court, because the moment it is admitted that it does not exist, and has never existed, as a legal entity, so to speak, it is at once settled that it never had the power to decide anything, not even the plea denying that it ever was a Court.
4. This Court can acquire jurisdiction to correct errors only where they have been committed by a Court, constituted and organized according to law or recognized as having the essential attributes of a properly constituted tribunal, and competent to exercise jurisdiction of controversies between litigants.

INDICTMENT against George Hall, heard by *Long, J.*, and a jury, at the August (Special) Term, 1906, of ROWAN.

The defendant was indicted for conspiring with divers persons to break and enter the common jail of Rowan County, with the intent to kill Nease Gillespie, John Gillespie and Jack Dillingham, therein confined as prisoners.

"Before pleading to the indictment and before announcing his readiness for trial, the defendant filed a plea to the jurisdiction of the Court, and moved the Court not to proceed with the trial, and for the discharge of the defendant. The motion was based upon the affidavit of the defendant, which was then filed, and which is in the follow-
(711) ing words and figures, namely: 'The defendant, George Hall, being duly sworn, says: That he is advised and believes, and so avers, that this Court is without jurisdiction to try him for the offense charged in the bill of indictment. That he is informed and believes that this special term of court was ordered and the commission of Hon. B. F. Long, the Judge presiding, issued by Robert B. Glenn, purporting to make said order and to issue said commission by virtue of his alleged office as Governor of North Carolina; whereas, affiant is informed and believes said Robert B. Glenn, at the time of making said order and the issuing of said commission, was wholly without authority or warrant of law for so doing, being, as affiant is informed and be-

lieves, at said time, to-wit, on 17 July, 1906, and for many days prior and subsequent thereto, absent from the State of North Carolina, and actually in the State of New Jersey, and defendant is advised and believes that his said action, while so absent from the State, was wholly without warrant of law, unlawful and void, and that all proceedings thereunder are and have been unlawful and void, and that this Court is without lawful constitution or jurisdiction to try this case against affiant, or any other cause. Wherefore defendant demands that he go without day.'"

In support of this motion, defendant introduced Hon. Robert B. Glenn, Governor of North Carolina, who testified as follows: "Q. You are the Governor of the State? A. Yes, sir. Q. I will ask you where you were on 17 July, 1906? A. I was in Atlantic City, New Jersey. Q. You were absent from the State on 17 July, 1906? A. I was in Atlantic City, N. J., on that day. Q. Governor, did you sign the commission of Judge Long to hold this Court? A. I sent a telegram to my private secretary and he signed the commission. I seldom sign commissions. Q. By the State: Did you direct and authorize him to sign it? A. I did. He could not get the Lieutenant-Governor, and he applied to me. I got this telegram at Atlantic City, and as (712) it needed attention at once, I ordered the Commissioners to hold this special term of court, because I wanted to stop this lynching in North Carolina. This signature (to the commission which was produced by the Judge) is my signature, but it is stamped with a rubber-stamp. I ordered it on a telegram, and directed my private secretary to give this order and stamp my name. I directed him to order a special term of court commencing 6 August, 1906." The commission of Judge Long was then introduced. It is in the usual form, and it is not necessary to set it out in full.

The Court, in passing on the defendant's plea to the jurisdiction, considered the minutes of the Board of County Commissioners relating to the special term, and those minutes were made a part of the case. They show that a special meeting of the board was called on 17 July, 1906, to take action in regard to the Governor's notice to the chairman that the special term had been ordered for the trial of criminal cases, to begin 6 August, 1906, and continue for one week, and that a grand jury had also been ordered to be drawn and summoned for the term.

The Board directed that notice of the term be published and that jurors drawn by them in that meeting be summoned by the Sheriff of the county.

The defendant objected to the introduction of the minutes. The objection was overruled and he excepted. The Court, upon consideration, overruled the plea to the jurisdiction, and the defendant excepted. There was a verdict of guilty. The defendant moved for a new trial and in arrest of judgment for the same reason which he assigned in support of his plea. The motions were overruled and he again excepted.

Judgment having been entered upon the verdict, the defendant appealed.

(713) *Robert D. Gilmer, Attorney-General,* and *Walter Clark, Jr.,* for the State.

T. F. Kluttz for the defendant.

WALKER, J., after stating the case: As we view the case there is but one question presented for our decision. When he was called upon to answer the indictment, the defendant entered what is called a plea to the jurisdiction of the Court, but in the formal statement of the grounds of his objection to the further prosecution of the case, he does not, either in fact or in a technical sense, attack the jurisdiction of the Court, but he denies its right to proceed against him solely upon the ground that the Court was unlawfully called and organized, or, in other words, that it was not a court, never having any legal existence under the law. Jurisdiction, when applied to courts and speaking generally, consists in the power to hear and determine causes. 12 Pl. and Pr., 116. It presupposes always, and of course, that there is a court to exercise it, for it is not predicable of anything but a lawful existing tribunal. It relates to the subject-matter of the controversy or to the person, and never is applied to any question touching the existence of the Court itself. It is not conferred until the Court designated to exercise it has been brought into being according to the mode prescribed by law. The defect here alleged is not that, if the Court had been properly called and organized, it would still not have had the necessary jurisdiction of the subject-matter of the prosecution and of the person of the defendant, but that there was no such court as that which pretended to indict and try him. This presents a somewhat different case from an exception to the right of a court, admitted to exist, to try a particular cause. The distinction is clear. *Burt v. R. R.,* 31 Minn., 475. We believe there is no such thing known to the science of pleading as a plea denying the very existence of the Court before which the plea is filed, and, in the nature of things, there can not be, for (714) no court can pass upon the validity of its own constitution and organization. It must always decide that it is a court, because the moment it is admitted that it does not exist, and has never existed, as a legal entity, so to speak, it is at once settled that it never had the power to decide anything, not even the plea denying that it ever was a court. How can a body, having no legal existence, and consequently no judicial power or authority, decide anything? Therefore it is that jurisdiction, or the right to hear and determine, necessarily involve the idea that there is some tribunal having legal existence under the law to hear and decide. This is not by any means a new propostion. It certainly has the full sanction of reason and common sense, as it would

be a legal solecism for a court to deny or disavow its own existence, and it is also, we think, supported by high authority. In *Beard v. Cameron,* 7 N. C., 181, the very question was presented to this Court. There, a plea to the jurisdiction was filed, and *Judge Henderson* said: "It is to my mind a very strange and incongruous proposition that an answer is required to be given by A B, whether he be a Judge, which answer he can not give unless he be a Judge. I plead that you are not a Judge; a Judge alone can decide the plea; and I call on you to decide. This certainly can not be the way of testing Judge Baker's appointment." And again: "It is said that the extent of the jurisdiction of all courts is settled by the courts themselves. This is true; but then it must be remembered that in all such cases there is a court competent to decide; and it is called upon not to decide whether it is a court, but the extent of its jurisdiction. The plea must, therefore, be overruled." That was a case in which the defendant pleaded to the jurisdiction because the Judge, as he alleged, had no authority whatever to preside over the Court—not even color of authority—and that he was no more than a private person, and consequently there was in fact, as well as in law, no court. With respect to this contention *Taylor, C. J.,*
who delivered a separate opinion, thus met the objection put (715)
forth in the plea: "The defendant prays judgment if he ought
to be compelled to answer to the plaintiff in his said plea here depending. Whom does he ask to pronounce this judgment? The person who is asserted by the plea to be constitutionally incompetent to render any judgment. If the person holding the Court were not a Judge, duly authorized and rightfully commissioned, he could render a judgment in no case; none of his acts or proceedings could possess a judicial character, or be capable of affecting, in any shape, the rights or property of the citzen. It must be nugatory, then, to propound to the person assuming this authority a question involving his competency to decide; for that were to ascribe to his decision authority which the very statement of the question denies it to possess. If he were to decide that he is a Judge, and proceed to try the cause and give final judgment, no efficacy could be imparted to such judgment by his decision; it would be *ipso facto* a nullity, in the one case as well as in the other, and no act of his could give it the force of *res adjudicata.* The highest evidence of the opinion of a person acting in the character of a Judge, that he has a right to do so, is exercising the functions of the office. This has already been given; and the strength of such evidence is not increased by his particular opinion to the same effect expressed on a plea to the jurisdiction." The *Chief Justice* did not mean here to deny the proposition that there might be a Judge *de facto. S. v. Lewis,* 107 N. C., 967; *S. v. Speaks,* 95 N. C., 689; *Norfleet v. Staton,* 73 N. C., 546; *Burke v. Elliott,* 26 N. C., 360; *Burton v. Patton,* 47 N C., 124. He was discussing the case upon the assumption of the defendant, as stated

in his plea, that the irregularity in the Judge's appointment not only disqualified him and rendered him incompetent to preside, but that it had the added effect of destroying the existence of the tribunal itself, so that there could be no court to hear and decide. It is difficult, (716) and we think impossible, to distinguish that case from the one at bar. In principle they are the same, and the reason which prevailed with the Court in the one should control the decision in the other. It all comes to this, that by his plea the defendant has called upon the Court to deny it own existence and to exercise a judicial function in doing so, whereas, by the very nature of the plea, and, indeed, by its very terms, he avers that it has no such function because it has no existence in law.

It we treat the plea as technically one to the jurisdiction, we must, of course, first assume that the Court had a legal existence, for, as we have seen, it could not possess or exercise jurisdiction of any kind, either of the person or the subject-matter, unless it was a court. If we eliminate the plea, as one denying the existence of the Court, which we must do, and also exclude all evidence bearing upon it, as it must share the fate of the plea itself, we only have left the record proper in the case, which shows on its face, and without resorting to any extraneous facts, that the Court was regularly called, organized and held, so that the plea, regarded merely as one to the jurisdiction, but not to the existence of the Court, must be overruled, for the record proper shows that it had jurisdiction of the person and the subject-matter.

We do not understand that the defendant intended to raise any objection to the "jurisdiction of the Court," using that term in its only legitimate sense, but that he merely intended to challenge the right of the Court to exercise judicial authority under any circumstances, because in fact it was not a court recognized by the law. In either view the plea was bad and was properly rejected. Again, if there was no court to hear and determine, how is it that anything has been heard and determined? If the proceedings were void *ab initio* there was no indictment, no arraignment, no trial, and no judgment, and it follows, logically, that there was nothing to appeal from to this Court, and we have therefore, no jurisdiction to review the proceedings. (717) This Court can acquire jurisdiction to correct errors only where they have been committed by a court constituted and organized according to law or recognized as having the essential attributes of a properly constituted tribunal, and competent to exercise jurisdiction of controversies between litigants. We can not entertain an appeal from anything except a court, or a person, such as a Judge, who is clothed with judicial power.

The reasoning by which the conclusion of this Court was reached in *Beard v. Cameron, supra,* is satisfactory to us, as it commends itself to our sense of the fitness of things and accords with our notion of the fundamental principles of the law relating to the formation and the

peculiar functions of courts. The plea of the defendant that there was no court to indict and try him is subversive of itself, as it violates the maxim *ex nihilo nihil fit.* You can not deduce the right to hear the plea from the premise that there was no court, for that is to deny and affirm at the same time.

As the plea must be overruled and as all the evidence introduced in its support must fall with it, there is nothing left for us to do but to inspect the record to see if there is any defect or error therein, and finding none and confining ourselves strictly to the question before us, we must declare that there was no error in overruling the plea of the defendant.

No Error.

INDEX