[*Citations Include 166 N. C.*]

NORTH CAROLINA REPORTS

VOL. 143

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1906. SPRING TERM, 1907.

BY

J. CRAWFORD BIGGS,
ROBERT C. STRONG,
STATE REPORTERS.

ANNOTATED BY

WALTER CLARK

RALEIGH
REPRINTED BY THE STATE
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1914

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1906

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

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

ATTORNEY GENERAL:

ROBERT D. GILMER.

ASSISTANT ATTORNEY GENERAL:

HAYDEN CLEMENT.

SUPREME COURT REPORTERS:

J. CRAWFORD BIGGS,
(To February Term, 1907).

ROBERT C. STRONG,
(From February Term, 1907).

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JUDGES OF THE SUPERIOR COURTS

Name.	*District.*	*County.*
GEORGE W. WARD	First	Pasquotank.
ROBERT B. PEEBLES	Second	Northampton.
O. H. GUION	Third	Craven.
CHARLES M. COOKE	Fourth	Franklin.
OLIVER H. ALLEN	Fifth	Lenoir.
WILLIAM R. ALLEN	Sixth	Wayne.
C. C. LYON	Seventh	Bladen.
WALTER H. NEAL	Eighth	Scotland.
J. CRAWFORD BIGGS	Ninth	Durham.
BENJAMIN F. LONG	Tenth	Iredell.
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M. H. JUSTICE	Fourteenth	Rutherford.
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HALLETT S. WARD	First	Beaufort.
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CHARLES C. DANIELS	Fourth	Wilson.
RUDOLPH DUFFY	Fifth	New Hanover.
ARMISTEAD JONES	Sixth	Wake.
N. A. SINCLAIR	Seventh	Cumberland.
L. D. ROBINSON	Eighth	Anson.
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MARK W. BROWN	Fifteenth	Buncombe.
THADDEUS D. BRYSON	Sixteenth	Swain.

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SPRING TERM, 1907

BARKER, JOHN R.....Jones.
BONITZ, FRED W.....New Hanover.
BRUMMITT, DENNIS G.....Granville.
BRYAN, STEVEN C.....Madison.
CAPPS, BISMARCK.....Rowan.
CARPENTER, JOHN G.....Gaston.
COCKE, NORMAN A.....Mecklenburg.
COCKE, PHILIP C.....Buncombe.
DAMERON, EDGAR S.....Sampson.
FOUNTAIN, RICHARD T.....Edgecombe.
FURR, THORNWELL G.....Iredell.
GARLAND, JR., PETER W.....Charlottesville, Va.
GARRETT, J. W. O.....Buncombe.
GOODWYN, GEORGE T.....Scotland.
HALL, JOHN W.....Forsyth.
HAYNES, JOSEPH W.....Buncombe.
HILL, ELI W.....Wayne.
HOLDING, BENJAMIN T.....Franklin.
HOLLOWAY, ALVIS C.....Harnett.
HORNER, GUY T.....Lynchburg, Va.
HOYLE, KENNETH R.....Moore.
LASSITER, BENJAMIN K.....Granville.
LILES, JOSEPH F.....Edgecombe.
LITTLE, JOSEPH W.....New Hanover.
LOVE, WALTER B.....Union.
LYON, OTTO D.....Granville.
LYON, TERRY A.....Bladen.
MCNEELY, ROBERT N.....Union.
MILLARD, DAVID R.....Buncombe.
NOBLE, ALBERT M.....Johnston.
OUTLAW, NEEDHAM W.....Wayne.
PAIT, ALBERTUS H.....Bladen.
RAEFORD, SAMUEL W.....Buncombe.
RAMSEY, JACOB C.....Madison.
RUARK, JOSEPH W.....Brunswick.
SCARBOROUGH, MORRIS M.....Buncombe.
SKINNER, BENJAMIN S.....Perquimans.
SMOOT, WILLIAM B.....Rowan.
THOMPSON, CHARLES M.....Buncombe.
WARREN, JULIEN K.....Chowan.
WHITSON, SAMUEL P.....Buncombe.
WINSTEAD, SAMUEL P.....Buncombe.
WINSTON, JAMES H.....Durham.
WOODY, THOMAS K.....New Hanover.
ZOLLICOFFER, DALLAS.....Halifax.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1907 AND THE SPRING OF 1908

SUPREME COURT

The Supreme Court of North Carolina 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 the first Monday in each term.

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

	Fall Term, 1907.		Spring Term, 1908.	
First District	August	26	February	3
Second District	September	2	February	10
Third District	September	9	February	17
Fourth District	September	16	February	24
Fifth District	September	23	March	2
Sixth District	September	30	March	9
Seventh District	October	7	March	16
Eighth District	October	14	March	23
Ninth District	October	21	March	30
Tenth District	October	28	April	6
Eleventh District	November	4	April	13
Twelfth District	November	11	April	20
Thirteenth District	November	18	April	27
Fourteenth District	November	25	May	4
Fifteenth District	December	2	May	11
Sixteenth District	December	9	May	18

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.

FALL TERM, 1907—Judge O. H. Allen.
SPRING TERM, 1908—Judge Cooke.

Beaufort—Oct. 21 (2); Dec. 2 (3); Feb. 10 (2); †Apr. 20 (1); *May 18 (3).
Currituck—Sept. 2 (1); Feb. 24 (1).
Camden—Sept. 9 (1); Mar. 2 (1).
Pasquotank—Sept. 16 (1); †Nov. 18 (1); †Jan. 13 (2); Mar. 9 (2).
Perquimans—Sept. 23 (1); Mar. 23 (1).
Chowan—Sept. 30 (1); Mar. 30 (1).
Gates—Oct. 7 (1); Apr. 6 (1).
Washington—Oct. 14 (1); Apr. 13 (1).
Tyrrell—Nov. 4 (1); Apr. 27 (1).
Dare—Nov. 11 (1); May 4 (1).
Hyde—Nov. 25 (1); May 11 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1907—Judge W. R. Allen.
SPRING TERM, 1908—Judge O. H. Allen.

Halifax—Aug. 19 (2); Nov. 25 (2); *Jan. 27 (1); Mar. 2 (2); June 1 (2).
Northampton—‡Aug. 5 (1); Oct. 28 (2); ‡Jan. 20 (1); Mar. 23 (2).
Warren—Sept. 16 (2); Feb. 10 (1); June 15 (2).
Bertie—Sept. 9 (1); Nov. 11 (2); Feb. 17 (1); Apr. 27 (2).
Hertford—Aug. 12 (1); ‡Oct. 14 (2); Feb. 24 (1); ‡Apr. 20 (1).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Lyon.
SPRING TERM, 1908—Judge W. R. Allen.

Pitt—†Aug. 19 (2); Sept. 16 (2); †Nov. 4 (2); †Dec. 9 (2); Jan. 13 (2); †Mar. 16 (2); Apr. 20 (2).
Craven—*Sept. 30 (1); †Oct. 7 (1); †Nov. 18 (2); ‡Feb. 3 (1); †Feb. 10 (1); †Apr. 6 (1); *May 4 (2); †June 8 (1).
Greene—Sept. 2 (1); Dec. 2 (1); Feb. 24 (2); †May 25 (2).
Carteret—Oct. 14 (1); Mar. 9 (1).
Jones—Oct. 28 (1); Mar. 30 (1).
Pamlico—Oct. 21 (1); Apr. 13 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Neal.
SPRING TERM, 1908—Judge Lyon.

Franklin—*Aug. 19 (1); †Oct. 14 (2); Jan. 20 (2); Apr. 13 (2).
Wilson—Sept. 2 (1); Nov. 11 (2); *Dec. 16 (1); Feb. 3 (2); May 11 (1).
Vance—Sept. 30 (2); Feb. 17 (2); May 18 (2).
Edgecombe—Sept. 9 (1); †Oct. 28 (2); Mar. 2 (1); †Mar. 30 (2); †June (2).
Martin—Sept. 16 (1); Dec. 9 (1); Mar. 16 (1); June 15 (1).
Nash—*Aug. 26 (1); Nov. 25 (2); †Mar. 9 (1); †Mar. 23 (1); Apr. 27 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Biggs.
SPRING TERM, 1908—Judge Neal.

New Hanover—*July 22 (2); *Sept. 23 (1); †Sept. 30 (2); †Dec. 2 (1); *Jan. 20 (2); *Mar. 30 (1); †Apr. 6 (2); †May 25 (2).
Pender—Sept. 9 (2); Jan. 13 (1); Mar. 23 (1).
Duplin—Aug. 26 (2); Nov. 18 (2); Feb. 17 (2).
Sampson—Aug. 5 (2); Oct. 21 (2); Feb. 3 (2); Apr. 27 (2).
Lenoir—*Aug. 19 (1); †Nov. 4 (2); Dec. 9 (2); †Jan. 6 (1); Mar. 9 (2); †May 18 (1); *June 15 (1).
Onslow—July 15 (1); Oct. 14 (1); Apr. 20 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Long.
SPRING TERM, 1908—Judge Biggs.

Harnett—Sept. 2 (1); †Nov. 11 (2); Feb. 3 (2); May 18 (1).
Johnston—Sept. 9 (2); Dec. 9 (2); Mar. 2 (2).
Wake—*July 8 (2); *Sept. 23 (2); †Oct. 21 (3); *Jan. 6 (2); †Feb. 17 (2); *Mar. 23 (2); †Apr. 20 (3).
Wayne—Aug. 19 (2); Nov. 25 (2); Jan. 20 (2); Apr. 6 (2).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Jones.
SPRING TERM, 1908—Judge Long.

Columbus—†July 15 (2); Sept. 2 (1); Nov. 25 (1); Feb. 24 (2); Apr. 13 (2).
Cumberland—*Aug. 26 (1); †Oct. 21 (2); *Nov. 18 (1); *Jan. 13 (1); †Feb. 17 (1); ‡Mar. 23 (1); †Apr. 27 (2); *May 25 (1).
Robeson—*July 1 (1); Nov. 4 (2); †Dec. 2 (2); *Feb. 3 (2); †Mar. 30 (2); †May 18 (1); †June 15 (1).
Bladen—†July 29 (1); Oct. 14 (1); Mar. 9 (1).
Brunswick—†Aug. 5 (1); Sept. 23 (1); Mar. 16 (1).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Webb.
SPRING TERM, 1908—Judge Jones.

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

Anson—*Sept. 9 (1); †Oct. 7 (1); †Dec. 2 (1); *Jan. 13 (1); †Feb. 10 (1); †Mar. 2 (1); *Apr. 13 (1); †May 11 (1); †June 8 (1).
Chatham—†Aug. 5 (1); Nov. 11 (1); Feb. 3 (1); May 4 (1).
Moore—*Aug. 12 (1); †Sept. 16 (1); *Nov. 18 (1); †Dec. 9 (1); †Jan. 20 (1); †Mar. 23 (1); *Apr. 20 (1); †May 18 (2).
Richmond—*Sept. 2 (1); †Sept. 23 (2); *Jan. 6 (1); Mar. 30 (2).
Scotland—†Oct. 21 (1); †Mar. 9 (1); *Apr. 27 (1); June 1 (1).
Union—*July 29 (1); †Aug. 19 (2); *Oct. 28 (2); *Jan. 27 (1); †Feb. 17 (2); *Mar. 16 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Councill.
SPRING TERM, 1908—Judge Webb.
Durham—*Aug. 26 (1); †Sept. 30 (2); *Dec. 2 (1); *Jan. 6 (1); †Jan. 20 (2); †Mar. 16 (2); *May 11 (1).
Guilford—†Aug. 19 (1); *Sept. 16 (1); †Oct. 21 (2); *Dec. 9 (1); †Dec. 30 (1); †Jan. 13 (1); †Feb. 10 (2); *Feb. 24 (1); *Mar. 30 (1); †Apr. 13 (2); †June 1 (2); *June 15 (1).
Granville—July 29 (1); Nov. 18 (2); Feb. 3 (1); Apr. 27 (2).
Alamance—Sept. 2 (2); *Nov. 4 (1); Mar. 2 (1); †May 25 (1).
Orange—Aug. 5 (1); Oct. 14 (1); Mar. 9 (1); †May 18 (1).
Person—Aug. 12 (1); Nov. 11 (1); Apr. 6 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Justice.
SPRING TERM, 1908—Judge Councill.
Montgomery—Sept. 16 (2); *Jan. 20 (1); †Apr. 13 (1).
Iredell—July 29 (2) Oct. 28 (2); Jan. 27 (2); May 18 (2).
Rowan—Aug. 26 (2); Nov. 18 (2); Feb. 10 (2); May 4 (2).
Davidson—Aug. 12 (2); †Nov. 11 (1); Feb. 24 (2); †Apr. 20 (1).
Stanly—*July 8 (1); †Sept. 9 (1); *Jan. 13 (1); †Mar. 9 (1).
Randolph—July 15 (2); Dec. 2 (2); Mar. 16 (2).
Davie—Sept. 30 (2); Mar. 30 (2).
Yadkin—Oct. 14 (2); Apr. 27 (1).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Moore.
SPRING TERM, 1908—Judge Justice.
Ashe—Oct. 21 (2); June 1 (1).
Forsyth—*July 22 (1); †Sept. 9 (2); *Oct. 7 (1); †Dec. 2 (2); *Feb. 10 (2); †Mar. 9 (2); May 18 (2).
Rockingham—*July 29 (1); Nov. 4 (2); Feb. 24 (2); †June 8 (2).
Alleghany—Aug. 19 (1); Mar. 23 (1).
Caswell—Oct. 14 (1); Apr. 13 (1).
Surry—†Aug. 26 (2); Nov. 18 (2) Feb. 3 (2); Apr. 20 (1).
Stokes—Sept. 23 (2); May 4 (2).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Ferguson.
SPRING TERM, 1908—Judge Moore.
Mecklenburg—†July 15 (2); *Aug. 12 (2); *Sept. 23 (1); †Sept. 30 (3); †Nov. 25 (1); *Dec. 2 (1); †Jan. 13 (2); *Feb. 10 (2); †Mar. 9 (2); *Apr. 20 (1); †Apr. 27 (1); *June 1 (1); †June 8 (1).
Cleveland—July 29 (2); Nov. 4 (2); Mar. 23 (2).
Gaston—Sept. 9 (2); Nov. 18 (1); Feb. 24 (2); May 18 (2).
Lincoln—Sept. 2 (1); Dec. 9 (1); Apr. 6 (1).
Cabarrus—Aug. 26 (1); Oct. 21 (2); Jan. 27 (2); May 4 (2).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Ward.
SPRING TERM, 1908—Judge Ferguson.
Wilkes—Aug. 5 (2); †Oct. 7 (2); †Jan. 20 (2); Mar. 9 (2).
Catawba—July 8 (2); Oct. 28 (2); Feb. 3 (2); †May 4 (2).
Alexander—Sept. 23 (2); Feb. 17 (1).
Caldwell—Aug. 26 (2); †Nov. 25 (2); Feb. 24 (2).
Mitchell—†July 22 (2); Nov. 11 (2); Apr. 6 (2).
Watauga—Sept. 9 (2); Mar. 23 (2).

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Peebles.
SPRING TERM, 1908—Judge Ward.
Yancey—Sept. 2 (2); Mar. 23 (2); †June 15 (1).
McDowell—July 22 (2); Sept. 16 (2); †Jan. 20 (2); Feb. 17 (2).
Henderson—*Sept. 30 (2); ‡Nov. 11 (2); *Mar. 2 (1); ‡May 11 (2).
Rutherford—†Aug. 19 (2); Oct. 28 (2); †Feb. 3 (2); Apr. 6 (2).
Polk—Oct. 14 (2); Apr. 20 (2).
Burke—Aug. 5 (2); †Dec. 2 (2); Mar. 9 (2); †June 1 (2).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Guion.
SPRING TERM, 1908—Judge Peebles.
Buncombe—July 29 (2); †Sept. 9 (6); Nov. 11 (2); †Dec. 2 (2); Feb. 3 (3); †Mar. 9 (4); Apr. 20 (2); †May 25 (4).
Madison—Aug. 12 (2); †Oct. 28 (2); †Jan. 20 (2); Feb. 24 (2); †May 4 (2).
Transylvania—Aug. 26 (2); Nov. 25 (1); Apr. 6 (2).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1907—Judge Cooke.
SPRING TERM, 1908—Judge Guion.
Haywood—Sept. 23 (2); Jan. 27 (3).
Jackson—Oct. 7 (2); Feb. 17 (2); †May 18 (2).
Swain—July 22 (2); Oct. 21 (2); Mar. 2 (2).
Graham—Sept. 2 (2); Mar. 16 (2).
Cherokee—Aug. 5 (2); Mar. 30 (2).
Clay—Sept. 16 (1); Apr. 13 (1).
Macon—Nov. 18 (2); Apr. 20 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.
Compiled from the Court Calendar of A. B. Andrews, Jr., of the Raleigh Bar.

CASES REPORTED IN THIS VOLUME

CASES CITED BY THE COURT

FROM NORTH CAROLINA REPORTS.

A

B

C

D

E

F

H

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1906

IN RE APPLICANTS FOR LICENSE.

(Filed 27 November, 1906.)

1. Under Revisal, ch. 5, an applicant for license to practise law who complies with the formal prerequisites prescribed by sec. 208 is entitled to be examined, and if, on his examination he satisfies the Court of his competent knowledge of the law, he is entitled to receive his license, and an investigation into his general moral character is no longer required or permitted.
2. Revisal, ch. 5, establishing the qualifications for applicants to practise law, is not unconstitutional as an unwarranted exercise of judicial power prohibited by sec. 8 of the Declaration of Rights, nor as an unlawful attempt to deprive the Court of its inherent power to direct and control the conduct of attorneys who are its officers.
3. The Legislature has the right to establish the qualifications to be required of one to become a practising member of the bar by virtue of the police power which is vested in that body.

BROWN and WALKER, JJ., dissenting.

HOKE, J. At the beginning of the present term, when the Court was about to enter on the examination of applicants for license to practise law, we found on file, signed by members of our profession, of high standing and deserved repute, protests against the admission of three of the applicants on the alleged ground that they did not have good moral characters.

As the applicants were here, ready, we determined to proceed with the examination; and the question being of the first im- (2) portance, we took the same under advisement; and two of these applicants having passed excellent examinations, the question of the protest is fairly presented.

After giving the matter our best consideration, the Court is of opinion that under the law, as it now stands, Revisal 1905, ch. 5, an applicant for license who, on his examination, shall satisfy the Court of his competent knowledge of the law, is entitled to receive his license, and that an investigation into his general moral character is no longer required or permitted. Prior to the enactment of this Revisal the law was otherwise.

Under the Code of 1883, the Revised Code, and the Revised Statutes, it was provided:

"That applicants for license shall undergo an examination before two or more Justices of the Supreme Court, and on receiving certificates from such Justices of their competent knowledge of the law and upright character, shall be admitted to practise in the courts."

By clear inference from the language of this statute, power is given the Court or Judges who acted in the matter, and perhaps the duty imposed, of satisfying themselves that the applicant's character was good. Under a rule or custom, the certificates of two practising attorneys of good standing as to the character of the applicants were accepted as evidence sufficient; but this was only *prima facie,* and on protest filed, as in this case, and under the former law, we think the Court would clearly have had the power to examine into the question. But under the Revisal, the sections controlling the question are as follows:

Section 208: "Before being allowed to stand an examination each applicant must comply with the following conditions:

"1. He must be twenty-one years of age, or will arrive at that (3) age before the time for the next examination.

"2. He must file with the Clerk of the Court a certificate of good moral character signed by two attorneys who practise in that Court. An applicant from another State may have such certificate signed by any State officer of the State from which he comes.

"3. He must deposit with the Clerk twenty-one dollars and fifty cents."

And sec. 207: "No person shall practise law without first obtaining license so to do from the Supreme Court. Applicants for license shall be examined only on the first Monday of each term of the Supreme Court. All examinations shall be in writing, and based upon such course of study and conducted under such rules as the Court may prescribe. All applicants who shall satisfy the Court of their competent knowledge of the law shall receive license to practise in all the courts of this State."

This statute presents no question, sometimes mooted by the courts, as to whether the certificates of the attorneys to the character of the applicants is *prima facie* or conclusive. This certificate, to be signed

by two practising members of the Court, is only a formal matter, fixing the status of an applicant. When this is done, and the other preliminaries complied with, sec. 207 requires that the applicant shall be examined, and if he satisfies the Court of his competent knowledge of the law he shall be licensed.

The change from the former law is too pronounced to pass unnoticed, and the meaning too plain for construction.

Says Black, in Interpretation of Laws, sec. 26: "The meaning of a statute must first be sought in the language of the statute itself."

And further: "If the language is plain and free from ambiguity and expresses a simple, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey." (4)

And in Lewis's Southerland Statutory Construction (2 Ed.), sec. 267, it is said: "When the intention of the Legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction."

It was not seriously contended in the able argument made by the protestants, in compliance with the request of the Court, that this change has not been wrought by the Revisal of 1905; but the validity of the statute is assailed on the ground that the same is unconstitutional, because—

1. It violates sec. 8 in our Declaration of Rights, to the effect that "the legislative, executive, and supreme judicial powers of the government should be kept separate and distinct."

2. Sec. 12 of Art. IV, which ordains that "the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it," etc. The argument being (*a*) that the admission of attorneys to practise is a judicial act, and the statute, requiring, as it does, that an applicant be admitted when found to have competent knowledge of the law, is an unwarranted exercise of judicial power prohibited by sec. 8 of the Declaration of Rights; (*b*) that attorneys, when admitted, are officers of the Court, whose appointment and conduct are under the control of the Court as one of its inherent powers, and the act is an unlawful attempt to deprive the judicial department of a power which of right belongs to it.

We do not think, however, that either of these positions can be sustained.

True, it is generally held, uniformly, so far as we have examined, that the admission of an applicant to the practice of the law is a judicial act.

In several decisions on this question a *mandamus* to control (5) the action of an inferior court was denied by an appellant tri-

bunal because the admission to the bar was an act involving judicial discretion, and that such discretion, as a rule, could not be directed by this writ.

We do not deduce from this principle and these decisions, as some authorities have done, that because admission to the bar is in some sense a judicial act, "that a Legislature has no power, therefore, to provide that any person, possessing certain qualifications, must be admitted, as this would be to assume judicial power."

It is well established and sustained by the weight of authority that the Legislature has the right to establish the qualifications to be required of one to become a practising member of the bar.

As said in *Ex parte Garland,* 71 U. S., at p. 379: "The Legislature may undoubtedly prescribe the qualifications for the office of an attorney, to which he must conform; as it may, when it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life."

The right to establish such qualifications rests in the police power—a power by virtue of which a State is authorized to enact laws to preserve the public safety, maintain the public peace and order, and preserve and promote the public health and public morals.

Under our system, and as a part of the governmental policy, this power is, in the first instance, rightfully vested in the Legislature. *S. v. Moore,* 104 N. C., 714.

And, subject to constitutional restrictions and limitations, the Legislature has the right to prescribe the qualifications and establish the rules and regulations under which its citizens may pursue this or that calling, professional or otherwise. As stated in Cyc., vol. 4, p. 900:

"As attorneys are officers of the Court, their admission is the exercise of a judicial power resting with the courts. The Legislature,
(6) however, may prescribe regulations and qualifications for the office, and have uniformly done so."

From the existence of these two admitted and well established principles we draw the conclusion that when a Legislature, by positive enactment, has prescribed the qualifications required to enable one to enter the legal profession, and a citizen presents himself for examination and is shown to possess these qualifications, the courts must admit him to the practice of the law. We exercise our judicial functions in determining whether the applicant possesses the required qualifications; and here our power in the premises ends. To hold, as we are requested to do here, that when a Legislature has acted and established the qualifications which shall be required, the Court can go on and superadd others, would, in effect, destroy the right admitted to be in the Legislature and uphold the Court in the exercise of legislative power.

If a Legislature, having prescribed certain qualifications, should undertake to direct whether an applicant did or did not possess them, this might be an unconstitutional exercise of judicial power. But not so here. The Legislature has established a general standard to which all applicants must conform, and has referred it to the Court to decide whether, in any particular case, the requirement has been met.

The principal test, then, by which the two powers are distinguished is complied with. The Legislature, in the valid exercise of the police power, lays down a general rule. The judiciary applies the principle to the particular case.

Nor do we think that the statute in question withdraws from the courts any power which rightfully belongs to them. So far as this Court is concerned, being now a court created by the Constitution, it has the constitutional power given to it and protected by that instrument; and, as set forth in Art. IV, sec. 8: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said Court over 'issues of fact' and 'questions of fact' (7) shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight; and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Convention 1875.

The power here referred to is generally understood to mean the power to hear and determine controversies between adverse litigants. Or, as said in *People v. Chase,* 165 Ill., p. 527: "Judicial power is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws." Certainly, the legislation in question interferes in no way with the powers granted to this Court by the Constitution which created it.

It is urged, however, that the statute impairs or destroys the inherent rights of the courts to admit and control the conduct of the attorneys who are its officers.

Passing from the Supreme Court and the power and jurisdiction given and guaranteed it by the Constitution, the power of the Legislature over the matter in question would seem to be plenary; not only by virtue of the general powers of legislation granted to it by Art. II, sec. 1, of the Constitution, but under the very section to which the protestants appeal. In Art. IV, sec. 12, it is said: "That the General Assembly shall have no power to deprive the judiciary of any power which actually belongs to it." The section further prescribes that the General Assembly shall allot and distribute that portion of the power and jurisdiction which does not pertain to the Supreme Court among

other courts prescribed in the Constitution, or which may be established by law, in such manner as it may deem best, etc.

Under this section the Legislature would seem to have the right, not only to prescribe the qualifications, but to determine the courts or agency which should pass upon them.

(8) In performing the duty of examining applicants and issuing licenses, we are not acting as a Supreme Court; certainly not in the exercise of our constitutional powers. We are simply discharging a duty imposed upon us by the Legislature, which we would, no doubt, have the right to decline. We have heretofore done this work in obedience to this reasonable requirement on the part of the Legislature; partly following a custom which has been sanctioned by time and approved by trial; partly from our desire at all times to do what we can to uphold the traditions and promote the interests of the profession to which we belong.

If the Legislature sees proper to impose the duty on another court, or to create one for the purpose, the admission of attorneys being a judicial act under sec. 8 of the article, the Supreme Court would have, no doubt, the right to supervise the procedure. But this would be in order only to see that the form and requirements of the laws addressed to this question are complied with and in accordance with the principles set forth in this opinion. It is urged, however, that the statute impairs or destroys the inherent right of the Court to direct and control the conduct of attorneys who are its officers.

There are decisions which so express themselves on this question; and if by inherent they intend to say—and this is all that most of them do say—that in the absence of legislation on the subject, the courts have the power to regulate and deal with the matters mentioned, this may be accepted. But if by inherent is meant that the power, to the extent claimed here, is one inherent because essential to the existence of the Court and the proper exercise of its functions, we do not think the position can be maintained.

Why and how is it essential? If any attorney who has been admitted as a practising member of a court is presently so conducting himself that the Court finds it impossible to properly administer justice in some case or cases being then considered, the question might be pre-

(9) sented. But how can the right to pass on an applicant's previous conduct or his character be considered as a power essential to a court's existence, when he has never become an attorney or been given an opportunity to have his demeanor observed or considered?

While the precise question has not been presented in this State, we are not without authority here which will aid us to a correct conclusion in this matter.

In *Ex parte Schenck,* 65 N. C., p. 353, the Court, in construing our statutes on contempt, held, "That the Act of April 4, 1871, declaring that no attorney who has been duly licensed to practise law shall be disbarred or deprived of his license and right to practise except upon conviction for a criminal offense, or after confession in open court, is constitutional." And further: "The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice."

And in *Kane v. Haywood,* 66 N. C., p. 1, under graver circumstances, the same act was upheld.

If the power to disbar an attorney who is a sworn officer of the Court can be taken away by the Legislature only after conviction or confession of crime, it would surely be competent for the Legislature to provide for the admission of one of its citizens who has established the requisite qualifications, and against whom there are charges which rest only on report.

The views we maintain on this question are supported, we think, by the best considered authorities. *Ex parte Thompson,* 10 N. C., 355; *In re Cooper,* 22 N. Y., 67; *In re Robinson,* 131 Mass., 376; *Ex parte Yale,* 24 Cal., 241; *S. v. Foreman,* 3 Mo., 602; Freunde on Police Power, secs. 646 to 650.

In *Ex parte Thompson* the power is treated as legislative. In *Ex parte Yale* it is held, "That the manner, terms and conditions of an attorney's admission to practise, and of his continuing in practice, as well as his powers, duties and privileges, are proper subjects of legislative control to the same extent, and subject to the same limitations as any other profession or business that is directed or regu- (10) lated by statute."

In *In re Cooper* the Legislature had directed that applicants holding diplomas from Columbia College should be admitted, and the act was upheld and the admission required.

In *Ex parte Robinson* a woman had offered for admission to the bar in Massachusetts, and was rejected because the statute had not so provided. The question is treated throughout as a matter exclusively under legislative control, and *Mr. Chief Justice Gray* closes the opinion in this way: "It is hardly necessary to add that our duty is limited to declare the law as it is; and whether any change in that law would be wise or expedient is a question for the Legislature, and not for the judicial department of the government." Many other authorities could be cited to the same effect.

The position here taken is not only sustained by the weight of authority, but will be found historically correct.

In an interesting and learned argument delivered before the Court

of Appeals of New York by Dr. Dwight in the *Matter of the Graduate of Columbia College, supra,* and from the opinion of the Court in that case, it will be found that barristers and counsellors at law in England were never appointed by the Court at Westminster, but were called to the bar by the Inns of Court, which were voluntary, unincorporated associations. And while the Judges seem to have had some kind of visitorial power in regard to these institutions, they declined, in their official capacity as Judges to exercise any control over the action of the benchers in the selection or admission of these officers. While attorneys, in fact, at an early period were authorized, by different methods, to appear for individual litigants, the power of the Court to appoint attorneys as a class of public officers was conferred originally, and has from time to time been regulated and controlled in England by statute.

(11) True, this historic account of English methods can not be allowed full significance here, because in that country the power of Parliament is without constitutional restraint or, rather, it is a part of the Constitution of England that their Parliament has supreme and transcendent power, and can, when it sees proper, exercise judicial as well as legislative power; but this statement of Dr. Dwight shows that in New York, also, the power to establish qualifications and regulate the admission of attorneys has always been a matter of legislative control.

In North Carolina, too, the matter has always so been dealt with: and here, certainly, this fact should be given great weight.

In 1754, by statute, the North Carolina Legislature conferred the power of admitting attorneys on the Judges of the Superior Court. In 1818 this was changed, and the power was given to two or more Judges of the Supreme Court, and so remained until 1869, when the Legislature passed an act that any citizen be allowed to practise law who proved a good moral character and paid a license tax of $20; and that it was the duty of the Judges of the Superior Court to admit to the practice of law in the courts of the State any applicant who complied with these provisions.

During the existence of this statute it was the custom for an applicant to prove his character and pay the tax to the Clerk of the Superior Court; and the Judges of the Superior Court admitted such applicant on the certificate of the Clerk that the provisions of the act had been complied with. While this statute was in force, the Judges of the Supreme Court declined to examine applicants, and many of our capable and prominent attorneys were admitted to the profession in this manner, this being the only way that was then open to them.

The act was repealed in 1871, and the former law was restored, and continued in force until the Revisal of 1905, being the act we are now

considering. And what valid objection can be made to this legislation? And here the writer speaks only for himself. (12)

It is said by an American author of blessed memory that it does not matter so much where a man is as the direction in which he is moving.

Why should a citizen, even if he has committed some offense in the past, be deprived of the privileges of turning his face the other way and making an honorable effort to gain his living by the practice of the law? Or why should one who seeks to enter this honorable profession be turned from his purpose and this privilege denied him by reason of charges which rest only in rumor, and without having the opportunity to face his accusers and submit the question to trial by a jury of his countrymen?—that goodly way which has long been the approved and accepted method of deciding disputed questions of fact among freemen, and will continue to be while the rights and liberties of men are worth preserving.

Nor do I apprehend the calamities suggested in some of the opinions which hold, or seem to hold, the contrary view.

The history of our great profession is writ large in the life and upbuilding of the republic. In every trial and stress of arduous circumstances they have been foremost in maintaining human rights and upholding the cause of human freedom; and nowhere has it shone with more luster than in the story of this Commonwealth; and I am glad to have the opportunity to say that, in my judgment, it has never been composed of more worthy members than it is today. Earnest-minded, upright, patriotic, and capable, they need no such prop as this to hold them to their highest standards and best traditions—the exercise, for their protection, by the Court, of a power which its most ardent advocates must admit to be doubtful, and which we hold to be forbidden and unlawful.

To urge that the public may also need protection is to surrender the position, for here we enter on the domain of the police power, which is undoubtedly with the Legislature.

There are decisions which seem to conflict, and some which do (13) conflict, with our present decision. In some of them, however, the question was not presented; and all of them, as said by Mr. Freunde in his work on the Police Power, can be upheld, where they can be upheld at all, on grounds other than the doctrine for which they are now cited. Thus, in *Ex parte Secombe,* 60 U. S., at p. 9, the Court denied an application for a *mandamus* to a lower court, holding that the admission of one to practise law in such court was a question which rested in the legal discretion of the Court.

The act of the Legislature in this case was held not to have respected

in any way the common-law power of the courts on the subject, and the question we are here discussing was in no way presented.

In *In re Attorney-General,* 21 N. J. Law, at p. 345, the Court, while declaring that the right to pass on the admission of an applicant was one of the inherent powers of the Court, were then considering a rule of their own very similar in language to our former law, and there being no statute on the subject, the question we are now discussing did not arise.

In *Splanes' case,* 123 Pa., at p. 528, the Court held that the admission to practise law being a judicial act, a *mandamus* to a lower court would not be allowed. The Judge who delivered the opinion, after resting the decision on this unquestioned principle, goes on to declare that the statute on the subject was an encroachment on the judicial power, paying a fine and deserved tribute to the character of the bar, in which we most heartily concur. And in *Goodell's case,* 39 Wis., 232, the headnote states the principle contended for by protestants with a *quære,* and the body of the opinion requires that it should be so stated.

The only decision which squarely declares that a statute on this subject is unconstitutional, describing it as an unlawful attempt to deprive the Court of one of its essential and inherent powers, is the case
(14) of *In re Day,* 181 Ill., 72. This opinion (and it is an able one) can well be upheld on other grounds, and its force is much weakened by the dissent of two of the Judges, who show that in Illinois also, as a matter of history, this question has always been one of legislative regulation and control. The dissenting Judge makes another pertinent suggestion, that if this is one of the inherent and essential powers of the courts, it is just as inherent in one court as another; and so it might come about that the Judges of the Supreme Court and each of the Judges of the Superior Courts might require a widely different set of qualifications, which would establish different rules in every section of the State.

As my Lord Coke would say: "The argument *ab inconvenienti* availeth much, reader."

As said in this able opinion of the Illinois Supreme Court: "The right to practise law is a privilege, and any law conferring this privilege should be general in its operations." There should be no differences in sections and no unreasonable discrimination in classes or individuals, and the qualifications should be established and proclaimed, so that every citizen may know what is required of him; and this can only be successfully and properly accomplished by means of a public statute.

In what has been said the Court does not express any opinion upon the facts offered in support or denial of this protest, nor must it be for one moment inferred that we speak in disapproval of the action of the

protestants. Under the former law their protest would have been timely. Like the Court, they were, perhaps, inadvertent to the pronounced change so recently made, and in any event they did right to take action in the premises; for if the law has been changed it should be declared. We know, too, that they acted from entirely disinterested motives and were prompted solely by a desire to do what was best for the good of the Commonwealth and of their profession.

We hold, however, as heretofore stated, that as the law now (15) stands one who complies with the formal prerequisites is entitled to become an applicant and to be examined and if, on his examination, he shows himself to have competent knowledge of the law, it is the duty of the Court to license him; and an investigation into the general moral character of the applicant is no longer required.

It is ordered, therefore, that the applicants be licensed.

CLARK, C. J., concurring: What the requirements shall be, and indeed whether there shall be any, before entering upon the practice of law, medicine, dentistry, pharmacy, piloting, engineering, or any other profession, calling or vocation, rests within the police power of the General Assembly. *S. v. Call* 121 N. C., 646; *S. v. Biggs,* 133 N. C., 729; Cooley Const. Lim. (6 Ed.), 745; Tiedeman Police Power, sec. 87.

The usual requirements as to the practice of law are twenty-one years of age, good moral character, an examination and certificate of proficiency by some committee or court designated by the Legislature, and the payment of a license tax. The Legislature at its will can add to or repeal any or all of these requirements. The judicial power of the courts in "admission to the bar" consists solely in determining whether these requirements have been complied with, and in administering the oath if required by the statute. "The Legislature may undoubtedly prescribe qualifications for the office (of attorney) * * * as it may prescribe qualifications for the pursuit of any of the ordinary avocations of life." *Ex parte Garland,* 71 U. S., 333. And then adds that its ruling in that case does not call in question such legislative power, but merely asserts that its exercise cannot be used as a mode of punishment without trial.

Though the admission of attorneys "has usually been entrusted to the courts, it has been, nevertheless, both here and in England, uniformly treated, not as a necessary or inherent part of their (16) judicial power, but as *wholly subject to legislative action. In re Cooper,* 22 N. Y., 67; 4 Cyc., 900.

In England there has not been any one of these requirements from the earliest time down to the present; but any one has been entitled to practise as a barrister, *i. e.,* as counsel and advocate, upon being "called

to the bar" by one of the Inns of Court, the requisite for which call till comparatively recently has been merely proof that the applicant has eaten a specified number of dinners at one of the fours Inns of Court, that is, that for a prescribed time he had had opportunity to acquire a knowledge of law. Now, however, a strict examination by the Inns of Court is required before an applicant is called to the bar by it. 6 and 7 Vict., c. 73 (1843). Attorneys in England are a distinct body. They cannot address the Court or jury, but attend to the "business end" of the legal profession, getting up the brief of the evidence, arranging the fee and selecting the barrister who deals with the attorney, and never directly with the client. Attorneys were originally appointed and restricted in number. Afterwards by act of Parliament an examination by some one appointed by the Court, and proof of good character was and is still required for these "business agents"—but not of barristers. *In re Cooper,* 22 N. Y., 67; 4 Cyc., 901; *Ricker's Petition,* 66 N. H., 207.

In this State, up to Laws 1754, ch. 1, lawyers were admitted to practise, it seems, upon appointment by the Governor; and this is still the case in New Jersey. By that act an examination as to legal knowledge by the Supreme Court was substituted. In 1777, second session, ch. 2, sec. 6 (24 State Records, 50), an examination by two Superior Court Judges was required. In 1818 a finding of good moral character and proficiency in legal knowledge by the Supreme Court was required before admission to the bar. In 1869 this was repealed, and proof
(17) of good moral character before a Judge of the Superior Court and the payment of $20 was made sufficient. This act remained in force until 1871, when the Act of 1818 was reënacted. During those two years many applied to the Supreme Court for examination, as formerly, but were refused on the ground of want of power. Under the Revisal of 1905 the requirement of a finding of good moral character by the Court was stricken out, and for it there was substituted, as sufficient, merely a provision that before the Court should examine an applicant for license he must produce a certificate of good moral character signed by two members of the bar of this Court.

If this change was an inadvertence the General Assembly can correct it. But this Court cannot add to the requirements of the law-making body as to lawyers any more than it can to the requirement for entering upon the practice of medicine or dentistry. It is true lawyers are officers of the Court; but so are sheriffs, clerks and the like, over whose selection the Court has no control. They are officers of the Court, but not public officers.

Ever since 1754 an oath has also been required by statute, the admin-

*This has since been done by the Act of 1907, Pell's Rev., 207.

istering of which is the act of "admission to the bar," before which by production of the certificate of this Court the other requirements are conclusively shown to have been complied with. Of course, if the oath is required by statute, that, like any other requirement, can be repealed. It is not required as to other professions.

In two States the Judges, presumably elderly men and very conservative, having never seen a female lawyer nor read that they were allowed under the Saxon Heptarchy, and doubtless thinking it improper, attempted to add to the legislative requirements, either by construction or a supposed inherent power, a requirement that the applicant must be of the male sex; but the Legislatures of those States promptly enacted otherwise, and female lawyers are numerous now in those (18) States, while here the first lady who applied was promptly admitted (in 1878), and for nearly thirty years since none other has sought entrance.

We do not examine applicants for license by virtue of our judicial functions. The Constitution, Art. IV, sec. 8, authorizes this Court only "to review upon appeal any decision of the Court below upon any matter of law or legal inference" and "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts," and sec. 9 gives this Court original jurisdiction of claims against the State; our decisions in such cases, however, to be "merely recommendatory."

Our examination of applicants for law license is made, therefore, not by virtue of our judicial duties, but since 1868 only out of courtesy and respect to the Legislature. That body up to the Constitution of 1868 created all the courts and defined the jurisdiction and duties of each, and could therefore make the examination of applicants a part of the judicial duty of any court. It is otherwise since this Court and its duties have been created and defined by the Constitution.

In only eight other States are applicants for license examined by the highest court in the State, to wit: in Virginia, South Carolina, Alabama, Vermont, Idaho, Oregon, Montana, and South Dakota. In two States Arkansas and Mississippi the examination is made by the District Judge; and in four others, Florida, Kentucky, Missouri, and Nevada, the examination is by the District or Circuit Judge, aided by a committee of lawyers. In Indiana, the Constitution forbids any examination as to legal attainments, and by act of the Legislature the admission to the bar is by a District Court upon proof of good moral character, and in New Jersey the Court admits upon license signed by the Governor. In the other twenty-nine States and in the Territories the examination is conducted by boards of practising lawyers whose appointment by

legislative enactment is provided for in various ways, but is
(19) usually vested in the Governor or the court of last resort.

In nearly all the States, as in this, the Legislature has committed the course of study and length of study to be prescribed by the courts. In one State the length of time is four years; in several it is three years. In this State it was two years from 1819 to 1869—one year to procure County Court license and another year to obtain license to practise in the Superior and Supreme Courts. From 1871 to 1901 it was only one year. In the latter year it was again raised to two years and the course of study was enlarged.

The General Assembly having, whether intentionally or not, withdrawn from this Court the duty to pass upon the moral character of applicants, having substituted therefor a certificate of character by two members of the bar, we are precluded from going into the charges against these two applicants. We are only empowered to certify that having filed the certificate of character required by the statute and certified that they are of legal age, they have thereupon been examined by us and on such examination have been found to possess a competent knowledge to practise law.

BROWN, J., dissenting: My convictions compel me to dissent from the judgment of a majority of my brethren, and, as I regard it a matter of vital importance to the profession of the law, I will give my reasons as briefly as I can.

These two applicants have each filed a certificate that he is a person of good moral character, signed by two attorneys of repute. Notwithstanding this other reputable and high-standing members of our profession protest against licensing these applicants upon the ground that they are men of bad character and unworthy to fill the responsible position of attorney at law, and they offer us evidence which, they claim, tends to prove that one of the applicants has been conducting the general
business of a usurer and extortioner, and who has preyed upon
(20) and swindled the poor and ignorant negroes of his community.

Against the other it is charged that he was implicated in burning his own store for the insurance money; and it is claimed as to both applicants that they do not possess good moral characters. As to whether the charges have been sustained I am unable, and it is unnecessary, to say. They have offered absolute denial and strong proof to contradict the charges. The judgment of the Court precludes an examination of the evidence, upon the ground that the General Assembly of 1905 in adopting the Revisal has taken from this Court the right to determine whether an applicant is a person of good moral character and committed the conclusive and final determination of that highly im-

portant matter to any two attorneys authorized to practise in this Court who may be selected by the applicant and who may be complaisant enough to give the necessary certificate. I am of opinion, first, that the construction placed upon the act is erroneous; second, that when the power to grant licenses is possessed by this Court, from whatever source derived, the exercise of it by the Court is a judicial act, and cannot be controlled in any material feature by the Legislature.

Prior to the Act of 1905 it is admitted that this Court not only passed upon the applicant's legal qualifications, but also upon his upright character. For its own information and guidance, the Court formulated rules which the applicant must comply with preliminary to his examination. Among others was the one requiring a certificate of good moral character. For some reason or other the wisdom of which is not apparent to me, the commissioners in compiling the Revisal of 1905 saw fit to embody these rules of Court in the Revisal, and, consequently, when that compilation was adopted *en bloc* by the General Assembly, these rules of Court became a part of the statute law of the State.

It seems to me to be incontrovertible that the possession of a good moral character ought to be and is a necessary legal requirement to admission to the bar, and I cannot for a moment suppose that (21) the eminent and reputable lawyers who compiled the Revisal, or the Legislature which adopted their work, intended to take from this Court the right, which it has always exercised, to pass on that question. I say, with entire deference, that such a construction is too narrow and is sticking too much in the bark. *"Qui haeret in litera haeret in cortice."* Broom Max., 685.

The public policy of our State has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice than legal learning. Legal learning may be acquired in after years, but if the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling—a curse instead of a benefit to his community—a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin.

Is it possible that the insertion of this precautionary rule of Court into our statute law has brought about the very thing the rule was intended to guard against, viz.: the possible, nay, probable admission of immoral persons to the bar Is it possible that it compels this Court to grant licenses to persons of bad character, notwithstanding the apparent purpose of the statute is to prevent that very thing? I do do not think there can be a reasonable doubt that the purpose of the statute, and the

motive that inspired its passage, is to keep the legal profession free of bad men. The profession of the law is one of the most important of all professions. The relation between attorney and client is very confidential, and often involves matters of the greatest delicacy, and it is of the highest possible importance to the welfare of the people of
(22) the State that those who are entrusted with their most important and private matters should be men of upright character.

Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and a literal interpretation of a statute may lead to an absurdity and fail to carry out the real purpose of the Legislature. When this is the case, courts should have recourse to Lord Wensleydale's Golden Rule, 2 App. Cas., 764, and let the spirit and purpose of the law control its letter, and so construe it as to advance the remedy and suppress the mischief aimed at by the framers. "The intention of the Legislature and the object aimed at, being the fundamental inquiry in judicial construction, are to control the literal interpretation of particular language in a statute, and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object and effect the purpose of the enactment." 26 Am. and Eng. Encyc. Law, 602, and cases cited. As illustrative of this idea, common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire, "for he is not to be hanged because he would not stay to be burnt." So I hold in this case that an act of the Legislature, the undoubted purpose of which is to keep bad men out of an important profession, should not be so interpreted as to easily let bad men in. The words should be interpreted with reference to the object to be accomplished, for the legislative intention is easily deducible from the subject-matter of the statute, and its unmistakable purpose should be given full effect by this Court: *Rex v. Hall,* 8 E. C. L., 59; *U. S. v. Caldwell,* 19 Wall., 264; *Opinion of Justices,* 7 Mass., 523. The purpose of the act being to exclude men of bad character from the profession, it follows logically that the certificates of good character are merely a preliminary requisite before the applicant can be
(23) examined as to his legal acquirements. They make out a *prima facie* case, and, if uncontradicted, entitle the applicant to his license if he passes the legal examination. The statute only prescribes what legal effect shall be given to a particular species of evidence if it stands alone and uncontradicted. *S. v. Barrett,* 138 N. C., 634. To hold that, when contradicted and evidence *contra* is offered, the certificates are conclusive and this Court cannot examine into the truth of the facts stated in them, is to frustrate and destroy the very noble purpose

the Legislature plainly had in view. It is holding substantially that the law does not require good moral character, but only certificates thereof. There is a somewhat similar requirement in New Jersey, yet the Justices of the Supreme Court of that State hold that they are not limited in their inquiry as to the moral character of an applicant for an attorney's license to the certificate, but will, and are bound, in cases attended with suspicious circumstances, to look behind it. I commend the exalted tone of their opinion, from which I extract the following: "The power of the Court to reject the applicant on the ground of moral delinquency is clear and unquestionable. The power, it is admitted, is one of great delicacy, and should be exercised with extreme caution and with a scrupulous regard for the character and rights of the applicant. But on the other hand, the standing of the profession must not be disregarded, nor must the Court shrink from the performance of a clear duty, however embarrassing." *Attorney's License Case,* 21 N. J. Law, 345. This continues to be the view of that Court, for I find a case as late as 1901 wherein the reasons are given at length for refusing license on the ground of disreputable conduct by the applicant. *In re Harris,* 49 At., 728.

In discussing the second proposition laid down by me, it is not necessary that I should deny to the General Assembly the power to regulate admissions to the bar. I can admit, for argument's sake, that the General Assembly may commit the right to grant licenses to the Bar Association of the State or to some other agency, if it sees fit to (24) do so. That is all that is decided in the case of *In re Cooper,* 22 N. Y., 67, so much relied on in the opinion of the Court. But the proposition contended for by me is expressly held to be law in that very case, viz., that where power is conferred upon a court of justice, to be exercised by it as a court, the action of the Court is regarded as judicial, irrespective of the source from whence the power is derived. Nor have the usages and customs of our mother country any bearing upon this question, as seems to be indicated in the opinion. The Inns of Court educated the lawyers in the legal profession and called them to the bar. In case of supposed injustice the candidate for admission could appeal to the twelve Judges in their visitorial capacity. They practically represented the judicial authority, although in theory they constituted only a domestic forum of final authority to do what they regarded as proper under the circumstances. The English system is founded upon immemorial usage, and the fundamental idea underlying it is that the Court could best ascertain the qualifications of one desiring to practise before it from the judgment of those under whom he had prepared himself for work. We have no such system anywhere in this country, nor anything analogous to it.

In this country where the power is conferred upon the courts, or exercised by them upon the principles of the common law, without special statutory authority, it is universally held that the Court acts in its judicial capacity in granting admission to the bar. This is the opinion held by *Chief Justice Taney in Ex parte Secombe,* 60 U. S., 13. Many courts hold that the power to admit, like the power to remove, an inherent power in the Court, the exercise of which may be, as it often is, *regulated* by statute, but the statute does not create it; that its exercise is necessary and incidental to the Court for its own protection. *S. v. Winton,* 11 Oregon, 456; *Ex parte Smith,* 28 Ind., 47.

In re Day, 181 Ill., 90, holds that the admission of attorneys
(25) is not the exercise of a ministerial power, but is the exercise of judicial power, and the following language of *Selden, J.,* in *In re Cooper, supra,* is quoted with approval: "Attorneys and counsellors are not only officers of the Court, but officers whose duties relate almost exclusively to proceedings of a judicial nature, and hence their appointment may with propriety be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their proper judicial functions." In 3 A. and E., 287 (2 Ed.), it is said: "But the admission of an applicant to practise is a judicial act, and the attorney when admitted is an officer and member of the Court. The Legislature has no power, therefore, to provide that any person possessing certain qualifications must be admitted. It cannot assume judicial powers; and in every case courts are vested with discretion as to whether any applicant is entitled to admission." In support of this the writer cites many cases. The Wisconsin Supreme Court says: "The Legislature has indeed from time to time assumed power to prescribe rules for the admission of persons to practise. When these have seemed reasonable and just it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coördinate branch of the government, without considering the question of power." *In re Goodell,* 39 Wis., 240. In this case the Court intimates plainly that if the regulation is unreasonable it will be disregarded.

The Supreme Court of Indiana holds that admission to the bar is a purely judicial function and that the power is inherent in the courts. *In re Leach,* 134 Ind., 671. The Pennsylvania Supreme Court holds the same, and speaking of an act of the Legislature upon the subject of admission to the bar says: "Moreover, it is as unwise as it is illegal. It is an imperative command to admit any person to practise law upon complying with certain specified conditions. Yet between the
(26) time when the applicant has obtained his certificate of good character from the Judge of the district, etc., and the presenta-

tion of the same to the Court which he seeks to enter, he may have committed some act which would render him an unfit person to practise or even to associate with gentlemen. No such iron-clad rule would ever be adopted by the judiciary, to which the subject properly belongs. No Judge is bound to admit, or can be compelled to admit, a person to practise law who is not qualified or whose moral character is bad. The profession of the law is one of the highest and noblest in the world. The relation between attorney and client is very close and involves matters of great delicacy. The attorney is an officer of the Court, and is brought into close and intimate relations with the Court. Whether he shall be admitted, or whether he shall be disbarred, is a judicial and not a legislative question." *In re Splane,* 123 Pa. St., 540.

I will not discuss the exclusive power of the General Assembly over the matter. Our statute plainly undertakes to vest in the Supreme Court as a court the power to grant licenses, in these words: "No person shall practise law without first obtaining license so to do from the Supreme Court." The power is not given to the Justices as individuals, but to the Supreme Court, which represents the judicial power of the State in its highest form. It is plain to my mind that the qualifications necessary to admission to the bar, as fixed by the act, are that the applicant must be twenty-one years of age, of good moral character and of sufficient legal learning. The general grant of power to issue the license necessarily and by plain implication confers upon the Court in its judicial capacity the power to determine each of these necessary statutory qualifications. It is admitted that age and legal learning are necessary qualifications. Why is not good moral character likewise a necessary qualification? If it is not a necessary qualification, why require certificates to that effect? Why require them to be filed with the Clerk of this Court if they are not for the information (27) of the Court? Why should the Court be informed of the applicant's moral character if the Court is not to pass on it? If the Court is to pass on it, can the Legislature control the exercise of a judicial function by limiting the evidence to the certificates filed? The Legislature can no more do so than it can limit the Court in its investigation of the candidate's legal learning. Note the disastrous effect upon the profession of the law if the Court is bound by the certificate: Lawyers, on the average, are morally no better and no worse than other people. There are some black sheep in their ranks as in every calling. One black sheep who wishes to enter can apply to two black sheep who are already in to certify to his good moral character. Result: more black sheep to degrade our noble profession. "Why should a citizen, even if he has committed some offense in the past, be deprived of the privilege of turning his face the other way and making an honorable effort to gain

his living by the practice of law?" asks the Court. I am one of the last of men to place an obstacle in the way of the penitent who has reformed. But I wish to know that he has in truth reformed, and, to be sure of it, I claim the right to investigate. A desire to enter the ranks of the law is no evidence of repentance of one's sins. I do not know a more profitable field for gifted rascals to exercise their talents in than in the practice of it. This makes it all the more important that the courts should be vigilant to keep them out. "It is not enough," says the Supreme Court of Connecticut, "for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practises." *County Bar v. Taylor,* 60 Conn., 11.

To prevent the admission to this honorable and important profession of any one not thus entitled to public confidence, this Court, and
(28) afterwards the Legislature, adopted these regulations. It is our duty to give them that broad and liberal construction which will effectuate the wise and beneficent purpose intended. It must not be understood from this opinion that I hold the applicants guilty of the charges preferred against them. We are precluded from passing on their guilt by the judgment of the Court.

WALKER, J., dissenting: I concur with *Mr. Justice Brown* in dissenting from the opinion of the Court. It seems to me clear that the Legislature did not intend to deprive this Court of the power to determine who is a fit and proper person to be admitted to practise in the courts of the State, but only to require that the applicant for license should, "before being allowed to stand an examination," file with the Clerk a certificate of his good moral character to be signed by two attorneys who practise in this Court, and that this should be *prima facie* sufficient to entitle him to his license, if otherwise qualified; but it was not intended to make this certificate conclusive evidence. Such a construction would defeat the manifest intention of the Legislature, that no person should be admitted to the bar who was not of good repute.

Suppose that after a certificate has been given by the two attorneys, the applicant should to our knowledge be convicted of a felony, or any infamous offense, or should commit some act of so grave a nature as to admittedly disqualify him for the position of an attorney at law, would this Court be bound to issue his license under such circumstances, and can it be imagined that the Legislature intended any such result? And yet under the decision of the Court in this matter, the filing of the certificate and the possession of a competent knowledge of the law would require us to admit an applicant in just such a case. A construction

which could impose that duty upon us might so corrupt the administration of justice in the courts that it should not be presumed to be in accordance with the true meaning of the statute. (29)

The courts of this country have, therefore, held that statutes similarly worded merely provide that the applicant, as a condition precedent to his examination, shall furnish *prima facie* evidence of his good character, and they were not intended to restrict the power of the Court to finally determine whether or not he possessed the requisite character. The Court is therefore not limited in its inquiry as to the moral character of the applicant for an attorney's license to the certificate, but it will, and is bound by the obligation of the duty necessarily imposed by law, to look behind it in all proper cases. *Attorney's License Application,* 21 N. J. L., 345.

The Legislatures of the several States have from time to time assumed to prescribe rules for the admission of attorneys to practise at the bar, and the courts have generally acted upon them when they have seemed reasonable, and in deference to the wishes of a coördinate department of the government; but the power to decide finally who possesses sufficient character for admission is a judicial function from the nature of the question, and is so regarded by all well-considered authorities. *Ex parte Garland,* 4 Wall., 333; *Matter of Goodell,* 39 Wis., 240.

In *Garland's case* the Court says: "The order of admission is the judgment of the Court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the Court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. Attorneys and counsellors are not only officers of the (30) Court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions," citing *Matter of Cooper,* 22 N. Y., 81. So in the case of *Ex parte Secombe,* 19 How., 9, the same Court said: "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor,

and for what cause he ought to be removed." 4 Cyc., p. 900, *et. seq.*, and notes.

The solution of this question does not depend upon the jurisdiction of this Court, as supposed in the opinion of the majority, but upon its judicial power, there being a clearly marked difference between the two in respect to this matter. Art. IV, sec. 8, of the Constitution confers jurisdiction upon this Court to review matters of law and legal inference and of certain issues and questions of fact, with the power to issue any remedial writs necessary to give it a general supervision and control over proceedings of the inferior courts. It shall have jurisdiction, that is, the power to hear and determine all such matters; but a moment's reflection will suffice to show that this cannot be all the judicial power the Court has. This was merely intended to define and determine its appellate jurisdiction, but not even by implication to deprive it of any part of the broad judicial power given by sec. 2. There are matters of a judicial nature which this Court may hear and determine other than those which are specified in sec. 8. Some of its powers are inherent, as being necessary for the preservation of its very existence, its dignity and the enforcement of obedience to its orders and decrees. There are still others which arise by implication, as being essential to the full and efficient exercise of the powers and jurisdiction
(31) which have been specifically granted. The two terms are not, therefore, exactly coextensive, although they may generally be considered as practically synonymous. But whether they are or not the same in meaning, it must be remembered that sec. 8 refers only to the appellate jurisdiction of this Court, and does not by its inclusive words deprive it of the jurisdiction or judicial power which must always reside in every court.

Those powers which are implied, as being necessary to the exercise of those which are expressed, are as much given as if they had themselves been expressed. This is an unquestioned rule of construction, applicable alike to constitutions and statutes.

I think, therefore, that no argument in favor of the conclusion of the majority can legitimately be drawn from the language of Art. IV, sec. 8 of the Constitution, as limiting the power of this Court.

Nor do I think any insuperable difficulty is presented by the suggestion that if the power of the Court to pass upon the character of the applicants is inherent, it inheres in all the courts. It belongs, of course, to any court having the power to examine and admit applicants to the practice of law, and this Court has been designated for that purpose for nearly a hundred years. If an application could be made to any court, then the particular court to which it is made would have the same power that we have.

The best statement of the principle governing a case like this one is perhaps to be found in *Garland's case,* namely, that the Legislature may prescribe the qualifications of an applicant, but the Court before which he is examined must determine whether he possesses them, that being a judicial and not a legislative function. The application of this simple rule excludes any discussion of the inherent power of the Court and places the decision of the question upon a sensible and practical basis and one in entire harmony with all our notions of the (32) duties and functions of the different branches of our government.

It is unfortunate that the explicit language of the former statute was changed, but I am quite sure it was the result of inadvertence and was not intended by the Revisers or the Legislature to change the meaning of the law and to divest this Court of a power it has exercised since the first year of its existence.

Ex parte Thompson, 10 N. C., 355, which is cited in the opinion of the Court, would seem to be an authority against the conclusion that we have been divested by the Revisal of the right to inquire into the character of an applicant. It is true *Chief Justice Taylor* said that if the Act of 1777 appeared, according to the usual rules of interpretation, to convey a peremptory direction to the Court to examine the applicants then before the Court, it could only yield obedience to the mandate, however striking might be the mischief and impolicy of such a course of legislation. He was then speaking of the qualification of citizenship in this State, which involved a political and not a judicial question. It was for the Legislature to say who should be citizens, or who should enjoy the rights of citizenship, such as the right to apply for license to practise law. It was a matter solely of public policy, and it was with reference to the question, in that phase of it, that the Chief Justice said what we have substantially stated. But the Court undertook to decide, and did decide, that notwithstanding the Acts of 1777 and 1818 provided for the admission by the Court to the bar of a person found to have competent law knowledge and an upright character, the Court could still reject any one who did not have the qualification of citizenship, and even though the act also provided that a person coming into this State from any foreign country should be admitted, if he had resided in the State one year and exhibited a testimonial of his unexceptionable moral character in the manner therein provided. (33)

The Court added another qualification to those required by the act, it being deemed essential that it should be possessed by any one who should apply for admission to practise in our courts. The language of the Court used in this connection is strong and most impressive: "Viewing the profession of the law as the source from which the superior judicial magistrates must be derived, and from which a large proportion

of enlightened and efficient public officers is usually selected, every one must naturally feel solicitous that it should not fall into such hands as would lower it in the national opinion." And again: "No longer a nursery in which merit is trained under the directing hand of experience and qualified to render manly and essential service to the community, the legal profession, 'in its nature the *noblest* and *most beneficial* to mankind; in its abuse and debasement the *most sordid* and *pernicious*,' would sink into a mere mercenary instrument, without sympathy in the public prosperity, and without hold on the public confidence."

Cited: *In re Ebbs,* 150 N. C., 50, 60; *Pullen v. Corporation Commission,* 152 N. C., 580; *Baggett v. Grady,* 154 N. C., 343; *School Commrs. v. Aldermen,* 158 N. C., 196.

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(34)

THAXTON v. INSURANCE CO.

(Filed 13 November, 1906.)

Insurance—Evidence—Prima Facie Case—Proofs of Death—Waiver—"Death by Own Act"—Suicide—Burden of Proof.

1. In an action to recover the amount of an insurance policy, where the plaintiff introduced the policy insuring the life of the deceased for plaintiff's benefit, proved the payment of premiums which kept the policy alive, till June 18, 1905, and introduced a clause of the defendant's answer admitting that deceased died on April 25, 1905, this testimony makes out a *prima facie* case for plaintiff.
2. Where proofs of death of the insured have been formally made, and the insurance company retains them without suggesting any defect or failure to comply with the requirements of the policy, and finally refuses to pay the claim, it thereby waives any defect in the formal proofs of death and acknowledges that the requisite proofs were received by it.
3. A provision in an insurance policy that if the insured, within one year from the issue of the policy, die by his own act or hand, whether sane or insane, the company shall not be liable for any greater sum than the premiums, etc., is valid, and refers to suicide, and does not include a killing by accident.
4. On an issue addressed to the question whether the insured committed suicide, the presumption is against an act of suicide, and the burden is on the party who seeks to establish it.
5. Where the testimony disclosed that the insured was "found dead with a gunshot wound in his left side," with the additional and only explanatory statement, "Everything pointed to an accident in handling the gun, which was supposed to be empty," the Court was correct in charging the jury that if the testimony was believed, they should find that death was not suicidal.

WALKER, J., dissenting.

ACTION by Mollie F. Thaxton against the Metropolitan Life Insurance Company, heard by *Justice, J.*, and a jury, at the June (Special) Term, 1906 of ROWAN. This was an action to recover the amount of an insurance policy.

Issues were submitted and responded to by the jury as follows:

1. Has plaintiff complied with all the conditions of the contract of insurance set out in the complaint, which by the terms of the contract were to be performed by her as a condition precedent to her recovery on this contract? Answer: "Yes."

2. Did the insured, Beverly Wiley Thaxton, die by his own hand or act, with intent to commit suicide? Answer: "No."

3. Is the defendant indebted to the plaintiff; if so, in what sum? Answer: "$2,000."

Judgment on the verdict for the plaintiff, and defendant excepted and appealed. (35)

R. Lee Wright and *P. S. Carlton* for the plaintiff.
Burwell & Cansler and *L. H. Clement* for the defendant.

HOKE, J. At the close of the testimony the Court instructed the jury that if they believed the evidence, they would answer the first issue "Yes"; the second issue "No," and the third issue "$2,000," the amount stipulated in the policy.

The defendant objected to this charge of the Court, and the brief for defendant filed in the cause stated that all other exceptions are abandoned.

We are of opinion that the objection to the charge cannot be sustained.

On the trial, the plaintiff introduced the policy insuring the life of the deceased for plaintiff's benefit for the sum of $2,000, proved the payment of premiums, which, by the terms of the policy kept same alive, till June 18, 1905; and then introduced a clause of the defendant's answer which admitted that deceased died on the 25th of April, 1905.

According to the authorities, this testimony makes out a *prima facie* case for plaintiff, and nothing else appearing, would justify the charge of the Court as given. *Spruill v. Ins. Co.*, 120 N. C., pp. 141-150.

Defendant's first objection rests upon the allegation that no satisfactory proof of the death of the insured has been made; that the requirements of the policy as to the form and *quantum* of proof have not been fully complied with.

We fail to discover any essential defect in the matter referred to; but if such defect existed, we do not think the objection is now open to defendant.

So far as the *quantum* of proof is concerned, it is admitted in the answer that the insured is now dead, and was at the beginning of the suit.

And as to the form, to which this objection is chiefly urged, it
(36) is well established that where proofs of death have been formally made and the company retains them without suggesting any defect or failure in this respect to comply with the requirements of the policy, and finally refuses to pay the claim, it thereby waives any defect in the formal proofs of death and acknowledges that the requisite proofs were received by it. Niblack Benefit Societies and Accident Insurance, Vol. II, sec. 326, and *authorities cited.*

Here, proof of death was made on blanks supplied by the company in July, 1905. So far as the testimony shows, no objection or suggestion of any defect was made as to the proof until answer filed November following, denying liability on the policy; and then in such general terms that plaintiff could hardly discover what change or correction was desired. Under such circumstances, the objection as to the form of proof is properly held to be waived.

Again, the charge of the Court is urged for error in connection with the second issue, the issue being in form as follows:

"Did the insured die by his own act or hand with intent to commit suicide?"

The policy, bearing date June 18, 1904, contains a condition that if the insured, within one year from the issue of the policy, die by his own act or hand, whether sane or insane, the company shall not be liable for any greater sum than the premiums, etc. A condition of this kind is held to be a valid stipulation. *Spruill v. Ins. Co.,* 120 N. C., p. 140; Vance on Insurance, p. 532.

And it is generally held also that such a provision, in its terms, refers to suicide and does not include a killing by accident, even although the act of the insured may have been the unintended means of causing death. Vance on Insurance, *supra.*

The issue was therefore properly framed: "Did he die by his
(37) own hand with intent to commit suicide?"

It is also accepted doctrine that on such an issue addressed to this question, the presumption is against an act of suicide, and the burden is on the party who seeks to establish it. 1 A. and E., 331; Vance on Insurance, 523; Lawson's Presumptive Evidence, 241; *Spruill v. Ins. Co., supra; Mallory v. Ins. Co.,* 47 N. Y., p. 52.

In Lawson on Presumptive Evidence, *supra,* the case is thus put: "H. is found dead. An examination reveals that his death was caused by taking arsenic. His life is insured, and the question arises whether

his death was caused by suicide or accident. The presumption is that it was caused by the latter."

This being the presumption, and defendants having offered no evidence, the question arises whether, on the testimony introduced by the plaintiff, there is, in law, sufficient evidence for the consideration of a jury tending to rebut the presumption. The testimony we find in the record pertinent to this question will be found in the statement of plaintiff and of the coroner, on file pursuant to a requirement of the policy, as a part of the proof of death. That of plaintiff is as follows:

"Give cause of death (full particulars). Ans.: Was caused by gunshot wound in left side. Everything pointed to an accident in handling the gun, which was supposed to have been empty."

That of the coroner:

"Was death the result of the deceased's own hand or act? Ans.: Yes; or by some unknown hand, accidentally or otherwise."

The statement of the coroner is colorless and without probative force of any kind. It amounts, in fact, to his saying what the physicians had said in answer to the same question: "They didn't know."

The testimony then discloses that the deceased was found dead (38) with a gunshot wound in his left side. There is no testimony as to the temperament, condition, or domestic, social or business life of the deceased which would tend to indicate suicide, or as to any declaration, written or oral, of like tendency. There is nothing offered as to the position of the body, the placing of the gun, or the character and course of the wound which would support such a theory.

The testimony before us leaves the matter as stated, with the objective fact, "Found dead with a gunshot wound in his left side," with the additional and only explanatory statement of the applicant, "Everything pointed to an accident in handling the gun, which was supposed to be empty," and this supports the presumption raised by the law that the killing under such circumstances is presumed not to be with suicidal intent.

We think it clear, therefore, that His Honor was correct in charging the jury that if the testimony was believed, they should find according to this presumption and answer the second issue "No."

There is nothing in *Spruill's case, supra,* pp. 150-151, relied on by defendant, which militates in any way against our present decision. In that case the plaintiff had stated, in his proof of loss, that the insured "had died by his own hand"; and the Judge writing the opinion had held that this statement, standing unexplained, was an admission of suicide, and at once shifted the burden of proof. The decision proceeded upon the idea that by fair intendment, and by uniform construction of the courts, these words, unexplained, amounted to an allega-

tion or admission of suicide; and the opinion; on this point, says: "The plaintiff, though she went on the stand herself, in nowise contradicted the import of these words; nor did she testify to any facts tending to show she had used them by mistake or inadvertence.
(39) Her admission, unexplained and uncontradicted, justifying his Honor's direction to the jury."

But there is no such admission in the proof offered here. Even if the statement of the applicant permits the interpretation that the deceased had hold of the gun when the death wound was inflicted; not only is there no admission of suicide, but such an inference is repelled by positive averment. "Everything pointed to an accident in handling a gun supposed to be empty."

There is no error in the charge of the Court, and the judgment is affirmed.

No error.

WALKER, J., dissenting: It may be conceded that where nothing else appears but the fact that the death of the insured was caused by his own act, the law will presume it to have been accidental rather than suicidal, for it will not generally presume a wrong; and it may also be conceded that under the terms of the contract the death must have been caused by the voluntary and intentional act of the insured in order to avoid the policy. But with these concessions made, it seems to me that there is sufficient evidence here of deliberate self-destruction to carry the case to the jury. The provision against liability in the event of suicide is not only a valid one, but a policy which insures against such a risk as suicide has been held to be void as being against public policy. *Ritter v. Ins. Co.,* 169 U. S., 139. Such a clause of exemption from liability should therefore be favorably considered, as it is in harmony with the policy of the law.

No one can read the testimony of the beneficiary without being impressed with the belief that in her answer to the question as to the cause of death she intended to convey the meaning that the insured died of a gunshot wound in his left side which was inflicted by him-
(40) self. If there was any doubt as to what she did mean, it was for the jury and not for the Court to resolve that doubt. The legal effect of this testimony was to bring the case within the operation of the principle laid down in *Spruill v. Ins. Co.,* 120 N. C., 141, for when she admitted substantially that he died of a self-inflicted gunshot wound, it was equivalent to saying that he died by his own hand, which in that case was said to be sufficient to establish a case of suicide. It is true, she added that "everything pointed to accident in handling

the gun, which was supposed to have been empty," but is the defendant to be concluded by such a statement? In the first place, it is evident that she is merely expressing an opinion, and not stating positively a fact within her knowledge. It is merely her influence from supposed attending circumstances which she deemed sufficient to justify her conclusion. But is it evidence? It is not condemned by the elementary rules governing the admission of testimony? The law deals with facts and not opinions or conclusions of witnesses, except in certain cases, of which this certainly is not one.

Again, we turn to the coroner's testimony, and find that to the question, "Was death the result of the deceased's own hand or not?" he gives this answer: "Yes; or by some unknown hand—accidentally or otherwise." Here again we have precisely the answer that was given in the *Spruill case;* and there is added, as was done by the beneficiary when replying to a similar question, what is nothing more or less than rank conjecture. He first says, "Yes," that is, "he did die by his own hand or act," and then proceeds to express his opinion in regard to something he evidently knew nothing about. The very terms of his further answer to the question after he had said positively that he had died by his own hand or act, shows clearly that he did not intend to speak of his own knowledge, but was only making a guess as to what other circumstances may have caused his death.

The insured died in April, and the proofs were not filed with (41) the company until the following August. Why this delay? But if this fact be not at all significant, why was not an investigation made in the meantime to ascertain if he had been shot by any one else? There is no suggestion that any one has even been suspected of having shot him. That he killed himself is the only fair and reasonable inference to be drawn from this evidence. It may be added that those who are supposed to know all the facts and circumstances in regard to the manner of the killing have vouchsafed no definite explanation of it, but have considered their duty performed by giving us a mere surmise, which we are just as capable of making as they. We are not told what was the position of the gun with reference to the body when it was found; what the habits of the deceased, nor are any of the attendant circumstances given, although some of them must have been known.

I do not think it was incumbent on the defendant to show that which was peculiarly within the knowledge of the other side, or of which they at least had the better opportunity of acquiring knowledge; and especially is this true when the coroner had admitted, and the plaintiff virtually so, that the insured died by his own hand, thereby casting upon the plaintiff the burden of explaining the occurrence.

It is also to be noted that the coroner testified that he held no in-

quest, and made no *post-mortem* examination, because no foul play was alleged. What did he mean by this statement? Simply that he died by his own hand and not by the hand of any one else; that a suicide and not a felonious homicide had been committed. These were all matters for the jury.

It is further to be said that the policy provides expressly that "the proofs shall be evidence of the facts therein stated in behalf of, but not against, the company." That which makes for the company shall be considered, but not that which may tend to make for the
(42) beneficiary. The sufficiency of the evidence for the purpose of being submitted to the jury and considered by them is to be determined in the light of this stipulation, which is reasonable and valid, and should therefore be enforced. *Ins. Co. v. Dick,* 44 L. R. A., 846, and notes. And surely this must be so when all the evidence was introduced by the plaintiff. If these matters are considered, it sufficiently appears, *prima facie* at least, that the insured died by his own hand (*Bigelow v. Ins. Co.,* 93 U. S., 284), and the other statements in the proofs are merely some evidence, if evidence at all, to qualify or contradict this admission; but at last it is for the jury to weigh and decide upon. *Ins. Co. v. Higginbotham,* 95 U. S., 380; *Ins. Co. v. Dick, supra; Johns v. Relief Association,* 90 Wis., 332; May on Insurance, sec. 325. If the opinion or conjecture of the plaintiff stated in the proofs was competent at all, it certainly should be considered by the jury and not held as matter of law to absolutely overcome and destroy the other statement. They would not, perhaps, attach as much weight to a mere expression of opinion as they would to the positive statement of a fact within her knowledge. It was evidence, therefore, for the jury, and not such as warranted the Court in rejecting altogether the other part of the answers and virtually directing a verdict.

It is to be noted that the plaintiff did not go on the stand, nor did she offer the other witnesses who joined her in the proofs. This is significant and was the proper subject of comment in discussing the evidence before the jury, and was a circumstance proper for their consideration. *Goodman v. Sapp.* 102 N. C., 477; *Yarborough v. Hughes,* 139 N. C., 199.

The right of trial by jury is one that should be jealously guarded and accorded to the citizen in all cases, where there are any disputed matters of fact which raise issues between the parties. It is one of the fundamental guaranties of our system of government, and should never be denied to any litigant in whose favor a reason-
(43) able inference of fact may be drawn from the evidence. *Spruill v. Ins. Co., supra.* Unless it is perfectly clear and manifest that there is no such evidence, to take from him the privilege of having the

evidence weighed by the only tribunal appointed for that purpose, and the best ever devised by the wit of man, is a plain invasion of his constitutional right. With all possible deference for my brethren, from whom I always regret to differ, I must think that there is evidence in this case which entitles the defendant to be heard by a jury and to have their judgment upon the facts. The majority, it seems to me, have attached too much importance to incompetent, irrelevant and inconclusive statements in the proofs, and have failed to shift the burden of proof from the defendant to the plaintiff upon the admissions in the "proofs of death" (*Insurance Co. v. Newton,* 22 Wallace, 32), or to give proper heed to the provision of the policy as to the effect those "proofs" shall have as between the parties to an action on the contract of insurance. When his Honor instructed the jury as he did, in my opinion he committed an error.

Cited: *Modlin v. Ins. Co.,* 151 N. C., 39.

(44)

CARLETON v. RAILROAD.

(Filed 13 November, 1906.)

Railroads—Lessor and Lessee—Negligence—Liability—Pleadings—Joinder of Defendants.

1. A railroad company which has leased its road-bed, track and rolling-stock to another corporation is liable for the torts of the lessee, and this liability extends to an injury sustained by a passenger by the negligence of the servants of the lessee.
2. Where a complaint alleges that two railroad corporations jointly operating their properties through the agency of a lessee between two points connected by their road-beds and tracks, in the discharge of their duty as common carriers undertook to carry a passenger over their tracks, a demurrer for misjoinder was properly overruled, as they are jointly liable for a failure to discharge the duty undertaken in a joint operation and use of their property in the exercise of their franchise.

ACTION by P. S. Carleton, administrator of J. T. Pender, against the Yadkin Railroad Company and the North Carolina Railroad Company, heard by *Justice, J.,* at the June (Special) Term, 1906, of ROWAN.

This action was brought for the purpose of recovering damages by reason of the death of plaintiff's intestate, alleged to have been caused by the negligence of defendants. The plaintiff alleges that the defendants, the Yadkin Railroad Company and North Carolina Railroad Company, are separate and distinct corporations, and as such are engaged in the business of common carriers of passengers and freight. The defendant Yadkin Railroad Company owns a line of railroad extending from Salisbury, N. C., to Norwood, N. C., and the defendant North Carolina Railroad Company owns the line of railroad extend-

ing from Greensboro, N. C., *via* Salisbury to Charlotte, N. C.; that prior to and at the time of the negligence complained of, both of said defendants had leased their aforesaid line of railroad to the Southern Railway Company, a corporation existing under and by virtue of the laws of the State of Virginia, and by virtue of said lease the said lessee company, by permission and consent of defendants, had control and possession of the aforesaid lines of railroad and was running its trains and cars thereover, in charge of its servants, agents and employees; that both defendants operate jointly the lines of said railroad from the Salisbury depot to the Salisbury Cotton Mills, which is a part of the North Carolina Railroad right-of-way. That on 22 August, 1905, plaintiff's intestate purchased of said lessee company's agent at Norwood a ticket from that point to his home, and became a passenger on said line of railroad belonging to the said de-
(45) fendant Yadkin Railroad Company; that after becoming said passenger and taking a seat in one of the passenger-cars on said line, said intestate became suddenly ill and unconscious, and that shortly thereafter the conductor on said train aroused said intestate and obtained his ticket. Said conductor then saw and realized that said intestate was dangerously ill, but negligently and carelessly passed him by without providing him with any comforts, restoratives, medicines or physician, and negligently and carelessly failed to notify any physician of the serious condition of said intestate, although six towns were passed through in which physicians resided, and which could have been easily procured if the conductor on said train had performed his duty to said intestate; that said lessee negligently and carelessly failed to remove said intestate from said train after he became ill and unconscious, but negligently brought him on to Salisbury, said train arriving at 7:15 o'clock P. M. That aforesaid lessee, through its servants and agents, failed to remove said intestate from said car or to provide him with any physician, etc., but negligently placed said car upon one of its sidetracks, with said intestate as the only passenger or person therein, and negligently left said intestate in said car on said sidetrack until 10 o'clock next morning without attention, etc. That about 12 o'clock said intestate died.

The defendant Yadkin Railroad Company demurred to the complaint, and assigned as ground of demurrer:

"1. The plaintiff has joined two separate and distinct causes of action arising out of an alleged tort against two separate and distinct defendants.

"First. An alleged cause of action against the North Carolina Railroad Company for alleged acts of negligence by the employees of the Southern Railway Company, while the Southern Railway Company

was alleged to be operating a train over the railroad tracks of the North Carolina Railroad Company, and while said train (46) was not on any railroad tracks of this defendant, with an alleged cause of action against this defendant, for the alleged negligence of the employees of the Southern Railway Company, while operating a train over the railroad of this defendant, and before the said train reached the railroad of the North Carolina Railroad Company.

"Second. That as to this defendant, the complaint does not state facts constituting a cause of action as to those matters alleged to have occurred after the said train left the said road of this defendant, and said cause of action for such alleged negligent acts is solely against the North Carolina Railroad Company, and said cause of action has been improperly joined with an alleged cause of action against this defendant for matters alleged to have occurred on the road and track of this defendant, over which it is not alleged that the North Carolina Railroad Company had any control.

"2. It does not appear from the said complaint, and it is not alleged, that the alleged acts of negligence, alleged to have occurred upon the road of this defendant, caused the death of the plaintiff's intestate.

"3. It does not appear from the said complaint that any acts done or failed to be done, while the said train was on the track or road of this defendant, caused the death of the plaintiff's intestate."

The defendant North Carolina Railroad Company demurred for the same causes set forth in the demurrer of its co-defendant. The cause coming on for hearing, the Court overruled both demurrers. Defendants were allowed to file answer. Defendants excepted and appealed.

R. Lee Wright for the plaintiff.
T. C. Linn for the defendants.

CONNOR, J., after stating the facts: That a railroad company which has leased its road bed, track, and rolling-stock to another (47) corporation is liable for the torts of the lessee has been so frequently decided by this and other courts that it cannot now be considered open to discussion. *Aycock v. R. R.*, 89 N. C., 321; *Logan v. R. R.*, 116 N. C., 940; *Tillett v. R. R.*, 118 N. C., 1031; *Norton v. R. R.*, 122 N. C., 910; *Pierce v. R. R.*, 124 N. C., 83. That this liability extends to an injury sustained by a passenger by the negligence of the servants of the lessee is decided in *Tillett's case, supra.*

In *Rocky Mount Mills v. R. R.*, 119 N. C., 693, it was shown that a number of railroad companies formed an association under the name of the "Atlantic Coast Dispatch." That bills of lading were issued in the name of and by the said association, by which it undertook to carry

freight from Lowell, Mass., to Rocky Mount, N. C. For negligent delay in carrying such freight the consignee sued two roads members of the association. *Faircloth, C. J.,* said: "Upon examination and reflection we are of the opinion that the defendants, and their connecting lines, are jointly liable, each for the others, on the contract before us, * * * that is to say, that they are engaged in business as partners under the name of the 'Atlantic Coast Dispatch.' They are still common carriers, none the less so because they have certain stipulations. Having jointly agreed to conduct the 'All-Rail Fast Freight Line' under the name above stated, * * * and having so informed the public and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business."

The demurrer and argument made to sustain it fails to note the allegation "that both defendants operate jointly the line of said railroad from the Salisbury depot to the Salisbury Cotton Mills, and which is a part of the North Carolina Railroad right-of-way," and the further allegation that the plaintiff's intestate purchased a ticket of the agent of the lessee of said roads from Norwood to Salisbury. The con-
(48) ductor was the employee of the lessee; and the agents and servants whose negligence is complained of were in the employment of the lessee.

The case presented by the complaint comes to this: Two railroad corporations jointly operating their properties through the agency of a lessee between two points connected by their road-beds and tracks, in the discharge of their duty as common carriers undertake to carry plaintiff's intestate over their tracks from Norwood to Salisbury. Why should they not be jointly liable for a failure to discharge the duty undertaken in a joint operation and use of their property in the exercise of their franchise? To hold otherwise would violate elementary principles of law and practically deny to the passenger any remedy. It may be that he could, if so advised, sue each road separately, but as in a case like the one disclosed by the complaint where the negligent acts were continuous and chargeable to the common agent of the defendant's lessee, who, for the purpose of this case, must be considered as the defendants themselves, we can see no reason why he may not join them in one action. The underlying principle upon which the decision is based is the liability of the lessor for the acts of its lessee, this being based upon the principle that a railroad company cannot divest itself of its duty to the public, or its consequent liability, by leasing its track or in any other manner permitting its track to be used by some other corporation.

For the purpose of this appeal the relation of the two roads must be construed as a joint undertaking in the discharge of their duty to the

public as common carriers, using the lessee as their common agent for that purpose. In this point of view it is immaterial whether we treat the cause of action as for a breach of contractual duty or a tort arising out of a breach of contract. The cause was argued before us principally upon demurrer for misjoinder, and we (49) think it best to refrain from entering into any discussion of the merits of the case as disclosed by the complaint. The principles applicable to the case after the facts shall have been developed on the trial are well settled.

The judgment overruling the demurrer and directing the defendants to answer over must be affirmed.

Affirmed.

BROWN, J., concurring: I concur in the judgment overruling the demurrer because of the peculiar wording of the complaint, which appears to allege that both defendants "operate *jointly*" the lines of said railroad from Salisbury, etc., which allegation was admitted when a demurrer was interposed. If it should turn out when the real facts are found upon the trial, as doubtless it will, that the only connection between these two defendants is that at different times each leased its road-bed, etc., to the Southern Railway Company then I should hold that insufficient to create a liability upon the part of the North Carolina Railroad Company for the negligence of the Southern, the lessee upon the tracks of the Yadkin road, and *vice versa*. As I interpret Logan's and similar cases, the liability of the lessor company for the negligence of its lessee must be confined to acts occurring on the lessor's property. The fact that the Southern holds leases of different railroads, runs a train through over each track and sells one ticket good over all, would not, in my judgment, alter this principle.

The decision in the *Rocky Mount Mills case* was based upon the idea that different railroad companies, engaged actively in the transportation of merchandise, had formed a transportation copartnership under the name and style of the Atlantic Coast Dispatch, and that each copartner was liable for the acts of the other done within the scope of the copartnership. The fact that two railroad corporations happen to independently lease their properties to the same lessee by dif- (50) ferent leases would not create a transportation copartnership between the lessors or extend the liability of each lessor for the acts of the lessee beyond each lessor's own property.

Therefore, I hold that in order to create a liability upon the part of the North Carolina Company it must be established that the actionable negligence—the breach of duty upon the part of the Southern which

caused the death of plaintiff's intestate—actually occurred upon the property of the North Carolina Company.

CLARK, C. J., concurring with *Mr. Justice Brown:* Barring the word "jointly," which doubtless was unadvisedly used in the complaint, I think that there is no liability accruing to the North Carolina Railroad Company by reason of any misconduct of the conductor of the Yadkin Valley Railroad Company, simply because both roads had been leased to the same lessee. There is no contract between the two lessors. Nor when the Yadkin Valley Railroad Company, acting through its lessee, contracted to take a passenger from Norwood to Salisbury, did any liability arise to the North Carolina Railroad Company for mistreatment of a passenger, from the fact that the Yadkin Railroad Company ran its train for one and a half miles over the track of the North Carolina Railroad Company. The latter would be responsible to the public, as for fires set out by the Yadkin train while on its track. (*Aycock v. R. R.*, 89 N. C., 321) or injury accruing to any one on its tracks, but it would not be liable for any breach of contract or tort by the Yadkin Company to its passengers or employees: *Washington v. R. R.*, 101 N. C., 239; *White v. R. R.*, 115 N. C., 631. The North Carolina Railroad Company was neither lessor nor lessee of the Yadkin Railroad, nor was it operating the latter's train merely because its train ran over the North Carolina Railroad track a short distance.

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(51)

ISLEY v. BRIDGE COMPANY.

(Filed 13 November, 1906.)

Negligence—Instructions—Reducing Verdict—Power of Court—Damages, Excessive and Inadequate.

1. In an action for injuries sustained from the breaking of a chain used in lifting heavy weights, where the only theory of negligence presented by the plaintiff's evidence was that the defendant in not having the chain properly annealed had allowed the metal to become crystallized, and there was evidence on the part of the defendant tending to prove that the broken link had not become crystallized, the Court erred in declining to give defendant's special instruction that "if the jury find from the evidence that the link of the chain was not crystallized they should answer the first issue as to negligence 'No.'"
2. The trial Judge has no power to reduce a verdict without the consent of the party in whose favor the verdict is rendered.
3. When the trial Judge thinks an injustice has been done it is his duty to set aside the verdict, and he may set it aside as to damages either excessive or inadequate.

ACTION by Warren W. Isley against the Virginia Bridge and Iron Company, heard by *Ferguson, J.,* and a jury, at the May Term, 1906, of ALAMANCE. From the judgment rendered, both parties appealed.

J. T. Morehead and *W. H. Carroll* for the plaintiff.
Brooks & Thomson and *Parker & Parker* for the defendant.

BROWN, J. This cause was tried upon the issues submitted upon the first trial, and we refer to the former report for the facts (141 N. C., 221.)

On the second trial the defendant requested the Court to charge the jury: "If you find from the evidence that the link of the chain in evidence was not crystalized, then I charge you to answer the first issue 'No.'" The Court declined to give this special instruction, (52) and defendant excepted.

The only theory of negligence presented by the plaintiff was that the chain suspended from the trolley and used in moving heavy pieces of iron had not been occasionally annealed, in consequence of which it had become crystallized, which caused it to break and drop the iron upon plaintiff's leg. The testimony of Albright and Turrentine, plaintiff's witnesses, tends to prove that the use of chains in lifting heavy weights tends to crystallize the links, or some of them; that the method used to prevent this is by annealing the metal, and that this chain had become crystallized. There is no other evidence of negligence, and plaintiff does not undertake to account for the breaking of the chain upon any other theory.

The defendant offered evidence tending to prove that the broken link had not become crystallized and that the occurrence was an accident and was not occasioned by any negligence of its agents.

In presenting defendant's contentions the only charge the Court gave was as follows: "If an inspection could not have discovered any defect in the chain, that is, would not have discovered that the chain had become crystallized and brittle, if it was crystallized, and liable to break in its use, and if you should fail to find from the evidence that it was necessary to anneal the chain, or that if the chain had been annealed it would not have broken, you will answer the first issue 'No.'"

It is contended that the defendant's prayer for instruction was inferentially given. This is not sufficient. The Court should have given the prayer definitely and with certainty. The defendant was entitled to that, for it is plain to us that if the chain had not become crystallized, the occurrence was an accident, "an event from an unknown cause," which reasonable care could not guard against. There is no evidence that the link was worn so badly as to be danger- (53)

ous, or that the chain was of inferior quality, but the case was tried upon the theory that defendant by its negligence in not having it properly annealed had allowed the metal to become crystallized.

His Honor declined to set aside the finding upon the issue of damages, upon motion of the defendant, upon the ground that the amount was excessive, but reduced the amount to $1,500. The plaintiff tendered judgment for $2,000, which the Court refused to sign, and plaintiff excepted and appealed. This must have been an inadvertence upon the part of the able Judge who tried this case. In view of the disposition we have made of the defendant's appeal a new trial is necessary, but we deem it proper to say that in this State Judges of the Superior Courts have no power to reduce verdicts without the consent of the party in whose favor the verdict is rendered. *Shields v. Whitaker,* 82 N. C., 523. When the trial Judge thinks an injustice has been done, it is his duty to set aside the verdict, and he may set it aside as to damages either excessive or inadequate. *Benton v. Collins,* 125 N. C., 83. Let costs of defendant's appeal be taxed against plaintiff and costs of plaintiff's appeal be taxed against defendant.

New trial.

(54)

RAILROAD COMPANY v. HARDWARE COMPANY.

(Filed 13 November, 1906.)

Malicious Prosecution—Abuse of Process—Profits—Measure of Damages. Evidence—Wrongful Attachment—Probable Cause—Advice of Counsel.

1. In an action for damages growing out of an attachment of plaintiff's cars, alleging malice and want of probable cause and that the attachment of ten cars was excessive and an abuse of process of the Court, evidence of profits which the plaintiff might have made from hiring its cars was properly excluded as speculative damages.
2. The true measure of damages in such a case is the interest upon the value of the cars, increased or diminished, as the case might be, by the difference between the deterioration of the cars if in daily use, and their deterioration while wrongfully tied up, provided plaintiff could not have avoided injury from the attachment by giving bond and retaining possession of its cars.
3. In an action for damages for alleged wrongful and malicious attachment of plaintiff's cars, the Court erred in refusing to admit the testimony of the agent of the company, which was surety on the prosecution bond in this action, that for the payment of $10 it would have signed a replevy bond to secure release of the cars attached.
4. In cases of contract, as well as in tort, it is generally incumbent upon an injured party to do whatever he reasonably can to improve all reasonable and proper opportunities to lessen the injury. He must not remain supine, but should make reasonable exertions to help himself, and thereby reduce his loss and diminish the responsibility of the party in default to him.

5. In an action for damages for alleged wrongful and malicious attachment of plaintiff's property, where the general manager of defendant testified that the party who bought the goods told him that they were for the use of and bought for the account of plaintiff; that he had no reason to disbelieve this statement; that the former action was instituted in good faith, believing the present plaintiff owed the debt for which the property was attached; that he submitted all the facts to his counsel and acted upon his advice, and that he had no idea what property the Sheriff had attached: *Held*, that the Court erred in charging the jury that if they believed the evidence they would find that the attachment was issued without probable cause.

6. Where the defendant laid all the facts before his counsel and sued out the attachment under his advice, this is evidence to rebut the allegation of malice.

7. Where the officer levied an attachment on an excessive quantity of property, the plaintiff in the attachment is not liable for the abuse unless he in some way advised, directed or encouraged such action.

8. In an action for malicious prosecution, it is necessary to show (1) malice, (2) want of probable cause, (3) and that the former proceeding has terminated. In an action for abuse of process it is not necessary to show either of these three things, but two elements are necessary: First, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding.

(55)

ACTION by Pittsburg, Johnstown, Ebensburg and Eastern Railroad Company against Wakefield Hardware Company, heard by *Moore, J.* and a jury, at the August Term, 1906, of GUILFORD.

This case was here, 135 N. C., 73, when a demurrer for misjoinder was sustained because the surety on the attachment bond had been joined as defendant. It was again here, 138 N. C., 174, when a demurrer to the complaint was overruled. The defendant had instituted an action against the Coke and Coal Company, a corporation of this State, for the recovery of $415 for car material, and joined the plaintiff herein, a railroad company incorporated in Pennsylvania, as co-defendant. The two companies had at that time the same officers and nearly the same stockholders, and the material had been used on the latter's cars. The complaint alleged that the material was bought for said railroad company, in fact, as an undisclosed principal. In said attachment ten of the defendant's cars were attached, and it not offering to give bond, the said ten cars were held two years, when the attachment was dissolved. This action was brought for damages, alleging malice and want of probable cause and that the attachment of the ten cars was excessive and an abuse of the process of the Court. Both plaintiff and defendant appealed. (55)

J. T. Morehead, W. H. Carroll and *Scott & McLean* for plaintiff.
Taylor & Scales for defendant.

PLAINTIFF'S APPEAL.

CLARK, C. J., after stating the case: The plaintiff sought to show that for the ten cars attached it should recover what the cars would have earned by way of rental or car toll. It was in evidence that the plaintiff's road is only seventeen miles long, but that it owns a large stock of cars and its principal business was the hiring or mileage of its freight and coal cars used on other roads, in short, as its counsel somewhat felicitously expressed it, its chief business was that of a "railroad livery stable"—hiring out conveyances. His Honor properly excluded the evidence of profits which the plaintiff might have made for hiring its cars, because that would be speculative damages. *Sharpe v. R. R.*, 130 N. C., 614. The true measure of damages is the interest upon the value of the cars, increased or diminished, as the case might be, by the difference between the deterioration in the cars, if in daily use, and their deterioration while wrongfully tied up, provided, of course, the plaintiff could not have avoided all injury from the attachment by simply giving bond—as it is shown that it was amply able to do—and retaining possession of its cars.

No error.

DEFENDANT'S APPEAL.

CLARK, C. J. It was error to refuse to admit the testimony of the agent of the company which was surety on the prosecution bond in this action, that for a payment of ten dollars it would have signed a replevy bond to secure release of the ten cars when attached. Though it may not be the duty of a defendant in all cases to execute a replevy bond, it would be preposterous to justify non-action whereby
(57) the plaintiff claims it has lost $4,750 rental of cars, when it was a perfectly solvent company, owing no debts, as its president testified, and could at a petty expense, and probably without any at all, have given bond and retained possession of its cars. "The rule, in brief, is that in cases of contract, as well as in tort, it is generally incumbent upon an injured party to do whatever he reasonably can to improve all reasonable and proper opportunities to lessen the injury. * * * He must not remain supine, but should make reasonable exertions to help himself, and thereby reduce his loss and diminish the responsibility of the party in default to him." Note to *Wright v. Bank*, 6 Am. St., 365. Where a mule was wrongfully taken it was held that the injured party should have bought another, and could not recover the profits of the crop he would have made if the mule had not been taken. *Sledge v. Reid*, 73 N. C., 440.

The Court below erred in instructing the jury that "if they believed the evidence, to answer the first issue 'Yes.'" That issue was, "Did the

defendant wrongfully and without probable cause, cause to be issued and levied a warrant of attachment upon the property of the plaintiff?"

There was ample evidence to submit to the jury upon the question of probable cause. There was the testimony of the general manager of the defendant that the party who bought the goods told him they were for the use of and bought for the account of the plaintiff; that he had no reason whatsoever to disbelieve this statement; that the action was instituted by the defendant in the utmost good faith, believing that the plaintiff verily owed the debt for which the property was attached; that notwithstanding this belief, out of the abundance of caution, he submitted honestly all the facts to his counsel, who advised him that he had a cause of action against the plaintiff; that no steps were taken except such as were advised by his attorney; that as for attaching more property than the amount of his claim would warrant, he (58) had no idea what property the Sheriff had attached under and by virtue of the writ, and that his only cause for taking a nonsuit at the time of the trial of the action was his inability to secure the attendance, as a witness, of the party who bought the goods.

The defendant had laid all the facts before counsel of high standing in the profession and had sued out the attachment under his advice. This is evidence to rebut the allegation of malice: *Smith v. B. and L. Asso.,* 116 N. C., 73; and there are many authorities holding that it is evidence also of probable cause; see cases collected in note 93, Am. St., 461.

This action, furthermore, cannot be maintained for malicious prosecution if, as the jury have found, there was no malice. *R. R. v. Hardware Company,* 138 N. C., 174.

The only ground for an action for abuse of process is the levy on an excessive number of cars for the alleged purpose of forcing payment of an alleged debt, preferably to submitting to loss and inconvenience by the attachment. There was certainly evidence, above set out, in denial of this, and it was error in any aspect of the case to instruct the jury to answer the first issue "Yes."

If the officer levied, as it seems that he did, on an excessive quantity of property, the plaintiff in the attachment was not liable for the abuse unless it had in some way directed, advised or encouraged such act. 19 Am. and Eng. Enc. (2 Ed.), 630. This being denied, raised an issue for the jury.

It may be as well to note here the distinction between an action for malicious prosecution and an action for abuse of process. In an action for malicious prosecution there must be shown (1) malice and (2) want

of probable cause, and (3) that the former proceeding has terminated. *R. R. v. Hardware Company,* 138 N. C., 174. In an action for
(59) abuse of process it is not necessary to show either of these three things. By an inadvertence it was said in the case last cited that want of probable cause must be shown. "If process, either civil or criminal, is wilfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie." 1 Cooley Torts (3 Ed.), 354. "Two elements are necessary: first, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding. *Ib.,* 355; 1 Jaggard Torts, sec. 203; Hale on Torts, sec. 185. "An abuse of legal process is where it is employed for some unlawful object not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not." *Mayer v. Walter,* 64 Pa. St., 283. The distinction has been clearly stated. *Jackson v. Telegraph Co.,* 139 N. C., 356.

Error.

Cited: Gither v. Carpenter, post, 242; *Stanford v. Grocery Co., post,* 423; *Bowen v. King,* 146 N. C., 391; *Hocutt v. Tel. Co.,* 147 N. C., 193; *Bell v. Machine Co.,* 150 N. C., 113; *Downing v. Stone,* 152 N. C., 530; *Harvey v. R. R.,* 153 N. C., 575; *Carmichael v. Telephone Co.,* 157 N. C., 27; *Wilkinson v. Wilkinson,* 159 N. C., 271; *Wright v. Harris,* 160 N. C., 546, 551, 554; *Smith v. Bonding Co., Ib.,* 576.

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(60)

JONES v. COMMISSIONERS.

(Filed 13 November, 1906.)

Taxation—Subscriptions to Railroads—Bonds—Legislative Power—Uniformity—Counties and Townships—Mandamus—Limitation of Action—Parties.

1. Where certain townships by extra taxation procured the building through their territory of a railroad, the Legislature has the power to direct the County Commissioners to expend exclusively in those townships the county taxes derived from such railroad property in said townships "in repairing roads, building bridges, extending schools, or such other purposes as the Commissioners may deem best," until the amount so used in said townships shall fully reimburse them for the amount paid out to aid in building said railroad.
2. There is no constitutional requirement that the tax rate for county purposes shall be the same everywhere. It varies in the different counties, and may vary in different townships, parts of townships, districts, towns, and cities in the same county.
3. The Constitution recognizes the existence of counties, townships, cities and

towns as governmental agencies; but they are all legislative creations and subject to be changed, abolished or divided, at the will of the General Assembly.

4. Where the relief sought is a *mandamus* to compel a Board of County Commissioners to expend in a township certain taxes as directed by statute, the tax-payers in said township are proper parties to bring the action, and there is no statute of limitations as the relief sought is prospective.

5. Where a statute requires the County Commissioners to invest each year, in interest-bearing securities, the county taxes derived from the taxation of the property of a railroad in a certain township, as a sinking fund for the payment, at maturity, of the bonds issued by said township to aid in building said railroad, a *mandamus* to compel the Commissioners to reimburse said township for the amount of said bonds was properly refused, where the bonds had been already paid off.

ACTION by A. G. Jones and others against the Board of Commissioners of Stokes County, pending STOKES, and heard by *Ward J.*, by consent, at chambers at Winston, on 12 October, 1906, upon the pleadings and agreements of facts.

In 1880 Sauratown and Meadows townships in Stokes County, under the authority of chapter 67, Laws 1879, voted to subscribe $6,660.66 each to the capital stock of the Cape Fear and Yadkin Valley Railroad Company to procure said railroad to be built through their respective townships, and to levy a tax on said townships to pay the subscription, which has since been fully paid up. The road was built through said townships and has since become the property of the Southern Railway Company. Meadows Township has been divided into two townships, Meadows and Danbury.

In 1887 said Sauratown Township, Stokes County, under the authority of chapter 87, Laws 1887, voted to subscribe $10,000 to the capital stock of the Roanoke and Southern Railroad Company (61) to procure said railroad to be built through the township, and to issue $10,000 in bonds, to be sold to pay up said subscription, which was done, and subsequently the township paid off and canceled said bonds. The road was built through said township and has since become the property of the Norfolk and Western Railroad Company.

In 1893 the General Assembly enacted chapter 448, Laws 1893, which as amended by chapter 131, Laws of 1895, reads as follows:

"SECTION 1. The Commissioners of Stokes County are hereby authorized and directed to set apart from all other county taxes all the taxes paid each year as county taxes by the Cape Fear and Yadkin Valley Railroad Company on their property, lying and being in Sauratown and Meadows townships of said county of Stokes; and the same so respectively paid each year on the property in each of said townships by said railroad company shall be divided into two equal

shares, one-half thereof to belong to Sauratown Township and the other half to belong to the territory now embraced in Meadows and Danbury townships, to be divided between said Meadows and Danbury townships in proportion to the amount of taxes paid by said territory now embraced in Danbury and Meadows townships, respectively, to the Cape Fear and Yadkin Valley Railroad Company, and shall be expended exclusively within the said Sauratown and Meadows and Danbury townships, respectively, for repairing the public roads, building bridges, extending schools, or such other purposes as the Commissioners may deem best, and not otherwise.

"SEC. 2. The Commissioners of Stokes County are authorized and directed to invest each year in interest-bearing securities, which in their judgment are safe and reliable, the surplus money arising from the county taxes paid by the Norfolk and Western Railroad Company, over and above the amount required to pay interest on the bonds
(62) issued by Sauratown Township in aid of said railroad, on all their property lying and being in Sauratown Township, in said county of Stokes, the interest on the bonds outstanding first having been paid each year before said surplus is invested; and the surplus so invested shall be a sinking fund for the redemption of the bonds at maturity, it being the intention of this act that the surplus shall not be used by the county as a part of the general county fund, but for the purpose herein set forth.

"SEC. 3. That whenever the bonded debt, principal and interest, of said township, contracted in aid of the Roanoke and Southern, now the Norfolk and Western Railroad, shall have been paid by said county taxes on said road, and the said township fully reimbursed for what has been already paid, and whenever the Meadows Township shall be fully reimbursed and said taxes, principal and interest, the amount paid by said township, then this act shall cease to be operative, and all such taxes shall be paid into the general county fund.

This is an action brought by these tax-payers of the aforesaid townships, on behalf of all the tax-payers therein, averring that the defendant Board of County Commissioners of Stokes has never complied with the requirements of the aforesaid acts, but has collected the taxes on said railroad property in said townships, and has applied them to general county purposes, and though a demand was made on the board, before bringing this action, that it should apply the aforesaid taxes to the purposes set out and required by said acts, the defendant refused to do so. The relief sought is a *mandamus* to compel the defendant to comply with the statute by applying the taxes raised on said railroad property in the townships named, as follows: "That the taxes levied on the property, formerly owned by the Cape Fear and Yadkin Valley Rail-

road Company, be applied to repairing the public roads in said townships and for the other purposes set out in said act, and that the taxes levied on the property owned by the Norfolk and Western Railway Company be paid to said Sauratown Township until (63) said township is reimbursed in both the principal and the interest paid on said bonded indebtedness of $10,000," and for a reference to ascertain the sum that should be so applied. His Honor granted judgment as asked in favor of the plaintiffs as to the taxes hereafter to be collected on the Southern Railway in said Township, that the same shall be applied as provided in section 1 of the act in the manner and to the extent therein mentioned, and for a reference to ascertain the amount. From this order the defendant appealed.

It was further adjudged that Sauratown Township is not entitled to be reimbursed in any amount for the sums paid out on the subscription for building the Roanake and Southern Railroad, and from this order the plaintiff appealed.

Lindsay Patterson and *W. W. King* for the plaintiff.
Manly & Hendren and *N. O. Petree* for the defendant.

DEFENDANT'S APPEAL.

CLARK, C. J., after stating the case: The townships named in the act having, by the extra taxation they had imposed upon themselves, procured the building through their territory of the Cape Fear and Yadkin Valley Railroad, now the property of the Southern Railway Company, the General Assembly thought it just and equitable that the county taxes derived from such property in those townships should be expended exclusively in said townships "in repairing roads, building bridges, extending schools or such other purposes as the Commissioners may deem best," until the amount so used in said townships should fully reimburse them for the amount paid out on subscriptions to aid in building said railroad. We know of no provision in the Constitution which disables the Legislature from passing such act. (64)

The defendant contends that the act interferes with the requirement of uniformity and equality of taxation. But there is no constitutional requirement that the tax rate for county purposes shall be the same everywhere. It varies in the different counties. The rate of taxation may vary in different townships, parts of townships, districts, towns and cities in the same county, as where some have voted extra taxation for roads, fences, schools, etc., and in this very instance the taxes were higher a few years ago in those three townships, by reason

of the tax to pay their railroad subscription—an inequality for which this act seeks to reimburse them. In fact, the levy for county taxation is uniform throughout the county under this act, which is merely a legislative requirement of the appropriation of money raised from certain property taxes, in those townships, to certain public purposes therein, which the General Assembly thought just and proper. The act does not interfere with the constitutional provision appropriating the poll tax and fines, forfeitures and penalties. The defendant suggests, however, that it infringes upon the provisions of the Constitution "establishing counties and requiring them to be maintained in their integrity." But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities and towns as governmental agencies (*White v. Commissioners,* 90 N. C., 437), but they are all legislative creations and subject to be changed (*Dare v. Currituck,* 95 N. C., 189; *Harris v. Wright,* 121 N. C., 172), abolished (*Mills v. Williams,* 33 N. C., 558), or divided (*McCormac v. Commissioners,* 90 N. C., 441) at the will of the General Assembly. In *Tate v. Commissioners,* 122 N. C., 813, it is mentioned that the names of fourteen counties, formerly existing, have disappeared from the map of the State. Another (Polk) was once abolished and subsequently recreated.

A case exactly in point with this is *Clark v. Sheldon,* 106 N. Y., 104, which held constitutional an act "directing and providing for the
(65) application of taxes assessed upon any railroad in a town, city or village towards the redemption of bonds issued by the municipality to aid in the construction of such railroad," and pointed out that this did not impose a tax upon property in other portions of the county for the benefit of any township, city or town, but simply appropriated the taxation upon such railroad property for the benefit of the municipality which had incurred a burden to procure the building of such railroad. The same view is upheld in *Commissioners v. Lucas,* 93 U. S., 108.

It rested in the judgment of the General Assembly to direct the Commissioners of Stokes County to make this application of the county taxes derived from railroad property in those townships. Should this statute not meet the approval of subsequent Legislatures it can be repealed, but unless repealed it is the duty of the County Commissioners to obey it until, as provided therein, the townships named in section 1 shall be reimbursed in the manner stated.

It was competent for these plaintiffs, taxpayers in said township, to bring this action, "the question being one of common or general interest" to all the taxpayers therein. Revisal, 411; *Bronson v. Ins. Co.,* 85 N. C., 411; *Thames v. Jordan,* 97 N. C., 121; *McMillan v. Reeves,* 102 N. C., 550.

Nor is there any statute of limitations. The plaintiff is not seeking to recover a debt, nor even to compel the County Commissioners to account for the taxes heretofore collected on railroad property in said townships, but the relief sought is prospective, to require compliance with the statute in future. It imposes a continuing duty until it shall be complied with or repealed.

No Error.

PLAINTIFF'S APPEAL.

CLARK, C. J. Section 2 of the act requires the County Commissioners to invest each year, in interest-bearing securities, the county taxes derived from the taxation of the property of the Norfolk (66) and Western Railroad Company in Sauratown Township, as a sinking fund for the payment, at maturity, of the bonds issued by said township to aid in building said railroad (after first deducting thereout enough to pay the current interest). As the bonds of said township have been paid off, there is no sinking fund required to pay the bonds, and the *mandamus* in this regard was properly refused.

It would have been otherwise if this section had, like section 1, required the reimbursement of that township by disbursing the taxation, derived from said railroad, for roads, schools, etc., in the townships named. Whether it shall be so amended is a matter for the Legislature. The statute does not now so require.

No Error.

Cited: Trustees v. Webb, 155 N. C., 385; *Commrs. v. Commrs.,* 157 N. C., 517.

WOODY v. FOUNTAIN.

(Filed 13 November, 1906.)

Processioning Proceeding—Pleadings—Practice—Possession—Title—Boundary—Burden of Proof.

1. In a processioning proceeding under Rev., secs. 325-6, to establish a boundary-line, where the defendant denied the plaintiff's title and pleaded both the twenty years' and seven years' statutes as a defense, the Clerk, under Rev., sec. 717, should "transfer the cause to the civil-issue docket for trial during the term upon all issues raised by the pleadings"—in this case, both the issues of boundary and title.
2. In a processioning proceeding, the provision in Rev., sec. 326, that occupation of land constitutes ownership for the purpose of establishing boundary, applies only where the answer does not deny the boundary, or denies only the boundary; but where the denial extends to the plaintiff's title

also, and the case is transferred to the term of Court for "trial on all the issues raised" (Rev., sec. 717), the action becomes substantially a civil action to quiet title, and it devolves upon the plaintiff to make out his title as well as his boundary, and possession ceases to be sufficient proof of ownership.

3. In a processioning proceeding, where the cause has been transferred to the Court at term, an instruction to the jury that "if they should find from the greater weight of evidence that the original and true line between the plaintiff and defendant is as claimed by defendant, then you will answer this issue (as to boundary) in his favor," was erroneous, as the burden of proof was on the plaintiff to establish the line.

(67)

ACTION by Mildred I. Moody against Griffin Fountain, heard by *Moore, J.*, and a jury at the August Term, 1906, of PERSON. From the judgment rendered the defendant appealed.

William D. Merritt for the plaintiff.
Kitchin & Carlton for the defendant.

CLARK, C. J. This was a special proceeding under Revisal, 325, 326 to establish the boundary line between the plaintiff and defendant. These sections provide that the owner of land may file a petition stating the facts constituting the location of the line claimed by him; that if this is not denied the Clerk shall enter judgment establishing the boundary as alleged in the petition, but if denial of the location is made in the answer the Clerk shall cause the line to be surveyed according to the contention of both parties, and after the surveyor's report and map are filed the Clerk shall hear the cause and render judgment determining the boundary, and if an appeal is taken "the Clerk shall certify the issues raised before him to the next term of the Superior Court for trial by jury *de novo*." This was the act of 1893, and while designating this a special proceeding and providing that the procedure, except as therein modified, "shall, in all respects, be the same" as in other special proceedings, marks out the procedure only when there is no denial of plaintiff's allegations or a denial as to location of his boundary only. But the later act of 1903, ch. 566, now Revisal, 717, provides further
(68) that in all "special proceedings it shall be competent for any defendant to plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the Clerk shall transfer the cause to the civil issue docket for trial during the term upon all issues raised by the pleadings."

In this case the defendant denies the plaintiff's allegation that she is "owner in fee," and pleads both the twenty years' and seven years' statutes as a defense. It is true that under Revisal, 326, "occupation of

land constitutes sufficient ownership for the purpose of that section," *i. e.*, establishing boundary. That would be sufficient when the answer does not deny the boundary or denies only the boundary. But the act of 1903, now Revisal, 717, authorizes the defendant in any special proceeding to plead any defense which he might do in a civil action. The defendant has denied the plaintiff's title. It would be a vain thing indeed to go on to establish a boundary when the title is controverted. It would be equally a hardship to turn the plaintiff out of court merely because the defendant has denied his title as well as boundary, and "the whole object in passing the act may be utterly defeated." *Stanaland v. Rabon,* 140 N. C., 204. Indeed such course would discourage these proceedings, which should rather be encouraged, that when possible boundary lines may be readily settled with small cost and delay. The simpler plan now that both parties are already in court and know each other's contention is, as the statute has now provided, Revisal, 717, "when such pleas are filed the Clerk shall transfer the cause to the civil issue docket for trial during the term upon all the issues raised by the pleadings," *i. e.*, in this case both the issues of boundary and title. Instead of turning the plaintiff out of court to begin anew by an action of ejectment, or doing the vain thing of trying a boundary when the title of plaintiff is denied, the statute simply converts the pending (69) special proceedings into a civil action to quiet title. It is true, as held in *Hill v. Dalton,* 140 N. C., 9, that in a "proceeding for processioning the question of title does not arise." But that applies in cases where the nature of the action is not changed by a plea arising on issue of title.

This is analogous to a special proceeding for partition in which, if the allegation of ownership is not denied, the lines laid out are an adjudication between the parties, subject only to a change of the dividing lines on appeal, but after judgment the partitioners are estopped to deny each other's title. Partition is a proceeding to establish boundary lines, but if title is not denied the judgment cannot be impeached by a party for defect of title, and if title is denied in the answer the cause is transferred to the Superior Court and "becomes substantially an action of ejectment and subject to all the rules of law applicable to such trials." *Alexander v. Gibbon,* 118 N. C., 796; *Huneycutt v. Brooks,* 116 N. C., 788; *Purvis v. Wilson,* 50 N. C., 20; *Bullock v. Bullock,* 131 N. C., 29.

This is the same view which this Court has taken of this special proceeding "to establish boundary"—commonly called "Processioning"—in all the decisions since Laws 1903, ch. 566, now Rev., 717. At the next term (August, 1903), in *Parker v. Taylor,* 133 N. C., 103, the Court stated that the purpose of the act is to furnish a cheap and speedy mode of establishing a boundary "between adjoining proprietors who do

not question each other's title to their respective tracts," but that, like a special proceeding in partition, "if an issue as to title is raised by the answer," the cause should be "transmitted to the Court at term, thenceforward to be proceeded in as if originally brought to determine the issue of title as in an action of ejectment." That case is cited as authority in *Smith v. Johnson,* 137 N. C., 43. In *Stanaland v. Rabon,* 140 N. C., 202, it was held that in a special proceeding under
(70) the processioning act, when an issue as to title is raised in the pleading, the cause should be transferred to the Court at term for trial, and that the Court erred in dismissing the proceeding. In *Davis v. Wall,* at this term, 142 N. C., 450, the above three cases are cited, and it is said: "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 be transferred to the Court at term for trial and tried as if the action had been originally brought to the term of Court, just as when an issue of title is raised in proceedings for partition."

The practice is thus simple and is well settled, and conforms to the statute, Rev., 717, and to the practice in all other special proceedings. By the denial of the allegation in the complaint that the plaintiff is "owner in fee," the action became in effect a civil action assimilated to an action to quiet title, Laws 1893, ch. 6, now Revisal, 1589, and should have been tried at term according to the practice and rules governing such trials. There is no formal order in the record transferring the issues for trial at term, but it was in fact transferred, since it was tried there, and if objection had been made on that account, the Clerk was in the courtroom and the Judge could and would have ordered an amendment *nunc pro tunc* to perfect the record.

The first issue was, "Is the plaintiff the owner and in possession of the tract of land described in the complaint?" His Honor erred in instructing the jury that "If they believed the evidence you will answer the first issue 'Yes.'" He was doubtless misled by the provision in Revisal, 326, that "Occupation of land constitutes ownership for the purpose of this section." But, as we have seen, "the purpose of that section" is to "settle a boundary," when there is no denial in the answer, or the
(71) denial is merely of the location thereof. But when the denial extends to plaintiff's title also, and the case is transferred to the term of Court for "trial on all the issues raised," Rev., 717, the action becomes substantially a civil action to quiet title, Rev., 1589, and is governed by the rules appertaining thereto. It devolved upon the plaintiff to make out his title as well as his boundary, and possession ceased to be sufficient proof of ownership when ownership was denied.

His Honor also erred in instructing the jury that "If they should find from the greater weight of the evidence in this case that the original and true line between the plaintiff and defendant is as claimed by defendant, then you will answer this issue (as to boundary) in his favor." This was, in effect, telling the jury that the issue could not be answered in the defendant's favor unless they found the greater weight on his side. The burden of proof is on the plaintiff to establish the line contended for by her. *Hill v. Dalton,* 136 N. C., 339; *s. c.,* 140 N. C., 9.

There are other errors, but we need not consider them as they are not likely to occur again when the case goes back to be tried, "as if it were an action to quiet title originally brought to the term of Court." *Parker v. Taylor,* 133 N. C., 103; *Davis v. Wall,* 142 N. C., 450.

The special proceeding for "processioning" is and will remain a cheap and speedy method of settling a boundary where only the boundary is in question, and should be encouraged. When an issue of title is raised by the answer, instead of throwing the costs upon the plaintiff and forcing him to bring a new action to term time, the case being already in the Superior Court before the Clerk, the statute converts it into an action to quiet title and transfers it to the term of Court for trial, to the economy of time and expense.

Error.

WALKER, J. I concur in the conclusion of the Court, and (72) also in its opinion, to this extent: It seems to me that in processioning proceedings, unless perhaps both parties claim under a paper title, it will be difficult if not impossible to confine the investigation required to the mere location of the dividing line. When both parties claim by right of possession, or one by a paper title and the other by adverse possession, it will become necessary in the large majority, if not all, of the cases to ascertain the nature and extent of the possession and, even in the case of a claim under a paper title, the true location of corners and of other boundaries, as preliminary to the location of the dividing line which is in dispute. So that it may, speaking generally, be safely said that the title to the land is not involved in such a proceeding, but that means that it is not directly involved, for in many cases, as we have already shown, it may become incidentally one of the questions or issues in the case, which must be decided before the main issue as to the location of the dividing line can be determined. The illustration put by the *Chief Justice* is an apt one. I refer to the case of a partition proceeding. There the question of title is not necessarily involved, but it may become necessary upon a plea of *sole seizin* to determine first how the parties stand with reference to the title before deciding whether they are tenants in common and entitled to partition.

It is a preliminary question which must be settled before the relief prayed can be granted. A partition proceeding will very often run into an action of ejectment, and the same may be said of a processioning proceeding. In the latter case the ownership of the land on either side of the alleged disputed line, which is a prerequisite to the right of having the land processioned, cannot always be determined by mere occupancy; but often will require an investigation of the title, as in other cases where the issue is not primarily involved.

Cited: Green v. Williams, 144 N. C., 63; *Cole v. Seawell,* 152 N. C., 350; *Brown v. Hutchinson,* 155 N. C., 207.

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(73)

HICKS v. MANUFACTURING CO.

(Filed 13 November, 1906.)

Master and Servant—Defective Machinery—Negligence—Contributory Negligence—Evidence.

1. In an action by an employee to recover damages for injuries sustained in endeavoring to clean out a machine, where he testified that he was injured by reason of a defective machine of which he had no notice, and that if the machine had been in proper condition there was no danger to be reasonably apprehended from cleaning it in the manner testified to, the Court committed no error in refusing to nonsuit plaintiff.
2. In an action by an employee to recover damages for injuries sustained in endeavoring to clean out a machine, where defendant offered evidence to show that the machine was a standard one and was superseding the old machines, and that the opening, by reason of which plaintiff's hand was injured, was not a defect, but a part of the structural plan of the machine, and plaintiff alleged that the old machine which he had hitherto used afforded complete protection, and if the defendant had installed a different machine which created an additional danger, it was its duty to warn him of this condition, an instruction, that if the jury found the new machine differed in this respect from the old ones and that plaintiff did not know of the opening and could not have known of it by the exercise of ordinary care, and was put to work on the new machine without notice of its condition, then the defendant would be guilty of negligence, was addressed to the duty of the defendant to warn the plaintiff, and did not make any particular machine the arbitrary standard of excellence.

ACTION by Joseph Hicks against Naomi Falls Manufacturing Company, heard by *Ferguson, J.,* and a jury at the June Term, 1906, of GUILFORD.

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

R. C. Strudwick for the plaintiff.

W. P. Bynum, Jr., Cabell, Talley & Cabell and *G. S. Ferguson, Jr.*, for the defendant.

(74)

HOKE, J. This cause was before the Court on a former appeal, and will be found reported in 138 N. C., 319. Pursuant to the order then made a new trial was had, and the case, under the charge of the Court, was submitted to the jury on the usual and ordinary issues in actions of this character.

On the trial below the plaintiff, among other things, claimed and testified that at the time of the injury he was an employee of defendant, at work in the lapper-room; that these machines were encased in a covering, and their operation in the process of cleaning cotton was explained to the Court and the jury by means of a model exhibited at the time of the examination; that when plaintiff first went to work there were three machines in the room, two Atherton and one Whiting. In a month or so another machine was installed, known as the Kitson, and plaintiff was injured in endeavoring to clean out this machine.

Plaintiff further testified that he had worked at this particular employment at this and other mills for several years; and in all properly constructed machines, and all that plaintiff had ever examined, there was underneath the covering a screen made by slats from ⅛ to ½ inch apart, and extending from the mote-box, which was on the floor of the lapper-room, clear around to the feed-roll, the point where the cotton entered the machine; and these slats were well-nigh a complete protection for any one cleaning the machine from the beaters of the machine as it revolved. That at the time of the injury, plaintiff was endeavoring to clean out the machine, when his hand was caught by the beater and severely injured; and this was caused by reason of the fact that one of the slats in this Kitson machine was missing, thus preventing the screen from offering the complete protection which it would otherwise have done.

On question and answer, the examination of the witness on this point was as follows:

Q. What were you doing when you were hurt? A. I was (75) cleaning out the motes.

Q. How were you cleaning them out? A. With my hands. I raked out what I could with my hands; then I had to stick my head and shoulders in to reach back there.

Q. I will ask you if there was any danger in cleaning out this machine while same was running if slats were all in place? A. No, sir.

Q. Why? A. There was no other place for me to be hurt.

Q. I will ask you if these screens fully composed of the slats would have protected you, whether running or not? A. Yes, sir.

Q. Was there any danger of putting part of your person in there if all the slats had been there? A. No, sir.

Q. What, then, was the cause of your being injured? A. Missing slat.

Plaintiff further testified that he had never examined this machine or raised the covering, having no occasion to do so, and was not aware of any defect in it till some time after the injury, when he went back and examined the machine, and found the slat missing, as stated.

There was evidence of the defendant to the effect that the machine was a standard machine, approved and in general use, and was in no way defective; that plaintiff had negligently exposed himself to injury by the unusual manner in which he was endeavoring to clean the machine at the time, etc.

On the argument here it was earnestly urged by counsel that defendant having supplied plaintiff with a standard, up-to-date machine, there was no fault imputable to defendant by reason of this injury; and it was further contended that plaintiff was guilty of contributory negligence by the unusual and uncalled-for method by which he was endeavoring to clean out the motes.

The fallacy of these positions rests in this: they both assume
(76) that the evidence offered by defendant is true or was uncontradicted, whereas the plaintiff, as we have seen, testified that he was injured by reason of a defective machine of which he had no notice; and, secondly, if the machine had been in proper condition there was no danger to be reasonably apprehended from cleaning the machine in the manner testified to. If this be true, there was a right of action, and his Honor committed no error in refusing to nonsuit plaintiff on defendant's motion.

Defendant further alleges for error the portion of the charge pointed out in exception 13, as follows:

"If you shall find from the evidence, by the greater weight, that the defendant removed the Whiting machine and placed the Kitson machine in its place, and that the slats of the Whiting were so arranged that the plaintiff, in getting out the motes from the mote-box, and he claims that the slats between that and the beater were so arranged that he could not get his hand through it, that the spaces were so close together that there was not sufficient space that his hand could go through, and you further find from the evidence, by its greater weight, that the Kitson machine, upon which he was hurt, was put in the place of the Whiting machine, and should further find from the evidence that in the Kitson machine the space between the upper slat was sufficient for

the hand of the plaintiff to have gone through, and should further find that the plaintiff didn't know of this space in the Kitson lapper, and could not have known of it by the exercise of ordinary care in doing and performing the duties required of him, and he was put to work on that Kitson machine without any notice of the condition of the slats or space, then I charge you that the deefndant would be guilty of negligence, and it would be your duty to find, if you find that the plaintiff was injured on account of the negligence of the defendant, to answer the first issue 'Yes.' "

Defendant contends that this charge erroneously fixes upon the Whiting machine as the standard of excellence; whereas the (77) standard is such machines as are approved and in general use. But we do not think this a correct interpretation of his Honor's charge.

Defendant was contending, and had offered evidence to show, that the Kitson was a standard machine that was coming in and superseding the old machines, and that the opening, by reason of which plaintiff's hand was injured, was not on account of a missing slat, but was a part of the structural plan of the machine.

Plaintiff, in reply, had alleged that in the machines which he had hitherto used, the Atherton and Whiting, the slats or screens afforded complete protection to the operator engaged in cleaning them; and if defendant had caused a new and different machine to be installed which created an additional danger, it was the duty of the employer to warn plaintiff of this condition, and not direct him to go on and clean the same when in motion, as he had been doing the others. 20 A. and E., 96.

The charge of the Court pointed out by this exception was addressed to this feature of negligence imputed to defendant, and did not, and was not intended to, make any particular machine an arbitrary standard of excellence.

Under a charge free from error, the jury have accepted the plaintiff's version of the occurrence; and this being true, the plaintiff has a clear cause of action, and the judgment must be affirmed.

No error.

(78)

BILES v. RAILROAD.

(Filed 13 November, 1906.)

Railroads— Rules of Employment—Abrogation—Defective Appliances—Negligence—Contributory Negligence—Assumption of Risk—Fellow-servant Act—Nonsuit.

1. In an action against a railroad for damages for personal injuries, an instruction that "if the jury found that the rule which was offered by the defendant was habitually violated to the knowledge of the defendant or of those who stood towards the plaintiff in the position of vice-principals, or if they found that the rule was so frequently and openly violated for such a length of time that the defendant could, by the exercise of ordinary care, have ascertained that it was being violated, the rule is considered in law as being abrogated, and would have no effect upon the acts of the plaintiff," was correct.
2. On a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true, and construed in the light most favorable to him.
3. In an action against a railroad company for damages for personal injuries, where the plaintiff's evidence shows that he was at the time of the injury at the usual position on the step provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown on the track and injured because the engine did not have the usual hand-hold along the pilot beam, and that he did not know it was lacking when he got on, and was guilty of no carelessness in his personal conduct, his right of action is established.
4. In an action for negligence against a railroad company operating in this State, the defense of working on in the presence of a defective appliance or machine, usually dealt with under the head of assumption of risk, has been eliminated by the Fellow-servant Act; but if, apart from the element of assumption of risk, the plaintiff in his own conduct has been careless in a manner which amounts to contributory negligence, his action fails, except in extraordinary and imminent cases like those of *Greenlee* and *Troxler*.

ACTION by David Biles against Seaboard Air Line Railway Company, heard by *Moore, J.*, and a jury, at the February Term, 1906, of ANSON.

The three ordinary issues in actions of this character were (79) submitted.

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

J. A. Lockhart and *H. H. McLendon* for the plaintiff.

J. D. Shaw, Adams, Jerome & Armfield and *Murray Allen* for the defendant.

HOKE, J. This case was before the Court on a former appeal, and will be found reported in 139 N. C., 528.

The facts supporting the claim of plaintiff are substantially similar to those disclosed in the former appeal.

There was much testimony on the part of defendant contradicting the evidence offered by plaintiff; but the jury have accepted the plaintiff's version of the occurrence, and we find no error which gives the defendant any just ground of complaint.

There was some additional testimony offered on the present trial as to the existence or non-existence of a rule on the part of the defendant forbidding the plaintiff to take a position on the pilot of the engine. This was submitted to the jury and found against defendant under the following charge (after correctly charging as to the effect of such a rule, if the same existed):

"If the jury find from the evidence that the rule which was offered by the defendant was habitually violated, to the knowledge of the defendant, or of those who stood towards the plaintiff in the position of vice-principals, or if the jury find from the evidence that the rule was so frequently and openly violated for such a length of time that the defendant could, by the exercise of ordinary care, have ascertained that it was being violated, the Court charges you that if you find these to be the facts, the rule is considered in law as being abrogated, and would have no effect upon the acts of the plaintiff."

This charge is in compliance with our former decision, and we still think it declares the correct doctrine on the question. (80)

The only objection seriously urged upon the argument here was that the Judge should have instructed the jury that on the entire evidence, if believed, they should answer the issue as to contributory negligence in favor of the defendant.

This would be, in effect, to sustain defendant's motion to nonsuit; and as said by *Douglas, Judge,* in *Coley v. R. R.,* 129 N. C., at page 413: "It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true, and construed in the light most favorable to him."

Applying this rule to the facts before us, we are of opinion that the position contended for by defendant cannot be sustained.

The plaintiff, among other things, testified as before, that he was an employee working on a freight train of defendant, and was known as the "front train hand"; that on the night of 29 November, 1902, as this train was going into the yard at Hamlet, N. C., he was injured by having his foot run over and crushed by the engine of the train on which he was working; that it was a part of plaintiff's duties at such times to keep a lookout in front of the engine, that he might change the switches, when required, for the proper moving of the train and to protect his train from loose cars which might be on the track; and in order to be ready to perform his duties efficiently the proper placing was on the pilot of the engine; that all the engines plaintiff had ever worked on to

this time had a step on the pilot for the use of the train hand, and also a hand-hold running around the beam of the pilot by which he could hold on with reasonable safety; and plaintiff was instructed, both by the engineers and conductors of freight trains, who had charge of the same, to take this position on the pilot when engaged in this duty. That all other hands did so when engaged in the work, and that an em-
(81) ployee could not properly perform this duty, as it was required of him, in any other position.

Stating the evidence on this point by question and answer in the redirect examination, the evidence appears as follows:

Q. When you entered a yard to change those switches, or perform those duties you had to perform, would the engineer stop for you to do it?

A. No, sir; he would not stop for me to get off or on. They would not have a man they would have to stop for. They would curse him and turn him off.

Witness further testified that on the night in question, as the train entered the yard at Hamlet, plaintiff had gone forward and changed the switch and came back to take his usual position on the pilot, the engine running along the track about as fast as a man could walk; that plaintiff got on the engine, putting his foot on the step provided for the purpose; and after having taken this position, the engine made some jolt or eccentric movement caused by a depression of the track, or otherwise and plaintiff was thrown on the track in front, and his foot run over and crushed, as stated; that plaintiff was thrown because this engine did not have the usual hand-hold along the pilot beam; that it was on all the engines that plaintiff had ever worked on before, and plaintiff did not know it was lacking here when he got on, or he would not have done so.

If this statement is accepted as true, the plaintiff, on general principles applicable to cases of this character, would have a clear right of action, and there would seem to be no case of contributory negligence presented. Certainly the Judge could not hold, as a matter of law, that plaintiff was guilty of contributory negligence.

Apart from this, it will be noted that there is no carelessness imputed to plaintiff here in his personal conduct, except that of working on in the presence of a defective appliance or machine, which, as
(82) stated in a former opinion, has been usually dealt with under the head of assumption of risk; and this defense, under our statute on the subject, as construed by the courts, has been eliminated in cases of this character.

The statute, Private Laws 1897, ch. 56, sec. 1, provides that whenever an employee of a railroad company operating in the State is injured or

killed by reason of the negligence of another employee, or by reason of any defect in machinery, way, or appliance, he shall have a right of action.

Section 2 provides that any contract or agreement, expressed or implied, made by employee to waive the benefit of the general section shall be null and void.

In *Coley v. R. R.*, 128 N. C., 534, the Court held that assumption of risk, being in its nature a contractual defense, was not open to defendant in a case of this kind, and a verdict and judgment for plaintiff was sustained.

A reference to the facts of *Coley's case,* stated in the opinion of the *Chief Justice* on page 534, will show that the cause was one in all its essential features exactly similar to the one before us; the only difference being that in *Coley's case* the employee had taken the usual and customary position on the rear of a shifting engine which was moving backwards, and was thrown on the track and injured by reason of a defective engine in not having a grab-iron by which employees engaged in that duty were accustomed to hold on and save themselves, while in the case before us the defect was in front of the engine, which was moving forward. In that case, too, a recovery was sustained, though the defect was known and observed; while here, the plaintiff testified that he did not know of the defect; and the testimony does not disclose that he had any opportunity to notice the absence of the hand-hold till the emergency was upon him. In both cases, however, the employees had taken, or were endeavoring to take, the position they were required to take in the proper performance of their duties.

As said in the present case, on the former appeal, this construction of the statute "does not at all import that in cases of the (83) kind we are now considering the plaintiff is absolved from all care on his own part. Except in extraordinary and imminent cases, like those of *Greenlee* and *Troxler,* he is still required to act with that due care and circumspection which the presence of such conditions require. And, if apart from the element of assumption of risk, the plaintiff, in his own conduct, has been careless in a manner which amounts to contributory negligence, his action must fail."

We are referred by defendant to a large number of cases which seem to hold that it is negligence *per se* to take a position on the pilot of an engine, and more especially on that portion of it popularly known as the cow-catcher. But an examination of the facts of these cases will, in every instance, disclose that the injured person seeking redress had voluntarily taken such a position; and was either not an employee of the train at all, or was not required to take such a position in the necessary and proper performance of his duty.

Thus, in *Warden v. R. R.*, 94 Ala., p. 277, the plaintiff was a brakeman who had voluntarily taken his position on the pilot when no duty required him to do so.

Said *McClellan, Judge:* "It does not appear that he had any duties to perform, or that any of his duties could be performed on the pilot crossbeam or cow-catcher, or that it was in any sense necessary for him to be on the crossbeam in front of the engine at any time."

In *R. R. v. Jones,* 95 U. S., p. 439, plaintiff was not an employee as a train hand, but had voluntarily taken a position on the pilot of an engine when he had been warned against riding on the pilot and forbidden to do so. The distinction is well brought out in a case from the Georgia Reports, quoted in one of the briefs (*R. R. v. Myers,* 112 Ga., 237), as follows:

"That such employee and others of his class had been in the
(84) habit of riding on the locomotive, and that he, at the time of the catastrophe, was so doing with the knowledge of the conductor and engineer, and that this was in pursuance of a custom known to the officials of the company, did not render the above rule inapplicable, unless it further appeared that the deceased was on the locomotive in obedience to some order which he was bound to obey, or in the discharge of some duty which it was incumbent on him to perform."

As we have heretofore seen, the plaintiff's evidence was to the effect that he was, at the time of the injury, on the pilot of the engine by order of his superiors and in the necessary performance of his duties; and having been injured by reason of a defective machine, and being guilty of no carelessness on his own part, personal conduct, his right of action is established.

There is no error in the record to the prejudice of defendant, and the judgment below is affirmed.

No Error.

WALKER, J. I concur in the conclusion of the Court, and also in the opinion, except as to the application of the doctrines of assumption of risk and contributory negligence and the true construction of the Act of 1897. When an employee enters into the service of his employer, he assumes all of the ordinary risks of the master's business when carefully conducted, and he does not assume any risks arising out of the employer's negligence. When the employer is once convicted of negligence which proximately caused injury to his employee, he is liable for the consequential damages, and cannot relieve himself of this liability unless he is able to satisfy the jury by the greater weight of the evidence, the burden being upon him, that the employee by his own negligence contributed to the injury. When we get into the domain of negligence, we

have necessarily passed beyond the region of assumption of risk. The first is tortious and has nothing to do with the contract of (85) employment; the second is wholly contractural in its nature. When the employee enters into the service, he contracts to take upon himself all the risks which are incident to the employment and which his employer cannot avoid by the exercise of care. The risks which the employer can prevent by the use of care are not within the terms of the contract, and the liability of the master depends upon principles wholly unconnected with the law of the contract. The very fact that the employer's negligence is, when generally considered, a breach of the duty impliedly enjoined by the contract, and therefore in a sense is a tort arising out of the contract, for which the employer is liable, but proves that the employee by the contract does not assume any such risk as that brought about by the employer's negligence. As a clear illustration of the difference between the two principles, let us consider the case of a fellow-servant. Before the Act of 1897, if a servant was injured by the negligence of a fellow-servant, the master was not liable, as that was regarded as one of the ordinary risks of the service which the servant assumed, upon the ground that the master, with the exercise of ever so much care, could not foresee that one of his servants would be negligent and thereby injure his fellow-servant. The servant was therefore held to have assumed this risk as one incident to the service and which he had impliedly by his own contract agreed to assume. But if the master was shown to have been negligent in selecting the offending servant and associating him with the others in his employ, he was held liable for an injury to a fellow-servant proximately resulting from the negligence of the delinquent servant, precisely because this risk, newly created, was not within the implied contract of assumption, as the master's own negligence had concurred with that of the servant in producing it. We might present examples indefinitely, which would thus point the distinction between the two doctrines and which would demonstrate beyond question that the line separating them is plainly (86) and distinctly marked. Upon no scientific principle, therefore, can it be said that when a peril is caused by the negligence of the master, the servant assumes it. On the contrary, he is entitled to recover his damages unless the master can convict him of contributory negligence. The Act of 1897 (Revisal, sec. 2646) abolished assumption of risk so far as it related to the negligence of a fellow-servant, but no farther. It then left the liability of the employer for furnishing or maintaining defective machinery, ways or appliances, to his employees to be determined by the general principles of the law of negligence, and certainly did not intend to make the employer liable absolutely and at all events, and in all cases, without regard to any question of negligence. This I

understand to be the construction which the act has received from this Court. In a certain class of cases, where the master, being a railroad company, neglects a primary duty to the servant and puts in his hand defective and unsafe appliances, by which the servant is injured, the master is held liable because of his neglect of a plain duty, which cannot be delegated (*R. R. v. Herbert,* 116 U. S., 642), and he will not be heard to plead his servant's contributory negligence, unless he can show that the servant knew that the situation was so obviously dangerous as to charge him with reckless indifference to his own safety, the chances of danger and probable injury being apparently greater than those of safety. *Elmore v. R. R.,* 132 N. C., 865. But these are exceptional cases, and as to all not within the exception the general law of negligence applies. The difference between assumption of risk and contributory negligence is well stated and illustrated in *R. R. v. Fort,* 17 Wallace, 553; *Hough v. R. R.,* 100 U. S., 213; *R. R. v. Herbert, supra; R. R. v. McDaniels,* 107 U. S., 454, and it was discussed
(87) and applied by this Court in *Avery v. R. R.,* 137 N. C., 130.

There have been expressions in some of the decisions of this Court to the effect that assumption of risk is but a species of contributory negligence, but I think this confounds two things as distinct in their nature as they can possibly be, and is apt sooner or later to introduce confusion and uncertainty into the law.

This case can well be decided upon principles in the law of negligence, and seems to be governed by the case of *Springs v. R. R.,* 130 N. C., 186. In that case the plaintiff had stood on the pilot of the engine while in the performance of his duties and while the train was in motion, although it appeared that he was acting under orders in doing so. He frequently stepped on and off the pilot while the train was moving, without objection from the company or any of its servants in authority over him, and once while stepping from the pilot his foot was caught between the slats and he was thrown to the ground and injured. The Court held the company liable under the circumstances, citing *Thomas v. R. R.,* 129 N. C., 392; *Cogdell v. R. R., ibid.,* 398, and *Coley v. R. R., ibid.,* 407, as covering all the points made in the case upon the question of negligence and contributory negligence.

BROWN, J., concurs in the concurring opinion.

Cited: *Dermid v. R. R.,* 148 N. C., 197; *Horton v. R. R.,* 162 N. C., 439.

(88)

BARRETT v. BREWER.

(Filed 13 November, 1906.)

Infants—Adverse Possession—Possession by Father—Presumption—Evidence—Exceptions and Objections—Instructions—Motion to Dismiss.

1. In an action of ejectment, where the sister of plaintiffs, who held a deed for a tract of land, died in infancy without ever having entered on the land, and thereafter their father, who lived on a different tract, took possession of the land and held it until his death, when the plaintiffs entered into possession: *Held*, the father will not be presumed to have entered in behalf of his children, where there was no evidence that he professed to do so, and none that they had any title, but at most only color of title, and his possession will not inure to them so as to perfect any colorable title they may have had as against a stranger.
2. An appellant is not bound to except to an instruction when there is no evidence to warrant it, and he has already moved to dismiss the action.

ACTION by R. A. Barrett and others against Robert Brewer and others, heard by *Ward, J.*, and a jury, at the April Term, 1906, of MONTGOMERY.

The plaintiffs brought this action to recover possession of a tract of land and damages for withholding the same. They introduced a deed from Alexander McQueen to George Bryant, dated 8 February, 1862, and a deed from George Bryant to Josephine Barrett, dated 5 February, 1870. These deeds covered the land in dispute. Plaintiffs then proved that Josephine Barrett who was their sister was born in 1864 and died in 1872 without ever having entered upon the land, and that the plaintiff R. A. Barrett was born in 1866, J. D. Barrett in 1872, Charlotte McArthur in 1873 or 1874, Ruhamah McNeill in 1876, and Mary L. Barrett in 1887 or 1888, and it appears that Maud M. Barrett and R. G. Barrett are now minors and appear in this action by their next friend, U. L. Barrett. All of said plaintiffs are the children of Robert W. Barrett, and lived with their father at his home on (89) another tract of land, until his death, which occurred in the year 1897. Evidence was then introduced by the plaintiffs tending to show that their father took possession of the land in controversy in 1881 or 1882 and cut timber on it or worked the trees for turpentine by himself or his tenants until his death in 1897, when the plaintiff R. A. Barrett entered into possession for himself and his co-plaintiffs and had timber cut on the land. That there was no part of the land cleared prior to 1897, when R. W. Barrett died. The defendants introduced a grant from the State to the defendant Frank Brewer and H. A. Johnson, dated 15 October, 1891, and a deed from the grantee, H. A. Johnson, to C. A. Brewer, who was one of the defendants, and they claimed title under the grant and deed which covered the land. They also introduced evidence

tending to show that R. W. Barrett and the plaintiffs after him did not, as the plaintiffs alleged and attempted to prove, have adverse possession of the land, but that they, and those claiming under and for them, had been in the adverse possession of it since the grant was issued in 1891 and had cleared and cultivated a part of it and worked the trees for turpentine. That they ousted Martin Black, the tenant of Robert W. Barrett.

The defendants' counsel moved, at the close of the plaintiffs' testimony and again at the close of all the testimony, to dismiss the action under the statute. Their motion was overruled, and they excepted. Defendants' counsel also requested the Court to charge, among other things, that if the jury believed the evidence they should find that the land belonged to Frank Brewer and H. A. Johnson in October, 1891. This instruction was refused and they again excepted.

The Court charged the jury as to what was required in this State to constitute title to land and explained to the jury what is meant
(90) by adverse possession, and further explained, as the case states, "the force and bearing of Robert W. Barrett taking possession for his children," to which there was no exception. It does not appear, though, what his Honor said in this connection. The Court further instructed the jury that the possession of Robert W. Barrett prior to the date of the State grant, 15 October, 1891, could not be considered, but only the possession of the plaintiffs, if they had any, since that time; and then told the jury if they found that the plaintiffs had been in adverse possession of the land under color of title from 15 October, 1891, to the spring of the year 1899, they should answer the first issue, as to the ownership and right to the possession of the land, "Yes." The usual issues in ejectment were submitted. There was a verdict for the plaintiffs, and the defendants moved for a new trial upon exceptions taken to the several rulings of the Court as to evidence, the refusal to give instructions and the instructions given, and also to the refusal to nonsuit the plaintiffs. The motion was denied and judgment entered upon the verdict; whereupon the defendants excepted and appealed.

U. L. Spence for the plaintiff.
J. A. Spence and *R. T. Poole* for the defendant.

WALKER, J., after stating the case: It was conceded that if the plaintiffs' counsel cannot avail themselves of their father's possession of the land, they cannot recover. The argument before us in this case indicated that the Court had charged the jury to presume that Robert W. Barrett went into possession of the land and held it for his minor children, because during the time of his occupancy they lived together

as members of the same family, and as he was their father and therefore was under the duty and obligation to look after all their affairs, and as they had color of title. We do not think this proposition can be sustained, and after diligent search we have not been able to find any authority sustaining it; and yet it must be upheld in order (91) to affirm the judgment, as there is no evidence that the father actually took possession of the land for his children. Indeed, the testimony tends to show that he was acting for himself. In *Campbell v. Everhart,* 139 N. C., 517, we stated, incidentally though not decisively, the general rule to be that, as between persons occupying parental or filial relations, the possession of one is presumed to be permissive and not adverse to the other who holds the title. But in that case the parties were living together as one family on the same tract of land, it being the *locus in quo,* while here the plaintiffs did not live with their father on the land in dispute, but on a different tract and, as stated in the argument, in another county. It may also be said that in that case the controversy was one between the father and his children, and the question presented was whether the father's possession was adverse to the children so as to have the effect of barring their right by the lapse of time, while here the dispute is between the children and a stranger, the former claiming by virtue of the alleged adverse possession of their father. *Clark v. Trindle,* 52 Pa. St., 492; *Allen v. Allen,* 58 Wis., 202; *McDougal v. Bradford,* 80 Tex., 558. The two cases are therefore entirely different. Here Josephine Barrett had a deed for the land which constituted color of title. She did not enter under this deed, and died at the age of eight years. The plaintiffs were not in actual possession of the land prior to the death of their father in 1897. They therefore had no title under which he could rightfully enter as their agent or trustee, but at the most only color of title, provided that they acquired the right to claim under the deed to their sister, Josephine Barrett, by virtue of descent cast, she not having had any seizin during her lifetime.

The case, therefore, presents this question: Will the father be presumed to have entered in behalf of his children, when there is no evidence that he professed to do so, and none that they had (92) any title, but at most only color, which would make his entry a trespass from the start? Is he presumed to have trespassed on another's land and to have subjected himself to a suit for damages by the true owner in order to ripen the colorable title of his children into a good and perfect one by continuing to hold the possession a sufficient length of time for that purpose? We think this would be pushing the doctrine of presumption a great way, and that the father cannot under the given circumstances be presumed to have been acting for his chil-

dren. He may be in a certain sense their natural guardian or protector, but no such duty as that supposed can be held to rest upon him. His possession commenced by disseizin, and if it had continued long enough it might have ripened into a good title, but it would have been a title which accrued to him, and not to his children.

When there is a mixed possession by several persons the law adjudges the legal seizin to be in him who has the title. *Hall v. Powell,* 4 Serg. & R., 465; *Langdon v. Potter,* 3 Mass., 219; *Codman v. Winslow,* 10 *ibid.,* 151; *Com. v. Dudley, ibid.,* 408; *Cheney v. Ringgold,* 2 Har. & J. (Md.), 87-94; Newell on Ejectment, p. 366. But no such case is presented here, as the possession was taken and maintained by the father apparently for himself, and besides, during the time he was in possession of the land the plaintiffs did not have the title, nor were they the owners of it, but they had merely a deed to their sister, which they claimed to be color of title.

We held in *Francis v. Reeves,* 137 N. C., 269, that there is no presumption that the husband is the agent of his wife and acting for her, and we do not see why we should hold that the father is the agent of his children and acting for them when he takes possession of land and commits a trespass in doing so. Is there anything in the relation of parent and child which casts the duty upon him of committing a trespass in
(93) their behalf so as to raise a presumption that in such a case he is acting for them? We think not. There being no evidence that Robert Barrett was acting for his children and none from which such an inference should be drawn, his possession did not inure to them so as to perfect any colorable title they may have had.

The defendants were not bound to except to the instruction as to the "force and bearing of R. W. Barrett's possession for his children," as there was no evidence to warrant the same, and they had already moved to dismiss the action.

The Court should, therefore, have granted the defendant's motion to nonsuit the plaintiffs under the statute, and in refusing to do so there was error, for which the judgment is reversed and the action dismissed.

Reversed.

HODGIN v. RAILROAD.

(Filed 13 November, 1906.)

Jurors—Qualification—Freeholders—Challenges to Jurors—Harmless Error—Railroads—Crossings—Watchmen—Care Required.

1. A juror who owns no land, but whose wife is seized of a fee and has children by him, is a freeholder, and eligible as a juror.
3. Where the jury found an issue in favor of the appellant, it is unnecessary an exception thereto cannot avail the plaintiff, as he did not exhaust his peremptory challenges.
3. Where the jury found an issue in favor of the appellant, it is unnecessary to consider the exceptions to the evidence and charge which bear only upon that issue.
4. In an action for injuries received at a railroad crossing, where there was evidence tending to prove that the railroad company kept a flagman stationed at this crossing for the purpose of warning passers-by, and that plaintiff knew of this custom, and that when he got near the crossing he looked for the watchman, but saw none, the Court did not err in refusing to charge at plaintiff's request that he had a right to cross the track under the circumstances, and was absolved from the usual duty of looking and listening.
5. When a watchman is stationed at a crossing to give warning, the traveler who sees the watchman in his place has the right to rely on him for protection, but when he discovers that the watchman is absent from his post of duty he is put on his guard at once, and must exercise ordinary care to protect himself from injury. He should then look and listen for passing trains.

(94)

ACTION by James A. Hodgin by his next friend, G. A. Hodgin, against the Southern Railway Company, heard by *Moore, J.*, and a jury, at the August Term, 1906, of GUILFORD.

This was an action to recover damages for injuries received by plaintiff from a collision with defendant's train at a crossing. The Court submitted the issues of negligence, contributory negligence and damage. The jury found the issue of contributory negligence against the plaintiff. From the judgment rendered, plaintiff appealed.

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

BROWN, J. One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed, and plaintiff excepted. The juror owned no land, but his wife was seized of a fee and had children by her husband. While the Constitution, Art. X, sec. 6, has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this Court that the husband still has

what is termed an "interest" in her land which constitutes him technically a freeholder.

In *Thompson v. Wiggins Mr. Justice Clark* said of the husband:

"By reason of such bare seizin he is still a freeholder and as
(95) such has always been deemed eligible as a juror in those cases in which being a freeholder is a qualification." 109 N. C., 510.

Although it is said in *Walker v. Long,* 109 N. C., 510, that the husband has no *estate* in his wife's land until after her death, being intestate, yet *Mr. Justice Merrimon* says "but he has an interest as tenant by the curtesy initiate," and cites *Thompson v. Wiggins.* The same case is also cited with approval by *Mr. Justice Avery* in *Jones v. Coffey,* 109 N. C., 518.

While much may be said to the contrary, we think it best to adhere to the former decisions of the Court.

The exception, however, cannot be sustained, and will avail the plaintiff nothing, as he did not exhaust his peremptory challenges. *S. v. Teachey,* 138 N. C., 592; *S. v. McDowell,* 123 N. C., 768; *S. v. Hensley,* 94 N. C., 1021. We, however, notice the matter briefly in order to set it at rest.

Inasmuch as the jury found the issue of negligence in favor of the plaintiff, it is unnecessary to consider the numerous exceptions in the record to the admission and rejection of evidence, and to the charge of the Court, which bear only upon that issue.

The only exception we deem it necessary to notice relates to the charge of the Court upon the issue of contributory negligence.

The defendant offered evidence tending to prove that plaintiff had been to Greensboro on horseback and was returning home about 11 o'clock at night; that as he approached the railroad crossing he did not pay any attention or exercise any care; that he had been drinking and was under the influence of liquor, and either ran into a passing train or else the train ran into him. There was evidence tending to prove that

the company had kept a flagman stationed immediately at this
(96) crossing for the purpose of warning passers-by, and that plaintiff knew of this custom. It is stated in appellant's brief, and is in evidence, that when plaintiff got near the railroad crossing he looked for the watchman, but saw none. It is contended by the plaintiff that as he looked for the usual watchman and saw none, he had a right to cross the track and was absolved from the usual duty of looking and listening, and that his Honor erred in refusing to so charge. For this position plaintiff relies upon *Russell v. R. R.,* 118 N. C., 1109. We do not think the citation gives any support to plaintiff's contention.

We do not gainsay the proposition that where a railroad company keeps gates at a crossing for the protection of the public, and the

gates are opened, it is an invitation to enter and cross the track. The company then assumes the care and protection of the passers. But if the passer sees when he gets near the track that the usual gates are gone, he is at once put on his guard, and he should look and listen for passing trains before crossing. The same rule applies when a watchman is stationed at the crossing to give warning. The traveler who sees the watchman in his place has the right to rely on him for protection, but when he discovers that the watchman is absent from his post of duty, he is put on his guard at once, and must exercise ordinary care to protect himself from injury. He should himself then look and listen for passing trains. It is true the watchman is guilty of negligence when he deserts his post, but when this negligence was discovered by plaintiff it made it all the more incumbent upon him to look and listen for his own protection, for he had ample time to do so. There would be more in plaintiff's contention had he proceeded to cross the track before he discovered that the watchman was absent, relying upon the protection which he supposed the watchman was giving him.

We have examined his Honor's charge, and especially that portion relating to contributory negligence. In explaining to the jury the relative rights and duties of railroad companies and travelers (97) at surface-crossings, his Honor quoted extensively from *Mr. Justice Bradley's* lucid opinion in *Improvement Company v. Stead,* 95 U. S., 161. The charge is also fully sustained by the principles laid down in *Norton v. Railroad,* 122 N. C., 928; *Cooper v. Railroad,* 140 N. C., 209; *Parker v. Railroad,* 86 N. C., 221; *Richmond v. Chicago,* 87 Mich., 374, and *Merrigan v. Railroad,* 154 Mass., 189.

The judgment of the Superior Court is

Affirmed.

Cited: *S. v. Bohanon,* 142 N. C., 697; *Sipe v. Herman,* 161 N. C., 111.

TYPEWRITER COMPANY v. HARDWARE COMPANY.

(Filed 13 November, 1906.)

Contracts—Collateral Agreements—Parol Evidence—Principal and Agent. Admissions—Instructions—Harmless Error.

1. It is 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 in writing and the promise it contains is to pay in so many dollars.
2. A statement made by the agent of plaintiff, at the time he took the order, as to what the contract was and as a part of the transaction, is binding upon the principal.

3. In an action on a written contract, where the defendant set up as a defense certain verbal stipulations, and the jury by their verdict have accepted the existence of the verbal stipulations, the fact that the Court annexed to it a qualification not required by the law to make it a valid defense is not error of which plaintiff can complain.

ACTION by Smith Premier Typewriter Company against Rowan Hardware Company, heard on appeal from a justice of the peace by *Justice, J.*, at the June Special Term, 1906, of ROWAN.

Plaintiff sued on a written order given by defendant to plain-
(98) tiff for a typewriter at the price of $102.50, and dated 28 April, 1905, the trade having been negotiated through one B. W. Allen, who was at the time a traveling salesman and agent of plaintiff.

Defendant admitted having placed this order in writing signed by defendant, and averred by way of defense that at the time the order was given, and as a part of the contract, the agent, Allen, who made the trade, agreed for plaintiff that defendant, in part payment for the machine ordered, should have a credit, as agent of plaintiff, of $40, the commission on four other machines then sold, or being sold—three of them to other parties, and this one to be included in the number on which the commission should be allowed. And defendant, by answer, claiming this reduction of $40 on the price, made a formal tender of $62.50 and interest, the price of this machine, less the alleged credit.

On the trial in Superior Court the plaintiff offered in evidence the written order, and rested.

For the defendant, S. A. Gregg, being duly sworn, testified, in part, as follows:

"That on 28 April, 1905 (it being the time the original order was made for the typewriter), I was president of the Rowan Hardware Company, defendant. Mr. Allen was agent of the plaintiff; we gave him the order for the machine and the machine was shipped to us from Richmond, Va. I did not hear the original contract, as it was made by Mr. Allen and Mr. Sossaman. After the order was signed and placed in Mr. Allen's hands, I called Mr. Allen and Mr. Sossaman over to my desk and told Mr. Allen that I did not understand the contract and wanted him to explain it to me. Mr. Allen then showed me the order and said that we were to be allowed a credit of $40 on the same for four machines he had heretofore sold or was in the course of selling, which would leave a balance of $62.50 due on the note or order."

Cross-examined:

(99) "I understood that we were only paying $62.50 for the machine. We did not especially need a machine at that time, but I thought if we could get this one cheap we had better take it."

The issue was submitted as to the amount defendant owed the plaintiff.

The case on appeal then proceeded as follows:

After his Honor had charged the jury, the jury retired, and, after having been out two and one-half hours, returned and said they could not agree. Whereupon, his Honor asked them if there was any matter of law upon which he could instruct them.

The jury, then, through their foreman, asked "Whether they should be governed by the oral evidence or by the written contract." Whereupon his Honor instructed them:

"The written contract is the contract of the parties at the time, and unless you find that Allen was the general agent for the plaintiff, and that Allen agreed, after the execution of the contract, that the defendant should have 10 per cent on four machines sold and that $40 was to be credited on the note, then the written contract would control."

The plaintiff excepted to all evidence concerning the $40 credit on the note, and all the evidence as to commissions allowed the defendant on the sales made by Allen. Objection overruled. Exception by the plaintiff. The plaintiff excepts to the charge of his Honor as above set forth, upon the ground that the same is not supported by the evidence.

Hayden Clement for the plaintiff.
R. Lee Wright for the defendant.

HOKE, J., after stating the case: This record and case on appeal disclose no error which gives the plaintiff any just ground for complaint.

The testimony offered by defendant admitting the written order to be a part of the contract, tended to establish, as an ad- (100) ditional feature, a further stipulation resting in parol as to the method by which a part of the obligation should be paid. It did not contradict the written paper, but only tended to show that such paper did not contain the entire contract.

It is well established that as between the original parties to an executory agreement such testimony is competent.

The principle upon which the doctrine rests, and instances where same has been applied, are so clearly set forth in an opinion at this term by *Mr. Justice Walker* that further discussion of the question is considered unnecessary. *Evans v. Freeman,* 142 N. C., 61.

In that well-considered opinion, as especially applied to the facts of the present case, it is said:

"It is 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 in so many dollars." Citing several decisions of our own Court.

And further:

"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."

The testimony, then, offered by the defendant was clearly competent, and if accepted by the jury, it establishes a valid defense to the amount allowed in the verdict.

The plaintiff makes further objection to the testimony of the witness, Gregg, that by its admission Allen was allowed to explain or vary
(101) a contract already entered into and complete, by subsequent statements, when there was no evidence that the original contract was abandoned and a new one entered into; and "there was no consideration for any subsequent contract."

But we do not think this is a correct interpretation of the testimony.

It is true the witness said: "I called Allen and Sossaman and asked Allen to explain the contract to me, as I didn't understand it." This was as to written order for the machine and which contained certain stipulations as to commissions which were to some extent ambiguous.

The reply of Allen, however, did not, and was not intended to explain away or vary the contract at all, but was an admission or statement on his part as to what the contract was. And it cannot be contended that this was without authority.

It was a statement by the agent at the time and as a part of the transaction. The order had been signed, but it was then in the office, and its meaning and terms were still being discussed. And it is accepted law that one who adopts and seeks to enforce a contract made for him by an agent is bound by its terms and stipulations.

As said in *Corbett v. Clute,* 137 N. C., 551, "If he claims the benefit, he must accept the burdens." Citing *Harris v. Delamar,* 38 N. C., 219; *Black v. Baylees,* 86 N. C., 527.

Nor can the objection to the charge of the Court, made in response to a question by the jury, be urged by plaintiff for error, "That the written contract would control, unless, after the execution, Allen agreed that defendant should be allowed the commission."

We agree with plaintiff that there was no evidence of any subsequent contract; and the law does not require that the stipulation, to be available to defendant, should be made after the written agreement was en-

tered into. As we have seen, it could be set up as a defense and shown by testimony, though it was contemporaneous. (102)

But the jury, in rendering their verdict, have necessarily accepted the existence of the verbal stipulations insisted on by defendant; and the fact that his Honor annexed to it a qualification not required by the law to make it a valid defense is not error of which plaintiff can complain.

The response of the Court was more favorable to the plaintiff than he had a right to expect.

There is no reversible error in the record, and the judgment below is affirmed.

No Error.

Cited: Mudge v. Varner, 146 N. C., 149; *Brown v. Hobbs,* 147 N. C., 76; *Basnight v. Jobbing,* 148 N. C., 357; *Woodson v. Beck,* 151 N. C., 146, 148; *Kernodle v. Williams,* 153 N. C., 478, 485; *Anderson v. Corporation,* 155 N. C., 134; *Carson v. Ins. Co.,* 161 N. C., 447; *Pierce v. Cobb, Ib.,* 304; *Mfg. Co. v. Mfg. Co., Ib.,* 434; *Wilson v. Scarboro,* 163 N. C., 385; *Richards v. Hodges,* 164 N. C., 188, 191; *Buie v. Kennedy, Ib.,* 299, 300.

MANUFACTURING COMPANY v. SUMMERS.

(Filed 21 November, 1906.)

Fraud—Right to Follow Property—Money—Choses in Action—Injunction Pendente Lite—Negotiable Instruments—Cashiers' Checks—Negotiability. Holder in Due Course—Demand Paper—Negotiation Within Reasonable Time—Consideration—Pre-existing Debt—Burden of Proof.

1. When a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrong-doer as long as he can identify or trace it; and the right attaches, not only to the wrong-doer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration; and this applies not only to specific property, but to money and choses in action.
2. Where the verdict of the jury establishes the right of the plaintiff to a fund in bank as against one of the defendants, who is insolvent and has attempted to misappropriate it, the payment of a cashier's check covering said fund, which he has endorsed to the other defendant, who is a nonresident, will be restrained until the rights of the parties are finally determined.
3. Under the Negotiable Instruments Statute (Rev., ch. 54, secs, 2335-6) cashiers' checks, whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by endorsement for value without notice and within a reasonable time, a holder can maintain the position of a holder in due course.
4. Under Rev., sec. 2201, "a holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument

is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

5. Under Rev., sec. 2202, which provides that where an instrument, payable on demand, is negotiated an unreasonable time after its issue, the holder is not deemed a holder in due course, and section 2343, which provides that in determining what is a reasonable or unreasonable time, regard is to be had to the nature of the instrument and the facts of the particular case, where a paarty obtained a cashier's check for $1,824 from a bank in the State and negotiated the same to a party residing in Virginia in five days thereafter, such negotiation was within a reasonable time.

6. Under Rev., sec. 2173, which enacts "that an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time," such an indebtedness is sufficient consideration to constitute one a holder for value within the meaning of the law merchant.

7. Where the evidence and verdict established that the title of the party who negotiated the check to defendant was defective, the burden under Rev., sec. 2208, was on the defendant claiming to be a purchaser in good faith for value and without notice, to make this claim good by the greater weight of the evidence; and the Court erred in charging that the burden was upon the plaintiff to prove that the defendant was not a holder in due course.

(103)

ACTION by Singer Manufacturing Company against G. A. Summers, F. D. Fuller and the City National Bank of Greensboro, heard by *Ferguson, J.*, and a jury, at the June Term, 1906, of GUILFORD.

From the facts, as stated in the record, it appears that on 17 May, 1904, G. A. Summers, then acting as agent of the plaintiff com-
(104) pany, deposited in the City National Bank of Greensboro a sum of money belonging to the plaintiff company amounting to $1,396.89. That this deposit was made in his own name, and on 18 May, 1904, the said Summers, adding other money to this, obtained a cashier's check from the defendant bank for the sum of $1,824; and that this was done by Summers with intent to embezzle and misappropriate the plaintiff's money so deposited.

That on 23 May, 1904, the plaintiff endorsed this check to F. D. Fuller, residing in Sylvatus, Va., the consideration claimed being a debt of $328 then due by Summers to Fuller, the remainder of the purchase-money being paid in cash.

There were circumstances from which the plaintiff claimed that the purchase of this check on the part of Fuller was neither in good faith nor for value.

The defendant denied the fraud, claiming that the check was negotiated in good faith, and the defendant Fuller was a holder of the same in due course.

There were facts which showed that Summers was insolvent and that Fuller resided in the State of Virginia.

The cause was submitted to the jury on the following issues:

1. Did the defendant Summers embezzle and fraudulently misappropriate $1,396.89 of the moneys of the plaintiff company and fraudulently use the same in the purchase of a cashier's check of 18 May, 1904, issued by the National Bank of Greensboro at $1,824?

2. Did the defendant F. D. Fuller, at the time he took the check, have knowledge of that fraud, and take the check in bad faith?

At the request of the defendant, the Court, among other things, on the second issue, charged the jury as follows:

"The burden of proof is upon the plaintiff to show that Fuller had knowledge of the fraud alleged, and took the check in bad faith or without value; and if the plaintiff fails to satisfy the jury by the (105) greater weight of evidence, they should find the issue in favor of the defendant Fuller, and answer the issue 'No.'"

The Court, in the body of the charge, in substance repeated this position, and the plaintiff excepted.

The jury, under the charge of the Court, and on the testimony, answered the first issue "Yes" and the second issue "No."

On the verdict there was judgment for the defendant, and plaintiff excepted and appealed.

King & Kimball for the plaintiff.

John A. Barringer and *W. P. Bynum, Jr.,* for the defendant.

HOKE, J., after stating the case: It is well established that when a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrong-doer as long as he can identify or trace it; and the right attaches, not only as to the wrong-doer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration. *Edwards v. Culberson,* 111 N. C., 342, citing Pomeroy's Eq. Jurisprudence, as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, * * * or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer or in the hands of any subsequent holder, until a purchaser in good faith and without notice acquires a higher right and takes the property relieved from the trust." See, also, *Wilson v. Scott,* (106)

3 Lans. (N. Y.), 308. The principle applies, not only to specific property, but to money and choses in action.

It is said by *Lord Mansfield* in the case of *Clark v. Shee and another,* First Cowper's Reports, p. 200: "Where money or notes are paid *bona fide* upon a valuable consideration, they shall never be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property, and if their identity can be traced and ascertained the party has the right to recover."

And as said by *Andrews, Judge,* in *Newton v. Porter,* 69 N. Y., 133: "It is immaterial in what way the change has been made—whether money has been laid out in land or land laid out in money, or how the legal title to the converted property may be placed—equity only stops the pursuit when the means of ascertainment fail or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the cases so as to protect the rights of the true owner."

This case is an apposite authority in support of the principle as applied to the facts of the case before us.

The verdict of the jury having established a clear right in the plaintiff against the defendant Summers, we think that upon this finding and the other facts of the case it is equally clear that the payment of the check should be restrained until the rights of the parties are finally determined. The facts show that Summers is insolvent and Fuller a nonresident of the State. Pomeroy Eq. Rem., sec. 365; *Parker v. Grammer,* 62 N. C., 28; *McCless v. Meekins,* 117 N. C., 34.

In *Parker v. Grammer* it is held: "Where there is reason to apprehend that the subject of the controversy in equity will be destroyed, or removed, or otherwise disposed of by the defendant pending the (107) suit, so that the complainant may lose the fruit of his recovery, or be hindered or delayed in obtaining it, the Court, in aid of the primary equity, will secure the fund by the writ of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause." And this principle is now embodied in our statute on the subject. Revisal 1905, sec. 806.

The property in controversy being represented by a cashier's check, a negotiable instrument, the rights of the plaintiff and defendant will largely depend upon our statute on negotiable instruments, Rev. 1905, vol. 1, ch. 54. Under this statute these checks, whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by endorsement for value without notice, and within a reasonable time, a holder can maintain the position of a holder in due course. Ch. 54, Revisal 1905, secs. 2335 and 2336.

As pertinent to this inquiry, secs. 2201 and 2202 of this chapter are as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Sec. 2201.

"Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Sec. 2202.

And sec. 2343 of the same chapter provides that in determining what is a reasonable or unreasonable time regard is to be had to the nature of the instrument and the facts of the particular case.

What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as defi- (108) nite a rule as could well be established or considered desirable.

On the facts of this case we think, and so hold, that so far as time is concerned, this negotiation was undoubtedly within a reasonable time.

Again, it will be noted that the defendant Fuller, according to the claim made by him, purchased and paid for this check partly in a pre-existing debt due from Summers to himself.

Many of the courts have heretofore denied that such an indebtedness was sufficient consideration to constitute one a holder for value within the meaning of the law merchant. Our statute on this question, however, sec. 2173 enacts "that an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

If defendant's statement is accepted, no objection can be made, therefore, to the consideration because same was in part a pre-existing debt, this being declared sufficient by the express terms of the statute.

We think, however, there was error in the charge of his Honor on the second issue, as to the burden of proof, which entitles the plaintiff to a new trial.

This issue is not very well framed to present the question as to whether defendant Fuller was a holder in due course. It would seem to be desirable that the issue should be drawn so as to present the question affirmatively and in more precise terms:

"Was defendant Fuller a purchaser of the check in good faith for valuable consideration and without notice of any infirmity in the instrument or defect in the title of Summers?"

But, in whatever form presented, the burden of the issue is (109) not on the plaintiff, as stated by the Court, but on the defendant.

By sec. 2208 of said ch. 54 it is enacted: "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The evidence and the verdict on the first issue established that the title of defendant Summers, who negotiated the check to defendant Fuller, was defective.

This having been established, the burden was on the defendant claiming to be a purchaser in good faith for value and without notice to make this claim good by the greater weight of the evidence.

The statute, in this respect, only enacts the law as it has always existed, which puts the burden in such case on the person claiming to be a holder in due course. *Bank v. Burgwyn,* 108 N. C., 62; Eaton & Gilbert Commercial Paper, p. 393.

For this error in the charge there will be a new trial on the second issue, and it is so ordered.

New Trial.

Cited: Modlin v. R. R., 145 N. C., 223; *Bank v. Oil Mills,* 150 N. N. C., 264; *Bank v. Brown,* 160 N. C., 25; *Bank v. Walser,* 162 N. C., 62; *Trust Co. v. Ellen,* 163 N. C., 46.

(110)

COMMISSIONERS v. TRUST COMPANY.

(Filed 21 November, 1906.)

Statutes—"Aye and No" Vote—Entries on Journals—Municipal Corporations. Ordinances—Enactment.

1. An entry on the legislative journal that "The bill passed its second reading, ayes 39, noes .., as follows:" then follows a list of those voting in the affirmative, without any reference to those voting in the negative, indicates that the bill passed by a unanimous vote and that there were no names to be recorded in the negative, and is a compliance with the requirements of Art. II, sec. 14, of the Constitution, that the ayes and noes shall be entered on the journals. *Debnam v. Chitty,* 131 N. C., 657, *overruled.*

2. Where the charter of a town provided that the Board of Commissioners might create a debt only after they had passed an ordinance by a "three-fourths vote of the entire board," the words "entire board" mean all the members of the board in existence, and not all those provided for by the charter; and where seven Commissioners were elected and one resigned, the passage of an ordinance by a vote of five members was sufficient.

ACTION by Board of Commissioners against Wachovia Loan and Trust Company, heard by *Ward, J.*, at the September Term, 1905, of FORSYTH.

The defendant entered into a contract with the town of Salem to purchase from the said town $100,000 par value of its bonds at the price of $101,750. The bonds were a part of a total issue of $125,000, issued pursuant to an election held on 26 June, 1906, under the provisions of the charter of the town of Salem, being chapter 40 of the Acts of 1891. On the tender of the bonds by plaintiffs, defendant refused to accept same on the ground that said bonds were not of a valid issue of bonds and did not constitute a legal obligation of the said town of Salem. Plaintiffs brought suit to enforce the contract, and the case was heard on the complaint and answer. From the judgment rendered, defendant appealed.

A. H. Eller and *Peele & Maynard* for the plaintiffs. (111)
Manly & Hendren for the defendant.

BROWN, J. It is contended by the defendant that the bond issue is void for two reasons: First, because the charter of the town of Salem, authorizing the issue, was not passed by the General Assembly and the ayes and notes entered on its journals in accordance with Article II, section 14, of the Constitution of this State. Second, because the ordinance directing the issue of the bonds and submitting the question to a vote of the people was not passed by a three-fourths majority of the entire Board of Commissioners of the town, as required by the charter.

In respect to the first objection made to the validity of the bonds, it is admitted that the journals of the House of Representatives are entirely regular and that the bill was passed by the House in strict conformity to the organic law. But on its passage by the Senate it is contended that the negative votes were not recorded. The entries on the Senate Journal in respect to this bill are as follows: "Senate Journal, Senate Chamber, 23 January, 1891. The bill passed its second reading. Ayes 39, noes..., as follows:" Then follows a list of those voting in the affirmative, without any reference to those voting in the negative. "The bill passed its third reading. Ayes 34, noes ..., as follows:" Then follows a list of those voting in the affirmative, with no further reference to those voting in the negative.

It is admitted that the case of *Debnam v. Chitty,* 131 N. C., 657, is an express authority sustaining defendant's contention. After much reflection, we are unwilling to follow the decision of the Court in that case, in so far as it holds that the entries upon the journal do not indicate that there were no negative votes. In the dissenting opinion of

Mr. Justice Clark it is said: "The expression, 'Passes by the
(112) following vote: Ayes 94 (giving names), nays ...,' is as express and intelligent declaration that there were no negative votes as if the word 'none' had been used. Nays ..., after the words 'passes by the following vote,' and giving those voting 'Aye' can convey no other meaning. Is it not hypercritical to say that 'Nays ...' did not mean that there were no names in the negative?"

This provision in our Constitution serves an important purpose in compelling each member present to publicly assume his share of the responsibility in the passage of such legislation, but more particularly in furnishing conclusive evidence whether the bill has been passed by a constitutional majority. In passing upon a similar question the Supreme Court of Illinois says: "The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative." "It must appear on the face of the journal that the bill passed by a constitutional majority." *Spangler v. Jacoby,* 14 Ill., 297; Cooley Cons. Lim. (7 Ed.), 201.

The entries upon the Senate Journal give the names of a large majority of the total membership of that body as voting for the passage of this bill upon the second and third readings, so that there can be no question of its passage by a constitutional majority. But the entries indicate further that the bill passed by a unanimous vote and that there were no names to be recorded as voting in the negative. This identical question was considered by the Circuit Court of Appeals, Fourth Circuit, in the case of *Commissioners v. Tollman,* 145 Fed., 765, a case originating in this State. In his opinion, *Judge McDowell,* referring to *Debnam v. Chitty,* says: "After the most careful consideration that we have been able to give the subject, we find ourselves unable to adopt the construction given the clause in question by the learned Supreme Court of North Carolina." So are we unable to agree with our
(113) predecessors, and in that respect we overrule the decision referred to.

It is next contended that the ordinance under which the election was held to authorize said issue of bonds was not passed by the Board of Commissioners of the Town of Salem as prescribed by the charter. Section 70 of said chapter reads as follows: "That under the powers hereby conferred upon the Board of Commissioners, they may borrow money or create a public debt only after they have passed an ordinance by a three-fourths vote of the entire board at two separate regular meetings * * * ." There were originally elected seven Commissioners as prescribed by the charter; one had resigned, leaving six members of the board at the time of the second passage of the ordinance. At the meeting of the board, when the ordinance was alleged to have been

passed the second time, only five members of the board were present, all voting for the passage of said ordinance.

It is argued by the defendant that the ordinance is not valid unless passed by three-fourths of the entire board; that the entire number is seven, and five is not three-fourths of seven; that in the construction of the language of the charter, there cannot be taken into consideration vacancies, however *bona fide* they may be, and the language means three-fourths of the entire board provided for by the charter.

The authorities which the learned counsel for the defendant have called to our attention do not bear out his contention that the language of the charter should be construed as if it read three-fourths of the entire board elected. Such a provision is not uncommon in charters of municipal corporations, and the fact that the word "elected" was omitted after the word "board" is indicative to us that the Legislature intended that three-fourths of the entire membership of the board in existence at the passage of the ordinance should have power to pass such an ordinance. Wherever the special provision in such charters contains the words "entire board elected," or similar (114) terms, it is invariably held that all the members elected must be taken into account. Dillon on Mun. Corp., sec. 281. We are unable to find any judicial decision which places the same construction upon the words "entire board," when the word "elected" does not follow.

The term board, when used in municipal charters, seems to have two meanings—one abstract, having reference to the legislative creation, the corporate entity, which is continuous, and the other referring to its members, the individuals composing the board. The words "entire board," as used in the Salem charter, refer to the membership of the board, and were evidently inserted to guard against hasty municipal legislation by requiring three-fourths of all the members to concur. As the board, the corporate body, was composed of only six members when this ordinance was finally adopted, five of its members being present and voting for its passage, the requirements of the charter were fully complied with. So in a case where the power of a motion was conferred upon a municipal council to be exercised "by a vote of three-fourths of that body," this was held to give the power of removal to three-fourths of a legal quorum. Three-fourths of the members elected were not required. *Warnock v. Lafayette,* 4 La. Ann., 419. In South Carolina it is held that where, of eighteen managers (a board constituted to try a certain election) appointed by the Legislature, two refused to qualify, one was disqualified and one was dead at the time the board of managers convened, the remaining fourteen, being all the members *in esse,* properly constituted the board and might act by a majority of the fourteen. *State v. Deliesseline,* 10 S. C., 52. It is held in Missouri that

an amendment is ratified by the "House" within the meaning of the Constitution of that State when it is ratified by two-thirds of a legal quorum; that when a legal quorum was present, that was in
(115) law the "House." *S. v. McBride,* 4 Mo., 308. See, also, *Stanford v. Ellington,* 77 N. C., 255.

In construing the meaning of the words, "with the concurrence of a majority of the justices of the peace," this Court has held that, where a majority of the justices of the county are assembled, the justices were in legal session, and a majority of that majority could legally act. *Cotton Mills v. Commissioners,* 108 N. C., 678.

We are of the opinion, therefore, in this case that the words "entire board" mean all the members of the board in existence, and not all those originally elected. When the five members assembled they constituted a legal board, and a majority of that five had the right to pass any ordinary matter; but as to borrowing money or creating indebtedness, such ordinances must receive the sanction of three-fourths of the then membership of the board, whether present or not.

Affirmed.

Cited: Cox v. Commrs., 146 N. C., 585; *Commrs. v. Bank,* 152 N. C., 390.

MILLER v. RAILROAD.

(Filed 21 November, 1906.)

Railroads—Passengers—Instructions.

1. In an action for injuries to a passenger on a caboose car, an instruction that "plaintiff admits that he asked the conductor if he could ride on his train, and was told by him that he could, but to wait until he got through his work, and he would pull the caboose up to the station," was erroneous where there was evidence from which the jury might find that the plaintiff admitted only that while the conductor did tell him to wait a few minutes and he would pull the caboose up to the station, he regarded it merely as a favor offered to him by an obliging conductor, and not as a denial to him of the right to enter the car, or even as a warning to him not to do so.
2. It is not proper, after laying down a legal proposition, as applicable to a supposed state of facts, if found by the jury, to instruct them, as a deduction therefrom, that the plaintiff is or is not entitled to recover, but simply to direct them how to answer the issues by applying the law as stated by the Court to the facts as they may find them to be.

(116)

ACTION by Jasper Miller against Atlanta and Charlotte Air Line Railway Company, heard by *Peebles, J.,* and a jury, at the October Term, 1906, of MECKLENBURG.

This action was brought to recover damages for an injury to the

plaintiff's hand, alleged to have been caused by the negligence of the defendant. There are numerous exceptions, but we need consider only one. The plaintiff testified that on the day the injury was received he was at Gastonia and went to the station to take the freight train for Charlotte. He then said:

"I found Captain Clapp, the conductor of the local freight, standing there as I walked up. A freight train was standing at the crossing and an engine was also at the crossing. Captain Clapp was standing about fifty to sixty feet from the crossing. I asked Captain Clapp if I could ride with him to Charlotte on the local freight. He replied, 'Certainly.' I said 'Thank you,' and started to go down to get on the caboose of the train where passengers rode. He said, 'If you will wait a little, I will pull the train up farther.' I said, 'No, much obliged; I will not put you to that trouble,' and walked down to the caboose. When I spoke to him and told him I would not put him to that trouble, he was standing facing me and looking at me. While he was facing me I moved on, I suppose about 200 yards, and got in the caboose at the rear of the train, which was standing on the main line of the road. The train appeared to be coupled up and ready to move off. The doors of the caboose were open; there was no one inside; nothing but the seats, and everything of that kind pertaining to that kind of a train was there. The caboose was used as a passenger and conductor's car for the crew. When I got in the car I sat on a seat between the two doors. It was warm. I had a bundle of samples and laid them down. I (117) was sitting between the middle door of the caboose and the side doors. I was leaning towards the side of the caboose and was figuring on a piece of paper. When I got aboard the caboose the flagman of the train was just coming down the steps. He asked me if I were going to remain on the run going to Charlotte, and I told him I was. The flagman asked me to watch the car while he was out. I told him all right, I would do it. I suppose I had been on the caboose two or three minutes before this conversation occurred with the flagman. He gave me no warning whatever. After I had the conversation with him and while I was sitting on the end of the bench between the two doors figuring, a collision took place, caused by the backing of some cars against the caboose, which came with such force that I was thrown to the door, my right hand caught the door, and it being a rolling door, was jerked and shut by the collision and my fingers on my left hand, on account of the same, were mashed into a pulp. The door cut my fingers at the end and mashed them into pulp. As soon as I could get myself together I caught my left arm with my right hand and tried to stop the flow of blood, which rushed out at every pulsation. I wrapped a handkerchief around the fingers and ran up to the ice-cooler in the caboose and turned

the water on, which intensified the pain. Just then the front door was opened and the caboose was stricken again by the cars and the shock came near throwing me under the cars. I caught around by the side and held the best I could until I got myself and tried to fasten the door. It had a latch on it, but it just flew back and forth as if it had nothing on it to control the same. Any motion of the car would throw the latch out. I sat there and tried to brace myself in case of another accident. In a few minutes the cars came back again against the caboose and threw me from the seat some distance on the floor, and
(118) I lay there until I saw the engine and tender going by on another track. I then got off the train, and when it started again I got on. My hip was injured. The latch to the door fell over a nail or little spike instead of a staple, and it flew back and forth with the movement of the train. There was no fastening to the side door. After I had the conversation with the conductor about riding with him on the train to Charlotte, I walked down by the side of the train, which was all coupled up and ready to pull out, as it looked to me. There was no obstruction between the conductor and me—nothing to prevent him seeing me. I signed the paper when I came to Charlotte the night of the injury. When I spoke to the conductor and asked him if I could travel on his freight train, I said, 'Captain, can I ride with you to Charlotte?' and he said, 'Certainly.' I said, 'Much obliged,' and started to walk down, and he said, 'If you will wait, I will pull the train a little farther up,' and I said, 'No, much obliged; I will not put you to that trouble.' When the statement which you show me and which I signed was signed I was in very great pain. I signed that paper at night, and I don't think I took time to read anything, I was in so much pain."

Defendant's counsel then asked the witness: "I notice in the statement which you signed, you say, 'He then told me to wait a few minutes and I will pull the caboose to the station.'" The witness then proceeded: "No, he did not say that. He said, 'If you will wait.' He did it as a favor to me and I appreciated it, and told him I would not put him to that trouble."

Question by the Court: "You thought he was doing that as a favor to you?"

Ans.: "No; pulling the train up would be a favor. My impression is that the conductor said that if I would wait he would pull the train a little farther up. Before I signed the statement I did not say,
(119) 'I am not going to do anything further about this; it was my own fault.' I did not say to Captain Clapp and Mr. Stahl that it was my own fault and I was not going to do anything further with the business. Captain Clapp said: 'This is trouble, a man has got hurt.' I told him, 'I hope there will be nothing further about it.' I did

not think there would be. I did not know I was so seriously hurt. When they asked me to make a statement I wanted to exonerate Captain Clapp. I did not think he was to blame. The engineer or the flagman ought to have notified me of the backing of the cars against the caboose. It was about 150 to 200 yards from where I saw Captain Clapp down to the caboose. The engine was right at the station. It was a long train. The doors of the caboose were all open. The flagman had not closed the doors when I got on. He came in afterwards and asked me if I was going to Charlotte, and if I was, to remain in. When I went down to the caboose the train was all coupled up. Captain Clapp did not tell me he was going to make up his train. He said, 'If you will wait, I will pull the train a little farther up.' I sat down on the seat and began to figure. The conductor did not tell me there was any danger. I went in the rear door of the caboose car. There was a partition across the middle. There were seats on each side. Passengers ride on any of the seats in there. They all sat in that section. The train got so rough in going to Charlotte that some of the train crew sat behind and tried to brace themselves against the partition."

The rules of the company were introduced by the plaintiff, and among them are the following:

"Rule 610. When their trains are ready for the reception of passengers, they (flagmen or brakemen) must take positions at the car steps and give all necessary assistance and information to passengers."

"Rule 613. They (brakemen or flagmen) must prevent passengers from going upon platforms and, as far as possible, from getting on and off trains while in motion, and from incurring other risks, (120) or violating any of the rules of the company provided for their safety."

There was testimony tending to contradict the witness Miller, and to show that he left the conductor and went to the caboose, which he entered, contrary to the directions he had received from the conductor, and that when told by the conductor that if he had followed his directions he would not have been hurt, he replied that he did not blame the conductor and he had not been at fault.

The defendant introduced in evidence a written statement prepared shortly after the plaintiff was injured and signed by him, in which he gave the following account of the occurrence. "I went to the station and found that the local freight would be along in a few minutes and was told by some one at the hotel that I could come over on that. Pretty soon the local arrived, and I asked the conductor if I could come over on his train, and he told me I could. He then told me to wait a few minutes and he would pull the caboose up to the station, but I told him

I would walk down to the cab, and did so. Pretty soon one of the trainmen came to the caboose and asked me if I was going to remain in the cab, and after telling him I intended coming to Charlotte with them, he asked me if I would watch the cab a short time for him, and I told him I would. In a few minutes after he left, and while I was sitting on the bench near the side door of the cab there was a very severe slack or jar of the train that threw me forward from where I was sitting, and I grabbed the door-facing to break the fall and the door caught my left hand, mashing and bursting the ends of my middle fingers. The door was a sliding door on rollers and was moved by same jar that threw me from my seat. In about fifteen minutes the crew of the train came to the cab and I told them what had happened. The pain was very painful until about ten minutes after the accident, when
(121) there was another severe jar which knocked me from my seat to the floor, and after that I did not feel so much of the pain. I wasn't hurt by the last fall. I came on to Charlotte on the local train No. 64. I did not buy a ticket, but paid the conductor cash fare."

The Court among other instructions gave the following one to the jury:

"1. The plaintiff admits that he got on this freight train, that carried freight and passengers, two hundred yards from the station. 2. He admits that he asked the conductor if he could ride on that train to Charlotte, and was told by him that he could, but to wait until he got through his work, and he would pull the caboose up to the station. 3. If you find as a fact from the evidence that, at the time he got on the caboose, it was not hitched on and connected, coupled with the engine, he was on the car wrongfully, and he cannot recover in this action. 4. But if you find from the evidence that the car was coupled up in apparent readiness to go, why, then, your finding upon the first issue will depend upon other circumstances."

The Court then proceeded to charge at length as to the duty and liability of the defendant and the care required of the plaintiff under the different phases of the case as disclosed by the testimony.

The plaintiff excepted to each of these instructions. The usual issues as to negligence, contributory negligence and damages were submitted. The jury answered the first issue, as to negligence, "No." The Court having overruled a motion for a new trial and entered judgment on the verdict, the plaintiff excepted and appealed.

Brevard Nixon for the plaintiff.
George F. Bason for the defendant.

WALKER, J. It seems to us that the Court erred in two respects.

We do not think it can be reasonably inferred from the testimony that the plaintiff admitted, or intended to admit, that the (122) conductor told him to wait until he had finished his work and the caboose had been drawn up to the station, in the sense that he was forbidden by the conductor to enter the caboose until this had been done; and that he was so forbidden is the clear implication from what is stated by the Court, in the opening of its charge, to have been admitted. The jury might well find from the plaintiff's testimony—and the written statement would not necessarily vary the finding—that the plaintiff admitted only that while the conductor did tell him to wait a few minutes and he would pull the caboose up to the station, he regarded it merely as a favor offered to him by an obliging conductor and not as a denial to him of the right to enter the car, or even as a warning to him not to do so. This is made clear by what he said on the cross-examination, where he gave the following version of the facts: "When I spoke to the conductor and asked him if I could travel on his freight train, I said, 'Captain, can I ride with you to Charlotte?' and he said, 'Certainly.' I said, 'Much obliged,' and started to walk down, and he said, 'If you will wait, I will pull the train a little farther up,' and I said, 'No, much obliged; I will not put you to that trouble.' When the statement which you show me was signed, I was in very great pain."

We do not think the written statement materially conflicts with this testimony, although it may not be quite as full and explicit as to what did occur, and even if it does conflict, the truth as to what was said and done was a matter solely within the province of the jury to determine. In *Tillett v. R. R.*, 118 N. C., at p. 1035, it appears that the Court charged the jury, upon evidence which in its general features was not unlike that in this case, as follows: "But if the statement was made by the conductor as simple information in response to a question, and was not intended as a direction or requirement, then no duty was imposed by such statement on the plaintiff to wait for the train to pull up." With respect to this instruction among others relating (123) to the same matter, the Court, at page 1046, said: "There was no complaint that the question, whether the plaintiff was warned to wait until the car should be drawn up in front of the station, was not properly left to the jury on the last trial. A careful review of the whole statement shows that there was no error."

It is not contended that the plaintiff made any judicial admission in the case which would be binding and conclusive upon him, but it is simply deduced by the Court from all the evidence that he did make the admission attributed to him. This statement of the Judge certainly excluded from the consideration of the jury the right, which the plain-

tiff clearly possessed, to have them pass upon his testimony and to adopt his version, if they should find it to be the correct one. In eliminating this view of the case from the consideration of the jury, by which the plaintiff was clearly prejudiced, there was reversible error. *Rumbough v. Sackett,* 141 N. C., 495.

We have decided frequently that it is not proper, after laying down a legal proposition as applicable to a supposed state of facts, if found by the jury, to instruct them, as a deduction therefrom, that the plaintiff is or is not entitled to recover, but the proper course is simply to direct them how to answer the issues by applying the law as stated by the Court to the facts as they may find them to be; and this should be the invariable rule when the case is tried upon issues before a jury. In this case, though, his Honor told the jury that if the caboose was not coupled to the engine, or, as we understand him to mean, if the train of cars, including the caboose, was not coupled to the engine, or, in other words, if the train was not "made up," the plaintiff boarded the caboose wrongfully, and was therefore on the car at the time of the injury in his own wrong, and for this reason he could not recover. The liability

of the defendant did not exclusively depend upon whether the
(124) caboose, when the plaintiff got on it, was coupled to the engine.

If it was not, there were other facts, and other questions to be considered, both in regard to the defendant's negligence and the plaintiff's contributory negligence. There was at least some evidence that the plaintiff had gone to the car and entered it with the knowledge of the company through its servants, who had charge of the train, if not with their implied consent, and this was sufficient to carry the case to the jury; and besides, even if he was at first to blame for boarding the car, the company might have been guilty of negligence in pushing the cars back against the caboose with unexpected and unnecessary violence and without the exercise of that degree of care which the situation of the plaintiff and the surrounding circumstances required of it.

Whether the plaintiff was himself guilty of such negligence as proximately contributed to his injury, is a question to be determined by the jury upon the evidence under proper instructions from the presiding Judge. It seems to us that the case, in the aspect of it now presented to us, is fully covered by the decision of this Court in *Tillett v. R. R.,* 118 N. C., 1031, which bears a striking similarity in some respects to it. We have so recently discussed the liability of carriers with respect to passengers traveling in caboose cars (*Marable v. R. R.,* 142 N. C., 557) that it is useless to enter upon the general inquiry as to the degree of care required of each under such circumstances.

The errors committed in the charge entitle the plaintiff to another trial.

New Trial.

Cited: *Kearney v. R. R.*, 158 N. C., 532, 543.

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(125)

HAYES v. RAILROAD.

(Filed 21 November, 1906.)

Accord and Satisfaction—Pleadings—Release—Fraud—Return of Consideration

1. Where there is an agreement to settle a controverted demand for a consideration fixed by the parties, all or a portion of which is executory, the defendant may set it up, by making proper averments in regard to performance, as an accord and satisfaction of the original demand.
2. In an action for damages for personal injuries, where defendant alleged that for a stipulated amount which had been paid, plaintiff executed a full release, and plaintiff in reply admitted the receipt of the money, but denied that the alleged release contained the terms of the settlement, averring that the provision that he was to have a lifetime job was omitted by fraud in the *factum* of defendant's agent, and there was evidence of the alleged negligence and fraud, the Court erred in nonsuiting plaintiff.
3. If one be illiterate, unable to read, and the paper-writing be read to him falsely, that is, otherwise than it is written, and he sign it, such paper-writing shall not be his act or deed.
4. In an action for damages for personal injuries, where the defendant set up a release as an accord and satisfaction, the plaintiff is not required to return the money received before setting up the plea that the release was procured by fraud in the *factum;* but if he recovers damages the amount paid him will be deducted.

ACTION by Samuel Hayes against Atlanta and Charlotte Air Line Railway Company, heard by *Bryan, J.*, and a jury, at the March Term, 1906, of MECKLENBURG.

This was an action for the recovery of damages for personal injury. The defendant denied plaintiff's right to recover, and by way of defense and accord and satisfaction alleged that plaintiff on 2 October, 1902, in consideration of the sum of $125 paid him, and an amount agreed upon, paid his counsel, executed a release in full and final settlement and satisfaction of any and all injuries, damages, etc., caused from the accident. The plaintiff, by way of reply, al- (126) leged that some time after the injury the agent of defendant company proposed to settle with him and offered to give plaintiff a position with the Southern Railway Company, which would afford a

living to him and his family during his life, and in addition pay him $125 to live on until he should be able to go to work. That plaintiff accepted said proposition. That thereupon said agent tendered to plaintiff a paper-writing, to be executed, which he represented to plaintiff as containing the terms and provisions of said proposition, and plaintiff, being unable to read for himself and relying upon the truth of said proposition, executed said paper-writing by making his mark, and thereupon received the sum of $125 in money. That he thereafter requested defendant to give him the position promised, which it failed and now refuses to do. That if defendant holds a release, or what purports to be a release, from the plaintiff, as alleged, the same was procured by the false and fraudulent representations of defendant's agent.

Plaintiff testified that after the injury had been sustained and suit was brought therefor in Atlanta, in which he had submitted to a *nonsuit*, that he executed a paper-writing presented to him by the agent of defendant corporation. In respect to this he said: "I signed a release to the company. Mr. Stracham saw me about it; he was working for the railroad; he came over to Gastonia two or three times after I was hurt. It was a good while after I was hurt before he spoke about the release. He said he would give me $125 and a lifetime job watching railroad crossings somewhere; this was in the waiting-room at Gastonia. The next time I saw him he came over there on 39 and brought me over here with him on 36; asked me if I had made up my mind to sign the release. He said he was going to Salisbury. I was going up the main street in Charlotte; met Mr. Torrence, policeman, who (127) told me Mr. Stracham was looking for me. We went to the depot, found Mr. Stracham; he wrote my name and told me to touch the pen and had Mr. Torrence to sign. Walter Dick also signed it as a witness. When I signed it I asked Mr. Stracham to read it over. He said it was no use to read it, but read a part of it to me. He read this: 'Sam Hayes was to have a lifetime job on the Southern that will pay him $25 a month—a lifetime job.' He gave me a pass and I went back home. He paid me the $125. I went to Atlanta before I signed any paper; went on a pass furnished by the company. I went down there four times. I went down there to withdraw a case I had against the Southern."

Upon cross-examination he said: "Mr. Stracham told me that he would pay me $125 and give me a lifetime job watching crossings. He paid me. I kept the money, never returned it; I signed the paper. Part of paper was read to me—that Sam Hayes is to have a lifetime job. I agreed with Mr. Stracham that if they would give me $125 and give me a lifetime job this was to be a compromise for the loss of my leg. He was representing the Southern Railroad. He told me to report

to Mr. Baker when I got ready to work. I had employed Mr. Mangum to represent me and talked to him about representing me. Erwin went with me to Arnold & Arnold in Atlanta. He is brother of Robert Erwin, who lives in Gastonia. I did agree to compromise this matter for $125; signed a paper to that effect, and a lifetime job. I got the money and have never given it back."

There was evidence in regard to the alleged negligence and the injury sustained by plaintiff. Upon the conclusion of the plaintiff's evidence, his Honor, upon motion of defendant, directed judgment of nonsuit. Plaintiff excepted, and appealed.

Pharr & Bell and *A. G. Mangum* for the plaintiff.
L. C. Caldwell for the defendant.

CONNOR, J., after stating the case: We concur with counsel for defendant that where there is an agreement to settle a con- (128) troverted demand for a consideration fixed by the parties, all or a portion of which is executory, the defendant may set it up by making proper averments in regard to performance as an accord and satisfaction of the original demand. In this case if there were no controversy in regard to the terms of the agreement to release, we should not hesitate to hold that the defense was complete and that plaintiff would be compelled, for any breach of the contract, to sue upon that cause of action. While for manifest reasons we could not compel specific performance of the contract of employment, the plaintiff could recover damages for its breach. The difficulty in fixing the amount would not affect his right of action. The authorities cited in defendant's brief sustain the contention made by counsel in that respect. The principle is well stated in *Laughead v. Coke Co.*, 209 Pa. St., 368 (103 Am. St., 1014): "It is no doubt true that when the accord is founded upon a new consideration and is accepted as satisfaction, it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. If the promise itself, and not its performance, is accepted in satisfaction, this is a good accord and satisfaction without performance."

The difficulty which we find in this appeal is that plaintiff alleges that he was to receive a certain amount in cash and to have the promise or obligation of the defendant to employ him, etc. This defendant denies. If plaintiff's contention be correct, and defendant, by fraud of its agent, has procured the execution of the release, omitting this most valuable portion of the consideration, it is in no position to rely upon the release as executed—and it offers nothing more.

The plaintiff alleges that there is fraud in the *factum*—that, being illiterate, the paper-writing which he signed was falsely read to
(129) him, and that he signed it believing that it contained the terms of the agreement as made by him. He testifies to his allegation. If the jury should find with his contention, the release is utterly void. It does not truthfully set forth the agreement upon which the accord and satisfaction is based.

In the cases cited and relied upon by defendant, *supra,* it is said: "The receipt was in full and was a receipt for unliquidated damages upon a disputed claim, and as such became final and conclusive because not successfully impeached for fraud, accident or mistake." The plaintiff, if so advised, could have asked equitable relief by way of reforming the instrument, so that it would conform to the agreement as he alleged it to be. Instead of doing so, he denies that he, knowingly executed such a paper-writing.

It is well settled that if one be illiterate, unable to read, and the paper-writing be read to him falsely, that is otherwise than it is written, and he sign it, such paper-writing shall not be his act and deed. This is elementary. *Furches, C. J.,* in *Cutler v. R. R.,* 128 N. C., 477, after stating the rule regarding fraud in the treaty, says: "If the plaintiff had required it to be read, and F had read it falsely, it would have been a fraud in the *factum.*" *Judge Battle,* in *McArthur v. Johnson,* 61 N. C., 317, after giving an illustration of a fraud in the *factum,* says: "Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read." The language of the present *Chief Justice,* in his concurring opinion in *Cutler's case, supra,* is decisive of this appeal: "The misrepresentations here are not as to matters in the treaty * * * , but as to the contents of the deed drawn by one of them which the other could not read without his glasses, and who, at the same time, was urged to sign at once without going for his glasses." *Dorsett v. Mfg. Co.,* 131 N. C., 254; 24 A. and E., 318.

There was competent evidence to be submitted to the jury,
(130) tending to sustain and, if believed, establishing plaintiff's contention.

The defendant, however, insists that plaintiff must, before setting up the defense, return the money which he has received. Whatever may have been required, if he had sued to cancel the instrument for fraud in the treaty, we do not think that he is required to return the money before setting up the plea of fraud in the *factum.* He is asking no equitable relief, but simply insisting that the paper-writing, relied upon by the defendant, is not his act and deed; and, as we have said, if he is

correct in this, the defendant's plea of accord and satisfaction has nothing upon which to stand. If the issue be found in his favor and he recover damages, of course the amount paid him will be deducted. If, on the contrary, the jury find against his contention, the defendant's plea of accord and satisfaction is sustained, thus putting an end to the case.

We have not considered the exceptions in the record pointing to his Honor's rulings upon questions of evidence, nor do we pass upon the controverted questions in respect to the plaintiff's right to recover upon his allegation of negligence. As the judgment of *nonsuit* does not state the reasons upon which it is based, we assume that his Honor was of the opinion that the defendant was barred by his release. The controversy in this respect, as we have seen, can only be settled by a verdict of the jury and there must be a

New Trial.

Cited: *West v. R. R.*, 151 N. C., 233, 236; *Briggs v. Ins. Co.*, 155 N. C., 75; *King v. R. R.*, 157 N. C., 66; *Brazille v. Barytes Co., Ib.*, 458.

(131)

SHAW v. MANUFACTURING COMPANY.

(Filed 21 November, 1906.)

Master and Servant—Defective Appliances—Negligence—Evidence—Res Ipsa Loquitur—Accidents—Presumptions—Contributory Negligence—Question for Jury.

1. In an action by a servant to recover damages for injuries received from the planks on a gangway slipping, he must prove that the gangway was in a defective condition, that its defective condition was the proximate cause of his injury, and that the master knew of its defective condition, or was guilty of negligence in not discovering and repairing the same.
2. Where the evidence shows a gangway built by a competent builder, upon a proper plan, of good material, capable of sustaining a number of people and heavy weights, in good condition, and safe for the purposes for which it was intended, as tested by actual use, up to a few minutes before the plank fell with the plaintiff, the doctrine of *res ipsa loquitur* does not apply, and the plaintiff is not entitled to recover for injuries sustained.
3. The fact of an accident carries with it no presumption of negligence on the part of the employer.
4. In an action for injuries caused by the falling of a bed-plate of a cloth press, weighing several thousand pounds, it was a question for the jury to determine whether the plaintiff placed himself in a place of obvious danger, such as no prudent person would occupy, in standing immediately behind and looking over the bed-plate as it stood on its edge, and directing a battering-ram which was being propelled against it from the opposite side.

SHAW *v.* MANUFACTURING CO.

ACTION by J. W. Shaw against Highland Park Manufacturing Company, heard by *Peebles, J.,* and a jury, at the October Term, 1906, of MECKLENBURG.

Action to recover damages for personal injuries received by plaintiff while in the employment of defendant. There were two separate actions for distinct injuries at different times. The actions were consolidated and tried upon a first and second cause of action. As to first cause of action the Court sustained a motion by defendant to
(132) nonsuit. As to second cause of action the Court intimated an opinion that upon the whole evidence he would instruct the jury that if they believed it the plaintiff was not entitled to recover. Thereupon plaintiff submitted to a nonsuit, and from the judgment rendered, appealed.

Burwell & Cansler and *McNinch & Kirkpatrick* for the plaintiff.
Tillett & Guthrie for the defendant.

BROWN, J. *First cause of action:* It appears from the evidence that the plaintiff was an employee of the defendant, and general utility man. On 12 August 1904, plaintiff was ordered by C. W. Johnston, defendant's general manager, to assist Robert McAlister in measuring the quantity of brick work in the walls of the power-house. Plaintiff and McAlister went upon a scaffold around the power-house by means of a gangway, which led from the ground up to the scaffold. McAlister walked on the same side of the gangway as he and plaintiff went up that the plaintiff walked on in returning. After plaintiff and McAlister had taken the measurements of the brick-work McAlister came down from the scaffold ahead of the plaintiff by means of the gangway. Horace Johnston, a boy, was walking down the gangway in front of Shaw, and, appearing to be frightened, plaintiff caught up with him, and walked down the gangway side by side with him, plaintiff walking on the two outside planks and Johnston walking on the two left-hand planks, plaintiff having hold of Johnston's right arm. This part of the gangway was about 12 feet above the ground. The two planks on which plaintiff was walking slipped off from the bench, or cross-piece, upon which they rested, falling with the plaintiff, whereby he was injured. The scaffold and gangway were erected by one Brown, a reputable contractor, who was doing the brick-work for a new mill by contract.

We deem it unnecessary to consider the question so ably argued
(133) as to defendant's liability for the injury of its servant upon the scaffold of the independent contractor. We concede for the sake of the argument that the gangway and scaffold were instrumentalities

of the defendant, and then we are of the opinion there is no evidence of any breach of duty defendant owed plaintiff.

In order to entitle plaintiff to recover he must prove these facts: 1. That the gangway was in a defective condition. 2. That its defective condition was the proximate cause of his injury. 3. That the defendant knew of its defective condition, or was guilty of negligence in not discovering and repairing same. *Hudson v. R. R.,* 104 N. C., 491.

We think the plaintiff has failed on all three. The gangway was built by a reputable contractor and used constantly by his own employees without accident. There is no evidence that it was deficient in strength or improperly constructed. McAlister, a heavier man than plaintiff, had safely preceded plaintiff up the same gangway only a few minutes before. Plaintiff was a carpenter who had built scaffolds and was fully competent to judge of the safety and capacity of the one he ascended. The evidence shows a gangway built by a competent builder, upon a proper plan, of good material, capable of sustaining a number of people and heavy weights, with no evidence of its being out of repair; but on the contrary, all of the evidence showing that it was in good condition, safe for the purposes for which it was intended, as tested by actual use, up to a few minutes before the plank fell with the plaintiff.

We do not think, taking the evidence as a whole, the doctrine of *res ipsa loquitur* has any application in this case. The fact of an accident carries with it no presumption of negligence on the part of the employer. *Patton v. R. R.,* 179 U. S., 658. *R. R. v. Barrett,* 166 U. S., 617, is cited with approval in the *Patton case.* In that case it was held that the plaintiff, a servant who was injured (134) by the explosion of a boiler, had not produced sufficient evidence to go to the jury when he proved the fact of the explosion and his injury thereby. The Court held that in order to make out his case he must establish not only that the boiler was defective, but must affirmatively establish such other facts as constitute negligence on the part of the master, to wit, that the master knew of the defect, or by the exercise of ordinary care ought to have known of it.

There have been cases wherein the circumstances surrounding and connected with the occasion of the injury were such that they were permitted to go to the jury and to be considered by them upon the issue of negligence. This is not such a case. *Womble v. Grocery Co.,* 135 N. C., 474; *Stewart v. Carpet Co.,* 138 N. C., 60; *Ross v. Cotton Mills,* 140 N. C., 115.

Second cause of action: It appears from the evidence that plaintiff was again injured on 19 May, 1905, while engaged in assisting in and

directing the work of tearing down a cloth-press in defendant's mill, preparatory to moving it to another part of the building. The press consisted of a top-piece and a bed-plate. Plaintiff had taken down the press and was endeavoring to separate the plunger from the bed-plate. The bed-plate was 4½ feet long, 3½ feet wide and 3½ inches thick, and weighed several thousand pounds. It had a shaft called a "plunger" fastened in its center, which extended some feet from it and the end of which was supported by a chain. This plunger weighed about 1,400 pounds and worked up and down in a cylinder immediately under the bed-plate, which, by means of hydraulic pressure, was used to raise and lower the bed-plate when necessary. It was necessary to separate the plunger from the bed-plate in order to move the machine separately.

As the bed-plate rested on its edge, it leaned a little towards
(135) the plunger and away from the plaintiff, who was standing on the opposite side looking over the top of it at the plunger, while he directed two of the boys to drive it out of the bed-plate by hitting the latter first on one side and then on the other of the plunger with a piece of iron shafting weighing 40 or 50 pounds used as a battering ram. When the plunger was knocked loose the bed-plate was driven over on plaintiff and broke his leg.

There was evidence tending to prove that Constable, the superintendent, was present and saw the manner in which it had been done. Plaintiff testified upon the question of negligence that he had demanded more help and also sufficient blocks and tackle to move the bed-plate, and that the superintendent refused or failed to furnish them, but directed him to do the work without them. Plaintiff also testified that if they had been furnished he would have fastened a chain around the bed-plate while it was on its edge, and have secured it so it could not have fallen when the blows on it succeeded in unfastening the plunger.

No question was made in the argument before us as to there being a sufficiency of evidence to go to the jury tending to prove the negligence. It appeared to be conceded that the intimation of his Honor as to his charge relates solely to the issue of contributory negligence. It is argued that the plaintiff, according to his own evidence, was in a position of great and obvious danger, such as no prudent man would occupy. It must be admitted that to stand immediately behind and look over a heavy bed-plate on its edge and direct a battering-ram which is being propelled against it is somewhat of a dangerous business. Whether it was so obviously dangerous that no prudent man would have acted under similar circumstances as the plaintiff did, we are unable to say. The jurors are more competent to pass on that question than we are.

If from all the circumstances surrounding the plaintiff, the jury
(136) should conclude that he had placed himself in a position of

obvious danger such as no prudent man would be willing to incur, he would not be entitled to recover. *Marks v. Cotton Mills,* 138 N. C., 402. In taking this question from the consideration of the jury and drawing the conclusion himself, we think his Honor erred.

The judgment on the first cause of action is affirmed. As to the second cause of action, it is ordered that the cause be remanded for a new trial.

Let the costs of this Court be equally divided.

New Trial.

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

Cited: S. c., 146 N. C., 237; *Cotton v. R. R.,* 149 N. C., 231; *West v. Tanning Co.,* 154 N. C., 48; *Ammons v. Mfg. Co.,* 165 N. C., 452.

(137)

BEARD v. RAILROAD.

(Filed 21 November, 1906.)

Evidence—Mental Capacity—Opinion—Physicians—Insanity—Presumptions. Letters—Notice to Produce—Contents—Copies—Witnesses—Cross-examination—Railroads—Contributory Negligence—Instructions.

1. Upon the question whether plaintiff, at the time he signed a release, possessed sufficient mental capacity to understand its effect upon his legal rights, the evidence of a witness that, in her opinion, plaintiff did not at the time have "sufficient mental capacity to enable him to have reasonable 'judgment' as to the effect of it and what it purported to be," is not so obscure as to constitute reversible error.
2. The testimony of the attending physician, who knew the conditions with which he was dealing, that, in his opinion, the fall described by plaintiff would produce the mental condition in which he found him; also that a blow on the "outer skull" leaving no sign might be sufficient to break the "inner skull," giving his reasons and describing the effect upon the mind of a person sustaining such an injury, was competent.
3. When insanity is once shown to exist, there is a presumption that it continues, open to testimony showing a restoration of mental soundness.
4. The receipt of a letter purporting to be signed by a person is no evidence it was written by such person.
5. Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend Court, to produce papers, is not sufficient.
6. Where plaintiff admitted receiving certain letters from defendant, which were not produced, and that the copies shown him were correct, defendant was entitled to ask him, on cross-examination, regarding their contents.
7. Where a person to whom a letter was addressed admitted its receipt, and that the copy shown him was a correct transcript of the original, which was not produced, the copy was admissible against him.

8. In an action by a freight conductor for personal injuries, where the evidence shows that he was going with a lighted lantern from the freight office to take charge of his train; that the night was dark and stormy and that the wind blew his lantern out and he did not return to light it, but continued along the platform, feeling his way with his feet, and fell down the steps which were cut into the platform about three feet, and which he knew were there; that there was no light on the platform nor railing around the steps: *Held*, That the Court did not err in refusing to hold as a matter of law that the plaintiff was guilty of contributory negligence.
9. An instruction that "although the plaintiff's lantern was blown out, he had the right to proceed on to his train if he thought he could safely make the journey by exercising ordinary care on his part," is erroneous, standing alone, as the standard of duty is not what the plaintiff thought he could safely do, but what a reasonably prudent man, under the same circumstances, would do; but this instruction was so modified by other parts of the charge as not to constitute reversible error.

ACTION by C. H. Beard against Southern Railway Company, heard by *Ferguson, J.*, and a jury, at the April Term, 1906, of GUILFORD.

This action is prosecuted for the recovery of damages sustained by the plaintiff while in the employment of defendant, by reason of alleged negligence. The defendant denies that it was guilty of negli-
(138) gence and alleges that plaintiff was injured by reason of his own negligence. For a further defense defendant sets up a release executed by plaintiff. In reply to this new matter plaintiff avers that at the time of the execution of the release he did not possess sufficient mental capacity to make the contract and that the release was procured by fraud and undue influence. For the purpose of ascertaining the truth in regard to these several allegations, appropriate issues were submitted to the jury, all of which were found in accordance with plaintiff's contention. The facts, as they are related to the exceptions, are set forth in the opinion. From a judgment upon the verdict, defendants appealed.

J. A. Barringer for the plaintiff.
King & Kimball for the defendant.

CONNOR, J. The record contains thirty-eight assignments of error. Several of them become immaterial by reason of the verdict upon the first issue, which was directed to the execution of the release. The jury found that plaintiff did not, for a valuable considration, "release and absolve the defendant from all liability on account of the injury." In view of the testimony and his Honor's instruction, this finding involves the conclusion that plaintiff did not possess sufficient mental capacity to understand its effect upon his legal rights when he signed the release. The second issue, therefore, as his Honor instructed the jury, became

immaterial and the several exceptions to the rulings bearing upon it need not be considered. *Sprinkle v. Wellborn,* 140 N. C., at page 181.

It is but just to the persons who were present and witnessed the execution of the release, to say that we find no evidence of fraud or undue influence practised upon plaintiff. He testified that he did not know or understand what he did and had no recollection that he ever signed the release. There was ample evidence, both upon his own examination and other witnesses, that plaintiff was in no fit mental condition to be entrusted with the duties which he undertook to discharge. (139) Much of his testimony is difficult to understand or reconcile. This, however was the duty and province of the jury. The release recites a consideration of one dollar and contains no stipulation or promise as to employment, although there is evidence that such was the real consideration.

The Court permitted Mrs. Beard to testify that, in her opinion, plaintiff did not at the time he signed the release have "sufficient mental capacity to enable him to have reasonable judgment as to the effect of it and what it purported to be." We cannot commend the form of the question, but do not think it sufficiently obscure to constitute reversible error. Evidently she used the word "judgment," which is criticised by defendant, as synonymous with "understanding." It was competent for the witness to express an opinion. *Bost v. Bost,* 87 N. C., 477; *Horah v. Knox,* 87 N. C., 483.

Dr. Hanes, who had attended plaintiff, was permitted to testify that, in his opinion, the fall described by plaintiff would produce the mental condition in which he found him; also that a blow on the "outer skull," leaving no sign, might be sufficient to break the "inner skull," giving his reasons and describing the effect upon the mind of a person sustaining such an injury. We do not think that defendant's exception to this testimony can be sustained. The witness was not expressing an opinion upon a hypothetical case. He had treated plaintiff and knew the conditions with which he was dealing. There was no controversy regarding the manner in which plaintiff sustained the injury. The exception does not present the question as in *S. v. Bowman,* 78 N. C., 509, or *Summerlin v. R. R.,* 133 N. C., 550. It is rather within the principle announced in *Jones v. Warehouse Co.,* 137 N. C., 337.

We have carefully examined his Honor's instruction regarding the quantum and character of mental capacity requisite to make a valid contract, and find that it is in accordance with the deci- (140) sions of this Court and standard authorities. *Sprinkle v. Wellborn, supra,* where the cases are collected. His Honor was clearly correct in saying that when insanity is once shown to exist, there is a presumption that it continues—open, of course, to testimony showing a res-

toration of mental soundness. There was evidence that at times plaintiff was mentally unsound—non-sane. We have examined the other exceptions to rulings bearing upon this issue, and find no error.

It appears that after the injury sustained by plaintiff, he again entered into defendant's employment. That some time thereafter he was discharged. Defendant claims that he was discharged because of the use of morphine and whiskey. It also claims that plaintiff's mental condition is attributable to injuries received several years before the one complained of. There was a large quantity of evidence bearing upon these contentions.

Among other testimony regarding the discharge of plaintiff, defendant proposed to introduce two letters purporting to be signed by plaintiff, which he denied writing or sending. Defendant's witness, assistant superintendent, testified "that he received in due course through the mail the letter," etc. The letter was, upon plaintiff's objection, excluded. We concur with his Honor's ruling in this respect. While it is well settled that where it is shown that a letter was addressed, stamped and mailed, there is a presumption that it was received by the addressee, it cannot be that the receipt of a letter purporting to be signed by a person is any evidence that it was written by such person. No authorities are cited to sustain the exception.

Defendant offered to introduce copies of two letters addressed to the plaintiff by its assistant superintendent. In respect to these copies, the record states: "The plaintiff having testified, after examining
(141) the papers, that he received the original, of which there were copies, and it being admitted that the defendant, on the convening of the Court in the afternoon on which the trial of the case was begun, had notified the plaintiff to produce the original in Court." It was also admitted that plaintiff resided about two miles from Mount Airy, the trial being had in Greensboro. That a train left Greensboro at 4:30 in the afternoon for Mount Airy, returning the next morning at 12 o'clock. Plaintiff and his wife were in Greensboro attending the Court. The offer to introduce the copies was made in the afternoon of the second day of the trial. The copies were excluded by the Court. There is no admission or finding regarding the distance between Greensboro and Mount Airy. We take note of the fact that it is some seventy miles.

The case was argued upon the theory that the Court excluded the copies because the notice to produce the originals was not sufficient in point of time. We concur in this view. "Generally, if the party dwells in another town than that in which the trial is had, a service on him at the place where the trial is had, or after he has left home to attend the Court, is not sufficient." Greenleaf Ev., sec. 563. Certainly

the plaintiff was not called upon to go himself or send his wife away from the town in which his case was being tried to find and produce the letters. No reference is made to them in the pleadings, nor was there anything in the case to suggest to the plaintiff the probability that they would be called for. The defendant did not offer to ask the plaintiff on cross-examination regarding the contents of the letter, as it may have done. *Kalk v. Fielding*, 50 Wis., 339.

Whether, upon plaintiff's admission that he had received the original letter of which the paper-writing shown him was a copy, did not entitle defendant to read the copy without having given the notice, is not raised in the argument. It would seem, however, that such admission relieved the plaintiff of the duty of giving the notice. The au- (142) thorities are not entirely in harmony, but upon the reason of the thing, if the person to whom a letter is addressed, and who admits its receipt, admits that the copy shown him is a correct transcript of the original, then, as against him, it should be admissible. The purpose of requiring the original, being the best evidence, is met. It does not appear whether the "copy" was a letter-press copy, which is really a duplicate original. We have examined the "copies" offered in evidence, and, in the light of the elimination by the jury of the release, they do not appear to be material to either of the issues. They referred to the reasons of the defendant's agents for discharging the plaintiff, and their substance was fully brought out in the examination of the witnesses. Several physicians were examined in regard to the plaintiff's mental condition and habits and the causes thereof. The learned counsel for the defendant say that the introduction of the copies could have done the plaintiff "no possible injury." Their rejection was harmless error.

We are thus brought to consider the main question presented by the appeal. At the conclusion of all the evidence, defendant moved for judgment of nonsuit, and to the refusal of the motion, excepted. The testimony disclosed the following case: Defendant maintained a freight depot at Winston, "consisting of two parts connected by one floor, the west end warehouse building and rooms in which the employees worked; the east end consisting of a wide platform covered by a shed; in the floor on the side next to the railroad track were steps leading down from the platform to the track. These steps were cut into the platform about three feet; a railing had been placed around the steps, but was gone at the time of the injury. Plaintiff was employed by defendant as freight conductor. On the night of 26 June, 1903, being dark and stormy, he received orders to take charge of a freight train going to Greensboro. He got his way-bills from the freight office and with a (143) lighted lantern was going to his train, standing on the track.

The lights along the platform were out. As he came out of the freight office, the wind blew his lantern out; he did not return to light it, but continued along the platform, feeling his way with his feet. He was going south to reach the steps which he usually used for the purpose of going to his train. He says that he "never hardly used the steps" cut into the platform. In his efforts to use them on the night in question he lost his footing and fell, striking his head against the track. In his own language he describes the fall: "It was a very bad night; rainy, wind blowing, very dark, no light on the platform anywhere. I was feeling my way and fell head foremost down through the hole and struck my head against the rail and wheel together. I remember hitting my head between the wheel and the track. It seemed to cover my whole head. I don't remember anything else until the next day at dinner-time. There was no railing at all, nothing to protect me whatever—simply a hole and a pair of steps. I was just feeling along with my feet. There was no light anywhere."

Upon cross-examination he says that he usually got his way-bills by going around the other way. "When I fell, I had started down. I knew the steps were there; do not know how many; think more than three."

Defendant contends that upon these facts his Honor should have held, as a question of law, that plaintiff was guilty of contributory negligence. It is clear that it was negligent to permit the platform to be in darkness while plaintiff was required, in the discharge of his duty, to pass along it. This is especially so when we recall that the steps cut into the platform some two and a half or three feet and that the railing had been removed. Defendant says, however this may be, it supplied the plaintiff with a lantern, and that when blown out by the
(144) wind it was his duty to return to the freight office and relight it.

The principles of law governing the case are well settled. If it can be said that the plaintiff's duty to return to the office and light his lantern was so manifest and his failure to do so clearly negligent, so that two reasonable minds could come to but one conclusion in regard thereto, the authorities sustain defendant's contention. On the other hand, if measured by the standard of conduct which would control the reasonably prudent man, under similar circumstances, his conduct is capable of more than one reasonable inference, the decision of the question was properly left to the jury.

Plaintiff was not injured by reason of falling into a hole, the existence of which was unknown to him. There was no negligence in the position or construction of the steps, but it was the duty of defendant to have and maintain sufficient light along the platform and near the steps or to have a railing so that their employees could use them with reason-

able safety. This was a positive duty, the failure to perform which makes the defendant liable, unless the danger in using them was so manifest and obvious that no prudent man would do so in the absence of lights. In passing upon this question his Honor was compelled to take into consideration the whole evidence and fix the standard of duty, applying the legal test of prudence. It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions, as described by plaintiff, he was manifestly regardless of his safety. Common observation teaches us that many persons, clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that by doing so they can be said to be clearly and obviously negligent. While it may have been wise for the plaintiff to return and relight his lantern, yet, in view of the fact that the train of which he was ordered to take charge was ready to move, and the time for its departure had arrived, that it was late at night and (145) that the same wind which blew out his lantern would probably do so again, we think that he was entitled to have his conduct, in this respect, submitted to the jury.

The defendant excepted to the following instruction given by his Honor: "Although the plaintiff's lantern was blown out, he had a right to proceed on to his train, if he thought he could safely make the journey to the same by exercising ordinary care on his part. It was the duty of the defendant to provide a light near enough the steps which was to be sufficient to enable the plaintiff on a dark night to see his way to the said steps and down the same safely. If the defendant failed to furnish said light and this was the proximate cause of the injury, the jury will answer the third issue 'Yes.'"

This instruction was given in response to plaintiff's request, and, if not modified or explained in other parts of the charge, is erroneous.

The standard of duty is not what plaintiff thought he could safely do, but what a reasonably prudent man, under the same circumstances, would do.

When his Honor reached the fourth issue, involving plaintiff's conduct, he said: "I charge you if the plaintiff, after his light had blown out, continued onward to his train and used ordinary care in approaching and finding the said steps, and he could not find them by exercising such care because of the fact that the defendant offered to him no light on the said platform by which he could see the steps, or if the plaintiff would have been prevented from falling down the steps by the railing having been placed around the steps, and these, or either of them, were the proximate cause of the said injury, the jury will answer the fourth issue 'No.' Ordinary care is the care of a prudent man, mindful and careful of his own safety, and it is for you to find from the evidence

whether the plaintiff was in the exercise of care in going in the dark after his lantern was blown out, or did ordinary care require
(146) that he should relight his lantern before going forward toward the steps inside the platform."

To this instruction defendant excepted. The criticism of the language is that it "withdraws from the consideration of the jury whether the plaintiff was or was not negligent in proceeding down the stairway after the wind had extinguished his light, without distinguishing, for the jury, the relative degree of care requisite to constitute ordinary care in the two cases."

The standard of duty imposed upon plaintiff is the same in both cases. He must exercise ordinary care, or that care which the ideal prudent man would have exercised under the existing conditions. What would constitute such care on the part of a person walking along the platform properly lighted, or doing the same thing in the dark, would, of course, differ essentially. If, after his light was extinguished, plaintiff had exercised no more care to avoid injury than before, he could not be said to exercise ordinary care. This demand upon him he met by "feeling his way along with his feet"—a most natural mode of avoiding the hole in the floor and going down the steps when he reached them. He appreciated the necessity for caution and says that he exercised it, and in this the jury found with him. If he had walked briskly along the platform when dark, in the same manner as if lighted, we apprehend the Judge would not have hesitated to enter judgment of nonsuit. The defendant's negligence, in not having light, did not absolve him from the duty of acting, under the circumstances, as a prudent man.

The real pivotal question in this case is, whether it was plaintiff's obvious duty to return to the freight office and relight his lantern. Suppose that he had done so, and it had, by the same cause, been again extinguished: Must he refuse to perform the duty imposed upon him to take the train out, or was it not his duty to try, by the exercise of ordinary care, to reach his train by using the way provided for doing so?

The error pointed out in the plaintiff's prayer, applied to the
(147) third issue, directed to defendant's negligence, was harmless. When his Honor instructed the jury in regard to the plaintiff's duty, he avoided the error.

We have examined the entire record with care. The case is, in many respects, peculiar. The testimony in regard to plaintiff's mental condition and the causes producing it is conflicting and far from satisfactory. His Honor submitted the questions debated fairly, and the jury have settled the facts. The defendant excepted to his Honor's in-

struction in regard to the measure of damage, but the exception is not assigned for error, nor noted in the brief. We therefore treat it as abandoned.

There is no reversible error. The judgment must therefore be

Affirmed.

Cited: Ivey v. Cotton Mills, post, N. C., 198; *Harvell v. Lumber Co.,* 154 N. C., 263.

HARRISON v. TELEGRAPH COMPANY.

(Filed 21 November, 1906.)

Telegraphs—Mental Anguish—Damages Recoverable—Question for Jury—Relationship of Parties—Stepmother—Presumption.

1. In an action to recover damages for delay in the delivery of a telegram, in order to enable the plaintiff to recover substantial damages, based upon his mental distress and suffering, it is necessary for him to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff.
2. Where a telegram notified a stepmother of the death of her stepson and of the hour fixed for the funeral, the defendant's contention that the only purpose of the telegram was to notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties, is without merit.
3. There is no presumption of mental anguish growing out of the relation of stepmother and son, but it is a fact that the plaintiff may prove, if she can, to the satisfaction of the jury.
4. In an action to recover damages for delay in the delivery of a telegram notifying the plaintiff of the death of her stepson and of the hour of the funeral, where plaintiff testified she raised deceased from a small boy, and he had been with her until just before his death; that she had no children of her own; that he treated her with affection and called her mother, and she regarded him as her own son and loved him dearly and would have attended his funeral if she had received the telegram in time; that she came on the first train after it was delivered, but that when she arrived he had been buried; that it made her very nervous and affected her so much she would never get over it: *Held,* that this evidence tends to prove something more than mere disappointment, and whether the plaintiff has really suffered mental anguish for which she was entitled to recover, was for the jury.

(148)

ACTION by Annie Harrison against Western Union Telegraph Company, heard by *Councill, J.,* and a jury, at the February Term, 1906, of ROWAN.

This case is reported in 136 N. C., 381, where the facts are stated. On the second trial the Court instructed the jury that, upon all the evi-

dence, plaintiff was entitled to recover only twenty-five cents, the cost of the telegram. Plaintiff excepted, and appealed.

R. Lee Wright for the plaintiff.
Tillett & Guthrie for the defendant.

BROWN, J. In this case the only question before us relates to the measure of damages the plaintiff is entitled to recover, as the negligence of the defendant is very properly admitted. This Court has in its decisions laid down the rule governing the measure of damages and has held that such damages as were not within the contemplation of the parties cannot be recovered. The rule is aptly stated for the
(149) Court by *Mr. Justice Walker* in *Williams v. Telegraph Co.*, 136 N. C., 82: "In order to enable him to recover substantial damages, based upon his mental distress and suffering, it is necessary for him to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff."

Not only was defendant's agent notified of the important character of the telegram, but on its face it stated the "pregnant facts of death and burial." It notified a stepmother of the death of her stepson, and of the hour fixed for the funeral. We think the learned counsel for the defendant takes a view much too restricted when he contends that the only purpose of the telegram was to notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties. The evident purpose was to notify the stricken mother at once that her son was dead, to the end that she might come without delay and have the melancholy pleasure, and perform the sacred duty, of being with his remains as long as possible before they were committed forever to the grave.

The fact that the hour fixed for the funeral is stated in the telegram is a mere incident to the general purpose for which the telegram was evidently sent. It was most natural that the plaintiff should desire to know the hour when the burial rites would be performed, but not at all in accord with the promptings of the heart of the average woman that she should be content to put off coming until the last moment. The plaintiff testified she would have come by the first train had she received the telegram when it should, with due diligence, have been delivered to her.

There is no presumption of mental anguish growing out of the
(150) relation of stepmother and son, but under our decisions it is a

fact the plaintiff may prove, if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible of proof as the condition of the stomach.

The plaintiff's testimony, if believed, tends to prove something more than mere disappointment. She says: "I raised the deceased from the time he was a small boy and he had been with me from then until just before his death. I have no children of my own. He called me mother. I addressed him as son. He was kind to me and treated me with kindness and affection. I regarded him as my own son. I loved him and loved him dearly. I would have come to Salisbury if I had received the message in time. I did come on the first train after it was delivered to me. When I arrived he had been buried. I did not get to Salisbury in time to attend the funeral. It made me very nervous and affected me so that I can never get over it."

We think the cause should be submitted to the jury under proper instructions, to the end that if they are satisfied the plaintiff has really suffered mental anguish, as distinguished from mere disappointment, they may award her such reasonable sum only as will in a measure compensate her for the injury done by the defendant's negligence.

Partial New Trial.

CLARK, C. J., concurring: The doctrine of damages for mental anguish as the probable result to be anticipated from the failure to deliver messages concerning death or illness is not only imbedded in our decisions, but it was adopted and has been reiterated after the fullest consideration and upon what seemed and still seem to us the soundest principles of justice and public policy as well. Inasmuch as the representatives of the telegraph company continue to question the correctness of these decisions, it may be well to again notice their (151) principal arguments, which are:

(1) That some other courts have not held the telegraph company liable for such damages. If there is any force in this argument, it is countervailed by the fact that the courts in about an equal number of States have sustained the doctrine. The courts maintaining each side of the question are summed up by *Mr. Justice Douglas* in *Green v. Telegraph Co.*, 136 N. C., 504, 505; also, see, *Bryan v. Telegraph Co.*, 133 N. C., 608, and Watson Pers. Inj., sec. 450.

(2) It has been contended that damages for mental anguish should not be allowed because there can be no exact standard of measurement. But that is true in most instances in which damages of any kind are sought, especially where damages are sought for wrongful death or physical suffering. Damages for mental anguish are as old as the law. They have been allowed in all courts where they are accompanied by

physical suffering, and damages for physical suffering are as difficult to admeasure as those for mental suffering. When the latter alone are sought to be recovered they cannot be more difficult to measure than when both mental and physical suffering are to be measured—a double uncertainty.

Besides, in very many instances damages for mental suffering unaccompanied by physical suffering have long been allowed in all courts, as in actions for breach of promise of marriage, seduction, libel, slander, malicious arrest, false imprisonment, wrongfully putting a passenger off the train, and other instances cited, with authorities. *Young v. Telegraph Co.*, 107 N. C., 384. To say that most of the instances in which damages have been allowed for mental anguish unaccompanied by physical injury have been actions of torts, not actions based on breach of contract, is merely to allege a technical distinction without any reason for a difference. There are many torts in which no mental sufferings should be allowed as an element of damages, and many actions *ex contractu* where they should be allowed. The test is not (152) whether the actions under our former practice were *ex delicto* or *ex contractu*, but the common-sense ground, whether in each case the mental suffering is the natural and probable consequence of the breach of contract or tort. Croswell Elec., sec. 649, puts this clearly: "As damages are allowed for pecuniary loss when the subject-matter of the telegram is a pecuniary transaction, so damages should be allowed for injury to the feelings when the subject-matter of the telegram is a transaction involving feelings. Thus messages which on their face show that they relate to sickness or death of relatives, give direct information to the telegraph company of the nature of the damages which may be suffered through its negligence."

(3) The third ground usually urged in behalf of a defendant telegraph company is the increased litigation; but as there can be no recovery unless the company has been negligent, it is entirely in the power of the defendant to relieve the courts of the labor, and itself of the expense of the threatened additional litigation, by faithfully discharging the duty it undertakes, by virtue of the public franchise it enjoys, of delivering promptly and faithfully the messages entrusted to it and which it is paid to transmit. A failure to do so "is not a mere breach of contract, but a failure to perform a public duty which rests upon it as a servant of the people." *Reese v. Telegraph Co.*, 123 Ind., 294.

As was said in *Cashion v. Telegraph Co.*, 123 N. C., 272: "A *quasi*-public corporation, exercising ordinary powers and receiving enormous profits solely in consideration of the performance of its public duties, cannot be permitted to neglect or evade those duties with practical

impunity. To allow it to cancel all liability for a negligence that may have wrung the heart-strings of the citizen, for whose service it was created, by refunding the twenty-five cents which it had received but never earned, would destroy all sense of responsibility." It shocks the moral sense of mankind.

In all countries but this, the telegraph is an integral part of the postoffice department (charging much lower rates than here), and (153) the direct exercise of public opinion compels efficient service, as in our postal service. But, here, notwithstanding the Act of Congress in 1869 giving the Government the option to take charge at any time of the telegraph service, and the recommendation of several Postmasters General that this be done, the telegraph service, whose efficiency is a matter of the utmost importance to the public, remains under private ownership, and public opinion is no factor in securing efficient or removing inefficient servants.

The only remedy for a citizen wronged by delayed or undelivered messages is damages at the hands of a jury for injuries caused by such negligence. So far from removing the liability for negligence in transmitting messages concerning death or illness, the public judgment and sense of justice have been always exercised, when exercised at all, by legislation reversing previous decisions of the courts which had held telegraph companies not liable for mental anguish, caused by their negligence in such cases as in South Carolina, Arkansas, Virginia, and other States. *Meadows v. Telegraph Co.*, 132 N. C., 44.

Our stand has been taken not hastily and unadvisedly nor been adhered to by mere persistence, but has been founded upon justice and the "reason of the thing," as it has seemed to us.

Cited: Shepherd v. Tel. Co., post, 247; *Helms v. Tel. Co., post,* 395; *Shaw v. Tel. Co.,* 151 N. C., 641; *Ellison v. Tel. Co.,* 163 N. C., 11, 12.

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(154)

HAYNES v. RAILROAD.

(Filed 27 November, 1906.)

Railroads—Switches—Negligence—Presumptions—Contributory Negligence. Violation of Rules—Knowledge of Employer.

1. It is the duty of a railroad to use reasonable care to provide and maintain a safe switch and to keep it properly adjusted, and the fact that it was not so adjusted and set to the main track, where, according to the regular schedule, a passenger train was expected to pass over it, raises a presumption that defendant's servants, entrusted with that duty, were negligent and casts upon defendant the duty of "going forward" with proof to the contrary.

2. In an action against a railroad company for the death of an engineer whose train ran onto a switch at night, at which there was no light, and collided with cars standing thereon, in order to meet the defense of contributory negligence based on an alleged violation of a rule requiring decedent, when approaching a switch, in the absence of a light, to bring his engine under control, in order to show that the rule had been so habitually violated as to nullify it, and that such violation was essential to the operation of the trains in accordance with prescribed schedules, it was competent to admit testimony of other employees as to the practice with respect to the lack of observation of such rule, the length of decedent's run, the schedule prescribed, the number of switch lights, their usual condition, and the length of time which would be consumed in conforming to the rule.
3. Where the orders given to an engineer by the general officers of the company require him to run in a different manner from that prescribed in the rules, and other trains of the class of that placed in his charge are so run with the knowledge and by the direction of the governing officers, negligence cannot be imputed to the engineer, although he does not follow the general rules.
4. The principle that a violation of a rule made by the employer for the employee's protection and safety, when the proximate cause of such employee's injury bars a recovery, does not obtain when the rule is habitually violated to the knowledge of the employer, or when the rule has been violated so frequently and openly, and for such a length of time, that the employer could, by the exercise of ordinary care, have ascertained its nonobservance.

ACTION by Bettie W. Haynes, executrix of Tyler D. Haynes,
(155) against North Carolina Railroad Company, heard by *Bryan, J.*, and a jury, at the April Term, 1906, of MECKLENBURG.

This was an action brought by the plaintiff executrix for the recovery of damages sustained by reason of the death of her testator on account of the alleged negligence of defendant's lessee. Plaintiff's testator was, on the night of 9 June, 1904, in the employment of Southern Railway Company, the lessee of defendant, in the capacity of locomotive engineer, and, in the discharge of his duty, was in charge of the engine attached to and forming a part of passenger train No. 40, operated by said lessee, which ran from Greenville, S. C., to Charlotte, N. C., and thence, over the main line of defendant company, through the city of Salisbury to Spencer, N. C.

On the said night, 9 June, 1904, while making said run, at about the hour of 12 o'clock, said engine and a portion of the cars left said track and ran onto a sidetrack, on the shifting yard of defendant, in the city of Salisbury, known as the "Ice-House Siding," where it collided with two box-cars standing on said siding, inflicting injuries upon said testator, causing his death.

Plaintiff alleged that the said engine left the main track and ran on the siding and into the box-cars by reason of the negligence of defendant's lessee, assigning three acts of negligence: 1. In failing to furnish a clear track and a safe roadbed upon which to run the engine and cars.

2. In failing to keep the switch at the siding in such repair, so adjusted, securely set, and locked as to keep disconnected said siding from the rail of the main track. 3. In failing to keep the switch rail of said siding, connecting the same to the rail of the main track, in such repair and so adjusted as to permit the engine to run over the said main track without running off the same and onto the siding.

Defendant denied that it was negligent in either of the respects specified, and for further defense alleged that plaintiff's testator (156) came to his death by his own negligence, specifying particularly the acts contributing thereto: 1. That he was running his engine at the time it left the track and collided with the box-cars on the siding, through the city of Salisbury, at a rate of speed in violation of the ordinance of the said city. 2. That he was running said engine at said time at a rate of speed in violation of the rules of the company, which were well known to him, and which required him to run his engine at such rate of speed that he would have it under his control, whereas, he was running at a rapid and reckless rate of speed. 3. That at said time he was violating a rule of the company which required that whenever a danger-signal was shown on the line of said road, the engineer in charge of said train should stop and examine the cause thereof. That at the said time there was shown a danger-signal at said switch or siding, which was plainly visible for a distance sufficient to enable him to stop the train. 4. That at said time he was violating a rule of the company which required him to stop his train, if the signal which was provided for that purpose did not show the track clear. That by each of the said acts of negligence he contributed to his injury and death.

Plaintiff replied to the new matter set forth in the answer alleged to constitute contributory negligence on the part of her testator: That if her testator was running said engine through the city of Salisbury in violation of the ordinances of said city, he was obeying the orders of the agents and officers of defendant's lessee, with their full knowledge and consent. That it was frequently necessary to run said trains through said city at a rate of speed prohibited by said ordinances in order to maintain the schedules promulgated and enforced by said company. That her testator was not at said time running his engine in violation of said ordinances. That if he was running (157) said engine in violation of the rules of defendant's lessee, he was doing so by its direction and in accordance with the uniform habit and custom of the engineers of defendant's lessee, to run the trains at the place of the said siding and switch at as high rate of speed as her testator was running said train at the time of the collision. That such speed was necessary to enable her testator and other engineers to maintain the schedules promulgated by said company. That the rules re-

ferred to in the answer were and had been abrogated and rendered nugatory by the officers of the defendant's lessee, and that defendant was estopped from setting up or relying on said rules in this action, etc. That if her testator attempted to run said train by the said switch and siding when the signal-light was absent, his conduct in so doing was in conformity with the uniform custom and habit of her testator and all other engineers of said lessee company engaged in running over this line of railway from Greenville to Spencer, which custom and habit was for a long time known to and acquiesced in by the officers of said company and was necessary to maintain the schedules of said company.

Upon the foregoing pleadings, his Honor submitted to the jury the following issues: 1. Was the plaintiff's testator killed by the negligence of the Southern Railway Company, as alleged? 2. Was the plaintiff's testator guilty of contributory negligence, as alleged? 3. What damages was plaintiff entitled to recover?

There was a verdict for the plaintiff and judgment thereupon, from which defendant appealed. The testimony pertinent to the exceptions is set forth in the opinion.

Burwell & Cansler for the plaintiff.

W. B. Rodman and *L. C. Caldwell* for the defendant.

CONNOR, J., after stating the case: The well-prepared briefs and arguments in this appeal present the merits clearly, and in the (158) light of the pleadings the decision turns upon two questions: First. Has the defendant, as a matter of law, successfully met the presumption of negligence raised by the fact that the switch was misplaced, by reason whereof the engine attached to train No. 40 collided with the box-cars on the siding? Second. Was there any competent evidence tending to show that the rule introduced by defendant governing plaintiff's testator in the management of the engine was, by reason of its habitual violation, known to defendant's lessee, or by the prescribed schedules, abrogated?

It appearing that the engine, while approaching Salisbury, left the main track at the "Ice-House Siding" and went upon the sidetrack, colliding with the box-cars, the presumption arises that the switch was defective either in its construction, was out of repair, or that, by some means, it was set to the siding instead of the rail of the main track. In either case the track was not clear, in the sense of being safe. We find no evidence that the switch was defectively constructed or was not in proper repair; but there is evidence, practically uncontradicted, that the switch was set to the siding; hence the engine, by the law of its construction and operation, could not do otherwise than, by following the rail, go upon the siding; this was inevitable.

It was the duty of the defendant's lessee to use reasonable care to provide and maintain a safe switch and to keep it properly adjusted. The fact that it was not so adjusted and set to the main track, where, according to the regular schedule, train No. 40, going north, was expected to pass over it, raises a presumption that defendant's agents or servants, entrusted with that duty, were negligent, and casts upon defendant's lessee the duty of "going forward" with proof to the contrary. This is conceded.

At the request of defendant his Honor, upon this point, instructed the jury:

"The defendant is not an insurer of the life of its employees; the defendant is not, under the law, required to guarantee that (159) its employees shall be free from danger. The only duty that the defendant owed to the employee was to exercise that reasonable care which a man of ordinary prudence, under similar circumstances, would exercise to furnish the employees with a safe road-bed and a clear track. What would a man of ordinary prudence, under similar circumstances, do towards furnishing its employees with a safe road-bed and a clear track?

"The Court charges you that the only duty that the defendant owed to the plaintiff was to exercise that care which a man of ordinary prudence would exercise under similar circumstances to keep the switch set to the main line.

"If the jury should find from the evidence that the death of plaintiff's testator was caused by the derailment, which derailment was caused by the train or engine running into an open switch, then if the jury should find from the evidence that the switch was left open, or set to the sidetrack, by an employee of the company, who was not engaged at the time of the changing of the switch in working for the company, you will answer the first issue 'No.'

"If the jury should find from the evidence that the switch was set to the sidetrack by some person engaged in working for the company, and should further find from the evidence that, at the time, this person whomsoever it was, was not actually on duty, but that it was done by an employee from a reckless and evil disposition, you will answer the first issue 'No.'"

There was evidence tending to show that the switch was in good condition, worked all right; that immediately after the accident it was found with the lever latched down, the switch set to the sidetrack and the lock gone. That a train passing over it would not throw the switch. That on the morning after the accident, about 10 o'clock, the lock was found, about one hundred and two feet from the switch, in a (160) garden on the side of the track. That the switch was fastened

by a standard switch-lock which could only be unlocked by a standard switch-key. The regulations of the road required an employee to sign for a switch-key, and when he left the service of the road to return it. That whoever took the lock off must have unlocked it, and must have had a key, that being the only way to do it. There was testimony in regard to the shifting of cars on the siding on the evening and night of the day of the accident and of the persons about the switch. That some of those in the employment of defendant's lessee in charge of the shifting crew had left the employment and were not present at the trial. There was also evidence in regard to the passing of trains over the switch during the early part of the night. His Honor fairly, and, we think, under proper instructions, submitted the question bearing upon defendant's negligence to the jury. We have examined the prayers for special instructions, which were refused, and concur with his Honor in declining to give them. While the complaint states plaintiff's contention, in respect to the alleged breach of duty on the part of defendant, in several aspects, we think that they all amount to the general allegation that there was a failure to furnish a clear track. The evidence points only to a change, either negligently or purposely, of the switch. It is difficult to perceive how this could have been done by any one other than some person having a key. His Honor correctly told the jury that if done maliciously, even by an employee, defendant was not liable.

The real contest in the trial below and in this Court was directed to the alleged contributory negligence of plaintiff's testator. It appears that the switch is supplied with a switch-lamp having four lenses, with two opposite each other. The white and red lenses are at right angles to each other; when the switch is set for the main line it shows
(161) white up and down the main line and the red shows crosswise the track. When it is set for the sidetrack, the red shows up and down the main line and the white crosswise. The lamp sits on a two-pronged fork, nineteen feet high, eight feet north of the track. There is also a switch-target to indicate the position of the switch by day, the lamps by night. The box-cars were on the siding about 375 feet from the switch, with which engine No. 40 collided, turning over and killing the engineer. For the purpose of showing negligence by plaintiff's testator, defendant introduced a rule book, a copy of which was furnished to him and which he carried in his pocket. The rules relied upon are:

"*Rule 531.* When fixed signals are obscured by fogs or storms they must approach them at such a rate of speed as to be able to stop within the distance at which their indication can be distinguished. Should they be unable to see the indication of a signal without encroaching upon

the danger-point, protected by it, they must stop clear of such point and send the fireman ahead to ascertain the indication and be advised thereof by him before proceeding.

"*Rule 533.* In approaching siding and yards they must be especially careful as to the indication and position of all switches.

"*Rule 534.* They will be held accountable for passing a switch which is not in the right position for them. The absence of switch-lights should be taken as a danger-signal in accordance with the general rules.

"*Rule 535.* If the signal is missing, or does not show good light, from any main-track switch, they must report the fact by wire to the Superintendent from the first open telegraph office at which they stop."

There was evidence tending to show that on the night of the accident the lights had gone out. Plaintiff contended that, while these rules had been promulgated and were known to her testator, (162) they had been, for all practical purposes, or controlling the conduct of engineers on defendant's road, abrogated and overruled: 1. By habitual violation known to defendant's lessee. 2. By the promulgation and maintenance of schedules which rendered it impossible to observe the rules. For the purpose of making good this contention, plaintiff introduced Mr. Fogus, who testified that he was an engineer and had run fast trains over defendant's road—was then running from Greenville to Spencer, No. 35, fast mail. That No. 40 was a first-class train, having precedence over second-class and inferior trains. He was asked the number of switches between Greenville and Spencer. He answered 140. That the distance between Greenville and Spencer was 154 miles; that the schedule of No. 35 was four hours and fifty-two minutes, having 12 stops. No. 40 had four hours and forty-nine minutes, having 13 stops. That he was on the road every other night; a good part of the switch-lights were out. It depends on the weather how many were out, usually from 10 to 15; sometimes more, sometimes less. On stormy nights one-third to one-fourth would be out. Did not stop train when lights were out. Could not maintain the schedule and observe the rules in regard to switch-lights which were out. In regard to the time lost by stopping at switch-lights, it would depend upon the location of the switch: If down grade, not more than two or three minutes; if at the foot of a long grade, five or six; average four or five minutes—about one-half to one hour on an entire run. In response to the question: "Assuming the jury should find from the evidence the facts to be that as many as from 10 to 15 of the switch-lights, on an average, were out, from Greenville to Spencer, every night for a year prior to the 8th day of June, 1904, and that train No. 40 and similar first-class trains ran over the said track between said points, have you an opinion, satisfactory to yourself, as to whether said train could

(163) have been run between said points and kept their schedule, and at the same time obeyed the rule of the Southern Railway requiring said trains to stop at each of said switches where said lights were out? and if you have such an opinion, state what it is." To which he responded: "I have an opinion. I do not think that they could obey that rule and hold the schedule. When the switch-light is out, you can see the target about two telegraph poles away by an electric light. A train running 35 miles an hour up grade I could stop in 130 yards; down grade it would take double that time; on medium grade 250 yards. Telegraph poles 90 feet apart. Would report, at end of run, number of lights out on run. Had done so six or seven months when Haynes was killed."

James C. Wallace, introduced by plaintiff, testified that he worked on Southern Railway from 1890 to 1899. Fireman and engineer; ran from different points, including Greenville to Spencer. Had frequently observed switch-lights out; knew the rules. Had seen the switch-lights out and in bad condition many times when running as fireman with Mr. Tankersley as engineer. Could never tell that he paid any attention to lights being out by way that he handled brakes. He seemed to be anxious to make schedule. Ran with other engineers when switch-lights were out. They did not stop trains or pay any attention to them. Has run a passenger train as engineer from Charlotte to Spencer. Switch-lights often out; did not stop for them; did not slacken speed—did not have time. Was violating rules. Was discharged from service October, 1899.

There was evidence that the usual speed of first-class passenger trains passing the switch at "Ice-House Siding" was 35 miles an hour.

The defendant introduced Mr. Tankersley, an engineer, who testified that when approaching switches, with danger-signal or when no light was shown, he always stopped, contradicting plaintiff's witnesses;
(164) that he found but few lights out—not more than two or three, never more than four or five, on the run. When he approached a switch at which the light was not burning he observed the target, and if it was all right, would go ahead.

There was other testimony bearing upon the custom of engineers in passing switch when lights were out. All of this testimony was objected to by defendant, and to its admission exception was duly taken. We have deemed it best to discuss the several exceptions directed to its admission together.

The plaintiff, by way of meeting the defense of contributory negligence, based upon an alleged violation of the rule requiring her testator, when approaching the switch, in the absence of the white light, which indicated that the switch was properly set, to slow down until he could

control his engine, sought to show, as we have seen, that the rules had been so habitually violated as to nullify them, and that such violation was essential to the operation of the trains in accordance with the schedules prescribed. For this purpose the testimony was competent. The only way in which plaintiff could maintain her contention, if at all, was by showing such a number of violations, during such a space of time and under such circumstances, known to defendant's officers and agents, as would substitute the practice for the rule. Whether the testimony, if found to be true, measured up to the required standard to work the result to which it was directed, is another question.

In the same way it was material and relevant to plaintiff's contention to show the distance between Greenville and Salisbury, the schedule prescribed, the number of switch-lights, their usual condition, the length of time which would be consumed in conforming to the rule to stop, etc. The value of the testimony, the knowledge and capacity of the witnesses, their temper and bias, if any, was for the jury. Assuming that the light was out, or, as expressed by some of the witnesses, that the switch showed "a dead light," the rule imposed upon plaintiff's (165) testator the duty of treating it as a danger-signal and directed him how to act. The evidence was plenary that he knew of the rule, and, if in force, was under obligation to obey it.

Mr. Giles testified that he was conductor of No. 40 on the night of the accident. That the engine ran into the switch at 12:30 o'clock, when running 35 or 40 miles an hour, which was the usual speed for first-class trains at that point. He got off and went to engine, returned to the switch in two or three minutes to learn the cause of the wreck. Found switch set for sidetrack, lock gone and light out; everything else in good condition.

Other witnesses for defendant testified to substantially the same facts in regard to the condition of the switch, etc.

If the testimony, taken as a whole, was fit to be submitted to the jury for the purpose of basing a finding that the rule was not, in respect to plaintiff's testator, alive and in force, the sole remaining question is whether there is error in his Honor's rulings in regard to the instructions to the jury. In *Biles v. R. R.*, 139 N. C., 528 (at page 532), *Mr. Justice Hoke* says: "The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and enforced, and does not obtain when a rule is habitually violated to the knowledge of the employer or of those who stand to the employer as vice-principals, or when the rule has been violated so frequently and openly, and for such a length of time, that the employer could, by the exercise of ordinary

care, have ascertained its nonobservance. Under such circumstances the rule is considered as waived or abrogated." Citing Thompson on Neg., sec. 5404; Beach Cont. Neg., sec. 373. "Knowledge on the part of the master of such habitual violation need not be shown by (166) direct evidence that the officers saw it practised, but notice may be inferred from circumstances, as from its notoriety, long standing, and that it was known to the company's employees." 20 A. and E., 109; *Barry v. R. R.*, 98 Mo., 69. "Where an engineer placed his engine upon the main track of the road contrary to its prescribed rules, and it appeared the rule had been habitually violated by engineers for a period of at least one year, it was held that the question of defendant's negligence in not enforcing its rule was for the jury, and a finding of negligence by them was warranted." *Whitaker v. D. & H. Co.*, 126 N. Y., 544. *Sanborn, Circuit Judge,* in *R. R. v. Nickels,* 50 Fed., 722, discussing this question, says: "To hold that the defendant company could make this rule on paper, call it to plaintiff's attention and give him written notice that he must obey it and be bound by it one day, and know and acquiesce, without complaint or objection, in the complete disregard of it, by the plaintiff and all its other employees associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law." *R. R. v. Reagan,* 96 Tenn., 128; *R. R. v. Leighty,* ... Texas, ...; *Wright v. R. R.,* 14 Utah, 383; *Tullis v. R. R.,* 105 Fed., 554.

There is another view of the question regarding disobedience of the rules pressed upon our attention in the argument. Plaintiff says that it is shown by the testimony that between Greenville and Spencer there were 140 switches. That frequently as many as 10 or 15 of the lights were not burning. That engineers were required by the rules to report, and, the evidence shows, did report, this to the superintendent of the company, whose duty it was to attend to such matters. That (167) the officers and agents, therefore, knew of the conditions existing in this respect. That, in the light of such conditions, they promulgated and maintained a schedule for No. 40, and other fast mail trains, requiring a rate of speed which could not be maintained without violating the rule. That, thereby, they not only knew of such habitual violation, but, by imposing duties upon the engineers the performance of which rendered such violations necessary, abrogated the rule. That by reason of this condition the defendant is estopped from setting up and enforcing the rules to prevent a recovery for injuries sustained by its own negligence in failing to furnish a clear track and switch-lights.

The same contention was presented and discussed in *Hall v. R. R.*, 46

Minn., 439, in which *Mitchell, J.*, says: "The next point urged is that the plaintiff was himself guilty of contributory negligence in not reducing the speed of his train while running through the yard, so as to have it completely under control, as required by the rule, which counsel claims means that the speed must not be greater than that at which the engineer can stop his train within the distance that he can see danger ahead. This rule, like many of the others, does not command the doing or not doing of a particular specific act, but is one calling for the exercise of judgment and diligence on the part of the engineer, and must be construed in that view and considered in connection with the other rules of the company and responsibilities imposed upon engineers. It would seem that the construction which plaintiff himself put upon this rule is a reasonable one, that is, that he should have his train so under control that he could stop it before reaching the danger-point, if the proper signals were seasonably given him. But even if the rule, if standing by itself, might mean what defendant claims, yet, as to plaintiff, it was clearly modified by the schedule of time according to which these trains were required to be run, and were actually run, presumably with the knowledge and at the direction of the (168) defendant's governing officers. The plaintiff could not conform to the time-table, and, at the same time, keep his train under complete control, in the sense in which defendant claims that term is used in the rules. If compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his employee, negligence cannot be imputed to the employee for not following the general rule."

The opinion from which we have made this citation is a strikingly able one, and much that is said in it is applicable to this appeal. It is cited by Judge Bailey in his work on "Personal Injuries," sec. 3455. The same doctrine is applied in *R. R. v. Raney,* 89 Ind., 453. *Elliott, J.*, writing for the Court, says: "When the orders given to an engineer by the governing or superior officers of the company require him to run in a different manner from that prescribed in the rules, and other trains of the class of that placed in his charge are so run with the knowledge and by the direction of the governing officers, then negligence cannot be imputed to the engineer although he does not follow the general rules. In this instance there was evidence fully justifying the jury in finding that the orders embodied in the schedule in the direction of the appellant's officers, and involved in the usual practise of the company, annulled and rendered ineffective its general rules, * * * the engineer was not guilty of contributory negligence in not seeing the condition of the switch. While, under the rules of the company, it was his duty to exercise great care and vigilance, he was not chargeable with negligence because he did not see what men could

not have seen. * * * In addition to this, he knew he was entitled to a clear track, and he had no reason to suppose that it had been made dangerous by the culpable negligence of others." *R. R. v. Flynn,* 154 Ill., 448.

These authorities, which meet our approval, amply sustain
(169) plaintiff's contention in this respect. The evidence in regard to the schedule, distance, and number of switches was uncontradicted. Two witnesses testified to the number usually not lighted and two others swore to a much smaller number. The uncontradicted testimony shows that No. 40 was running at the usual speed when it reached the switch and just about schedule rate of speed. We think that there was evidence proper to be submitted to the jury upon both aspects of the controversy.

His Honor, in charging the jury upon the second issue, gave the instructions asked by defendant respecting the duty of the engineer to keep a careful watch and look-out for obstacles and defects in the track and condition of the switches, and his duty to take precaution to protect his train. Among other instructions, he said to the jury: "That under the rules of the company, it was the duty of the plaintiff, in approaching yards, to be especially careful as to the location of switches, and if the jury should find from the evidence that the deceased, by being specially careful, could have seen that the switch-light was out, in time to have stopped the train, you will answer the second issue 'Yes'—if the rule was alive and enforced." His Honor had before this instructed the jury in regard to the duty imposed by the rule and what must be shown before it could be treated as abrogated. In his general charge he adopted the language used by us in *Biles v. R. R., supra.*

The defendant took a number of exceptions to the refusal to give instructions regarding the condition of the road-bed. There was no controversy in regard to the road-bed. The answer to the first issue depended upon the view which the jury took of defendant's testimony in regard to the condition of the switch, the persons who used it during the day and night of the accident, and persons who had the key, etc. These were peculiarly questions for the jury.

It is not for us to conjecture how or by whose agency the
(170) plaintiff's testator, while in the discharge of his duty, relying upon defendant's lessee, his employer, to furnish him a clear track, was carried to his death by an open switch and a "dead light." It is not clear to our minds why in the defendant's shifting yard, with so many of its employees moving about, having ample opportunity to watch and see the condition of the switch and that the light was out, it was left to the engineer to save himself, and his train loaded with passengers, from destruction. Doubtless the jury thought that the man

who threw the key into the garden was the one who negligently left the switch set to the siding, and after seeing, when too late, the terrible disaster resulting from his negligence, divested himself of the evidence of his guilt, and when the trial came was not to be found. To say the least of it, much of the testimony was unsatisfactory, and the absence of two persons who had an opportunity to know something of the management of the shifting-engine on the day and night of the disaster justified the jury in finding that the defendant had not satisfactorily removed the burden which the law cast upon it. The engineer is dead. The conductor says that in two or three minutes after the accident he went to the switch; it was set to the siding and the light was out. It devolved upon the defendant's lessee to explain this condition of its track. It was its duty to use reasonable care to keep the rail to the main track and to keep a light burning. It failed in both.

Upon a careful examination of the entire record and the several exceptions made by defendant, we do not discover any error of which it can complain. The judgment must be

Affirmed.

Cited: Overcash v. Electric Co., 144 N. C., 577; *Winslow v. Hardwood Co.*, 147 N. C., 279; *Bordeaux v. R. R.*, 150 N. C., 531; *Boney v. R. R.*, 155 N. C., 111.

(171)

CREIGHTON v. WATER COMMISSIONERS.

(Filed 27 November, 1906.)

Eminent Domain—Damages—Evidence—Value—Existing Easement. Pleadings.

1. In an action by a landowner to recover damages for land appropriated for the purposes of a waterworks company, evidence as to the character of the land and the value of the crops raised prior to the appropriation was competent to aid the jury in determining the market value of the land.
2. In an action by a landowner to recover damages for land appropriated for the purposes of a waterworks company the Court erred in excluding a deed, offered by defendant in mitigation or reduction of damages, executed by plaintiff to a company to whose rights defendant succeeded, which imposed an easement upon a portion of the land in controversy of like kind, but less in degree.
3. Matters in mitigation of damages may be shown under an answer containing a general denial only, and need not be specially pleaded.

ACTION by H. L. Creighton and wife against Board of Water Commissioners of Charlotte, heard by *Bryan, J.*, and a jury, at the June Term, 1906, of MECKLENBURG.

There is allegation and evidence tending to show that defendant, under and by virtue of power given in its charter, in the exercise of the right of eminent domain, has entered upon certain lands of plaintiffs and seeks to appropriate same and impose an easement thereon for the necessary and public purposes contemplated by the statute.

Plaintiffs, in accordance with the provisions of the law, instituted this proceeding to recover damages sustained by reason of the acts of defendant; and on issues determinative of different features of this controversy there was a verdict and judgment for plaintiffs, and defendant excepted and appealed.

(172) *Maxwell & Keerans* for the plaintiffs.
Hugh W. Harris for the defendant.

HOKE, J., after stating the facts: The objections urged to the validity of this trial are to the rulings of the Court on questions of evidence.

Defendant excepted:

1. To the admission of evidence indicated in the following question and answer:

Q. Now, Mr. Creighton, state to the jury what sort of meadow-land it is, or rather was, before the dam was erected and the water was placed over the meadow-land (which is admitted, I believe, in the pleadings). Ans. I have been working with it about thirty years, and it was certainly good meadow—just as fine as anybody's meadow in the country.

Q. Can you state the value of the hay you got off of it from year to year? A. I never weighed it just exactly how many pounds. I would get four to six to eight two-horse loads.

This testimony was offered and admitted to show the character and quality of the land appropriated, and was clearly competent; tending to establish a relevant fact to aid the jury in determining therefrom the market value of the land—one of the principal questions in dispute. We think the exception is without merit. *Brown v. Power Co.*, 140 N. C., 341.

Defendant further excepts because the trial Court excluded a deed offered by defendant in mitigation or reduction of damages. The deed was executed by plaintiff in November, 1887, and conveyed to Charlotte City Waterworks four acres of the land included in the controversy, and granting to the City Waterworks a privilege or easement as follows:

"And it agreed that the party of the second part, its successors and assigns, may dig, ditch, and lay pipe for the purpose of conduct-
(173) ing waters through the same across the lands of the parties of

the first part, with the right to so conduct, provided that the party of the second part shall pay any and all damages done to growing crops of the parties of the first part or their tenants caused by reason of digging said ditches."

In excluding this deed we think there was error, which entitles the defendant to a new trial.

We see no reason why, in ascertaining the damage done to the land by the easement now to be imposed upon it, the jury should not be allowed and required to consider the existence of an easement formerly granted and now held by defendant covering a portion of the same land and imposing a burden upon it of like kind, but less in degree or quantity. The real damage done to the land is the difference between the burden now sought and the one already imposed upon the land by plaintiff's former deed. There is also well-considered authority for this position. *Crowell v. Beverly,* 134 Mass., 98.

It is urged by plaintiff, in support of the ruling: That no connection is shown between the present defendant and the Charlotte City Waterworks, the grantee in the deed; this company being, at that time, a private corporation, and entirely distinct from the present defendant.

The answer is that plaintiff's complaint, in section 2, makes specific reference to this same deed, and alleges that the present defendant has "taken, holds, and controls the land conveyed in same by virtue of its charter," etc.

And section 3 of the defendant's answer avers in admission of this allegation:

"That under and by virtue of said Act of the Assembly, the defendant became vested with all the rights and franchises, privileges and easements, and all the powers and duties of the said municipal corporation of the City of Charlotte, pertaining to its water-works, and of the "Charlotte City Waterworks Company," a corporation (174) duly created by an act of the General Assembly of North Carolina, ratified the 10th day of March, A. D. 1881."

Again, it is urged that the ruling is correct because the rights and privileges conveyed in the deed are not set up and claimed in the answer; and this in accord with the recognized principle that the right to an easement as a defense to an action must be pleaded specially, and cannot be taken advantage of under the general issue, for which plaintiff cites us to 7 A. and E., Pl. and Pr., 258, 259.

We agree with plaintiff that, as a general proposition, this position is well taken.

It is true that, at common law, matter in mitigation of damages, for which purpose plaintiff claims to have offered this deed, could or should

not have been pleaded, but was given in evidence under the general issue.

And, in the absence of specific requirement to the contrary, we are of opinion that, under The Code, facts in mitigation as a general rule, not being issuable matter, are not required to be set up by plea. And the weight of authority, we think, justifies the statement on this subject, 13 A. and E., 182, that "Matters in mitigation of damages may, in most jurisdictions, be shown under an answer containing a general denial only, and need not be specially pleaded." Citing authorities from California, Michigan, Massachusetts, and other States.

But in setting up an easement, particularly one which rests in a written deed, this is not strictly matter in mitigation. While it may not go to the entire demand so as to afford full protection to the extent of the right sought to be acquired, it is a bar to relief *pro tanto,* and the same reasons which require that such a right should be set up when claimed in bar of all relief exist when it is offered in bar of part of the relief; though, in terms, it may be offered in reduction of dam-
(175) ages.

We do not think, however, that the position is available to plaintiff on the facts of the case before us; for we hold that the rights referred to by the deed in question are sufficiently set forth in the pleadings to permit that the same should be received in evidence for the purpose for which it was offered.

In section 3 of the answer, already quoted, defendant alleges that it holds "all the rights, franchises, privileges and easements of the Charlotte City Waterworks," grantees in this deed.

While this might not ordinarily be sufficiently definite and precise, it is rendered so, we think, by the positive allegation in section 2 of the complaint, that defendant, under its charter, has "taken, holds, and controls the land by virtue of this very deed" to the Charlotte City Waterworks.

The existence and contents of this deed are, therefore, fully disclosed in the pleadings.

The allegation of section 3 of the answer, otherwise, perhaps, too general, becomes definite and precise as to this particular claim, and the deed should have been received in evidence. For this error there will be a new trial on all the issues.

New Trial

Cited: Myers v. Charlotte, 146 N. C., 248; *New Bern v. Wadsworth,* 151 N. C., 313.

(176)

ROBERTS v. RAILROAD.

(Filed 27 November, 1906.)

Railroads—Assaults—Master and Servant—Scope of Employment.

In an action against a railroad company for damages for an alleged wrongful assault by its servant, the Court correctly charged the jury that "where a servant does a wrong to a third person the master must answer for the act, if it was committed in the scope and course of the servant's employment and in furtherance of the master's interests," and committed no error in refusing plaintiff's prayer that if the assault was committed by the servant while engaged in the performance of his duties, the company was, in any event, responsible.

ACTION by T. J. Roberts against Southern Railway Company for damages for assault and battery, heard by *Bryan, J.*, and a jury, at the June Term, 1906, of MECKLENBURG.

The evidence shows that plaintiff, an employee of the defendant, on its yard at Charlotte, was assaulted by one Bradley, the yardmaster, and plaintiff's superior.

Plaintiff's account of the difficulty tended to show that plaintiff, having made some mistake in switching a train onto the wrong track, went into the office; and some time thereafter, and within a short time, Bradley, the yardmaster, came in and spoke to plaintiff about the mistake, and plaintiff called Bradley a swell head, and the assault was then committed.

Bradley's account was that he spoke to plaintiff about the mistake when it was made, and then he, Bradley, went into the office. That later, plaintiff came in and commenced to quarrel with witness, and the fight followed. Bradley further testified that the assault was not at all serious, and both he and plaintiff were off duty when it occurred.

Plaintiff contended that though Bradley's successor may have been then on the yard and in charge, that Bradley had still con- (177) tinued to work and was engaged in his duties at the time of the assault.

Plaintiff asked the Court to charge that on the testimony, if believed, the jury should answer the first issue as to a wrongful assault "Yes," which was declined, and the plaintiff excepted.

The plaintiff further asked the following special instructions: "That if the jury find from the evidence that Bradley, the servant of the defendant, while in the discharge of the work of the defendant company, assaulted the plaintiff, they will answer the first issue 'Yes.'" Refused, except as given in the general charge, and plaintiff excepts.

"That if the jury find from the evidence that the plaintiff was assaulted by Bradley, the servant or employee of the defendant, while

the plaintiff was on duty doing the work of the defendant company, and that such assault was made by the servant Bradley in consequence of a dispute which arose over the manner in which plaintiff's work was being done or had been done, the jury will answer the first issue 'Yes,' although the jury may find that Bradley had been relieved for the time by the arrival of another yardmaster." Refused, except as given in the general charge, and plaintiff excepts.

"That if the jury find that Mr. Blackwood had relieved Mr. Bradley from his duty as yardmaster before the difficulty commenced between the plaintiff and defendant's employee, Bradley, the defendant is nevertheless liable in damages for the assault of Bradley on the plaintiff, unless Bradley had actually quit his duties before he made the assault upon the plaintiff, about the defendant's business, and before he had actually gone off duty for the defendant, the jury will answer the first issue 'Yes.'" Refused, except as given in the general charge, and plaintiff excepts.

The Court, among other things, charged the jury that where
(178) a servant does a wrong to a third person, the master must answer for the act if it was committed in the course and scope of the servant's employment and in furtherance of the master's business. And, on the request of plaintiff, further charged that the defendant company is responsible in damages for the wrong done plaintiff by the employee of the defendant while such employee or servant was acting within the scope of his employment.

And, in response to a prayer of the defendant, the Court charged that if the jury find from the evidence that Bradley had been relieved from duty by the day yardmaster, Blackwood, before the fight occurred, the answer to the first issue should be "No."

The plaintiff excepted to the refusal of the Court to give his prayers for instructions and to the prayer given at the request of the defendant.

The jury answered the first issue as to wrongful assault "No."

Judgment on the verdict for the defendant, and plaintiff excepted and appealed.

Morrison & Whitlock for the plaintiff.

W. B. Rodman and *L. C. Caldwell* for the defendant.

HOKE, J., after stating the case: The Court, among other things, charged the jury as follows:

"The Court further charges you that where a servant does a wrong to a third person, the master must answer for the act if it was committed in the scope and course of the servant's employment and in furtherance of the master's interests."

This is a correct general principle which has been frequently applied to different cases in this and other jurisdictions, and on the facts disclosed by the testimony is as favorable as plaintiff had any right to ask. *Jackson v. Telegraph Co.,* 139 N. C., 347; *Pierce v. R. R.,* 124 N. C., 83.

And the charge of the Court below in giving the defendant's prayer for instructions, while not under all circumstances a defi- (179) nite or precise test of responsibility, as applied to the facts of this case, is in accord with the best-considered decisions. *Palmer v. R. R.,* 131 N. C., 250. Nor was any error committed in refusing plaintiff's prayers for instructions. They all embody the idea that if the assault was committed by Bradley while engaged in the performance of his duties, the company is, in any event, responsible. The Court is confirmed in this interpretation of the prayers by the statement in the brief of plaintiff's attorney in connection with them, as follows:

"We think that the true test is whether or not Bradley was still engaged in and about the duties pertaining to his position when the assault was committed."

And we hold that this is not the correct principle. The test is not whether the act was done while Bradley was on duty or engaged in his duties; but was it done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do?

As held in *Sawyer v. R. R.,* 142 N. C., 7, quoting from Wood on Master and Servant, sec. 307: "The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be 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 written orders."

And again from the same author, at sec. 288:

"An employer who leaves to an employee to do certain acts for him according to the employee's judgment and discretion is answer- able for the manner or occasion of doing it, provided it is done (180) *bona fide* and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness and wholly outside of the duties conferred upon him."

The distinction here dwelt upon is very well stated in *Mott v. Ice Co.,* 73 N. Y., 543, as follows: "For the acts of a servant in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible, whether the act be done negligently, wan-

tonly, or even willfully. The quality of the act does not excuse. But if the employee, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible." And the general doctrine on the subject is fully considered in the case of *Daniel v. R. R.*, 136 N. C., 527.

The error in plaintiff's position, as contained in the prayers for instructions, is that they make the responsibility depend on whether the act was done by Bradley, the yardmaster, while engaged in his duties, and leave entirely out of consideration the questions whether the act was done in the scope of Bradley's employment and in prosecution and furtherance of the powers entrusted to him, and whether it was not an independent tort on the part of Bradley; in which case, the employer is not responsible. Jaggard, Torts, 279. The same author says, at p. 279: "The question of what is or is not an independent tort of the servant cannot, it seems, be referred to any definite rule, but is ordinarily a question of fact for the jury."

Applying these rules to the facts of the case before us, there has been no error committed which gives the plaintiff any ground of complaint.

While the testimony differs considerably on the merits of the controversy as between plaintiff and Bradley, there is no substantial
(181) difference as to the facts which do or do not tend to inculpate the defendant company.

Both plaintiff and defendant testify that the conduct of plaintiff in changing, or failing to change, the switch had passed at the time of the quarrel. Whether plaintiff went into the office and Bradley afterwards came in, or Bradley went into the office and was later followed by plaintiff, does not affect the question in this aspect of the case. Both statements show that the conduct of plaintiff about the switch as a physical act was a closed incident; and that at the time Bradley was neither directing plaintiff about his work nor giving him instructions about it for the future; nor even physically correcting him about it in the past. It was simply a quarrel that two employees had about a past event, in which Bradley was clearly acting of his own mind and will as an independent agent, and in which plaintiff is not at all free from fault.

No Error.

Cited: Stewart v. Lumber Co., 146 N. C., 69, 81, 114; *Marlowe v. Bland*, 154 N. C., 143; *Dover v. Mfg. Co.*, 157 N. C., 327; *Bucken v. R. R., Ib.*, 447; *Fleming v. Knitting Mills*, 161 N. C., 437, 439.

MACHINE COMPANY v. CHALKLEY.

(Filed 27 November, 1906.)

Sales—Contracts—Requisites—Mutual Mistake as to Subject-matter—Conversion—Liability—Counterclaim.

Where the plaintiff proposed to sell a certain kind of machine and the defendant to buy another and quite a different kind, there was a mutual mistake as to the subject-matter of the sale, and the minds of the parties not having met in one and the same intention, there was no contract, but the defendant, having received and converted to his own use the machine shipped to him, is liable for its value, and his counterclaim for the difference in the price of the two machines must fail.

ACTION by Charles Holmes Machine Company against D. B. and M. H. Chalkley, trading as Stanton Tanning Company, heard by *Councill, J.,* and a jury, at the June Special Term, 1906, of (182) WILKES.

The plaintiff brought this action to recover the sum of two hundred and twenty-five dollars, it being the balance due on the purchase-price of a remodeled scouring and setting machine, and the possession of a Sawyer measuring machine, or if the same cannot be had, then for two hundred and fifty dollars, the value thereof, and one hundred dollars for its detention and deterioration, all of which property it alleges was sold at one and the same time to the defendant. There was no dispute about the sale of the scouring and setting machine, and defendant admitted his liability for the amount of the balance due on the price of that machine; but he averred in his answer that he had not bought the Sawyer measuring machine, which was a side or half-hide measuring machine, whereas he contracted to purchase of the plaintiff and the latter agreed to sell to him a whole-hide measuring machine, and he sets up a counter-claim for the difference in the price of the two machines, as damages, the amount of the said difference being six hundred and fifty dollars. The contract was made by correspondence. The plaintiff advertised for sale a Sawyer measuring machine, and the defendant, referring to the advertisement, inquired by letter for the price of the machine, describing it as a Sawyer whole-hide measuring machine. In the correspondence which followed the plaintiff agreed to sell a Sawyer measuring machine, as it is described in the advertisement, at $250, and the defendant to buy a whole-hide measuring machine at that price. The correspondence was lengthy, but this is the substance of it, so far as it is material to this case. The defendant received the measuring machine and sold it for $250—the price he gave for it. It is admitted that the plaintiff is entitled to recover the full amount of its claim, unless the defendant can recover on his counter-claim.

The Court charged the jury that if they found the facts to be
(183) as set out in the correspondence, they should return a verdict in favor of the plaintiff for the full amount of its claim. The defendant excepted. The issue and answer thereto were as follows: "What amount, if any, is the plaintiff entitled to recover of the defendant? Ans. The sum of $475, with interest from 15 August, 1902, until paid." Judgment was entered on the verdict, and the defendant appealed.

Finley & Hendren and *F. D. Hackett* for the plaintiff.
W. W. Barber for the defendant.

WALKER, J., after stating the case: The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium,* or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforcible. Wald's Pollock on Contract (3 Ed.), p. 3. It is necessary that the parties should be assured by mutual communication or negotiation that a common intention exists and that they mean the same thing in the same sense. *Ibid.* (1 Ed., 1881), p. 5. It must be remembered, though, that this common intention is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. *Ibid.* (3 Ed.), p. 4. Nor is the contract to be ascertained by what either one of the parties thought it was, but by what both agreed it should be. *Prince v. McRae,* 84 N. C., 674. The law proceeds not upon the understanding of one of the parties, but upon the agreement of both. *Lumber Co. v. Lumber Co.,* 137 N. C., 436, where the authorities are collected. Subject to this rule, if the treaty of the parties is based upon a material mistake of fact of such character that there is no mutual assent to one and the same thing, then no contract comes into existence, as, in contemplation of the law, there has been a failure to agree. Tiffany on Sales, p. 108.

In this case, the difference between the parties is as to the
(184) subject-matter of their contract or as to what was sold by one and bought by the other. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem.*" *Utley v. Donaldson,* 94 U. S., 29. It has also been said that "as mutual assent is necessary to the formation of the contract, it follows that an error or mistake of fact in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really assenting to something different,

notwithstanding the apparent mutual assent." 24 A. and E. (2 Ed.), 1034. And this doctrine, of course, applies to a mistake of the parties as to the subject-matter, as is there stated. In a case much like this one it was held that the contract must be on the one side to sell, and on the other side to accept, one and the same thing. *Thornton v. Kempster,* 5 Taunton, 786 (1 E. C. L., 265). Where there is a mistake as to the subject-matter of the sale, it affects the substance of the contract by eliminating its essential element, the mutual assent of the parties, upon the principle embodied in the maxim of the civil law, *"Cum in corpore dissentitur, apparet nullam esse acceptionem." Gardner v. Lane,* 94 Mass., 39. So in the case of *Kyle v. Kavanaugh,* 103 Mass., 356, the Court uses language peculiarly applicable to the facts of this case: "If the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject-matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This rule is in accordance with the elementary principles of the law of contract." The following cases are also in point: *Wheat v. Cross,* 31 Md., 99; *Sherwood v. Walker,* 66 Mich., 568; *Cutts v. Guild,* 57 N. Y., 229; *Calkins v. Griswold,* 11 Hun. (N. Y.), 208; *Sheldon v. Capron,* 3 R. I., 171; *Ketchum v. Catlin,* 21 Vt., 191; *Spurr v. Benedict,* 99 (185) Mass., 463.

Let us now apply the principle thus established to the facts of this case. The correspondence plainly shows, as his Honor held, that the parties were mutually mistaken as to what was being sold. The plaintiff advertised for sale the very machine which was shipped to the defendant, it being the one and the only one it proposed to sell at $250. The defendant accepted the proposal, but not according to the terms in which it was made. The plaintiff proposed to sell one thing and the defendant to buy another and quite different thing. There is no other construction to be placed upon the correspondence between the parties. There was a mutual mistake as to an essential matter, and the minds of the parties have therefore not met in one and the same intention. There is no fraud alleged in this case, but nevertheless it results that there was no contract. The defendant, though, has received and converted to his own use the machine shipped to him, and as it was not his property, but belonged to the plaintiff, he is liable for its value, which is admitted to be $250, that being the amount realized from the sale of it by him. Tiffany on Sales, pp. 108 and 109. In this view of the case, the counter-claim, as a matter of course, must fail.

It does not appear that there is any machine known in the trade as a "whole-hide measuring machine," though there may be one of that kind. Assuming that there is, the defendant says in his counter-claim that it

is worth $900, and seeks to recover the difference in the price of the two machines. The defendant was conducting a tannery at Stanton, N. C., and intended to use the machine in his business and may be presumed to have had knowledge of the value of such machines. It seems that he expected to buy a machine worth $900 at the much reduced price of $250. The great disparity between the real value of the machine which the defendant thought he was buying and the price at which the
(186) plaintiff's machine was advertised for sale, it would seem, was sufficient to excite his inquiry as to whether he and the plaintiff really understood each other, if not to induce the belief that there was a mistake. But however this may be, they did not agree, and there was no sale by which the defendant acquired title to something he did not get, but which, as he alleges, he should have received.

No Error.

MORRISON v. TEAGUE.

(Filed 27 November, 1906.)

Marriage Licenses—Register of Deeds—Reasonable Inquiry—Question of Law.

In an action against a Register of Deeds to recover the penalty under Revisal, sec. 2090, for issuing a marriage license contrary to its provisions, where the uncontradicted evidence showed that the Register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the Court should have given the plaintiff's prayer for instruction that as a matter of law defendant failed to make reasonable inquiry as to the age of plaintiff's daughter.

ACTION by State on relation of W. P. Morrison against G. C. Teague and sureties on his official bond, heard by *Bryan, J.*, and a jury, at the October Term, 1906, of ALEXANDER.

Action to recover penalty under sec. 2090, Revisal, for issuing marriage license for the marriage of relator's daughter, under the age of eighteen, without the written consent of relator and without having made reasonable inquiry before issuing the license as required by law. From the verdict and judgment rendered, relator appealed.

(187) *R. B. Burke, L. C. Caldwell, Z. V. Long,* and *Harry P. Grier* for the plaintiff.

J. L. Gwaltney, J. H. Burke and *R. Z. Linney* for the defendant.

BROWN, J. The plaintiff testified that his daughter, Ina May, was seventeen years four months and six days old when she was married

to Ross Kennedy, her first cousin, who resided in Nebraska, and that she had the appearance of a well-developed woman; that she lived in Iredell County with plaintiff, some twelve miles from Taylorsville and eight miles from Statesville. The defendant Teague, Register of Deeds of Alexander County, issued the marriage license, upon the application of Ross Kennedy, and under it the marriage was duly solemnized in said county. At the time the application was made for the license the young lady was not present, and as there is no evidence that the Register knew her, we think her physical appearance may be considered as irrelevant.

What transpired at the time Kennedy applied for license appears solely in the testimony of witness Matherson, as follows: "I live in Taylorsville; in April, 1905, I was in the office of the Register of Deeds, Mr. Teague, with Mr. Long, when he asked Mr. Teague about issuing the license. Teague said he had no written permission; said he inquired of Kennedy and a man with him about the girl's age; said he knew neither of them, but issued the license and made no further inquiry of any one." Cross-examined: "Teague said he made inquiry of them why they applied for license in Taylorsville; he said they said the girl lived in an adjoining county, and that it was nearer to Taylorsville than it was to Statesville; that he inquired of both; said they appeared to be nice, decent men; he said they both said they knew her age and she was over eighteen years of age, and said Kennedy swore she was." Defendant offered no evidence.

Plaintiff requested the Court to charge the jury as matter of law that defendant Teague in any view of the evidence failed to (188) make reasonable inquiry as to the age of plaintiff's daughter. Refused. Plaintiff excepted. The Court instructed the jury that the evidence being uncontradicted, he held as a matter of law that the defendant had made reasonable inquiry as to the age of Ina May Morrison, and if the jury believed the evidence they would answer the third issue "No," and the fourth issue, "Nothing." Plaintiff excepted.

The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that upon a fair interpretation of the words "reasonable inquiry," the charge of his Honor should be sustained. Notwithstanding we find ourselves unable to reconcile this view with very recent decisions of this Court, we agree with counsel that upon the evidence in the record the question was one of law, and that his Honor was correct in so holding. The uncontradicted evidence shows that the Register took the word of the prospective bridegroom and his friend as to the age of the young lady and made no further inquiry of any one; that the Register did not know either Kennedy or his friend. The Register's suspicions seem to have been aroused, for he inquired why

they applied for license in Taylorsville, as the girl lived in Iredell; nevertheless, he made no further inquiry.

We think that under our decisions his Honor should have given the plaintiff's prayer for instruction, and that he erred in the instruction he gave. The subject is fully discussed by *Mr. Justice Connor* in *Furr v. Johnson,* 140 N. C., 157; *Trolinger v. Boroughs,* 133 N. C., 312.

Possibly on the next trial defendant may offer evidence which will tend to prove that he made reasonable inquiry. In this record there is none.

New Trial.

Cited: *Joyner v. Harris,* 157 N. C., 301.

(189)

IVEY v. COTTON MILLS.

(Filed 27 November, 1906.)

Contracts — Collateral Agreement — Ambiguous Terms — Parol Evidence. Master and Servant—Discharge of Servant—Burden of Proof—Depositions. Notice—Time and Place—Objections—Waiver—Practice—Evidence—Letters—Notice to Produce—Copies.

1. Where, in an action to recover upon a contract for services, plaintiff introduced a letter from defendant which fixes the compensation, but does not set forth the terms of the employment nor the nature of the services expected of plaintiff, and it shows that the entire contract was not reduced to writing, it was competent to resort to parol evidence to explain the ambiguous terms and to fill out the terms of the contract and to show that the plaintiff represented himself competent to superintend the work he was about to undertake.
2. Where one contracts to serve another there is an implied representation that he is competent to discharge the duties of his position and is possessed of all the requisite skill which will enable him to do so, and the breach of any material stipulation, whether express or implied, which disables the servant to discharge his part of the contract or which results in his inability to do so, furnishes good ground for the master to terminate the contract and is a valid and legal excuse for the discharge of the servant.
3. Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appear by counsel and cross-examines the witness without making any objection at the time, this is a waiver as to any defect in the notice.
4. Exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon.
5. The Court properly excluded a paperwriting which plaintiff "alleged was a substantial copy of the greater part of his letter to the defendant," when the defendant was not notified to produce the original.

6. In an action to recover upon a contract for services, the Court correctly charged that the burden was upon the defendant to show good legal excuse for discharging the plaintiff, and that if the plaintiff failed to perform his duty as superintendent, the defendant had the right to discharge him, and that if the plaintiff had performed his part of the contract, and did not voluntarily withdraw from the service, they should find that he was wrongfully discharged.

(190)

ACTION by G. F. Ivey against Bessemer City Cotton Mills, heard by *Cooke, J.*, and a jury, at the February Term, 1906, of CATAWBA.

This action was brought to recover upon a contract for services. The plaintiff was employed by defendant as superintendent of its mill on 22 March, 1902, at $1,600 per annum and entered upon the discharge of his duties 1 May, 1902. The plaintiff introduced a letter, dated 22 March, 1902, from defendant to him, which is as follows: "Yours of the 21 inst. received and noted, and you can come on as soon as you choose at the rate of sixteen hundred dollars ($1,600) per annum from now until 1 January, 1903, and at the rate of $1,800 per annum as long as it is mutually agreeable after that time, and this shall be a contract to this effect, and I hope you will be here many years. I simply want the best results, and as long as you can give these, I see no reason to change. Ours is a close corporation, and you have few to please. We will begin work on striped madras, out of 26 warps and 26 fillings, 64 and 54, and weave 32-inch goods. I mean to finish 32-inch goods, and I presume will be 33¾ to 34-inch rough; and you will please write Charlotte Supply Company about reeds, harness, etc., at once. They will want to begin work on the harness. I enclose you letter to C. Supply Company. I will build you a six-room house at once near the mill in a nice place. I leave Monday night and will be gone a week or ten days."

The defendant, over the plaintiff's objection, introduced evidence tending to show that the plaintiff had represented himself to be competent for the work he was about to undertake, and also evi- (191) dence tending to show that the plaintiff acted as superintendent of the mill and took control and direction of the construction work from 1 May, 1902, until 25 October, 1902, at which time the defendant had discovered that he was incompetent and not qualified for the work for which he was employed, he having made many serious mistakes in the manner of performing the work. The defendant thereupon threatened to discharge him, but he asked to be continued in the service, as it would injure his reputation as a mill superintendent to be discharged at that time, and he could not get a place anywhere else. He then promised that if he was kept in the employment of the defendant for another month that at the end of that time he would resign, and he signed a paper dated 25 October, 1902, agreeing that the contract would

expire on 1 December, 1902. The defendant then agreed to retain him upon condition that no mistakes were made thereafter. After a few days the defendant discovered that the plaintiff had made other mistakes, and that it would have to replace machinery put up under his supervision and direction. The plaintiff was notified of this, and admitted that he had made the mistakes, and asked to be allowed to resign at once. This was on 30 October, 1902. He did resign, and was paid his salary in full to that date.

There was evidence on the part of the plaintiff in contradiction of that of the defendant as to plaintiff's representation that he was a competent mill man and as to what took place 30 October, 1902. The defendant denied that he had resigned after that date. He now sues for his salary alleged to be due for the months of November and December, 1902.

The defendant introduced the deposition of James L. Wilson to prove that the plaintiff had represented himself to be competent for the position of superintendent of the mill. The plaintiff objected to the deposition because the defendant had served notice to take this depo-
(192) sition in Philadelphia, Pa., on a certain day and also a notice to take the deposition of another witness on the same day at Fayetteville, N. C., though the latter deposition was not taken.

The Court found as facts that the deposition of Wilson was opened by the Clerk and passed upon by him after due notice, and allowed to be read "subject to exceptions," and as no exception was then made to the service of the notices to take two depositions in widely separated places, the Court ruled that the exceptions reserved applied only to the competency or admissibility of the evidence and not to the validity of the deposition. The Court further found that no such objection as is now urged was made at the opening of the trial or before the trial commenced, nor until after the plaintiff had rested his case and the defendant had introduced the greater part of its evidence, the plaintiff's counsel then agreeing to waive all objections to the competency of evidence. Thereupon the Court overruled the objection and admitted the deposition. The witness testified that Ivey gave him to understand that he was a capable superintendent and understood the business he was agreeing to undertake.

The Court submitted two issues, one as to whether the plaintiff had been wrongfully discharged and the other as to the damages, and charged the jury that as the defendant discharged the plaintiff, the burden was upon it to justify the discharge, but that the parties to the contract could at any time, by mutual consent, put an end to it; and if the jury found as a fact by the greater weight of the evidence, the burden being upon the defendant, that the plaintiff failed to perform his

duty as superintendent, the defendant had the right to discharge him, and they would answer the issue "No"; or if they found that there was a disagreement between the parties in respect to the manner of performing the work, and the plaintiff, thereupon, voluntarily resigned his position and accepted the balance due him to the time of his resignation in full settlement of the contract, they should answer (193) the issue "No"; but if they found that the plaintiff did not fail to perform his part of the contract and did not resign, they should answer the issue "Yes."

The plaintiff excepted to the refusal of the Court to charge the jury, at his request, that if the defendant knew that the plaintiff was incompetent at the time he was employed, his incompetency would not excuse the defendant from discharging him; and he also excepted because the Court, in response to the defendant's requests one and four, charged the jury that if the plaintiff hired himself out to the defendant as being competent and having experience in the kind of business he was employed to superintend, and it turned out that he was not competent and did not have such experience and he failed to properly perform the duties of his position or he neglected to perform his duties, the defendant had the right to discharge him, and they should answer the first issue "No."

There was a verdict for the defendant and judgment was entered thereon, from which the plaintiff appealed.

George W. Wilson and *Cline & Mebane* for the plaintiff.
Self & Whitener for the defendant.

WALKER, J., after stating the case: This case, we think, has been correctly tried, and the plaintiff has no just ground of complaint. The objection to the testimony of J. A. Smith, president of the defendant company, as to his conversation with the plaintiff at the Buford Hotel in the presence and hearing of James L. Wilson, is not tenable. It will be observed that the writer of the letter of 22 March, 1902, which is stated therein to be the contract, does not profess to set forth the terms of the employment, nor does he even mention the particular position which the plaintiff had been employed to fill. He does refer to a certain class of goods on which the defendant intended to work at the outset, but this is really all in the letter that gives any (194) intimation of the nature of the service expected of the plaintiff. This phraseology of the letter shows that there had been some previous negotiation between the parties looking to the entrance of the plaintiff into the service of the company, but, beyond fixing the compensation, we are left in the dark as to what that service was. It shows clearly that the entire contract was not reduced to writing, and by an ele-

mentary rule of law we are permitted to resort to oral evidence to supply the omission. *Cumming v. Barber,* 99 N. C., 332; *Nissen v. Mining Co.,* 104 N. C., 309, and *Evans v. Freeman,* 142 N. C., 61, where the cases are collected. But if this were not so, the contract would be ambiguously worded, and therefore susceptible in law of explanation, in order to ascertain the true intent and meaning of the parties. The principle is clearly and fully stated by *Mr. Justice Burwell* in *Colgate v. Latta,* 115 N. C., 127, and requires no further elucidation. Such evidence does not vary or contradict the writing, but in the one case it merely shows the completed contract and in the other it reveals the meaning of the parties and makes plain that which would otherwise be insensible. It is just as competent in the latter case as in the former. 17 Cyc., 672 to 679; *Egerton v. Carr,* 94 N. C., 653; *Perry v. Hill,* 68 N. C., 420; *Robbins v. Love,* 10 N. C., 82; *Lane v. Wingate,* 25 N. C., 326.

The letter of 22 March, 1902, contains a promise to pay a definite sum, and it may be inferred that it was for some kind of service, but for what kind is left doubtful, and parol evidence was necessary to explain these ambiguous terms and to fill out the terms of the contract. *White v. McMillan,* 114 N. C., 349. It has always been considered competent to prove by oral evidence the consideration of such a promise, if it is not clearly expressed in the written instrument. *Perry v.* (195) *Hill, supra; White v. McMillan, supra.* But this testimony, if strictly within the rule excluding oral evidence, did not prejudice the plaintiff, as it tended to prove only that Ivey had substantially represented himself as fit and competent for the position of superintendent of the defendant's mill, and this is no more than the law implies.

There is said to be always on the part of the servant an implied obligation to enter the master's service and serve him diligently and faithfully, and to conduct himself properly, and generally to perform all the duties incident to his employment honestly and with ordinary care, having due regard to the master's interest and business. So, too, the law implies a representation by the servant that he is competent to discharge the duties of his position and is possessed of the requisite skill which will enable him to do so. These and perhaps other obligations arise out of and are implied from the relation created by the contract, and the breach of any material stipulation, whether express or implied, which disables the servant to perform his part of the contract or which results in his inability to do so, furnishes a good ground for the master to terminate the contract and is a valid and legal excuse for the discharge of the servant. Wood's Master and Servant (1877), p. 166; *Waugh v. Shunk,* 20 Pa. St., 130. In the case last cited it is said: "Where skill, as well as care, is required in performing the undertaking,

if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or in other words, to perform it in a workmanlike manner. In cases of this sort, he must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. It is his own fault if he undertake without sufficient skill or applies less than the occasion requires." *Lyon v. Pollard,* 20 Wall., 403; *Harmer v. Cornelius,* 5 C. B. (N. S.), 236; *Callo v. Brouncker,* 4 C. & P., 518; *Stanton v. Bell,* 9 N. C., 145; 2 Kent Com., 458; *Fletcher v. Knell,* 42 (Q. (196) B.), 58. This principle was virtually accepted and applied in the recent case of *Eubanks v. Alspaugh,* 139 N. C., 520, a case much like this in its prominent features, and sufficiently so to be decisive of this case upon the main questions involved.

The principles we have stated also apply to the objection of the plaintiff to the deposition of James L. Wilson. He really proved no more than the law implies, and the ruling in regard to that piece of evidence, if erroneous, was harmless. But the exception as to the deposition cannot be sustained for another reason. It appears from the record that the plaintiff did object to it before the Clerk, upon the ground that notices were served on him to take the two depositions at the same time in different places. But it also appears that the deposition was not taken in Fayetteville, and that the plaintiff appeared by attorney before the commissioner at Philadelphia and cross-examined the witness Wilson without making any objection at that time. When notice is served that depositions will be taken at the same time in two different places, so that the party who is so notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other; and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed. This is the general rule where statutes such as ours are in force, and it seems to be a reasonable one. 13 Cyc., 909 (b); *Evans v. Rothchild,* 54 Kan., 747; *Cole v. Hall,* 131 Mass., 885; *Hankinson v. Lombard,* 25 Ill., 572; *Uhle v. Burnham,* 44 Fed., 729. The plaintiff in this case made his election to appear before the commissioner in Philadelphia, and the deposition was taken, and counsel for the plaintiff cross-examined the witness, without making any such objection as is now made. We think this was a waiver of any defect in the notice, and the plaintiff cannot now avail himself of it, if the objection does not come (197) too late. How the matter would have stood if he had not elected to attend at either place, we need not decide.

The deposition, it is stated in the record, was opened by the Clerk in the presence of the attorneys of the respective parties and found to

have been taken in accordance with the notice and commission, and the same was ordered to be read at the trial, subject to the plaintiff's exceptions. It is not a strained inference from these proceedings that the plaintiff abandoned his exception to the irregularity in the notice, as his Honor held. We take notice of these matters in order to call attention to a custom which we do not approve, and which is contrary to the spirit of the statute, and that is, reserving the right to have exceptions, especially those which relate to the regularity of a deposition, passed upon when the deposition is offered in evidence. A practise which essentially nullifies the purpose of the statute is not to be commended. Such exceptions should be disposed of, at the latest, before the trial is entered upon. Parties may be taken at a great disadvantage if this is not done. They may, perhaps, consent to wait until the deposition is introduced, but it should be so expressly stated, and we will not be disposed to extend the reservation by implication beyond the commencement of the trial. His Honor seems to have taken this view, as he held that the plaintiff had waived this objection, not having urged it until the defendant proposed to read the deposition. Revisal, 1647; *Carroll v. Hodges,* 98 N. C., 418; *Davenport v. McKee,* 98 N. C., 500.

The plaintiff offered in evidence a paper-writing "which he alleged was a substantial copy of the greater part of his letter to the defendant, dated 21 March, 1902, to which the defendant's letter of 22 March, 1902, was an answer." It was not claimed by the plaintiff that the alleged "substantial copy" was made at the time the original was
(198) written, nor was there any evidence that said copy was made before the commencement of this action. This paper was excluded on objection. We think the ruling was proper. The defendant was not notified to produce the original of the letter, even if the copy was sufficient and would have been competent if such notice had been given. *Murchison v. McLeod,* 47 N. C., 239; *S. v. Kimbrough,* 13 N. C., 431. It is evident that the copy was made from memory, and we hardly think it is such a document as is contemplated by the rule admitting secondary evidence, if it can be called a copy at all. It was at least not an admitted copy, if that would be sufficient to dispense with the necessity of notice. *Beard v. Railroad, ante,* 136.

The charge of the Court was as favorable to the plaintiff as the law permitted. The burden was placed in the first instance upon the defendant to show good legal excuse for discharging the plaintiff. *Eubanks v. Alspaugh, supra; Smith v. Lumber Co., ante,* 136, 142 N. C., 26. It was undoubtedly correct to tell the jury that if the plaintiff failed to perform his duty as superintendent, the defendant had the right to discharge him. *Johnson v. Machine Works,* 130 N. C., 441.

The defendant was not bound to retain in its service an incompetent superintendent, who did not and could not do the work assigned to him. If the parties agreed that the plaintiff might quit the service, and he voluntarily resigned, the contract was thereby terminated, and, having been paid to the time of his resignation, the defendant was not under any further liability to him. The Court also instructed the jury that if the plaintiff had performed his part of the contract, and did not voluntarily withdraw from the service, they should find that he was wrongfully discharged. This was a fair submission of the case to the jury. They found against the plaintiff on the issue of fact thus joined, and he has, in law, no good reason to complain.

The exceptions to the instructions given in response to the defendant's prayers one and four are covered by what we have (199) already said in discussing the admissibility of the testimony of the witnesses J. A. Smith and James L. Wilson as to the conversation between them and the plaintiff. If that evidence was competent, those two instructions were not improper.

The jury have accepted the defendant's account of the transaction, and it would therefore seem that by agreeing, on 25 October, 1902, to resign, and afterwards asking for another trial, the plaintiff thereby virtually admitted his incompetency and the mistakes he had made to the great loss of the defendant, if he did not do so in his testimony. It seems that the defendant was very indulgent to him and gave him every chance to do better and retain his position. He was discharged not so much for his general inefficiency, or for failing to do what the defendant had the right to require of him, as for doing that which was positively injurious to his employer's business. The remaining exceptions have been examined and are, we think, without merit. They do not call for any separate discussion.

No Error.

Cited: *R. R. v. R. R.*, 147 N. C., 383; *R. R. v. R. R.*, 147 N. C., 383; *Freeman v. Brown*, 151 N. C., 114.

(200)

LEMLY v. ELLIS.

(Filed 4 December, 1906.)

Attachment—Affidavit for Publication—Sufficiency—Property in Custodia Legis—Subsequent Attachment—Transaction with Insane Person—Value of Stock—Book Entries—Evidence—Appearance, General After Special—Personal Judgment—Sale by Commissioner—Warranty—Damages.

1. In an action for damages for breach of a covenant of warranty, an affidavit, upon which an order of publication was based, which alleged that the

cause of action arose upon a breach of warranty contained in a deed from defendant to plaintiff registered in M. County, by which said breach the defendant is indebted to the plaintiff in the sum of $13,500, sufficiently sets out the cause of action, it not appearing that there was ever any other deed between the same parties.

2. Where an attachment had been levied by the Sheriff on certain bonds and thereafter the plaintiff caused a second attachment to be levied on them, the fact that the plaintiff had deposited them with the Clerk of the Court before the second levy was made upon them, the deposit not having been made by authority of the Court, did not place them *in custodia legis*, so as to protect them from the second levy, as they were constructively in the possession of the Sheriff under the prior levy.
3. Where the Court has the custody of property, it will be retained to await the result of the action and satisfy any judgment that may be recovered, it being immaterial how the property was brought under the control of the Court, whether by attachment or some other equivalent and lawful act.
4. In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by Rev., sec. 1631, though he may have an interest in the land.
5. Where a witness had testified that the stock of a certain corporation was not worth more than fifty cents on the dollar, the entries in the stock book as to the value of the stock, which witness did not make, were not competent to contradict him.
6. Where the defendant entered a special appearance and moved to dismiss for defective service, which motion was denied and he excepted, and he thereafter entered a general appearance, the Court was authorized to enter a personal judgment against him.
7. In an action for damages for breach of warranty in a deed, in which certain bonds were attached, the defendant cannot complain of a judgment directing that the bonds be sold by a commissioner, instead of an order to the Sheriff to sell the attached property under Rev., sec. 784.
8. Where, in order to ascertain the damages plaintiff sustained by breach of a covenant of warranty in a deed, it became necessary to show the value of certain corporate stock transferred with the deed, the Court erred in charging the jury that in valuing the stock they could consider "the testimony as to the payment of dividends and as to whether the plant had been a success or not," as the value should have been determined as of the time the covenant was made, and according to the facts then existing, and not by what afterwards occurred.

(201)

ACTION by W. A. Lemly against W. B. Ellis, heard by *Peebles, J.*, and a jury, at the March Term, *1906*, of FORSYTH.

The plaintiff brought this action to recover damages for the breach of covenants of seizin and warranty and a covenant against incumbrances contained in a deed executed by the defendant to him, and to have the amount of said damages, which were laid at $13,700, declared to be a lien upon sixteen bonds each of the par value of $1,000, which were a part of the purchase-price agreed to be paid for the land conveyed by the said deed and for other property sold to the plaintiff at the same time, the other part of the said consideration being $21,000 in cash and an account.

It appears that the defendant, on 29 December, 1900, contracted to sell to the plaintiff, for the sum of $37,000, eight tracts of land on the French Broad River in the county of Madison and 800 shares of the capital stock of the North Carolina Electrical Power Company, or the subscription to that many shares of the capital stock; each share being of the par value of $100, and W. B. Ellis having already paid on his shares or subscriptions $48,000. A deed for the land was pre- (202) pared and duly executed by W. B. Ellis and his wife on 20 March, 1900, and acknowledged by them, and the privy examination of the wife taken on 24 March, 1900, before the Clerk of the Superior Court of Forsyth County, and the deed ordered to registration by the Clerk of Madison Superior Court on 5 January, 1901. This deed was afterward registered. After its execution the plaintiff discovered that there was a defect in the title to one of the tracts of land, known as Mountain Island, embracing the southern half of the river and running along its bank for a distance of about 46 poles, at a point about two miles from Hot Springs, and containing about 30 acres. He had paid $21,000 on the purchase-money in cash and an account, but still held the $16,000 in bonds. On 6 February, 1904, he commenced this action by causing a summons to be issued against the defendant to the Sheriff of Forsyth County, who made the following return:

"Received 6 February, 1904. Not executed. The defendant not to be found in my county."

The same day the plaintiff filed his complaint, in which he alleged the execution of the aforementioned deed which is described as dated 20 March, 1900, and registered in the office of the Register of Deeds of Madison County in Book 14, p. 159. He then sets forth the several covenants and the breach thereof as evidenced by the defect in the title to the 30-acre tract, and the existence of certain judgment liens, which had been paid off by him. It is then alleged that the plaintiff has possession of the sixteen bonds and brings them into Court to be subjected by its order to the payment of his claim. He prays judgment for the amount of his alleged damages, $13,500, and for a sale of the bonds to satisfy his lien thereon, which he acquired by reason of the defect in the title to the thirty acres.

The plaintiff on the same day, and presumably at the same time that he filed his complaint, made an affidavit before the (203) Clerk in which he alleged that the defendant was indebted to him in the sum of $13,700 for breach of the warranty contained in the deed from him to the plaintiff dated 20 March, 1900, and registered in Madison County in Book 14, p. 159; that the defendant is a nonresident and has property in this State which should be applied to the satisfaction of the said claim for damages; that plaintiff has possession of

the sixteen bonds, in which the defendant claims certain rights; that plaintiff has a lien on the said bonds for the payment of his claim and that he holds the bonds subject to said liens. He therefore asks for a warrant of attachment, which was issued and levied 9 February, 1904, upon the sixteen bonds in the possession of the plaintiff, as appears from the Sheriff's return, which was made by his deputy. On the day of the levy the plaintiff made an affidavit before the Clerk in which he set out in full the return of the Sheriff on the summons and then alleges that the defendant cannot, after due diligence, be found in this State, and that he is a nonresident; that the plaintiff has a good cause of action against him, "which arose upon a breach of warranty contained in a certain deed from W. B. Ellis to this plaintiff dated .... day of ....., and duly recorded in the office of the Register of Deeds of the County of Madison, Book .., folio .., by which said breach of covenant the defendant is indebted to the plaintiff in the sum of $13,500; that said defendant is a proper party to this action; that he has property in this State and that plaintiff has issued a warrant of attachment in this cause. He then prays for an order of publication, which was granted, and the publication was made on the same day (9 February, 1904), in the following form:

"The defendant above named will take notice that a summons in the above-entitled action was issued against him on the 6th day of
(204) February, 1904, and that an action entitled as above has been instituted in the Superior Court of Forsyth County for the purpose of recovering damages for breach of covenants of warranty and of seizin contained in a deed made by said W. B. Ellis to the said plaintiff, dated the .... day of ..... The defendant will also take notice that a warrant of attachment was issued by said Court on the 6th day of February, 1904, against the property of said defendant, and on the 9th day of February, 1904, the attachment and notice of garnishment were served on W. A. Lemly, and said warrant of attachment and notice of garnishment are returnable before the said Court on the 14th day of March, 1904. The defendant is hereby required to appear and answer or demur to the complaint at the term of the Superior Court of Forsyth County to be held on the 14th day of March, 1904, or the relief demanded will be granted."

The Court (*Judge W. R. Allen* presiding) adjudged the publication to be in due form and properly made and that the original process or summons and the warrant of attachment had been duly served upon the defendant.

At March Term, 1904, the defendant, by his attorney, entered a special appearance and moved to dismiss, upon the following grounds: 1. No cause of action is set out in the affidavit for publication. 2. That

an attachment cannot issue in favor of the plaintiff against himself as garnishee. 3. The plaintiff alleges in his complaint that he holds the sixteen bonds subject to his claim against Ellis and that he brings the same into Court to be subjected under its order to the payment of the said claim. 4. That the bonds, at the time of the levy by the deputy sheriff of the attachment issued in this action, had already been levied upon (15 September, 1903) by the Sheriff himself in the action of *McCoy v. Ellis,* which is still pending, and the bonds were and still are subject to the said prior levy. The motion was denied, and the defendant excepted.

At the same term of the Court the defendant Ellis was duly adjudged insane, and D. H. Blair was appointed his guardian (205) *ad litem.* In the following August he filed an answer through the same attorney who had entered the special appearance, and in his answer he admits that the plaintiff had agreed to deliver the sixteen bonds to Ellis as a part of the consideration for the deed, the execution of which is admitted, though he denies any knowledge of the nature of its contents. He further denies that the plaintiff has any right to hold the same or that he has any lien thereon, but avers that Ellis is entitled to the possession of the bonds. He admits the nonresidence of Ellis, but denies all the other material allegations of the complaint.

We state the twenty-first exception substantially as it appears in the brief of the defendant's counsel:

The defendant attempted to show that the plaintiff Lemly was acting for himself, the witness C. A. Reynolds, and others, in making the purchase from Ellis, and that Reynolds had such an interest in the transaction and in the result of the action as would exclude his evidence concerning any transaction between Ellis and Lemly under sec. 1631 of the Revisal. Reynolds was a stockholder in the North Carolina Electrical Power Company. Defendant's counsel asked the witness Reynolds the following question: "Is Mr. Lemly under any contract or agreement to convey what was given him in this deed to the Power Company?" Plaintiff objected; the objection was sustained, and the defendant excepted. The witness answered: "Mr. Lemly has entirely conveyed part of it. He has not made us a deed to the land, though we have agreed upon the price, and he has agreed to convey it." The witness also testified that he had no interest in the result of this action. The defendant's counsel insisted that under this admission of the witness, he was incompetent. The Court ruled otherwise, and the defendant excepted.

The thirty-eighth exception is stated in the same manner: It was in evidence that about the time of the sale by Ellis to Lemly, (206) stock in the Power Company had been sold to Carr and others,

and the defendant offered a book, which Reynolds had previously identified as the stock-book of the company, to show that the stock had been sold to these outsiders at par, and to contradict Reynolds' evidence that the stock was not worth more than fifty cents on the dollar. The book was excluded, and defendant excepted.

In order to ascertain the damage that the plaintiff sustained by reason of the defect in the title of the Mountain Island tract of land, it became necessary to show the value of the property sold, the stock and the land and also the value of the Mountain Island tract, and to determine what part of the price was paid for that tract. It appears that at the time the contract between Lemly and Ellis was made (29 December, 1900), the dam of the Power Company had not been completed, the machinery had not been purchased and the plant was only in the process of construction, not being capable at the time of earning anything. In this connection, C. A. Reynolds, a witness for the plaintiff, testified: "At the time Mr. Lemly bought Mr. Ellis's stock, or rather subscription to stock, of the North Carolina Electrical Power Company, it is hard to say what it was worth. There was nothing finished but the plant at Ivy. The dam was only eight feet high. No electrical machinery had been bought; nothing of that sort had yet been obtained, and it is hard to tell what the stock was worth. If you want my opinion, I do not think it was worth fifty cents on the dollar." The other evidence tended to show that after Ellis sold his interest to Lemly, the plant was completed and the company furnished electric power to the city of Asheville, but that it had not paid a dividend, because it had not earned profits sufficient for that purpose.

Upon the issue as to damages the Court charged as follows:
(207) "When you come to consider the value of the property, you have to estimate the value of the eight hundred shares of stock in the Electrical Power Company. There was evidence that 60 per cent of the par value of the stock had been paid in, but the real value of the stock depends on the property owned by the corporation, and in a great measure on the success of the enterprise in which the company was engaged. If the enterprise was a success and paid dividends, of course the stock would be worth more than it would be if it was a failure and paid no dividends. If the operation of the corporation proved a disastrous one and lost money, why then, as a matter of course, the stock would be depreciated in proportion as it lost money. The law would be that if the corporation failed and got in debt—if it had to go in debt for the running expenses—as a matter of course, the stockholders would have to make good to the creditors for the unpaid stock (and, therefore, you can take into consideration in valuing that stock the testimony as to the payment of dividends, and as to whether the plant had been a success or not)."

The issues and the answers of the jury thereto are as follows:

1. Did the defendant W. B. Ellis and wife execute the deed mentioned in the complaint? Answer Yes.

2. Did said deed contain the covenants alleged in the complaint? Answer: Yes.

3. Has there been a breach of said covenants? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: Twelve thousand five hundred dollars, with interest from 29 December, 1901.

5. Were the judgments set out in the complaint liens on the lands conveyed by Ellis to Lemly? Answer: Yes.

6. Have the said judgments been paid off by the plaintiff? Answer: Yes.

7. If, so, how much has the plaintiff paid out in discharging said judgments? Answer: Seventy-eight dollars and ninety (208) cents, which is included in fourth issue.

The Court rendered a personal judgment against the defendant for $12,500 and interest from 29 December, 1901, and costs, and declared the said amount a lien on the sixteen bonds. The Court further adjudged that the bonds be sold by the commissioner named in the judgment and the proceeds applied to the payment of the judgment, and that the residue, if any, be paid to the defendant, who excepted to the judgment generally, and especially for the reason that a personal judgment could not be given against him. Defendant appealed.

Manly & Hendren for the plaintiff.
Lindsay Patterson for the defendant.

WALKER, J., after stating the case: The first question raised by the defendant is that the affidavit upon which the order of publication is based is defective, as no cause of action is sufficiently set out therein, and the defendant's counsel, in support of this position, relies on *Bacon v. Johnson,* 110 N. C., 114, and *Mullen v. Canal Co.,* 114 N. C., 8; Code, sec. 218 (Revisal, sec. 442). The specific grounds of objection are: 1. That there is not a sufficient reference to the deed in which the covenant is to be found. 2. That there is no definite description of the land, having special regard to its locality. 3. That there is no allegation of an eviction under paramount title so as to constitute a good cause of action for a breach of the covenant of warranty.

It seems to us that the reference to the warranty, as contained in a certain deed from W. B. Ellis to W. A. Lemly, which is registered in Madison County, is definite enough to notify the defendant of the particular nature of the cause of action, and this is the chief purpose in

requiring publication to be made. The context of the affidavit would lead to the inference that Madison County is in this State, noth-
(209) ing appearing to the contrary. The same kind of reference is once made to the county of Forsyth, that is, without naming the State of which it is a part, although it elsewhere appears that a county of this State is intended. The allegation is at least sufficient to inform the defendant of the deed to which reference is made, as it does not appear that there ever was any other deed between the same parties and certainly none registered in the county of Madison. The amount of damages claimed for the breach, while not of very much weight in identifying the cause of action, should not be entirely excluded from consideration in this connection.

What we have said applies to the first two grounds of objection. The third is clearly untenable. When the plaintiff alleges that there has been a breach of the contract, it is necessarily implied that there has been an eviction under a paramount title, or its equivalent, the adverse possession of the land at the time of the delivery of the deed by some one having such a title. *Shankel v. Ingram,* 133 N. C., 258; *Price v. Deal,* 90 N. C., 290. The allegation of a breach includes, of course, everything essential to constitute a breach of the covenant. It may not be a good allegation in a pleading, as being in the nature of the statement of a conclusion, but we cannot say that it is so radically defective when used in an affidavit for publication as to render it ineffectual. A fuller and more explicit statement of the facts would perhaps be better, as in affidavits, and especially in pleadings, the law seeks to deal with the facts and not the conclusions of the pleader from them. But the failure to comply with the requirements of the law as to the form of a pleading or of a statement in an affidavit falls short of proving that the affidavit is fatally defective, if otherwise it give sufficient notice of the nature of the cause of action. The cases cited by the defendant's counsel do not apply. In the first case, the affidavit referred
(210) simply to a suit for specific performance of a contract to convey land in Craven County to which, it is alleged, the defendant was a proper party; while, in this case, special reference is made to the covenant of warranty in a deed from the plaintiff to the defendant, which is registered in Madison County, for the breach of which he claims $13,500 as damages. The other case cited was decided upon a different point. The defendant's counsel also contended that the defect in the affidavit is also to be found in the publication itself; but what we have already said is equally applicable to this objection. We hold that the affidavit and publication, when naturally and reasonably interpreted, were not calculated to mislead the defendant as to what was really meant, and gave him sufficient notice to come in and defend his rights.

The defendant's next ground of objection is that the attachment could not be levied upon the bonds, as they were at the time in the possession of the Court (*in custodia legis*), having been deposited there by the plaintiff three days before the levy was made. It appears in the case that the bonds had been levied upon by the Sheriff under a prior attachment, and we see nothing in the case to show that the lien of this levy did not continue to the time of the second levy; and if so, the Sheriff had, in contemplation of law, the custody of the bonds, although he may have left them with the plaintiff for safe-keeping and they were afterwards turned over to the Clerk of the Court, for no rights of third persons, either creditors or purchasers, had intervened, so as to invalidate the levy as to them. It is admitted by the defendant, in his written motion, that the former levy was still in force; and if this be true, the Sheriff had the legal right to the possession. This, therefore, is the ordinary case of a second levy on property in the possession of the officer who made the first one. The act of the deputy was, of course, the act of the Sheriff, who was his principal *"qui facit per alium facit per se."* It was competent for the Sheriff, so far as the defend- (211) ant is concerned, to leave the bonds in the possession of the plaintiff as his bailee; and thus placed, they were still subject to the prior levy. Kneeland on Attachment, secs. 474 and 492. How could the defendant be prejudiced in such a case, if the Sheriff has the bonds forthcoming to answer the mandate of any process afterwards issued to him by the Court? But we do not see, if there was no prior levy by the Sheriff, why he could not levy on the bonds in the hands of the plaintiff or even after they were put in the custody of the Clerk. They were not, in a legal sense, in the custody of the Court by reason of the deposit with the Clerk, because the Court had never ordered any such deposit to be made, had not even recognized it, and there was no reason why the deposit should be made at that stage of the case. Besides, the Sheriff had, in law, the custody of them by virtue of the prior levy and was at least in constructive possession. The general rule undoubtedly is that property in the possession of the Court cannot be attached, as it is said then to be *in custodia legis,* and is protected not only on the ground of public policy, but for other good reasons. Kneeland on Attachment, sec. 410, *et seq.* The rule has been relaxed in some cases. See *Williamson v. Nealy,* 119 N. C., 339, where the course of decision in this State is fully set forth. But in this case the deposit, as we have shown, was not made by the authority of the Court and was not within the rule protecting property *in custodia legis* from a levy. The statute is broad in its language and requires the Sheriff to levy upon any of the property of the defendant in his county. Revisal, secs. 765-767. It appears that there is nobody who can complain of the levy except the

plaintiff, as the deposit was made by him. Besides all this, the Court, by its subsequent proceedings, has recognized the levy of the Sheriff as a valid one and has acted upon it as such. But if the Court had
(212) the custody of the bonds by virtue of the deposit or of the Sheriff's levy—and the Court surely had it either the one way or the other—it will not be released, but the custody of it retained so as to await the result of the action and answer and satisfy any judgment that may be recovered. It is immaterial how the property was brought under the control of the Court, whether by attachment or some other equivalent and lawful act. *Pennoyer v. Neff,* 95 U. S., 714.

The objection to the evidence of Reynolds is not well founded, even if it was made in apt time. The witness testified that he is not interested in the event of the action, and it does not appear that he is. He may have an interest in the land, but this action was not brought to recover the land. The plaintiff already has it and requires no aid from the Court to complete the investiture of title. He sues for damages, and the witness is in no way interested in his recovery of them, and he must be so interested in order to disqualify him. *Bunn v. Todd,* 107 N. C., 266; *Wetherington v. Williams,* 134 N. C., at p. 279; *Deaver v. Deaver,* 137 N. C., 240. We do not see how the entries in the stock-book as to the value of the stock were competent to contradict the witness Reynolds. He did not make them, nor does it appear that they were made in such a manner as to be admissible against the plaintiff. They were *res inter alios acta.* But the witness testified substantially to the contents of the book, and in this way the defendant got the full benefit of the entries as evidence.

The Court properly entered a personal judgment against the defendant. *Mullen v. Canal Co.,* 114 N. C., 8, which was cited by the defendant's counsel, does not decide otherwise. The Court merely holds in that case that, if there is a special appearance and a motion to dismiss, which is overruled, the entry afterwards of a general appearance and taking part in the trial of the case upon its merits, do not constitute a
(213) waiver of the defendant's right to insist in this Court on his motion to dismiss, if he appeals from the judgment, and it was not intended to decide that the general appearance does not authorize the Court to render a personal judgment. The exception to the ruling on the motion to dismiss is fully reserved to the defendant, but this does not affect the right of the plaintiff to a personal judgment, which follows, as a matter of course, when there is a general appearance. Revisal, sec. 447; *Wilson v. Seligman,* 144 U. S., 47. When there is no general appearance, but merely a special one, and a motion to dismiss for defective service of the original process, or for defective substituted service by publication, and the motion is overruled, or if the defendant

does not appear at all, the Court acquires jurisdiction, where an attachment has issued or the *res* has otherwise been brought within its control only to the extent that the *res* will satisfy the plaintiff's recovery, and no general or personal judgment will be binding beyond that. *Pennoyer v. Neff,* 95 U. S., 714; *Winfree v. Bagley,* 102 N. C., 515, and *May v. Getty,* 140 N. C., 318, where the cases are collected. But a general appearance changes all of this and confers general jurisdiction of the person and cause of action, with the right to proceed personally against the defendant. It occurs to us that the defendant's counsel pursued the proper and only safe course, in making his general appearance, so as to protect the interests of his client.

The Court does not appear to have rendered a simple judgment for the debt, as if it were an action at law, with an order to the Sheriff to sell the attached property, in the nature of a *venditioni exponas* (Revisal, sec. 784; *Atkinson v. Ricks,* 140 N. C., 421; *May v. Getty,* 140 N. C., 310), but it rather proceeded on the idea that the contract for the sale of the land had not been fully executed by the parties, and therefore granted equitable relief by directing that the bonds be sold by a commissioner. No harm can come to the defend- (214) ant from this form of judgment, as he will have the right to object to the sale if the property does not bring a fair price, whereas if it had been sold by the Sheriff, this objection to the sale would not be open to him.

While there was no error committed in the rulings so far considered, we do think the Court erred in its charge to the jury upon the fourth issue as to the damages. Let it be conceded, for the sake of the argument, that the Court correctly charged the jury as to how to value the stock, until he told them that they could consider, in that connection, "the testimony as to the payment of dividends and as to whether the plant had been a success or not," we think that instruction was erroneous. The value should have been determined as of the time the covenant was made, and according to the facts then existing, and not by what afterwards occurred. The parties did not and could not know with certainty whether the company would fail or succeed. They dealt with each other and made their own calculation upon the facts as they then existed and upon the situation as it then appeared to them. It, perhaps, was proper for the jury to consider the probabilities of success or failure, but when they were instructed that they might also consider actual eventualities, a factor was introduced into the computation which the parties could not have had in their minds at the time they fixed and agreed upon the consideration of the deed. It is what the parties thought, at the time of making their contract, were the values of the respective pieces of property sold, and not what they proved to be by sub-

sequent events, which could not be taken into the calculation beforehand, as they could not be forecasted with any degree of certainty. Matters beyond the human ken could hardly be said to have been within the contemplation of the parties, so as to become proper elements (215) to be considered in assessing the damages resulting from a broken covenant. The evidence and charge as to the actual success of the company were calculated to mislead the jury and produce a wrong appraisement of the value of the stock, and one that would necessarily increase the value of the Mountain Island tract of land, the title to which had proved to be defective.

There was error in the respect indicated, for which a new trial is ordered, but it will be restricted to the fourth and seventh issues as to damages, the seventh issue being included, as the amount awarded, in response to that issue, was made by the jury a part of the damages assessed under the fourth issue. The appellee will pay the costs of this Court.

New Trial.

Cited: *S. c.*, 146 N. C., 222; *Currie v. Mining Co.*, 157 N. C., 218.

RILEY v. CARPENTER.

(Filed 4 December, 1906.)

Sales—Performance of Contract—Measure of Damages for Breach—Substantial Performance.

1. A contract for the sale and delivery of yarns, in which it was stipulated that bills of lading were to be sent direct to the buyer and upon receipt of the goods he was to remit to the seller, was not substantially performed when the seller shipped the goods with bill of lading attached, and the buyer was justified in not receiving them, and is entitled to recover as damages the difference between the contract price and what it reasonably cost him on the market to supply the goods.
2. One who invokes the doctrine of substantial performance in order to show a right to recover on a contract, must present a case in which there has been no wilful omission or departure from the terms of the contract.

ACTION by Charles E. Riley against D. J. Carpenter, heard by *Cooke, J.*, and a jury, at the May Term, 1906, of CATAWBA.

This was a civil action on contract for sale and delivery of (216) a certain quantity of yarn. Defendant admitted the amount claimed by plaintiff, but set up a counter-claim for damages by reason of an alleged breach of the contract on the part of plaintiff in failing to deliver the remainder of the yarn contracted for. The jury answered the issue on the counter-claim against defendant, and to his

Honor's instructions, the verdict and judgment thereon, defendant excepted and appealed.

Self & Whitener for the plaintiff.
W. C. Feimster and *M. H. Yount* for the defendant.

BROWN, J. The Court charged that "If plaintiff shipped the goods with bill of lading attached, and defendant could have gotten the goods by calling at the depot and paying for the yarn, that would be a substantial compliance with the contract, and if you find from the evidence that this is true, you will answer the second issue 'No.'"

In this we think there was error. The contract that bills of lading were to be sent direct to the defendant, and upon receipt of the goods he was to remit to the plaintiffs, was not performed when the plaintiff billed the goods to themselves with draft attached. It was not a substantial compliance with the contract, but a wilful violation of it. The defendant had the right to insist upon such a contract, and the plaintiffs need not have agreed to it, but having agreed to it, they should have performed it. If the defendant's credit had become impaired and his solvency seriously doubted, the plaintiffs could have refused to ship the goods, and should then have notified the defendant of the reason. There is nothing of that sort in the case. The defendant may have thought, and with some reason, that if all his goods were shipped c. o. d. it would impugn his credit, and for that reason insisted as a part of the contract upon direct shipments. One who invokes the doctrine of substantial performance in order to show a right to recover on a (217) contract, must present a case in which there has been no wilful omission or departure from the terms of the contract; he must have faithfully and honestly endeavored to perform it in all particulars. To justify a recovery upon a contract as substantially performed, the omission must be the result of a mistake or inadvertence and not intentional. *Elliott v. Caldwell,* 9 L. R. A., 53, and cases cited.

If the evidence of the defendant is to be believed, the departure from the alleged contract was intentional. He says: "I told them when we talked of the modification of this contract, and as a part of the modification and understanding, it was agreed that no goods were to be shipped to me with bill of lading attached. I expressly told Corbett that I never received or had goods shipped to me with bill of lading attached, and I would not receive any goods that way, and they were not to be shipped to me under the modified terms in any such manner, but bills of lading and invoices were to be sent direct to me, and upon receipt of the goods I was to remit to Riley & Co., Boston, Mass." As the terms of the modified contract do not seem to be in dispute, we are

of opinion that the plaintiffs violated it when they shipped the goods c. o. d., and that the defendant was justified in not receiving them, and that the defendant is entitled to recover, as damages, the difference between the contract price and what it reasonably cost the defendant on the market to supply the yarns which plaintiffs failed to supply.

Let there be a new trial upon the second and third issues.

New Trial.

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

(218)

IN RE SHELTON'S WILL.

(Filed 4 December, 1906.)

Wills—Revocation—Declarations of Testator—Evidence—Handwriting—Comparison—Argument of Counsel—Exceptions—Burden of Proof as to Revocation—Harmless Error—Ambiguous Verdict.

1. A cancellation, obliteration or erasure made after the execution of a will, which does not in fact destroy some portion of the material substance of the will, does not constitute a revocation thereof.
2. To constitute a valid revocation of a will within the language of Rev., sec. 3115, it is essential, among other requirements, that the entire writing, including the signature, should be in the testator's handwriting, where it is not attested by witnesses.
3. Declarations of the testator made after the date of an alleged revocation written on the margin of the will, tending to prove that he did not write or execute the alleged revocation, were competent.
4. In a proceeding for the probate of a will, on the margin of which was written an alleged revocation by the testator, where it was admitted to be the testator's will unless it had been revoked by the words written on its margin, declarations by the testator as to how he was going to leave his property, made before the date of the alleged revocation, were not competent.
5. The declarations of the testator may not be received to explain, change or add to a written will, nor can it be revoked by parol.
6. While it was erroneous for counsel for the propounder of a will, in his argument, to show the alleged revocatory words on the margin of the will to the jury and point out differences in the formation of letters, etc., between the signature on the margin and the signature to the will, it does not constitute reversible error where the contestant failed to call the Court's attention to it and took no exception at the time.
7. In a proceeding for the probate of a will, on the margin of which was written an alleged revocation, after the propounder offered the will and proved its due execution, the burden of proving that the will had been legally revoked was upon the contestant.
8. Where the Court erroneously put upon the propounder of a will the burden of proving that an alleged revocation of a will was not genuine, the contestant, at whose request it was done, cannot complain.

9. In a proceeding for the probate of a will, where the usual issue was submitted to the jury, "Is the paper-writing propounded for probate, and every part thereof, the last will and testament of deceased" to which the jury answered, "Yes," the verdict was not ambiguous because the will bore on its margin an alleged revocation, as the marginal words were no part of the will.

(219)

PROCEEDING heard by *Bryan, J.*, and a jury, of LINCOLN, wherein A. F. Shelton appeared as propounder for probate of a paper-writing as the last will of F. M. Shelton, who died on 25 January, 1905, and the administrator of the estate of F. M. Shelton appeared to contest the probate.

The paper-writing executed by F. M. Shelton in 1902 was offered in evidence as his will. The following words were written in ink on the margin thereof, to wit:

"This will I this day make void and of no effect. 16 January, 1905.
F. M. SHELTON."

The contention of the contestant was that said words revoked the paper-writing as a will. Evidence was introduced by the propounder and contestant. Many exceptions were taken by contestant to the admission and exclusion of testimony, to the charge of the Court and other rulings of his Honor.

The following issue was submitted to the jury: "Is the paper-writing propounded for probate, and every part thereof, the last will and testament of F. M. Shelton?" to which the jury answered "Yes." Upon this verdict the Court gave judgment that the paper-writing, excluding the words on the margin thereof, was the last will and testament of F. M. Shelton. The caveator appeals.

Clarkson & Duls, Tillett & Guthrie, and *C. E. Childs* for the propounder.

Ruffin & Preston for the caveator.

BROWN, J. We will not discuss *seriatim* the twenty-seven exceptions set out in the record, but will consider only such (220) phases of the case as we deem necessary. The learned counsel for the caveator in an able argument and carefully prepared brief has pointed out many alleged errors in the record, none of which are, in our opinion, sufficiently serious to warrant another trial of the issue. It is plain that the testator did not revoke the will by "canceling, tearing, or obliterating the same." It seems to be generally held that cancellation, obliteration, or erasure made after the execution of a will, which does not in fact destroy some portion of the material substance of

the will, does not constitute a revocation thereof. *Lewis v. Lewis,* 2 Watts & S., 455; *Ladd Will,* 60 Wis., 188; *Clark v. Smith,* 34 Barb. (N. Y.), 140; *Gardner v. Gardner,* 65 N. H., 230; *Wolf v. Bollinger,* 62 Ill., 368; *Matter of Miller,* 50 N. Y., Misc., 70; *Howard v. Hunter,* 115 Ga., 357; Underhill on Wills, sec. 229; Redfield on Wills, star page 318.

The words written on the blank margin of this will do not touch any part of the will proper. It is unnecessary, however, to discuss this feature of the case, because the jury have in effect declared that the writing alleged to have been made by the testator purporting to revoke his will was not in fact made by him.

It is contended that his Honor erred in permitting the propounder to prove by Mattie Shelton the declarations of the testator made the day before he died, tending to prove that testator did not execute or write the alleged revocation and referring to and speaking of his last will. His death occurred 25 January, 1905. The alleged revocation is dated 16 January, 1905. These declarations did not tend to explain the meaning of anything contained in the writing, but only to prove that it was not the testator's act. To make it a valid revocation within the language of our statute, Revisal, 3115, it is essential, among
(221) other requirements, that the entire writing, including the signature, should be in the testator's handwriting, inasmuch as it is not attested by witnesses. We will not either review or undertake to reconcile the conflicting decisions upon the admissibility of such evidence. It seems to be generally held that the declarations of a testator are not competent upon the question of the interpretation of the contents of his will, but as to the admissibility of declarations made by the testator upon the question of the *factum* of the will the authorities are divided. This Court seems long since to have aligned itself with those favoring the admission of such evidence, and it has been so classified by other courts. In *Tucker v. Whitehead,* 59 Miss., 594, the Supreme Court of that State says: "There are few questions in the law upon which authorities are more hopelessly in conflict than upon the admissibility of declarations of a deceased testator in support or in rebuttal of a supposed *revocation* of a testamentary paper. It has engaged the attention and elicited the logic of the greatest jurists who have adorned the bench of this or any country. Against the admissibility of such evidence are to be found the names of Kent, Story, and Livingston, and in favor of it those of Walworth, Ruffin, Lumpkin, and Cooley. Certainly we can hope to add nothing to the strength of an argument on either side, which has already been exhausted by such men as these."

To the names of the great lawyers who support the admission of such evidence we will add the name of Henderson, who says in *Reel v. Reel,*

8 N. C., 248: "To our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they
are received, not upon the grounds of their being a part of the (222) *res gestae,* for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their *competency;* those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace. The English books are full of cases where the declarations of the testator were received, and without any objection as to their *competency;* generally the question being as to their *weight.*"

This language is quoted by Professor Wigmore as supporting the admission of such evidence as one of the exceptions to the general rule excluding hearsay. Vol. 3, sec. 1738.

The controlling authority of this case was acknowledged in 1832 by this Court in an opinion by *Judge Ruffin* in the following language: "The admissibility of the evidence rejected in the Superior Court was, as a general principle at the common law, determined in *Reel v. Reel.* The discussion in that case was full, and the decision is to be regarded by succeeding Judges, not only with respect, but, in my opinion, as authoritative. For this reason, I must say I do not consider that question open to dispute." *Howell v. Barden,* 14 N. C., 443. In this case *Judge Ruffin* gives very cogent reasons why the evidence should be received.

The *Reel case* was again cited and approved in 1888 in *Patterson v. Wilson,* 101 N. C., 587, by *Mr. Justice Merrimon,* as follows: "The case of *Reel v. Reel,* 8 N. C., 248, cited by the learned counsel for the appellant, has no application here. That was a contest of the will then in question; the purpose was not to interpret it and ascertain its meaning. The evidence as to what was said by the supposed testator was for the purpose of showing that he did or did not execute a valid will.
In such case, no doubt, the pertinent declarations of the testator (223) for proper purposes might be evidence."

The syllabus in *Reel v. Reel* was made and published many years before either of the cases approving it were decided, and that syllabus interprets the opinion as holding that declarations of a testator made at any time subsequent to the execution of a will which go to show that it is not his will, are admissible, and that it is the general principle

deducible from that case. Such is the interpretation placed upon it by *Judge Merrimon,* and by the accurate reporter of *Patterson v. Wilson, supra,* who states the law tersely and correctly when he says: "While under some circumstances the declarations of a testator are competent upon the question of the *factum* of the will, they are not competent upon the question of the interpretation of the contents of the will."

In *Waterman v. Whitney,* 11 N. Y., 168, this case (*Reel v. Reel*) is spoken of as a leading case on this subject and as upholding the admissibility of the testator's declaration made *after* the execution of the will in which he stated its contents to be materially different from what they were. Contestants offered to prove that at various times between the date of the *supposed* will and the death of Reel he had repeatedly mentioned the substance of the will left in the hands of Blackledge, and that according to those declarations the contents of the paper offered for probate were utterly variant from the will left with Blackledge. There were evidently two defenses set up in the *Reel case,* viz., undue influence and that the writing offered was not Reel's true will, but a fraud and imposition perpetrated by Blackledge. The declarations were offered in support of the latter contention. This is shown most clearly by the brief of Judge Gaston, counsel for contestants, who says: "The object of the evidence was to show by Reel's repeated declarations what he believed to be the will he had signed, in order, with the other (224) facts proved, to establish a fraud."

In the case before us the propounders have offered evidence, however strongly it may be contradicted, tending to prove that the writing on the margin, purporting to be a revocation, is a fraud and forgery. To corroborate such evidence they offered the declarations of the testator made after the date of the writing and shortly before he died, tending to show that he had not revoked or destroyed his will and that he knew nothing of such revocation. This evidence is offered to prove fraud in the *factum* as much so as in *Reel's case.* In the *Evans will case,* 123 N. C., 117, *Reel's case* and *Howell v. Barden, supra,* are cited and approved. In that case declarations of the testatrix were admitted as competent, although held to be insufficient, to show that the writing offered was not her will.

Declarations of this kind are admitted as an exception to the general rule rejecting hearsay, because the testator has peculiar means of knowledge and may be supposed to be without motive to speak other than the truth. He differs from a grantor in a deed, because when his declarations are made he has not parted with his property, but retains control over the subject-matter until his death, and he must be presumed to know what disposition he has made of it. In *Sugden v. St.*

Leonards, L. R. I., P. D., 154-225, *Chief Justice Cockburn* reasons strongly in favor of the admission of such evidence, as follows: "The testator must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with declarations of members of a family in matters of pedigree." In the same case *Sir George Jessel,* Master of Rolls, who is regarded (225) by Professor Wigmore as the greatest English Judge of the century, declares in substance that all the reasons in favor of any exception to the hearsay rule exist in the case of a testator declaring the contents of his will. Furthermore, says he: "The Court should be anxious not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case we have under consideration."

We are not without support in this country. Practically the same kind of evidence was admitted in the following cases: *Conoly v. Gayle,* 61 Ala., 116; *Patterson v. Hickey,* 32 Ga., 159; *McDonald v. McDonald,* 142 Ind., 55; *Scott v. Hawk,* 77 N. W., 467; *Schnee v. Schnee,* 61 Kan., 643; *Muller v. Muller,* 108 Ky., 511; *Lambies' Estate,* 97 Mich., 49; *Lane v. Hill,* 68 N. H., 275; *Beadles v. Alexander,* 9 Baxter, 604. In the latter case the declarations of testator that he had signed a will were held admissible in corroboration of other evidence, as "the declaration of the only party having a vested interest to declare the truth," approving *Reel v. Reel.* In *Tynan v. Paschal,* 27 Tex., 300, declarations were received to show the execution of a will and to rebut the inference of a revocation. In *Sawyer v. Smith,* 8 Mich., 411, the declarations of the testatrix were admitted to aid the jury in determining whether a mutilation of a will had been made by the testatrix or by some other person.

We think, so far as the administration of the law in this State is concerned, the question may be regarded as settled.

This exception to the general rule prohibiting hearsay, however, does not make competent the testimony of the witness, Mollie Beatty, by whom contestant offered to prove statements made by the testator in November, 1904, "as to how he was going to leave his property." This will was made in 1902, and there is no allegation made of (226) any fraud in the *factum.* It was evidently admitted during the whole course of the trial to be the testator's will, unless it had been re-

voked by the words written on its margin. The case was tried on this theory. The declarations to Mollie Beatty could not constitute a revocation in themselves, for that must be in writing, and they were made before instead of *after* the date of the writing offered as a revocation. It is generally agreed that the declarations of the testator may not be received to explain, change or add to a written will, nor can it be revoked by parol. 1 Redfield on Wills, 498. We see no view in which such evidence was competent on this trial.

We have carefully considered the several exceptions to the admission of testimony in respect to the handwriting of the revocatory words. While his Honor may have erred in some instances in his rulings relating thereto, yet the alleged improper testimony was so colorless and tended to prove or disprove so little that we regard the errors as harmless.

The contestant assigns error because counsel for propounder in his argument showed the revocatory words on the margin of the will to the jury and pointed out differences in the formation of letters, etc., between the signature on the margin and the signature to the will. This was erroneous, as is held in *Fuller v. Fox,* 101 N. C., 119, but the contestant failed to call the Court's attention to it and took no exception at the time, as the record shows.

We have examined carefully contestant's prayers for instructions, as also his motions to set aside the verdict as ambiguous and for judgment upon the verdict as rendered, and will consider them together.

With all deference for the learned counsel for the contestant, we think they have an erroneous idea about the character of the issue, and the burden of proving the revocation, and having succeeded in impressing their view as to the latter upon his Honor, we think they can-
(227) not complain of the charge to the jury. When the paper-writing purporting to be the testator's will was offered by the propounder for probate he did not necessarily or in fact offer the revocatory words written on the margin of the paper containing the will. He offered only the will dated 15 July, 1902. This must necessarily be so, for the revocation is no part of the will, and had he been compelled to offer it as a part of the will, because written on the margin of the same paper, the effect would be to destroy the very will the propounder was offering for probate. The revocation was not a concellation technically, nor was it a mutilation, and, therefore, needed no explanation upon the part of the propounder of the will. After the propounder had offered the will and proved its execution as required by law, if the jury believed the evidence, he was entitled to a verdict to the effect that the paper-writing was the last will and testament of F. M. Shelton, unless the contestant could prove that it had been revoked. The burden of proving that the will had been legally revoked was as much upon contestant as it would

have been to prove undue influence, had such been the ground of contest. It was then up to contestant to go forward with his proof and to offer the revocation in evidence and to prove its execution or that it was all in testator's handwriting and found in a secure place, as required by statute. So far as the record discloses, no question seems to have been made in the Superior Court about the security of the place, and his Honor's charge plainly relieves contestant from proving that essential fact.

The case appears to have been tried solely upon the contested fact of the genuineness of the handwriting of the alleged revocation and the signature thereto. His Honor charged that "If the jury find that the paper-writing was properly executed, and the testator was sound in mind, then they should answer the issue 'Yes,' unless they further find that the will was revoked by the writing on the margin of the paper. This writing puts the burden on the propounders of (228) the will to account for this—and it is not the will of the testator, F. M. Shelton, until they do so to the satisfaction of the jury. The law presumes that the will is revoked. This writing on the margin is *prima facie* evidence of revocation, and the propounders must rebut it." Thus the Court placed upon the propounders the burden to prove the negative facts that the revocation and signature were not in the handwriting of the testator and that it was not found in a secure place, and gave contestant the full benefit of a *prima facie* case. This relieved the contestant from proving at first hand any of the statutory essentials necessary to constitute a valid revocation, and puts the burden upon the propounder to disprove them all. When he proved the will, he had to disprove the revocation. While this is erroneous, we see no reason why contestant should complain, as it was done at his request. It was far more than he was entitled to.

There is plainly no ambiguity in the verdict as contended by contestant. The issue is in the form always submitted in contests growing out of the probate of wills. It is contended by contestant that, as the marginal words, "This will I this day make void and of no effect. Jan. 16, 1905. F. M. Shelton," were a part of the paper-writing, as introduced by propounder, the verdict was, therefore, ambiguous and unintelligible. The marginal words were not offered as any part of the will of the testator. The paper-writing propounded and established by the verdict as the will of F. M. Shelton is the one dated 15 July, 1902, and the marginal words are no part of it.

We have examined the record in this case with care and all the exceptions of contestant, and we find no error of which he has just cause to complain.

No Error.

Cited: In re Wellborn, 165 N. C., 639.

(229)

LINEBARGER v. LINEBARGER.

(Filed 4 December, 1906.)

Wills — Transaction with Deceased — Evidence — Declarations of Testator. Undue Influence—Declarations of Devisee—Joint Interest—Submission of Special Issue—Evidence—Sufficiency—Mental Capacity.

1. On an issue of *devisavit vel non*, it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action which disqualified her under Rev., sec. 1631 (Code, 590).
2. Upon an issue of *devisavit vel non*, declarations of the testator regarding the execution of his will indicating the state of his mind, etc., made contemporaneous with or so near thereto as to fall within the principle of *res gestæ*, are competent.
3. Upon an issue of *devisavit vel non* declarations of the testator regarding the execution of the will, tending to show undue influence, made prior to the execution of the will, are competent.
4. Upon an issue of *devisavit vel non*, the declarations of a legatee regarding his own conduct, for his own benefit, cannot be used against other legatees, as they have not a joint interest.
5. In a proceeding for the probate of a will, where there is sufficient evidence as to undue influence by only one of the devisees, a special issue may be submitted directed to the validity of the interest of such devisee.
6. Where a special issue is submitted directed to the undue influence exerted over the testator by one of the devisees, the declarations of the testator made prior to the execution of the will, coupled with those made by such devisee, are competent to be considered by the jury upon the issue thus presented.
7. Upon an issue of *devisavit vel non*, declarations of the testator made prior to the execution of the will, are not sufficient to be submitted to the jury to show undue influence, in the absence of evidence showing any acts of undue influence or any admissions thereof.
8. In passing upon the question as to whether the will was procured by undue influence, the age of the testator, his mental and physical condition, and other relevant facts may be considered by the jury.

PROCEEDINGS by Caroline Linebarger and others against H. D.
(230) Linebarger and others, heard by *Bryan, J.*, and a jury, at the July Term, 1906, of CATAWBA.

Propounders, appearing in the record as plaintiffs, offered for probate a paper-writing purporting to be the last will and testament of Fred. H. Linebarger, deceased. Caveators, appearing as defendants, filed a caveat averring that said paper-writing was not the last will and testament of said Fred. H. Linebarger, for that "It was obtained by the undue influence of Caroline Linebarger, Hosea Linebarger, Marvin Linebarger, and other persons in their behalf." Thereupon an issue was submitted, to wit: "Is the paper-writing offered for probate, and

every part thereof, the last will and testament of Fred. H. Linebarger, deceased?" The jury having responded "No" to the issue, judgment was rendered accordingly, and propounders having noted exceptions to his Honor's rulings set forth in the opinion, appealed.

Witherspoon & Witherspoon for the plaintiffs.

W. C. Feimster, M. H. Yount and *Self & Whitener* for the defendants.

CONNOR, J., after stating the case: Propounders proved the execution of the alleged will by the subscribing witnesses thereto and that at the time thereof the alleged testator was of sound mind, etc., and read the same. By the provisions of said paper-writing the alleged testator gave his entire estate, both real and personal, except several pecuniary legacies, to his wife, Caroline Linebarger, for life, remainder to two of his sons, being the youngest, Hosea and Marvin Linebarger. He gave to six of his children twenty dollars each, to one child fifteen dollars, to two sons forty dollars each, and to the children of two deceased daughters one dollar each. He named his wife and another person executors, The paper-writing was executed 27 November, 1903, and he died 15 March, 1905. It was offered for probate April, 1905. (231)

For the purpose of showing undue influence, caveators offered to show the declarations made by the alleged testator before and subsequent to the execution of the paper-writing, also declarations of one of the devisees. To the admission of this class of testimony propounders excepted.

It appeared that the alleged testator was, at the date of the paper-writing, eighty-one years of age, and that Caroline Linebarger was his second wife. There was nothing in the testimony of the subscribing witnesses indicating mental incapacity, nor was there any evidence from this source showing undue influence or fraud.

Among other witnesses introduced to show declarations of the alleged testator was Mrs. Susan Linebarger, wife of one of the caveators. Propounders objected to her competency to testify to declarations of the alleged testator, because of sec. 1631, Rev. (Code, 590). It is clear that if the caveators succeeded in their contention, the husband of the witness, as one of the heirs at law, became the owner of an undivided interest in the real estate. It is well settled by a number of decisions that the wife immediately upon the seizin, either in law or deed of the husband, becomes entitled to "an inchoate right of dower or estate in the land" of her husband. *Gatewood v. Tomlinson,* 113 N. C., 312; *Gore v. Townsend,* 105 N. C., 228 (8 L. R. A., 443); *Trust Co. v. Benbow,* 135 N. C., 303. She therefore had an interest in the property de-

pendent upon the result of the controversy and, under the ruling in *Pepper v. Broughton,* 80 N. C., 251, was incompetent. The exception to the admission of her testimony must be sustained. This ruling would result in a new trial; as, however, other exceptions are made in the record, and will probably arise in another trial, it is our duty to dispose of them at this time.

(232) The declarations of the testator fall within three classes and their admissibility depend upon different principles and exceptions. Caveators proposed to show declarations which it is claimed tend to show undue influence made prior to the execution of the paper-writing.

Mrs. Kale testified that prior to the death of her first husband, which was two years before the death of Mr. Linebarger, he said in her presence that he wanted the law to make his will, each child to have his part; that he did not intend to make a will unless "they all" persuaded him to do so.

Mr. Gant testified that during the month of April, 1900, while at Mr. Linebarger's house, he said that "he didn't see much pleasure; that they terrified him day and night; he saw no peace." Witness asked him, Who? He said, "Ma and Hosea, to make a will to Hosea and Ma." That he had heard Mr. Linebarger say repeatedly that he wanted his property divided equally among his children. That in 1901 he had another conversation with Mr. Linebarger in which he complained of the conduct of Hosea and his wife, to whom he referred as "Ma."

One Helderman testified that, at some date not fixed; but which by reference to certain matters of public history we may fix at some time during the year 1903, Mr. Linebarger said to him that "Hosea and his last children wanted him to make a will, but he said he wanted all his children to fare alike when he was dead and gone."

One Monroe Gordon testified that some time during the year 1903 Mr. Linebarger said to him that his wife wanted him to make a will to her and her two boys, but that he was not going to do that; that he could not eat, sleep, and work; that he could not live many years.

(233) The only evidence of declarations made subsequent to the execution of the paper-writing were those testified to by Mrs. Susan Linebarger. We find no testimony showing any *acts* on the part of propounders or any other person of undue influence or fraud.

That the declarations of the testator regarding the execution of his will indicating the state of his mind, etc., made contemporaneous with or so near thereto as to fall within the principle of *res gestæ* are competent in an issue of *devisavit vel non,* is well settled. 1 Redf. on Wills, 542. In *Shailer v. Bumstead,* 99 Mass., 112, *Colt, J.,* says: "It

is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud or undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented."

In so far as the declarations tend to show undue influence, we think that they are competent. While the authorities respecting the extent to and purpose for which such declarations may be admitted are not uniform, we think that, at least in this State, those offered here were competent. 1 Green. (16 Ed.), 760.

Eliminating the testimony of Mrs. Susan Linebarger, we find no evidence of declarations made subsequent to the execution of the paper-writing. This relieves us from the discussion of the much vexed question as to the extent to and purpose for which such declarations are admissible in this State under the rulings in *Reel v. Reel,* 8 N. C., 248, and *Howell v. Barden,* 14 N. C., 442. Interesting discussions of these cases as related to the current of authority upon this question will be found in *Shailer v. Bumstead, supra; Waterman v. Whitney,* 11 N. Y., 157; *In re Hess's Will,* 48 Minn., 504 (S. c., 31 Am. St., 665, and notes); *Meeker v. Boylan,* 28 N. J. L., 274 (289); *Jackson v. Kniffen,* 2 Johns, 31 (3 Am. Dec., 393, and notes). (234)

Caveators proposed to show declarations of Hosea Linebarger made prior and subsequent to the execution of the paper-writing, tending to show undue influence by him. There was no declaration regarding any act done by said Hosea. The exception to this testimony presents a difficult question. It is elementary learning that a party's declarations against his own interest, or those claiming under him, are always competent, this being one of the settled exceptions to the hearsay rule. It is equally well settled that, when the person whose declarations are sought to be shown, is alive, they are not competent against strangers, or those claiming a common but not joint interest. That persons taking a devise, or bequest, in a will have a community of interest, but not a joint interest, is well settled. "Upon the question whether a declaration of a legatee made after the execution of a will is admissible to show that it was procured by undue influence, there is a conflict of authority. The majority of the cases reject such evidence, reasoning, on general principles, that no one should be concluded by unauthorized statements of others with whom he is in no way associated or identified in interest. The admission of a legatee is evidence against the will where he is the sole beneficiary under it. But the interests of legatees under a will are several, not joint. Each claims independently of the others, and his

interest should not be affected by the acts or declarations of the other legatees." 1 Underhill on Wills, 163. The question is presented and discussed in *Shailer v. Bumstead, supra.* "The admissions of a party to the record against his interests are, as a general rule, competent against him; and this rule applies to all cases where there is an interest in the suit, although other joint parties in interest may be injuriously affected. But it does not apply to cases where there are other (235) parties to be affected, who have not a joint interest, or do not stand in some relation of privity to the party whose admission is relied upon. A mere community of interest is not sufficient. Devisees and legatees have not that joint interest in the will which will make the admission of one admissible against the other legatees. * * * The separate admissions of each made after the act, that the will was procured by their joint acts of fraud or undue influence, cannot be permitted to prejudice the other. Such statements are only admissible when they are made during the prosecution of the joint enterprise. Admitting, for the present, that any interest in a will obtained by undue influence cannot be held by third persons, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions. The admissions of a legatee made prior to the date of the execution are rejected for the reason that, if made before he becomes a legatee, they are not declarations against his interest." 1 Underhill on Wills, 163.

Of course, if there be a conspiracy, or the undue influence be either the result of a common design or be committed jointly or in concert, the acts and declarations of the parties engaging therein would be admissible in the same way and to the same extent as in other like cases.

In *Gash v. Johnson,* 28 N. C., 289, the question came up in a rather peculiar way, and while in the opinion the Court expressly says that the declaration of one of the legatees in regard to undue influence is not competent against the others, it is decided that, because he was not a party to the record, the will being propounded by the executor alone, such evidence is immaterial to affect his rights as devisee. In that case the contest was between the executor, who alone propounded the (236) will in common form, and the caveators.

It would seem from the decision in *McRainy v. Clark,* 4 N. C., 698, that the declarations of one of the legatees or devisees are competent as against himself. The usual and statutory method of proceeding in this State, when a caveat is filed, is to summon all persons in in-

terest to make themselves parties. Rev., 3136. It is suggested by *Judge Daniel* in *Gash v. Johnson, supra,* that the Court should direct that a special issue be drawn "for the jury to find" whether the paper-writing propounded, or any part thereof, and if any, which part, is the last will and testament of the testator. It may be that, under an issue so drawn, the declarations of one or more of the legatees could be received as against the interest of such legatee when such declarations affected the validity of the legacy or devise made to such declarant. That there are practical difficulties in the application of this rule is apparent. We are impressed with the views of *Mr. Justice Craig,* expressed in *McMillan v. McDill,* 110 Ill., 47: "In the case under consideration, the Court, in deciding the question, admitted the declarations only as against the party who made them; but this did not relieve the evidence of its injurious effect. The evidence was admitted upon the issue involved in the case. It was incompetent as against the other defendants, and as it could not affect the issue without affecting the other defendants, it was, in our judgment, incompetent to go to the jury on the issue involved. If the interest of the devisees had been joint, the evidence might have been admitted against all of them, as we understand it to be a rule of evidence where the parties have a joint interest in the matter in suit, an admission made by one is in general competent evidence against all. But here the devisees did not have a joint interest under the will, but they had separate interests in one subject—the validity of the will, as held in *Dietrich v. Dietrich, supra.* If this was a case where a judgment could be rendered against one of the defendants without affecting the rights of the others, (237) there might be some ground for admitting in evidence the declarations as against the defendant who made them; but such is not the case. The only question here is as to the validity of the will, and testimony which defeats one defendant—one devisee—defeats all, and a judgment against one necessarily defeats all. While it might be proper to defeat a will on the admissions of a party who was a sole devisee, it would be manifestly unjust, where there are several devisees, to suffer the rights of all to be concluded and swept away by the admissions of one, and these admissions made in their absence and without their knowledge or sanction. If the admissions here could have gone to the jury and affected the rights of none but the one making them, no error would have been committed; but such was not the case. The admissions, notwithstanding the ruling of the Court, went to the issue *devisavit vel non,* in which all the devisees were equally interested."

It is true that the declaration offered in that case was that the testator was mentally incompetent. It may be that a distinction exists between declarations of this character, which go to the validity of the

entire will, and those amounting to admissions that the declarant who has a legacy or devise, under the will, admitted that he had exerted undue influence or practised a fraud upon the testator. There is not a scintilla of evidence in this record that Marvin ever spoke to his father, to his mother, or to Hosea, in regard to the will. He denies that he did so, and no one contradicts him. He expressly says that Marvin had not done so. There is no evidence, other than Mr. Linebarger's declarations before the will was made, that Mrs. Caroline Linebarger had talked with her husband in regard to his will. It would therefore be manifestly unjust that Hosea's declarations regarding his own conduct, for his own benefit, should be used against them.

Excluding the declarations of Hosea and of Mrs. Susan Line-
(238) barger, we are of the opinion that, measured by the standard applied by this Court in *Lee v. Williams,* 111 N. C., 200, there is not sufficient evidence to be submitted to the jury to show undue influence as against Mrs. Linebarger and Marvin. The declarations are not inconsistent with the final determination of Mr. Linebarger to make the will as we find it. He said that it was hard to make a will; that he wanted the law to make his will. That he would not make a will unless they persuaded him. That they terrified him day and night; that he saw no peace. This was in April, 1900; whereas, he did not make a will until November, 1903. That he wanted his property divided equally between his children; that his first wife's children were as near to him as his second and it was a hard thing to have to do. Monroe Goodson says that he said: "I want my land to go to my first chaps." That they, meaning Hosea, would curse him. That was Hosea. He didn't say the old lady cursed him or that Marvin did so. His land was worth about $2,000, and he had, it appears, about $1,200 in money.

His Honor instructed the jury that if they found that the paper-writing was executed as testified to by the witnesses to it, they would answer the issue "Yes." unless they found from the evidence by the caveators, first, that undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. In regard to the declarations, he said that they afforded no substantive proof of undue influence and were not admitted for that purpose, and before the caveators could recover it was necessary that they should prove that undue influence was in fact actually exerted upon the testator by other evidence than his own declarations. This instruction was correct and is sustained by the authorities and the reason of the thing. *In re Hess's Will, supra.*

It would be an exceedingly dangerous innovation upon the
(239) statute which requires a will to be executed according to the formalities prescribed, to permit it to be set aside upon mere

declarations of the testator in regard to undue influence, unaccompanied by any act on the part of any person. Measured by the standard laid down by his Honor, we think that he should have instructed the jury that there was no evidence upon which they could find against the will as to Mrs. Linebarger and Marvin. We can see no reason why a special issue may not be submitted to the jury, as suggested in *Gash v. Johnson, supra,* directed to the interest of Hosea. In that event, as we have seen, the declarations of the testator made prior to the execution of the will, coupled with those of Hosea, would be competent to be considered by the jury on the issue thus presented.

The propounders excepted to certain parts of his Honor's charge in regard to insanity. While we find no suggestion of insanity, either in the caveat or the evidence, in passing upon the question as to whether the will was procured by the undue influence of Hosea, the age of the testator, his mental and physical condition and other relevant facts would be competent to be considered by the jury.

The propounders attempted to raise the question that there was no evidence to be submitted to the jury by a motion for judgment of *non obstante veredicto.* This was not the proper motion. His Honor could not have rendered judgment notwithstanding the verdict. It is evident, however, that it was their purpose to move for judgment upon the whole evidence.

We are of the opinion that as to Caroline and Marvin Linebarger, eliminating the incompetent testimony, the motion should have been allowed. The cause should be remanded for a new trial, in accordance with the principles announced herein.

New Trial.

HOKE, J., concurs in result.

Cited: In re Fowler, 156 N. C., 342; *Ib.,* 159 N. C., 207; *In re Patrick's Will,* 162 N. C., 520.

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(240)

GAITHER v. CARPENTER.

(Filed 4 December, 1906.)

Case on Appeal—Appellee's Exceptions—Duty of Appellant—Malicious Prosecution—Evidence of Deliberations of Jury—Harmless Error—Malice—Instructions—Contentions of Parties—Charge Taken to Jury-room.

1. Where the Court adopts the "appellant's case as amended by the appellee's exceptions" it is the duty of the apellant to have the case, as thus modified, redrafted and submitted to the Judge for signature. When he does not do this, but merely sends up his case with the appellee's exceptions and Judge's order, there is strictly no "case settled," and the Court in its

discretion (there being no errors upon the face of the record) may, *ex mero motu*, either affirm the judgment or remand the case.

2. Where the counsel do not agree upon the case on appeal, only the "case settled" by the Judge should come up in the record.
3. The "case on appeal" should contain such incidents of the trial as were duly excepted to.
4. In an action for malicious prosecution, evidence of a member of the jury in the criminal trial that the jury were "out a considerable time" and at first stood "seven for acquittal and five for conviction" was irrelevant, and should have been excluded, but this Court cannot see that its admission was prejudicial or reversible error in this case.
5. An instruction that to constitute malicious prosecution there must be want of probable cause and malice was correct.
6. In an action for malicious prosecution, the plaintiff cannot complain of the definition of malice as "a disposition to do the person prosecuted a wrong without legal excuse."
7. If a party wished fuller instructions upon any phase of the evidence than those given, it was his duty to have presented them by prayers for special instructions, and in the absence of such prayers he cannot complain that any of his contentions were not presented to the jury.
8. The Court properly permitted the jury to carry the charge with them on retiring to the jury-room, at the request of one of the jurors.
9. Where the charge of the Court was taken to the jury-room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error, where his counsel were present in the court-room and did not then, or at any time before verdict, call the matter to the attention of the Court.

(241)

ACTION by A. S. Gaither by his next friend against P. O. Carpenter, heard by *Cooke, J.*, and a jury, at the May Term, 1906, of CATAWBA.

The plaintiff had been tried for larceny of a watch, and acquitted. This is an action against the prosecutor for malicious prosecution. Verdict and judgment for defendant; appeal by plaintiff.

Cline & Mebane and *T. M. Hufham* for the plaintiff.

W. C. Feimster, Self & Whitener and *M. H. Yount* for the defendant.

CLARK, C. J. To the case on appeal tendered by appellant, the appellee offered exceptions. The Court adopted the "appellant's case as amended by appellee's exceptions," and the matter comes up to this Court in that shape, leaving this Court to incorporate the amendments. This practice cannot be tolerated. It is "the duty of the appellant to have the case as thus modified redrafted and submitted to the Judge for signature. When he does not do this, but merely sends up the appellant's case with the appellee's exceptions and Judge's order, there is strictly no 'case settled,' and the Court in its discretion (there being no errors upon the face of the record) may, *ex mero motu*, either affirm the

judgment or remand the case." *Mitchell v. Tedder,* 107 N. C., 358; *Hinton v. Greenleaf,* 115 N. C., 5; *State v. King,* 119 N. C., 910. When counsel do not agree upon a case, only the "case settled" by the Judge should come up in the record. No part of the tentative cases of counsel, on either side, should come up, save as they appear in the re-drafted case signed by the Court. *S. v. Dewey,* 139 N. C., 557. (242) The "case on appeal" should contain such incidents of the trial as were duly excepted to. What those incidents were is a matter which, if not agreed upon by counsel, must be "settled" by the trial Judge, and cannot be determined by this Court.

A member of the jury in the criminal trial having testified as to the evidence of the defendant when prosecuting the criminal action, was allowed to state, over the plaintiff's exception, that the jury in that case were "out a considerable time" and at first stood "seven for acquittal and five for conviction." We do not approve of the admission of such evidence. As the jury, on full deliberation, acquitted, this is of more value than its first tentative vote. The evidence was irrelevant and should have been excluded, but we cannot see that its admission was prejudicial or reversible error in this case.

His Honor charged the jury that to constitute malicious prosecution there must be want of probable cause and malice. This was correct. *Kirkham v. Coe,* 46 N. C., 423; *R. R. v. Hardware Co., ante; ibid.,* 138 N. C., 174. Nor could the plaintiff complain of the definition of malice —"a disposition to do the person prosecuted a wrong without legal excuse." In *R. R. v. Hardware Co.,* 138 N. C., 180, it was defined to be a "wrongful act intentionally done without just cause or excuse." Nor could the plaintiff complain that any of its contentions were not presented to the jury. If he wished fuller instructions upon any phase of the evidence it was his duty to have presented them by prayers for special instructions. *Patterson v. Mills,* 121 N. C., 258, and cases there cited.

As the jury were about to retire, one of the jurors asked the Judge to be allowed to carry the charge to the jury-room with them. This the Judge properly did, for though not within the very language of Revisal, 537, it could not be erroneous in view of that statute. (243) Unintentionally, by some oversight, the special prayers asked by the plaintiff, and which had been given, were not also handed to the jury. It does not appear what they were nor that the failure to hand them to the jury worked any prejudice to the plaintiff. They are not set out so that we might see. It is not contended that they contradicted the charge in any way. If they were material, the jury would probably have sent back for them, for they had been read in the hearing of the jury. Besides, the plaintiff's counsel were present in the court-room

and did not then or at any time before verdict call the matter to the attention of the Court—who would doubtless gladly have corrected the oversight—nor make any exception. "Exceptions to the evidence and to all matters occurring on the trial, except the charge of the Court, must be noted *at the time.*" Rev., 554 (2). "If not, they are waived." *Taylor v. Plummer,* 105 N. C., 57 (often affirmed), citing *S. v. Ballard,* 79 N. C., 627; *Scott v. Green,* 89 N. C., 278; *Alley v. Howell,* 141 N. C., 116.

"It is the policy of the law to encourage citizens of the country in their efforts to bring public offenders to the notice of the Court to the end that they may be regularly put on trial. Hence, one who institutes proceedings for that purpose is in some measure protected, and he does not expose himself to an action merely by acting without probable cause. It must appear also that he acted from malice." *Kirkham v. Coe,* 46 N. C., 429. The jury have found that the defendant acted without malice and, from the evidence doubtless, that he had probable cause also. Actions of this kind are not favored by the law unless oppression and malice is shown.

No Error.

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

Cited: *Farris v. R. R.,* 151 N. C., 492; *S. v. Bailey,* 162 N. C., 584.

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(244)

SHEPARD v. TELEGRAPH COMPANY.

(Filed 4 December, 1906.)

Telegrams — Delay in Delivery — Presumption of Negligence — Burden of Proof—Mental Anguish—Elements of Damage—Jurors' Own Feelings—Evidence—Presumption of Mental Anguish—Proof in Aid of Presumption.

1. In an action to recover damages for delay in the delivery of a message, the Court charged the jury, "The message not having been delivered until a week afterwards, the law presumes negligence on the part of the defendant company, but it is not such a presumption as could not be rebutted. But it requires proof on the part of the defendant by the greater weight of the evidence that it did exercise due care in the effort to deliver the message." The first paragraph was correct, the latter incorrect.
2. The party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced.
3. In an action to recover damages for mental anguish on account of the delay in the delivery of a telegram, an instruction on the issue of damages that the jury had "a right to take into consideration their own feelings" was erroneous, as a jury has no right to do more than give the

plaintiff recompense for the anguish he suffered from the negligence of the defendant—the amount to be determined, not by their own feelings, but by the evidence.

4. It was competent for the plaintiff to testify that he was greatly grieved and it almost killed him because he could not be at his father's deathbed and funeral.

5. The fact that mental anguish is presumed where close relationship exists, does not exclude the more direct proof by the plaintiff's own testimony.

ACTION by D. M. Shepard against Western Union Telegraph Company, heard by *Justice, J.*, and a jury, at the May Term, 1906, of HENDERSON. From a judgment for plaintiff the defendant appealed.

Holmes & Valentine and *B. A. Jones* for the plaintiff. (245)
Merrick & Barnard for the defendant.

CLARK, C. J. The Court charged the jury: "The message not having been delivered until a week afterwards, the law presumes negligence on the part of the defendant company, but it is not such a presumption as could not be rebutted. But it requires proof on the part of the defendant by the greater weight of the evidence that it did exercise due care in the effort to deliver the message." The first paragraph was correct, the latter incorrect.

The burden of the issue as to negligence was upon the plaintiff. If no evidence had been offered in rebuttal, the Court might have told the jury that if they believed the evidence, to answer that issue "Yes." But when evidence was offered in rebuttal it was not incumbent upon the defendant to prove it by a preponderance of testimony, but upon all the testimony it was the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. This has been recently discussed. *Board of Education v. Makely*, 139 N. C., 35, citing a very apposite passage from 1 Elliott Ev., sec. 139:

"The burden of the issue, that is, the burden of proof, in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor (246)

must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced."

In criminal cases, when a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matter in mitigation or excuse to the satisfaction of the jury, *S. v. Matthews,* 142 N. C., 621; and when a totally independent defense is set up, as insanity, which is really another issue, *S. v. Haywood,* 94 N. C., 847, the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the State throughout, and when evidence is offered to rebut the presumption of fact raised by the evidence, the burden is still on the State to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an *alibi,* for example, which goes to the proof of the act. *S. v. Josey,* 64 N. C., 56.

Nor can we approve his Honor's instruction that the jury had "a right to take into consideration their own feelings." If this was correct, damages would depend not upon evidence, but upon the difference in the feelings of the individuals composing a jury. A jury has no right to do more than give the plaintiff a fair recompense for the anguish he suffered from the negligence of the defendant, the amount to be determined, not by their own feelings, but by the evidence. *Cashion v. Tel. Co.,* 124 N. C., 459.

The plaintiff testified that he was greatly grieved and it almost killed him because he could not be at his father's deathbed and funeral. This evidence was competent. It is true that where close relationship (247) exists mental anguish is presumed, but this does not exclude the more direct proof by the plaintiff's own testimony. In *Thompson v. Tel. Co.,* 107 N. C., 456, a similar exception was said to be "without merit." See, also, *Hunter v. Tel. Co.,* 135 N. C., 465, where it is said that mental anguish "is a matter of proof, and may be inferred from all the surrounding circumstances, as well as the personal testimony of the plaintiff." In *Harrison v. Tel. Co., ante,* 147, *Brown, J.,* says that "the condition of the mind is as susceptible of proof as the state of the digestion, and can be proved by the personal testimony of the sufferer." But for above errors in the charge there must be a

New Trial.

Cited: Helms v. Tel. Co., post, 395; *Winslow v. Hardwood Co.,* 147 N. C., 277; *Cox v. R. R.,* 149 N. C., 119; *Lanning v. Tel. Co.,* 155 N. C., 345; *Brock v. Ins. Co.,* 156 N. C., 116.

(248)

IN RE WITTKOWSKY'S LAND.

(Filed 4 December, 1906.)

Highways—Eminent Domain—Commencement of Legal Proceedings—Notice —Assessment of Damages—Limitation of Action—Appeal—Practice.

1. A notice by Township Trustees to a landowner that they had condemned a strip of his land to widen the public highway was not the beginning of legal proceedings, under Laws 1901, ch. 50, sec. 5, as amended by Laws 1905, ch. 770, sec. 1 (2), where the taking was under the right of eminent domain and was not contested.
2. In a proceeding by a landowner under Laws 1901, ch. 50, sec. 5, as amended by Laws 1905, ch. 770, sec. 1 (2), to assess damages for land taken for highway purposes, notice of the proceeding is required to be given to the Township Trustees and County Commissioners under the "law of the land."
3. Laws 1901, ch. 50, sec. 5, as amended by Laws 1905, ch. 770, sec. 1 (2), providing that any person aggrieved may within six months after a change of road, or a new road has been opened and completed, apply for a jury to assess damages, means that the proceeding shall be begun "within," *i. e.*, "not later than" six months after the road has been changed or the new road opened and completed.
4. When a case is before the Judge on appeal, it is optional with him to try it or remand to the Clerk with instructions.

SPECIAL PROCEEDINGS for condemnation of land of S. Wittkowsky, heard by *Peebles, J.*, on appeal from the Clerk, at the July Term, 1906, of MECKLENBURG.

On 15 March, 1906, the Board of Trustees of Charlotte Township notified S. Wittkowsky that they had condemned a strip of his land to widen the public highway. On 23 March, 1906, he applied to the Clerk of Court to appoint a jury of five men to assess his damages. On 24 March, 1906, the Clerk appointed the jury, who were summoned by the Sheriff, and assessed the damages at $2,000. The application to the Clerk, the appointment of the jury, their summons by the Sheriff, their meeting and assessment, were all without notice either to the Board of Township Trustees or to the County Commissioners, whose first knowledge of the proceeding to assess damages was a notice from the Clerk, on 17 April, that the counsel for Wittkowsky had moved for judgment for $2,000 damages assessed by the jury. The Board of Township Trustees moved to dismiss the proceeding because prematurely brought. This motion was allowed, and Wittkowsky appealed. The Judge remanded the proceedings to the Clerk, with directions to issue notice to Township Trustees and County Commissioners of the application for appointment of a jury, which shall be composed of new men, none of whom have already acted in this case; that said jury when appointed shall procure from the Township Trustees a map of the land con-

demned and shall appoint a time and place for assessment of damages, giving due notice of time and place to the Township Trustees and County Commissioners as well as to the petitioner, and after hearing all the parties and the evidence offered, make report of their assess-
(249) ment of damages to the Clerk. Wittkowsky appealed.

Brevard Nixon and *J. D. McCall* for appellant.
Burwell & Cansler and *R. S. Hutchinson* for Township Trustees.

CLARK, C. J. This was a proceeding under Laws 1901, ch. 50, sec. 5, as amended by Laws 1905, ch. 770, sec. 1 (2). The notice to Wittkowsky that the strip of his land had been taken for public purposes was not the beginning of legal proceedings. The "taking" was under the right of eminent domain and was not contested. The above-quoted section provided that any person aggrieved "may within six months after said change of road, or new road has been opened and completed, apply to the Clerk of the Superior Court, who shall appoint a jury to consist of five freeholders to assess the damages." This was the beginning of these proceedings, whose object was solely to assess damages.

It is true that the statute does not in terms require that notice of the proceeding should be given to the Township Trustees and County Commissioners, but that is required under the "law of the land"—that general law "which proceeds upon inquiry and renders judgment only after trial." In *Gamble v. McCrady,* 75 N. C., 509, it was held that an assessment of damages was void for want of notice, though no notice was required by the statute under which those proceedings were had. That a notice must be given, as of right, is recognized. *S. v. Jones,* 139 N. C., 618.

The Clerk, on motion, dismissed the proceeding as premature—doubtless on the ground that the statute provides that the land-owner must institute this proceeding "within six months after said change of road or new road has been opened and completed." But this, we think, means simply that the proceeding to assess damages shall be begun "within," *i. e.,* "not later than" six months after the road has
(250) been changed or the new road has been opened and completed. It was error, therefore, to dismiss the proceeding.

We think his Honor took the correct view in remanding the proceeding to the Clerk with directions to give notice to the Township Trustees and County Commissioners, that they may be represented when the jury of five men are selected and that said jury must give notice and hear all parties before assessment of damages. This report will be subject to action of the Clerk upon exceptions and an appeal therefrom.

The case being before the Judge on appeal, it was optional with him

to try it or remand to the Clerk with instructions. *Martin v. Briscoe, ante.* As the notices, if given before the Judge, would have carried the case over to the next term, the course taken was preferable, especially as the jury appointed by the Clerk will have a better opportunity to view the premises.

Affirmed.

(251)

MORRISON v. MINING COMPANY.

(Filed 4 December, 1906).

Parties—Right to Withdraw—Lien for Services—Attachment—Lien—Services of Agent—Special Contract—Quantum Meruit.

1. Where an action for services rendered was brought by attachment and without personal service against parties who owned no interest in the land attached, but the real owners at their own request upon their verified petition were made parties defendant, the Court properly denied their motion, made at a subsequent term, to be allowed to withdraw from the case, especially as an allegation in the petition which constituted the basis of plaintiff's cause of action had been admitted by plaintiff in his reply.
2. Plaintiff's services, consisting in looking after mining property, paying the taxes and listing it and keeping trespassers off, constitute no lien on the property which followed it into a purchaser's hands, and where plaintiff had no personal claim against such purchaser, who acquired his interest after the suit had been commenced, the motion to nonsuit as to the latter should have been allowed.
3. An attachment on land is void and constitutes no lien where the defendants named in the attachment had parted with their title before the attachment was issued.
4. In an action to recover the value of services rendered, where it was admitted that plaintiff was defendant's agent in caring for his property, and there being proof of services performed and knowingly received, and of their value, the law implies a promise by defendant to pay a fair and reasonable compensation therefor, and it was not necessary for plaintiff to allege or prove a special contract for the payment of his services.

ACTION by W. H. Morrison, administrator of J. A. Seals, against New Haven and Wilkerson Mining Company and others, heard by *Cooke, J.,* and a jury, at the August Term, 1906, of BURKE.

This action was commenced by plaintiff to recover the value of his intestate's service as a care-taker and agent in charge of mining property. The Court submitted the following issues:

1. Was there any contract to pay the plaintiff's intestate, John Seals, for the taxes and his care of the land their value in excess of the value of the rents? Answer: Yes.

2. If there was, how much, if any, are the defendants Ward and Epley indebted to plaintiff? Answer: $600.

No other issues were tendered. By consent of plaintiff the Court reduced the recovery to $250, and rendered judgment against the defendants Epley and Ward, to which they excepted and appealed.

No counsel for the plaintiff.
John T. Perkins for the defendant.

(252) BROWN, J. This action was brought 23 February, 1904, by attachment and without personal service, against the New Haven and Wilkerson Mining Company and the New Haven and North Carolina Mining Company and George F. Newcombe. Prior to that date, on 29 June, 1898, the New Haven and North Carolina Mining Company had conveyed the lands attempted to be attached to George F. Newcombe by deed registered in Burke County, 19 July, 1898, and George F. Newcombe had duly conveyed the lands to Denslow, Ward & Company by deed registered 19 July, 1898. Denslow, Ward & Company, the registered owners, were not made defendants in the attachment. Inasmuch as the defendants named in the attachment owned no interest in the land attached, and the Court had acquired no jurisdiction by service of the summons, the case would have come to an end but for the interpleading of T. L. Epley and Fleetwood Ward. The latter was a member of Denslow, Ward & Company of New York, and the owner of half the land and mining property. The former, after commencement of the action, had purchased the other half from E. H. Denslow, the other member of the firm, by deed registered 11 January, 1905. For the purpose of defending their title to this property, Epley and Ward, upon their verified petition in writing were made parties defendant at their own request at December Term, 1905, of Burke Superior Court, and a nonsuit was entered as to George F. Newcombe, he having disclaimed any interest in the property.

At August Term, 1906, Messrs. Morgan and Perkins, the attorneys who filed the joint petition to be made parties defendant on behalf of Ward and Epley, asked to be allowed to withdraw the same, and objected to the order making them defendants. We think his Honor very properly disallowed the motion. Epley and Ward had come in of their own accord upon a joint petition written and presented by their
(253) attorneys setting out their interest in the property and asking to be made defendants. Because they repented their act afterwards is no reason the Court should deny to plaintiff the benefit of their presence in the suit. This is especially true in view of the allegations of the petition filed by them, which plaintiff had a right to take advantage of and to admit that particular allegation which constitutes the

basis of his cause of action, as plaintiff did in his replication. The fourth and fifth sections of the petition read as follows:

"4. That, as the said T. L. Epley and Fleetwood Ward are informed and believe, the said J. A. Seals, plaintiff in this cause, well knew prior to the bringing of this suit that said land had long since been conveyed by the said George F. Newcombe to the said Denslow, Ward & Company. That they now have in their possession letters signed in the name, and, as they believe, written by the hand of the said J. A. Seals, which letters are dated, one 17 November, 1898, and the other 2 April, 1900, in which letters the said J. A. Seals reports and accounts to the said Denslow, Ward & Company concerning said land, which is therein referred to as, and acknowledged to be, the property of the said Denslow, Ward & Company.

"5. That they, the said T. L. Epley and Fleetwood Ward, are informed and believe that the said J. A. Seals was, during his lifetime and prior to the institution of this suit, paid in full for any and all services rendered to the owners of said land in caring for the same and on any and all other accounts; and that as they are informed and believe, the said J. A. Seals was at the time of the bringing of this suit, and his estate now is, justly indebted to the owners of said land for and on account of valuable timber cut, sold and removed by the said J. A. Seals, in great quantities therefrom, in the sum of at least several hundred dollars."

It is thus admitted that plaintiff's intestate, Seals, was the agent of the defendant Ward, as the care-taker in charge of the property, and the defendant Ward also set up a plea of payment in full (254) for all services rendered and a counter-claim for timber wrongfully removed and sold by Seals to the amount of several hundred dollars in excess of the services. It is true that, when the Court declined to allow them to withdraw from the case, the defendants filed another paper called an "intervention," in which they ignore these allegations and admissions of the first petition, but that did not have the effect to deprive plaintiff of their benefit. They had voluntarily become parties defendant, and did not occupy the position of mere intervenors for the sole purpose of dismissing the attachment. Besides, the defendant Ward has judicially admitted by his attorneys that Seals was the agent of his firm in charge of the property. The complaint had been properly amended and a reply to the answer filed, and it was eminently proper that Ward, at least, should have been continued as a defendant to the end that there should be a mutual accounting and settlement of the agency.

At the close of the evidence both defendants moved to nonsuit, and as to Epley we think the motion should have been allowed. There is

no evidence of any contract between him and Seals, and likewise none that he knowingly accepted any service from Seals. On the contrary, he acquired his half of the property some time after the suit had been commenced. Seals' services constitute no lien on the land which followed it into Epley's hands, and the attachment was void and constituted no lien because the defendants named in the attachment had parted with title some years before the attachment was issued. Epley, therefore, acquired a good title as to one-half of the property, and as Seals had no personal claim on him he is entitled to go without day.

As to the defendant Ward, the case is different. It is true, plaintiff acquires no lien on his half of the land by virtue of the attachment, but he has a personal judgment in an action to which of his own voli-
(255) tion he is a defendant. The issues are framed with a view to present the controverted matters, not admitted by the pleadings, and to the form of them there was no exception, and no others were tendered.

The plaintiff offered evidence tending to prove that his intestate, J. A. Seals, was engaged between 29 January, 1898, and the date of his death in the fall of 1904, in looking after this mining property; that he received little rent from it; that he paid the taxes and listed it and kept trespassers from entering and working the mines; and that his services were reasonably worth $175 to $200 per year. The defendants offered evidence tending to prove not only that they knew Seals was caring for the property, but that Seals was to care for it and pay the taxes on it for the rents, and that he was to receive no other compensation, and that he received rents and proceeds of timber in excess of the value of his services.

The defendants offered evidence of a special contract as against plaintiff's claim for a *quantum meruit*. The counsel for defendants are mistaken in urging that plaintiff alleges a special contract and, therefore, cannot recover on his *quantum meruit*. Plaintiff alleges the agency, and it is admitted, but he does not either allege, admit or offer evidence of a special contract for the payment of his services. It is the defendant who offers the evidence that, according to agreement, Seals was to have no remuneration for his services and payment of taxes except the rents. It is not necessary that plaintiff allege or prove a special contract. The agency being admitted by defendant Ward, and there being proof of the services performed and knowingly received, and of their value, the law implies a promise to pay by defendant, but to be confined, as it was confined, to the years since defendant Ward purchased.

"Where services are performed by one for another, either with or without the latter's consent and knowledge, and he knowingly ac-

cepts and avails himself of these services, the general rule is (256) that the law will imply a promise to pay a fair and reasonable compensation therefor." 15 A. and E., 1083; *Blount v. Guthrie,* 99 N. C., 93; *Bailey v. Rutjes,* 86 N. C., 517; *Moffitt v. Glass,* 117 N. C., 142; *Dixon v. Graveley,* 117 N. C., 84.

We think his Honor's charge followed the law as well settled and applied it properly to the contentions of the parties. The exceptions to the evidence need not be discussed. They are mostly based upon the erroneous idea that plaintiff should not be permitted to prove the value of the services rendered by the intestate because no special contract had been proven.

The judgment against defendant Ward is affirmed, and as to the defendant Epley it is ordered that he go without day.

Modified and Affirmed.

Cited: Stephens v. Hicks, 156 N. C., 242.

HAY v. ASSOCIATION.

(Filed 4 December, 1906.)

Insurance—Right of Reinstatement—Reinsurance—Non-payment of Assessments—Waiver of Terms of Policy.

1. Where a by-law of an assessment insurance company provided "that any member failing to pay his assessment within thirty days after notice mailed to him shall be dropped from the association and shall be required to pay a new membership fee in order to renew his insurance," and the insured, having failed to pay an assessment of which he had notice, was dropped, the company had the right to refuse to reinstate him after the lapse of three months after he had forfeited his policy and when his health had become hopelessly impaired.
2. The fact that an assessment life insurance company, on some occasions, accepted payment by the insured of assessments after they should have been paid, did not constitute a waiver of the terms of the policy nor amount to an agreement that premiums need not be paid promptly, especially where there was unreasonable delay and the health of the insured had become hopelessly impaired.

ACTION by Helen Hay against The People's Mutual Benevolent Association of North Carolina, heard by *Cooke, J.,* and a (257) jury, at the May Term, 1906, of CATAWBA. From a judgment for the plaintiff the defendant appealed.

Self & Whitener for the plaintiff.
M. H. Yount and *W. C. Feimster* for the defendant.

CLARK, C. J. The jury find that the insured had notice of the yearly assessment upon his policy due 23 January, 1905; that he failed to pay

it; that his wife, the beneficiary named in the policy and plaintiff herein, in the latter part of April or first part of May, 1905, made inquiry of the secretary and treasurer of the defendant whether or not any assessments were due on the policy, and offered to pay the same if they were due, and to pay such other sum as might be necessary for the reinstatement of the policy, and that from 7 January, 1905, until his death 18 June, 1905, the insured was in such broken health as not to be able to attend to business part of the time.

The plaintiff testified that her husband had a severe attack in November, 1904, and from then on he was in failing health; that about first April he began to grow more feeble; that the last of March she came to Raleigh, whither her husband had come just before Christmas, and found him unable to attend to his business, so she took charge of all his mail matters, and the latter part of April or in the first part of May wrote the company, as found by the jury, asking if any assessments were due, and to be permitted to pay anything that was due. This offer was not accepted by the company.

The defendant is an assessment insurance company. The by-laws in force at the time the policy was issued were put in evidence. Section 9 thereof reads as follows: "Any member failing to pay his one dollar yearly assessment, or one dollar and fifteen cents on every
(258) death, within thirty days after notice mailed to him, shall be dropped from the association, and shall be required to pay a new membership fee in order to renew his insurance."

The insured having failed to pay his yearly assessment of 23 January, of which he had notice, he was dropped by the terms of section 9. Did he, or his wife for him (he being, as she says, grown too feeble to attend to business), have the absolute right, without the consent of the company, to pay that and other unpaid dues, ninety days or more thereafter, the last of April or first part of May, and reinstate him? We think not. Indeed, the terms of section 9 seem to contemplate not a reinstatement, but a reinsurance—"a new membership fee in order to renew his insurance." If so, a new contract was required, and the company did not enter into it. The difference between reinsurance and reinstatement is pointed out, *Lovick v. Ins. Co.*, 110 N. C., 93.

But if it be conceded even that section 9 provides for a reinstatement, did the insured have a right to be reinstated after the lapse of more than three months after he had forfeited his policy, and when his health had become so impaired that he was unable to attend to his business and was practically a dying man—dying, indeed, on 18 June? The by-law, section 9, does not state the terms upon which a member who has forfeited his policy could be reinstated, or reinsured, but certainly it required the assent of the company as well as of the defaulting member,

unless an absolute right on certain specified terms had been stipulated for; nor could it be considered reasonable or seasonable that one in such a state of health and after such delay should be entitled to restoration. *Lane v. Ins. Co., ante.*

In *Lovick v. Ins. Co.,* 110 N. C., 93, the policy, by its terms, gave the delinquent the opportunity for reinstatement upon certain conditions which the context showed meant reinstatement by payment of dues within a reasonable time after default. That decision, (259) besides, expressly excludes its own application to cases where reinsurance, not reinstatement, is stipulated for.

It is true it is found in this case that prior to 1905 the defendant had, on some occasions, accepted payment by the insured of assessments after the date at which they should have been paid. It is not found how often nor after how long a default these indulgences were granted. But these were mere personal favors and cannot be construed into a standing waiver of the terms of the contract. They did not constitute a "course of dealing" which amounted to an express agreement that premiums need not be paid promptly, as in *McCraw v. Ins. Co.,* 78 N. C., 149. That was a fire policy and there was no impaired health or increased risk during delay of payment. It is against public policy that such casual courtesies, extended to the insured when still in good health, should confer a right to demand other indulgences (*Thompson v. Ins. Co.,* 104 U. S., 252; *Lantz v. Ins. Co.,* 10 L. R. A., 577), more especially when, as here, there is unreasonable delay and the health of the insured has become hopelessly impaired.

It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has a right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted. Assessment companies being operated upon the plan of requiring only the actual cost of insurance, there is no reserve which, in certain conditions, keeps a policy in force for a limited period in "old line" companies, notwithstanding a failure to meet the payment of a premium promptly. (260)

Upon the issues found, the Court should have signed the judgment in favor of the defendant, which it tendered.

Reversed.

Cited: Bank v. Hay, ante, 336; *Page v. Junior Order,* 153 N. C., 409.

PETERSON v. RAILROAD.

(Filed 4 December, 1906).

Railroads—Permissive Licensees—Degree of Care Required—Wanton Injury.

1. A railroad company by carrying on its cars venders of fruits for sale to its passengers does not invite or induce the public to enter into them at a station for the purpose of making purchases, and the fact that without objection on the part of the company persons usually went into the cars for the purpose of buying fruit cannot amount to more than a permissive license.
2. Where the plaintiff went into the train at a station for the sole purpose of purchasing fruit without invitation or inducement, but simply by the silent acquiescence of defendant's agents, he was a mere permissive licensee, and took the risk incident to the movement of the train, and, in the absence of any wanton injury, the motion for nonsuit should have been allowed.

ACTION by Moses Peterson against South and Western Railway Company, heard by *Cooke, J.*, and a jury, at the April Special Term, 1906, of MITCHELL.

Moses Peterson, on his own behalf, testifies: "I was at Huntdale, in this county, 2 May, 1903. I went up on the train to that place and got off about 12 o'clock; the train returning passed there about 5 or 6 on its way to Johnson City. I live in Yancey County, and was about to start home on my wagon when the train came on, but while it was stopped at station I went on the train to purchase some lemons. It was a mixed train, and I got on a freight car where the lemons (261) were. There was a door on each side. There were steps to the door and up which I went. Moses Wilson and Van Adkins went on with me. There was a man in there standing in one corner and had lemons and some other fruit to sell. They were in the rear end of the car. The car doors were about four feet wide. Both doors were open. I reached him a dollar and told him to give me three lemons. He says, 'The train is going to start in a minute.' I says, 'Well, hand me the dollar and I'll get out of here.' He handed me the dollar, and as he reached it to me it dropped on the floor. I stooped down to pick it up. The train started and gave a jerk and threw me out of the door. I had picked up the dollar and was straightening up when the train gave the jerk. There was no signal given of the movement of the train either by the bell or whistle. It threw me five or six feet to the door and out of the door on the ground. The door was nearly four feet from the ground, and I fell five or seven feet from the car on my left side and leg, and broke both bones in my left leg. I don't know that it was the custom of the railroad company to sell lemons and other fruit from that car. It was the first time I had ever been there. I was not intoxi-

cated. I had only taken one drink that day; that was just before dinner. When the jerk came I was five or six feet from the door, towards the back end. Adkins and Wilson were both out before I was thrown. When the man said 'The train is about to start,' they went out the other door from the one I was thrown out. The train had been delayed at the stop at that station for about half an hour on account of their screwing up some parts of the engine. I did not get out when the others got out because I wanted my dollar. It dropped on the floor. I can't say whether the man dropped it or I."

Enoch Bennett testified: "I don't know that the railroad company kept fruit for sale in the car, but I know that somebody sold fruit in that car, for I have purchased it there myself, and I (262) have seen other people than passengers get things in there. They would go in there and come out eating oranges or other things. I was there for four months. There was no alarm given of the starting of the train that I know of. I was near enough to have heard it. It was the custom of the train at that point to give notice before starting. It started that day with a sudden jerk. There were two or three trains a day passing along there. I can't say whether the bell rang or the whistle sounded on 3 May, but was the common thing for them to do it. I don't know whether the car had doors in the ends or not. I think Moses went in the side of the door."

J. R. Hughes testified: "It was the general custom that they sold fruit in them at the different stations. They sold oranges, lemons, and other fruits. They had been selling that way for two or three months. What I saw of people purchasing fruit was generally they went to the door and the fruit was handed out to them, but I had seen persons that I remember now go in the car and purchase the fruit. I saw it sold, besides Huntdale, at Poplar Station and Relief; the first once, the last twice. Part of the time they would ring the bell or the conductor would throw up his hand and holler 'All aboard.' The train started out faster than I ever knew it to do before. I think I recollect that the conductor was in such a position sometimes that he could have seen people who went in the car to purchase fruit."

Moses Wilson testified: "I went in car with plaintiff. He went in first. There were end doors to the car, and I went up the steps and in at one of the end doors. When I got near the man who was selling the fruit, he said, 'The train is going to start.' Peterson says, 'Hand me my dollar.' I started to get off the car. I went at once and went through the front end door and down the steps. I was four or five steps from the end door. Directly I got off, the train started and seemed to start sudden. I had just cleared the steps. It seemed to be a (263) sudden jerk, a little more than common. It was for two or three

weeks the general custom for people to go in car to purchase fruits and ginger-pop. I had bought these myself. Sometimes at the door; sometimes, when I thought I had time, I would go inside. The selling of fruit from the car had been carried on in the previous summer, not so much in the winter months. They kept ginger-pop on ice in the summer. They did not keep ice there in winter. There are no side steps to the side doors. I had just passed in the car and gone some two or three steps when the man told me the train was going to start. The man said, 'The train is going to start in a minute, boys; get off.' "

Plaintiff rests. Defendant moves for judgment of nonsuit. Refused, and defendant excepts. From a verdict and judgment for plaintiff, defendant appeals.

No counsel for the plaintiff.
J. Crawford Biggs for the defendant.

CONNOR, J., after stating the case: The plaintiff was neither a passenger nor an employee. He had no contractual relation with defendant, hence it owed him no contractual duty; nor did defendant owe him any duty in respect to its business as a carrier of passengers. The rights and duties of the parties are therefore not, in any degree, affected by the fact that defendant was employed in the business of a common carrier.

For the purpose of disposing of the exception presented upon the appeal, the car was the property and under the control of defendant, subject to the same power of management as the premises of a private citizen. Taken in the light most favorable to the plaintiff, he was upon the car by virtue of a permissive license in the pursuit of his own business, with which defendant had no connection or concern. It cannot
(264) be successfully contended that, by carrying on its cars venders of fruit and confectionaries or newspapers for sale to its passengers, the company invites or induces the public to enter into them at stations for the purpose of making purchases. Besides being foreign to its legitimate business, to do so would seriously interfere with its power to discharge the duty imposed by law, to carry passengers with all reasonable dispatch and safety.

It is not necessary to hold, nor do we hold, that plaintiff was a trespasser, although we see no good reason why the defendant's agents and employees may not have forbidden plaintiff to enter the car for the purpose of buying fruit, just as a private citizen may forbid any person to come upon his premises. His failure to do so is no more than a permissive license. If there be any evidence of an existing custom by which persons were in the habit of going into the car at stations for the

purpose of buying fruit, it is very slight. It is very doubtful whether, when analyzed, there is any evidence of such custom. One witness, who undertakes to so testify, says: "What I saw of people purchasing fruit was, generally, they went to the door and the fruit was handed out to them; but I had seen persons, that I remember now, go in the car and purchase fruit. At Huntdale once and Poplar Station twice." Another witness says: "It was for two or three weeks the general custom for persons to go in the car and buy." The plaintiff says that he had never heard of such a custom. It was the first time he was ever there. It would impose hard lines upon the owner of premises—and, in respect to the plaintiff, the defendant occupies that position—if by permitting persons, in a few instances, to enter thereupon for their own purposes or convenience, a custom or usage should be established, imposing upon such owners the degree of care imposed in the case of invited guests or persons going in for the purpose of transacting business with the owners. *Winder v. Blake,* 49 N. C., 332; *Penland v. Ingle,* 138 N. C., 456; 12 Cyc., 1028. (265)

Discussing the question involved in this appeal, *Boynton, J.,* in *R. R. v. Bingham,* 29 Ohio St., 270, says: "It is therefore a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes."

Conceding, however, that there was evidence sufficient to be submitted to the jury, and that they found in accordance therewith, nothing more is shown than that, without objection on the part of defendant, persons usually went into the cars for the purpose of buying fruit; it cannot, as matter of law, amount to more than a permissive license, and in respect to the duty imposed upon the owner to one thus entering, the rule is well settled. "A licensee who enters upon premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils. * * * Here permission is neither inducement, allurement, nor enticement." *Pitts, etc., Railroad v. Bingham, supra.*

In a case involving the same principle, *Burbank v. Railroad,* 42 La.

Ann., 1156 (11 L. R. A., 720), *McEnery, J.*, says: "It is not stated in the petition, nor is there any evidence to show that the plaintiff was in the habit of going to the train to solicit custom for her board-
(266) ing-house. * * * Her presence on the platform, and at the depot, was not for the purpose of transacting any business with the company * * * or for any purpose for which the depot had been built. She was at the depot, it is true, by a general license form the company, in the absence of any express prohibition. It would not be practical for a railroad company * * * to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform. * * * There must have been, on the part of the company, such gross and wanton negligence that it was equivalent to intentional mischief," to make it liable.

We had occasion to discuss the question regarding the measure of duty which defendant owed the plaintiff, as a mere permissive licensee, in *Quantz v. Railroad,* 137 N. C., 136, and find that the conclusion reached in that case is sustained by the additional authorities cited by the learned counsel for defendant.

Is there any evidence of a breach of duty or the absence of the degree of care imposed upon defendant not to wantonly injure plaintiff? The reason why it is negligent, in respect to passengers, to so manage the engine approaching or leaving a station as to suddenly jerk the cars, arises out of the duty of the engineer to know and keep in mind the fact that passengers and those who are entitled, by reason of relationship or otherwise, to accompany them, are usually in the act of going upon or leaving the car at stations. *Nance v. R. R.,* 94 N. C., 619; *Tillett v. R. R.,* 118 N. C., 1031; *Denny v. R. R.,* 132 N. C., 340. No such reason existed in respect to persons going upon the cars for purposes having no connection with the business of defendant as a carrier of passengers. The engineer cannot be presumed to know that persons are using the car for other purposes than as passengers or employees. If he were required to await the pleasure or convenience of all per-
(267) sons who, from curiosity or other cause, were upon the cars, the common complaint of belated trains, with all of the attendant inconvenience, damage and dangers to travelers, would increase more than tenfold. To require the company to keep guards at the doors of their cars to prevent persons going in for other than proper purposes would be impracticable. It is well known that the cars are for passengers, and that, save within the exceptions noticed, no one else is entitled, as of right, to go into them. In many towns and cities, ordinances are made prohibiting persons, having no business, from going upon cars. In the absence of such ordinances, the only reasonable and workable

rule is that which the law prescribes—in respect to passengers the highest degree of care in the handling and movement of trains; in regard to mere permissive licensees, abstention from wanton injury. It is hardly possible to move a train of cars, especially a mixed train, as this one, without some jerk or jolt. *Smith v. R. R.,* 99 N. C., 241. Persons going upon them must take notice of the necessity of some jerk or jolt when the train moves. Of course if the conductor or any one having control of the train had seen the plaintiff on the car he should have warned him that it was about to move. It is said, however, that no signal was given that the train was about to leave the station. More than one answer may be given to this suggestion; the defendant owed no duty to plaintiff to give a signal; again, the plaintiff was told that the train would leave "in a minute." He does not claim that he did not have time to get off; the fact is, that the other persons who went in with him did get off safely. The cause of his injury was that either he or the fruit vender dropped the coin, and plaintiff was trying to recover it, thereby delaying his movement in leaving the car. Certainly the engineer could not be expected to know that some one was on the car buying lemons, that a coin had been dropped and that it would require some time to recover it; nor is there any evidence that any one connected with the train knew that plaintiff was on the car. The (268) fruit vender, who was on the same car, is not shown to have been jerked or jolted. The evidence that the jerk was any more severe than was proper or necessary in moving the train, as "made up," was very slight.

The plaintiff when he went into the car, on his own business, without invitation or inducement or, as he says, any knowledge of any custom for persons to do so, but simply by the silent acquiescence of defendant's agents, took the risk incident to the movement of the train.

In the absence of any evidence of breach of duty on the part of the defendant, the motion for nonsuit should have been allowed. For refusal to do so the judgment must be reversed. *Hollingsworth v. Skelding,* 142 N. C., 246.

Reversed.

Cited: Bailey v. R. R., 149 N. C., 173; *Muse v. R. R., Ib.,* 449; *Fortune v. R. R.,* 150 N. C., 698; *Finch v. R. R.,* 151 N. C., 106; *Monroe v. R. R., Ib.,* 376.

TILLINGHAST v. COTTON MILLS.

(Filed 4 December, 1906.)

Pleadings—Counter-claim—Judgment by Default—Breach of Contract—Measure of Damages.

1. The defendant was not entitled to judgment by default on his counterclaim where, pursuant to leave given by the Court, a formal denial was entered.
2. Where the complaint alleged a contract of sale and a breach thereof, and the answer denied that it was an absolute sale and alleged by way of counter-claim that the goods were shipped on consignment, and demanded an account, the plaintiff's cause of action was in itself a direct denial of the counter-claim, and a judgment by default on the counter-claim before the issues in reference to the plaintiff's cause of action were determined would have been irregular and improper.
3. In an action for breach of a contract of sale of cotton yarns, the measure of damages is the difference between the contract price and market value at the time when and place where the goods should have been delivered by the terms of the contract.
4. Where the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant, at the time the contract was entered into, had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages.
5. Where there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage; or the damage which arises from his own neglect will be considered too remote for recovery.

(269)

ACTION by Tillinghast-Styles Company against the Providence Cotton Mills for breach of contract, heard by *Cooke, J.*, and a jury, at the May Term, 1906, of CATAWBA.

On the part of plaintiff there was allegation and evidence tending to show that on or about 5 June, 1905, defendant contracted to sell and deliver to plaintiff, f. o. b. Providence, R. I., a quantity of cotton yarns as follows:

10,000 lbs. 24 2s regular warp twist skeins, at 18¾c.
10,000 lbs. 26 2s regular warp twist skeins, at 19¼c.

That defendant delivered the 26 2s as per contract, save a lot of waste with this shipment, showing a default in the shipment of $10.50; but failed and refused to deliver the 10,000 pounds of 24, as agreed by terms of contract; that plaintiff had sold the order of yarn to other parties, and, by reason of defendant's failure to supply same as per contract, plaintiff was forced to go into the market and buy the same at the price

of 23c.—at a loss of 4¼c. over the bargain price; and plaintiff thereupon claimed

Damage of 4¼c. on 10,000 lbs. 24	$425.00
Waste on shipment 26	10.50
Overdraft on same	3.00

Defendant denied any claim by reason of waste or overdraft; denied any increase in market price of this yarn; denied that (270) plaintiff was forced to buy at an advance price of 23c. per pound, and by way of counter-claim alleged that the 26 2s were shipped to plaintiff, not by way of absolute sale, but to be sold on commission; and that plaintiff had sold 26 at an advanced price, and defendant demanded the amount realized therefrom, over and above commissions and costs, as a counter-claim.

Plaintiff, by leave of Court, at the next term entered a formal denial to this counter-claim, and defendant excepted.

On issues submitted and considered material to the questions involved in this appeal, the jury by their verdict have established:

1. That the contract was one for an absolute sale. 2. That the same was broken by defendant. 3. That the market price of yarns at the time of the breach was 22c. per lb., being 3¼c. over the bargain price. 4. That the plaintiff had resold the yarn in reliance on this contract; and to make good their own sales was compelled to repurchase yarns at the price of 23c. per lb. 5. That defendant after breach had notice of these contracts of plaintiff and were given opportunity to deliver the yarns before plaintiff bought at 23c., and after they received notice of the obligation on plaintiff. 6. That the amount due plaintiff by reason of waste and overdraft was $8.69.

On the verdict, the Court gave judgment against defendant for:

Damage at 4¼c. per lb., estimated at 23c., the amount plaintiff was compelled to pay	$425.00
Amount for waste and overdraft	8.69
	$433.69

Defendant excepted and appealed.

HOKE, J., after stating the case: There is no merit in the exception of defendant to the refusal of the Judge below to enter (271) judgment by default on his counter-claim. In the first place, pursuant to leave given by the Court, a formal denial was entered, and the order allowing such denial was in the sound discretion of the Judge below. Revisal 1905, sec. 512.

Again, the plaintiff's cause of action set out in the complaint was, in itself, a direct denial of the counter-claim.

The complaint alleged a contract of sale and a breach thereof on the part of defendant.

Defendant denied that this was an absolute sale; and speaking to the same transaction, alleged, by way of counter-claim, a consignment of goods for sale and demanded an account.

The one was in direct contradiction of the other, and a judgment by default on the counter-claim before the issues in reference to plaintiff's cause of action were determined would have been irregular and improper. *Phipps v. Wilson,* 125 N. C., 106.

This being the only relevant exception, there is, therefore, no valid objection shown to the verdict as rendered by the jury.

We think, however, that on this verdict the judgment against defendant should have been entered for $333.69, the difference between the contract price and market value at the time and place when the goods should have been delivered, adding the $8.69 found to be due by reason of default in another shipment, instead of $433.69, estimated on the difference between the contract price and the amount plaintiff was compelled to pay for yarn in order to make good contracts of sale between him and other parties, and under the circumstances established by the verdict.

In *Hosiery Co. v. Cotton Mills,* 140 N. C., 454, we stated the rule to be "That on failure by the bargainor to deliver goods having a (272) market value, the measure of damages is the difference between the contract price and market value at the time when and place where the goods should have been delivered by the terms of the contract." This follows from the principle, generally recognized and accepted, that damages for breach of contract are such as are the natural and probable results of the breach according to the usual course of things.

In goods having a market value like these and usually procurable, the probable loss occasioned by a breach of the contract in the ordinary and usual course of things would be the sum required to buy other goods of like kind and at the market price. *Hadley v. Baxendale,* 9 Exch., 341; *Lumber Co. v. Iron Works,* 130 N. C., 584; *Critcher v. Porter Co.,* 135 N. C., 542.

If the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of

damages. Tiffany on Sales, 239; Wood's Mayne on Damages, sec. 20; *Lindley v. R. R.*, 88 N. C., 547; *Booth v. Milling Co.*, 60 N. Y., 487.

It is not established by this verdict, nor is it declared anywhere in this record, that the defendant at the time the contract was entered into had any knowledge of special sales made by plaintiff dependent on this contract, or otherwise. And if it be conceded that a general perusal of the pleadings and evidence would disclose a general knowledge on the part of defendant that plaintiff was buying the goods to sell again, here too, in the absence of special circumstances, the method of computing plaintiff's profits or loss would be the difference between the contract and market value; and any special price paid by plaintiff to cover against his own sales could only be considered as evidence on the (273) question of market value. *Lewis v. Rountree*, 79 N. C., 122; *Marsh v. Patterson*, 67 Conn., 473.

On what principle should plaintiff be allowed to recover in this case on a basis of 23 cents per pound, when the market value was 22 cents? If he paid this extra cent because of some "corner" of or on the market, such a price, paid by reason of abnormal conditions, would not ordinarily be the correct basis for determining the damage.

As said by *Agnew, J.*, in *Kountz v. Kirkpatrick*, 72 Pa., 384: "It is the market value, and not necessarily the price paid, that should determine the amount." The price paid being evidence on that question. *Marsh v. Patterson, supra.*

Or if plaintiff, after he was aware of a definite breach of contract, delayed and neglected to purchase against his own sales till there had been an additional rise of the market, an increase of damage on this account should not be allowed him.

It is an established principle that when there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage, or the damage which arises from his own neglect will be considered too remote for recovery.

As is said in Benjamin on Sales (7 Ed.), p. 934: "In every case, the buyer, to enable him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."

And in 1 Sedgwick Damages, sec. 201: "The same principle which refuses to take into consideration any but the direct consequences of an illegal act is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them." And again, at sec. 202: "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say (274) that by consequences which the plaintiff, acting as prudent men

ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the correct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as remote. In this view the doctrine would rest on the intervention of the plaintiff's will as an independent cause. *Ad hoc* he is not damaged by the defendant's act, but by his own negligence or indifference to consequences."

If, therefore, the plaintiff at the time of the breach of contract, in the exercise of reasonable business prudence, could have saved himself this increase of damage by then making purchases against his own sales, he should have done so, and the increased damage incident to such failure will not be awarded against defendant.

We are not inadvertent to the finding that after the breach of contract the defendant had notice of plaintiff's collateral sales in time to have shipped the goods, and saved this extra loss. This fact might be a relevant circumstance if the contract was in the course of performance, and the contract relation still subsisted.

Such a suggestion was made by *Bramly, Baron,* in case of *Gee v. R. R.,* 6 Exch., 211, referred to in Wood's Mayne on Damages; and the principle may have been applied in subsequent decisions; but no such conditions exist in the present case.

As heretofore suggested, the obligation of the contract had matured and the breach was absolute, causing an entire severance of the contract relations.

Defendant has never, for an instant, changed his attitude about the matter. He has maintained all along that the transaction was a consignment of goods for sale, and that he had a right to terminate
(275) the relation whenever he saw proper. The jury have determined this against him; but he has never requested any postponement or indulgence, or indicated in any way that he intended to comply with plaintiff's demand.

In such case the notice of special circumstances required to fix a party with special and increased damage means notice given or knowledge had at the time the contract was entered into; and notice given after the contract was definitely and completely broken would not avail to enhance the damages.

As said by *Andrews, C. J.,* in delivering the opinion of the Court in *Marsh v. Patterson et al., supra:* "Notice to defendants after the contract was entered into would not increase their liability. If these subsales could not reasonably be considered to have been in contemplation of the parties at the time they made the contract, then the defendant could not be made responsible for special profits to be derived therefrom."

We are of opinion, therefore, and so hold, that on the facts established by the verdict, the correct rule for awarding the damages is the difference between the contract price and market value as fixed by the jury, and, applying this rule, that the judgment should be reduced $100 as of the time when the same was first rendered.

Modified and Affirmed.

Cited: *Bowen v. King,* 146 N. C., 391; *R. R. v. R. R.,* 147 N. C., 384; *Development Co. v. R. R., Ib.,* 508; *Harvey v. R. R.,* 153 N. C., 575.

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YORK v. WESTALL.

(Filed 11 December, 1906).

Compromise and Settlement—Validity—Consideration—Statute of Frauds—Standing Timber—Pleadings—Mutual Mistake.

1. An agreement made in good faith to compromise and settle disputed matters is valid and binding, and will be sustained as not only based upon a sufficient consideration, but upon the highest consideration of public policy as well; and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties.
2. A contract, by which the defendant agreed to withdraw all claim to standing trees and to abandon all interest he acquired under an extension by parol of a written contract with plaintiff's grantor to cut timber, and the plaintiff, in consideration thereof, agreed to waive or release all claim for damages for the trespass alleged to have been committed by the defendant, is enforcible and is not within the statute of frauds.
3. The averments in the answer that "when the plaintiff purchased the land from W. and received the deed therefor he was notified by W. that the defendant was the owner of the merchantable timber trees then on the land, and that the time for cutting and removing the same had been extended for one year after the date of the expiration of their former contract, and that W. intended to insert the said agreement for an extension in the deed to plaintiff, but omitted to do so by the mistake and inadvertence of the draftsman of the deed," are not sufficient to show any such mutual mistake of the parties to the deed as would induce a court of equity to correct it.

ACTION by W. H. York against W. H. Westall, heard by *O. H. Allen, J.,* and a jury, at the June Term, 1906, of BURKE.

This action was brought to recover damages for a trespass committed in entering upon the lands of the plaintiff and cutting and removing timber trees therefrom. The land formerly belonged to R. L. Wilson, who entered into a written contract with the defendant Westall and others on 24 March, 1903, whereby he agreed to sell to them (277) for $126 all the merchantable pine, poplar and oak timber trees on the said tract of land, to be cut and removed therefrom within two

years from that date. The plaintiff bought the land from Wilson and it was conveyed to him by deed dated 19 October, 1904. He alleges in his complaint that the defendants failed to cut and remove the timber within the two years allowed to them for that purpose in the contract, but that they unlawfully entered upon the land after the expiration of that time and cut and removed from the premises many valuable trees, amounting to about 3,000 saw-logs, though claiming the right to do so under their contract with Wilson, to the plaintiff's damage five hundred dollars.

The defendant avers, in his answer, that when the plaintiff purchased the land from Wilson and received the deed therefor he was notified by Wilson that the defendants were the owners of the merchantable pine, poplar and oak timber trees then on the land, and that the time for cutting and removing the same had been extended from 24 March, 1905, the date of the expiration of their former contract, for one year after that date, and that Wilson intended to insert the said agreement for an extension in the deed to York, but omitted to do so by the mistake and inadvertence of the draftsman of the deed, and that the trees which the defendants were entitled to cut and remove were not considered by Wilson and York in fixing the purchase-price of the land; that afterwards, on 13 December, 1905, the plaintiff and the defendants came to an understanding and agreement with each other in regard to the controversy between them about the trees, and it was then agreed that defendants should have all of the saw-logs that had been cut on the premises prior to 13 December, 1905, and that the plaintiff should have all of the merchantable pine, poplar and oak timber trees still stand-
(278) ing, which would yield, by estimation, about 50,000 feet of lumber; and it was further agreed in consideration thereof that the defendants would no longer insist upon the right to cut the timber trees still remaining on the land and that plaintiff would make no claim on account of the trees which had already been cut, or the saw-logs which had been removed from the premises after 24 March, 1905. That the defendant has not, since said agreement was made with the plaintiff, cut any timber trees on the land or removed any saw-logs therefrom. That the trees and saw-logs, for the cutting and conversion of which this action was brought, are the same described in that agreement and which the defendants had theretofore removed from the land, and that this suit was brought in violation of the express promise of the plaintiff not to hold the defendant liable for the cutting and removal of the same.

Among others, the defendants tendered the following issue: "Did the plaintiff release and discharge the defendant from liability as alleged in the answer?"

The Court refused to submit the issue, and the defendants excepted, as they did to the issues submitted by the Court, which, with the answers thereto, were as follows:

1. What was the value of the timber trees cut and removed by the defendant W. H. Westall from the land which is described in paragraph one of complaint after 24 March, 1905? Answer: $150.

2. What damage, if any, was done to said land by the defendant in cutting and removing timber trees from the same after 24 March, 1905? Answer: $25.

Judgment was given for the plaintiff upon the verdict, and the defendant appealed.

Avery & Ervin for the plaintiff.
Self & Whitener and *S. J. Ervin* for the defendant.

WALKER, J., after stating the case: We are unable to perceive why the issue which was tendered by the defendants was (279) not a proper one. It was directly raised by the answer of the defendant Westall, the only one of the two defendants named in the summons who was served. The case was prosecuted against him alone.

The rule is established that an agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties. The real consideration which each party receives, in contemplation of law, under the settlement, is not to be found so much in the mutual sacrifice of any rights, as in the bare fact that they have settled their dispute, which is considered to be of interest and value to each one of them. 8 Cyc., 505, *et seq.* They give and take, so to speak, not knowing precisely what will be the outcome if they should bring their controversy to the test of the law and subject it to the uncertainties of litigation. Under such circumstances, there is no good reason why the mutual concessions of the parties, resulting in a settlement of their dispute, should not be upheld.

In discussing the law of contracts, with reference to the consideration sufficient to support them, Mr. Parsons says that the prevention of litigation is a valid and adequate consideration, for the law favors the settlement of disputes, and on this ground a mutual compromise is sustained. It is not only a sufficient, but a highly favored consideration, and no investigation into the character or relative value of the different

claims involved will be entered into for the purpose of setting
(280) aside a compromise, if, of course, the parties are engaged in a lawful transaction, it being enough if the parties to the agreement thought at the time that there was a question between them—an actual controversy—without regard to what may afterwards turn out to have been an inequality of consideration. 1 Parsons on Contract (5 Ed.), pp. 438, 439.

So in *Barnawell v. Threadgill,* 56 N. C., 58, this Court, by *Battle, J.,* citing *Leonard v. Leonard,* 2 Ball. & Best, 178, and quoting the words of *Lord Chancellor Manners,* says: "In the case of a compromise as distinguished from a release, both parties are ignorant of their rights, and the agreement is founded on that ignorance, and the party surrendering may, in truth, have nothing to surrender; and whether the uncertainty rests upon a doubt in point of fact or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be affected by a subsequent investigation and result." And in *Williams v. Alexander,* 39 N. C., 209, the Court thus refers to the subject: "While the title is thus in contestation, or while he (the defendant) is claiming them as his property, and the plaintiff holding them as hers, they agree, in order to put an end to the dispute, to divide the property. The compromise of a doubtful right, fairly entered into, with due deliberation, will be sustained in a court of equity. It is reasonable and proper it should be so; parties must be at liberty to settle their own controversies by dividing the property in controversy, and public policy upholds the right." *Mayo v. Gardner,* 49 N. C., 359, is also directly in point on this phase of the question, and the Court there mentions with approval the statement of the law as contained in Parsons on Contracts, *supra.*

It was said on the argument, that the ruling of the Court below was based upon the idea that there was no consideration to support the agreement, and for that reason we have discussed the proposition at some length. Analogous cases are *Matthis v. Bryson,* 49 N. C., 508;
(281) *Findly v. Ray,* 50 N. C., 125; *In re Lucy,* 21 Eng. Law and Eq., 199.

The defendant agreed to withdraw all claim to the standing trees and to abandon all interest he acquired under the contract with Wilson, and the plaintiff, on his part, in consideration thereof, agreed to waive or release all claim for damages for the trespass alleged to have been committed by the defendant. This was the contract, as we understand it to have been made, and we do not see why it is not enforcible, or why the plaintiff should be allowed to repudiate it and recover damages contrary to his solemn agreement.

The plaintiff's counsel, however, contended that the agreement was

void under the statute of frauds. It may now be considered as settled, in this State at least, that a contract for the sale of standing timber is within the statute of frauds. *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; *Mizell v. Ruffin,* 113 N. C., 21; *Drake v. Howell,* 133 N. C., 162; *Hawkins v. Lumber Co.,* 139 N. C., 160, and *Ives v. R. R.,* 142 N. C., 131. But this is in no sense a contract for the sale or conveyance of land or any interest therein, but an agreement for the adjustment of differences between the parties where, under the circumstances, no deed from the defendant to the plaintiff was necessary to consummate the arrangement. The plaintiff had only a claim for damages and the defendant Westall had acquired the right to cut the timber during the extended period by parol, and we do not see why he could not relinquish it in the same way. This agreement between him and Wilson did not operate to pass any interest or estate in the trees, as it was not in writing, but it did have the legal effect to confer upon the defendant a license or privilege to enter upon the land and cut the remaining timber.

This very question arose in *Green v. R. R.,* 73 N. C., 524, where the same kind of contract was made orally between the parties and the Court, after holding that while it could not be enforced spe- (282) cifically as an executory agreement, not having been reduced to writing, decided that "the contract amounted to a license to the defendant, from the plaintiff, to enter his land and cut and cord wood. As soon as the wood was cut it became personal property, and it matters not whether the plaintiff himself cut and corded the wood he sold to the defendant, or whether, under the contract, he used the labor of the defendant to cut and cord it." See *Ives v. R. R.,* 142 N. C., 131.

It may be that the defendant intended to assert an equitable estoppel as against Wilson and the plaintiff, upon the ground that Wilson had agreed before the two years expired, and when the defendant, perhaps, still had time to cut the trees then standing on the land, that he would extend the time for cutting them one year longer, and that defendant, relying upon the agreement, refrained from cutting during the remaining portion of the two years, and that the plaintiff York, at the time he purchased the land, had actual notice of this agreement and consented to abide by it, and that, in consideration of his said consent and promise so to do, he was allowed a reduction in the price asked for the land. Whether this constitutes a good equitable estoppel and will render the license to enter upon the land and cut the trees irrevocable or will estop Wilson, and his assignee York, from pleading the statute of frauds, if any interest or estate in the standing trees passed to the defendant, and that statute applies, is a question we need not decide, as we do not think

it is sufficiently raised by the pleadings, nor have we formed an opinion in regard to it. We leave it open for future consideration should it arise.

We do not think the defendant has pleaded any matter which entitles him to reform the deed of Wilson to the plaintiff York. The averments of the answer are not sufficient to show any such mutual mistake
(283) of the parties to the deed as would induce a court of equity to correct it. Whether such an equity exists in favor of the defendant, he not being a party to the deed, or whether he can avail himself of the facts out of which the supposed equity is said to have arisen, as an equitable defense to this action, are also questions not before us, although discussed on the argument.

There was error in the ruling of the Court by which the issue was rejected, and for this a new trial is awarded as to all the issues in the case.

New Trial.

BIRD v. LEATHER COMPANY.

(Filed 11th December, 1906).

Master and Servant—Fellow-Servant Act—Manufacturing Plant—Negligence—Contributory Negligence—Question for Jury—Evidence.

1. The Fellow-servant Act applies to a corporation chiefly engaged in manufacturing, which, in connection with and in aid of its primary purpose, owns and operates a railroad having its own engines, cars, crews, etc.
2. Where the testimony shows that plaintiff, a foreman of a force unloading cars, engaged in the performance of his duty, was injured because some cars, which had been stopped on an incline thirty steps away, commenced to move without warning to plaintiff and, rolling down the incline, struck the car on which plaintiff was standing doing his work, and caused the injury, the Court properly submitted the case to the jury, it being the duty of the engine crew to place and securely scotch the cars on the incline, there to remain until moved by plaintiff's order.
3. Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence.
4. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.
5. Where the plaintiff testified that he was applying the brakes in the customary and usual way when he was injured by a collision with cars that rolled unexpectedly down an incline, and being stationed

between two cars loaded with bark, it is not likely he could have noted the approach of the cars, and the evidence shows that he had not noted their approach, the Court properly declined to hold as a matter of law that plaintiff was guilty of contributory negligence.

(284)

ACTION by V. W. Bird against U. S. Leather Company, heard by *Cooke, J.*, and a jury, at the September Term, 1906, of McDOWELL.

There was evidence tending to show that defendant was a corporation engaged in the business of manufacturing leather and extracting tannic acid, and also owned and operated about ten miles of steam railway, standard gauge, in and about their plant at Old Fort, N. C., having their own engines, cars, crews, etc.

That plaintiff, an employee of defendant company, and foreman of a lot of hands engaged in unloading cars of defendant, on or about 20 December, 1904, was injured under the following circumstances:

The defendant had a railway track laid on their grounds at Old Fort, running from the bark shed to the chipper-house; here, the cars entered the chipper-house shed, were moved along the track opposite the chipper machines placed at intervals, and unloaded. This track, as it approached the chipper-house shed, was on a downward incline, and the method pursued here was for the engine and crew of defendant company to push the loaded cars to a point near the chipper-house shed, where they were stopped and left by this crew and scotched or held by brake till the chipper-house crew was ready to unload (285) them.

That the engines were not allowed under the shed, but when the cars were to be unloaded, plaintiff and his gang pushed them along under the chipper-house shed, unloaded the cars, moving them along the track when this was done to the further end of the shed, where they were taken by the switching engines and carried away.

On this occasion, plaintiff and his hands were engaged in unloading cars under the shed and were moving the cars along the track so as to put them in position for unloading, and in the performance of his duty plaintiff got on the cars to apply the brakes and stop them at the proper point. That plaintiff had one foot on one car and one on the other when applying the brakes, and that plaintiff was following the customary way of using the brakes in cars of that kind. That these cars were of different heights, one being a Southern Railway car, 12 to 14 inches higher than the other, coupled by a goose-neck. If they had been of the same height, he could have placed his feet on the body of each car and probably have escaped an injury. That while plaintiff was in this position, in the act of applying the brakes, several other tannery cars, which had been left on the track by the engine crew some thirty steps away, moved from their position and rolled down the incline, striking the car

on which plaintiff was standing, causing a collision and doing plaintiff severe injury.

Plaintiff testified that he had given no orders to any of his men to move the cars which were on the incline.

Testifying as to the duties concerning them, plaintiff stated on examination: "I don't know who put the brakes on those tannery cars (those on the incline). The engine gang did that. It was their duty to bring the cars there and stop them on the incline; and it was the duty of my force to bring them down when we were ready to unload them."

J. C. Moore, witness for plaintiff, testified: "We were moving
(286) the cars into place when plaintiff jumped up on it to put the brakes on and stop them at the proper point. I was pushing it down, and about a second after Byrd got up, the tannery company's car hit me on the back. I looked round and saw plaintiff's foot caught between the cars."

The three ordinary issues in actions for negligence were submitted: 1. Negligence of defendant. 2. Contributory negligence of plaintiff. 3. Damage.

Verdict and judgment for plaintiff, and defendant excepts because the Court declined to charge, as requested, that on the entire evidence, if believed, the jury should answer the first issue "No" and the second issue "Yes."

Hudgins & Watson and *Frank Carter* for the plaintiff.
E. J. Justice for the defendant.

HOKE, J., after stating the case: The Court is of opinion that neither objection assigned for error by defendant can be sustained.

The facts show that defendant, a corporation chiefly engaged in the manufacture of leather and extraction of tannic acid, in connection with and in aid of its primary purpose, owns and operates a railroad, having its own engines, cars, crews, etc.; and in such case, the Court has held that the act known as the Fellow-servant Act, chapter 56, Private Laws 1897, applies, and will affect the right of litigants for actionable negligence occurring in that department or portion of their work. *Hemphill v. Lumber Co.*, 141 N. C., 487. This being true, the Judge below could not have properly charged, as requested, that there was no evidence to go to the jury on the first issue.

The testimony in the case shows that plaintiff, engaged in the performance of his duty, was injured because some cars, stopped on an incline
thirty steps away, commenced to move, and, rolling down an in-
(287) cline, struck the car on which plaintiff was standing doing his work, and caused the injury. These cars were placed there by

the engine crew, and should have been securely stopped by brake or scotched on the incline to remain till they were moved into the yard by plaintiff's force.

He had given no order for moving these cars, and to move them upon him without warning at the time, and engaged as plaintiff then was, was very likely to cause injury to some one; and the injury resulted.

There is no explanation given by direct evidence as to the starting of the cars, but it can hardly be explained without imputing negligence to some of the defendant's employees. Certainly, the great probability is either that the engine crew, whose duty it was to place and scotch these cars, had not done their work properly, or some one of the force, without direction and without the exercise of proper care, had started the cars at this inopportune time.

In either case, the plaintiff was entitled to have the question go to the jury.

In *Fitzgerald v. R. R.*, 141 N. C., 530, the Court has held: "Under the Fellow-servant Act, which operates on all employees of railroad companies, whether in superior, equal, or subordinate positions, if the plaintiff, a hostler of the defendant, was injured as the proximate cause of the negligence of his helpers in shoveling coal from a car into a tender, the defendant is responsible. Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable (288) evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

Applying these principles to the facts disclosed, there was no error in refusing the request of defendant on the first issue.

On the second issue, the Court is of opinion that there is very little evidence that tends to show contributory negligence, and certainly none that would justify the charge requested by defendant.

The plaintiff testified that he was applying the brakes in the customary and usual way when he was injured by a collision with these cars that had rolled unexpectedly down the incline. Stationed between two cars loaded with bark, it is not likely he could have noted the approach of the other cars, and the evidence shows clearly that he did not note their approach. So far as appears, he was in the customary position to do the work, and he had taken the best one that was open to him. He

was not injured at all by reason of the position he had taken as affected by the condition and action of the cars or hands where he was then working; and he was not, under the circumstances of this case, required to anticipate a negligent act on the part of the engine crew or his own co-employees. Beach on Contributory Negligence, sec. 38.

The case is not unlike *Hudson v. R. R.*, 142 N. C., 198, and the Court is of opinion that there is no error shown which gives defendant any just ground of complaint.

No Error.

Cited: Hairston v. Leather Co., post, 518; *Stewart v. Lumber Co.,* 146 N. C., 49; *Dermid v. R. R.,* 148 N. C., 190; *Blackburn v. Lumber Co.,* 152 N. C., 363; *Skipper v. Lumber Co.,* 158 N. C., 324.

(289)

PARKS v. RAILROAD.

(Filed 11th December, 1906).

Railroads—Right-of-Way—Acquisition by Occupation—Rights Acquired—Surface Water—Drains—Permanent Damages—Issues.

1. The defendant, by entering upon and occupying plaintiff's land for railroad purposes, acquired, at the end of two years from the construction of the road, an easement permitting it to use one hundred feet from the center on either side for railroad purposes, to the same extent as if condemned, which includes the right to construct the road-bed and to carry from it by the use of drains, carefully constructed, the surface water accumulating on the right-of-way.
2. In exercising this right, care must be taken to avoid, by the use of all reasonable means, all unnecessary damage to the lands over which it has a right-of-way.
3. In an action for damages for the negligent construction of a drain by a railroad, the issues should be so framed that the plaintiff recovers damages up to the time of the trial, not exceeding five years, and for the permanent easement which is acquired by the payment of the judgment.

ACTION by C. L. Parks against Southern Railway Company, heard by *Councill, J.,* and a jury, at the June Special Term, 1906, of WILKES.

This action was brought for the recovery of damages alleged to have been sustained by the negligent construction of a drain or culvert, called in the pleadings and testimony a "trunk," under defendant's road-bed, whereby the plaintiff's land is washed, overflowed and injured. The pleadings and undisputed testimony show that plaintiff was at the time of the construction of the railroad and has at all times since been the owner of a tract of land containing ninety acres, on one side of which is

a hill and the other side lying on the north bank of the Yadkin River. That some sixteen years ago the Northwestern North Carolina Railroad Company entered upon said land and constructed its (290) road-bed and track through said land. No right of way was granted or condemned over the land nor has any proceeding for condemnation or compensation been instituted by the plaintiff. The said railroad is now the property of defendant corporation.

The plaintiff describes the manner in which his land is affected by the construction of the road as follows: "The land lying north of the railroad is upland and a large hillside, eight acres in all, which drains through to this trunk; all open land. My land on the south side of the railroad is lower than on the north side. The point where the trunk runs is 150 yards from the river. When it rains the water accumulates from the land above and runs down and on through the trunk, taking earth, and when the water gets below the trunk it spreads out over the land and distributes the dirt, etc. There is no other way for the water to go except through this trunk. Some two hundred yards from the trunk is a branch which passes under the track of the road. The branch is lower than the trunk. * * * The water accumulates in the side ditches of the railroad as it flows down from the hill above and is thereby carried to the trunk, and the water goes through the trunk and spreads out over my land. * * * When the road was first built there was a wooden trunk through which the water flowed, and this rotted out, and another and larger one of pipe was put in. The water goes through this pipe with greater force than formerly. * * * There is no more water that goes on this land through the trunk than would have gone over it if there had been no railroad. The only difference is that, instead of spreading out over the entire six acres, it is collected in the side ditches of the road and then cast in a body through the trunk. The drainway is about the lowest point and is a place where the water would naturally flow to."

Bud Parks, the brother of plaintiff, says that he knows the land; that it is hill land, north of the road, several acres of it. (291) Some of it is pasture land. The natural flow of the water from the north hill land would be to and over the land lying to the south. It would be distributed but for the railroad. The water is collected in the side ditches and as collected goes through the trunk.

The testimony in regard to the damage is very conflicting. His Honor submitted the following issue: "Did defendant damage plaintiff's land as alleged in the complaint?" There was an issue directed to the amount of the damage.

The defendant requested his Honor to instruct the jury that upon all the evidence they should answer the issue "No." This was de-

clined, and defendant excepted. His Honor instructed the jury upon the first issue that although no more water went on plaintiff's land since the construction of the road than before, still if it so constructed its road as to permit the water passing along the natural drainage and flow, but so as to collect in its side ditches the water coming from the water-shed above, and which would have naturally flowed upon the six acres of land, and conveyed this water in its side ditches to the trunk, and it there became concentrated and permitted to go through the trunk onto plaintiff's land, and carry with it dirt and other matter, such water and dirt and other matter being distributed over plaintiff's land, defendant having furnished no sufficient and proper drain beyond the trunk to take water away, and on to the river at lower part of plaintiff's land, then the jury would answer the first issue "Yes," if they find that thereby plaintiff's land was damaged. To which defendant excepted.

There was judgment upon the verdict, and defendant appealed.

Finley & Hendren for the plaintiff.
Manly & Hendren for the defendant.

CONNOR, J., after stating the case: The plaintiff's land forms (292) a water-shed to the Yadkin River. Prior to the construction of the railroad the water found its way down the hillside, spreading over the bottom-land and either percolated through the soil or passed over the surface into the river. It was necessary in the construction of the railroad to make a road-bed of the usual width, which operated as a barrier, or dam, to the natural flow of the water. Coming down the hill, unless carried off by side ditches, the water percolated through the road-bed, endangering the solidity of the track. To avoid this danger, the company cut a side ditch, into which the water flowed, finding its way to the lowest point along the north side of the road-bed. At this point it ponded, rendering it necessary to provide an outlet to the river. For this purpose the company, at the time of constructing the road, put in the road-bed, under the track, a wooden trunk or drain. This was done some sixteen years ago. During the year 1899, as alleged in the complaint, this drain was enlarged and a pipe inserted through the road-bed. This pipe was, we assume, no longer than the width of the road-bed at its base, thus throwing the water from its mouth onto plaintiff's lower lands. It does not appear whether the wash was on the right of way or beyond it. We assume that it was on the plaintiff's land over which defendant had acquired an easement, by virtue of the provision of its charter, after two years from the construction of the road. The water passing through the culvert was surface, or such as fell, when it rained, upon the water-shed above the track. There is no evidence that the company diverted any water from a natural water-course.

It is conceded that the defendant has not increased the flow of surface water, that is, that no more surface water went through the culvert than formerly passed over plaintiff's land, either before the road was built or with the under-drain. The plaintiff does not complain of the construction of the road-bed and track through his land or the manner in which the side ditches are constructed. (293)

It is well settled that for the entry upon and taking his land "for railroad purposes, he should have sued within two years from the construction, and that by his failure to do so it shall be presumed that the land upon which the road may be constructed, together with one hundred feet on each side of the center of the road, has been granted to the company by the owner, and it acquired a good right and title to the same, so long as the land may be used only for the purpose of the road, and no longer." *Barker v. R. R.*, 137 N. C., 214; *McCaskill v. R. R.*, 94 N. C., 746; *R. R. v. Olive*, 142 N. C., 257.

The defendant insists that the right, with the accompanying easements, thus acquired by the company are the same in all respects as if the land had been condemned or granted for railroad purposes. An examination of the decisions of this Court does not show that this question has been heretofore directly presented or decided. In the cases involving the rights and duties of railroad companies, in respect to their rights of way, no distinction has been suggested or made between the several methods of acquisition. In *McCaskill v. R. R., supra,* which was the first of a series found in our Reports, the right was acquired under the statutory presumption arising after two years' occupation, and the right was treated as coextensive with a condemnation or grant. In *Brinkley v. R. R., supra,* the question was presented whether, upon a right acquired in this way, the company could, without being liable to the owner, change the grade and relocate its track on the right of way. Montgomery, J., discussing the question, cited *Blue v. R. R.*, 117 N. C., 644; *R. R. v. Sturgeon,* 120 N. C., 225, and *Shields v. R. R.*, 129 N. C., 1, and says: "In these cases it was decided that railroad companies, if they should need the whole of the right of way for railroad purposes, had the right to the use of the whole. (294) Some of these uses were mentioned in the decisions, viz., road-bed and drains, sidetracks and houses for their employees, warehouses, etc." The Court held that the company was not liable for making a change in the grade, etc. In *Sturgeon's case, supra,* it is said: "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 railroads? That is the whole business of

the company. They need land for no other purpose than to properly construct their road-beds and drain them, build sidetracks, etc." *Fleming v. R. R.*, 115 N. C., 676.

It would seem, in the light of what has been said by this Court, as well as upon the reason of the thing, that when the land-owner acquiesces for two years after the construction of the road over his land, with full knowledge of his legal rights and of the extent of the rights accruing to the company by such occupancy, he assents to the acquisition of the easement in the same manner and to the same extent as if the land had been condemned. We would find it exceedingly difficult, if not impracticable, to draw any line of distinction between the rights acquired by the different methods prescribed by the law. As we held in *Hodges v. Telegraph Co.*, 133 N. C., 225, for any additional burden not necessary for "railroad purposes" placed upon the land covered by the right of way, the owner is entitled to compensation.

What rights pass to the company in regard to disposing of surface water in the drainage of its road-bed, or what elements of damage are considered in fixing compensation when the land is condemned or surrendered by the owner by acquiescence in regard to surface water?

This question was first considered and decided by this Court in (295) *R. R. v. Wicker*, 74 N. C., 220, in which *Rodman, J.*, adopting the rule laid down by the Supreme Court of Massachusetts, said: "A distinction is taken between cases in which the ponding is caused by the obstruction of a natural or artificial drainway, and when it is caused by the alteration of the previous grade or slope of the land, by which the surface water on defendant's land is prevented from running off as it was accustomed to do. In the first of these cases it is held that the resulting damage should not be estimated in measuring the compensation to the land-owner; but that in the second it should be." This case has been uniformly approved and followed by this Court. The only difficulty consists in the application of the rule. In that case the question discussed was ponding surface water. In *Willey v. R. R.*, 98 N. C., 263, *Smith, C. J.*, said: "In condemnation, everything necessary and incident to the original making and subsequent operating the road must be intended to have passed as against the owner of the condemned land." In *Bell v. R. R.*, 101 N. C., 21, *Davis, J.*, says: "The water drained by the defendant's ditches was all surface water, except occasionally, after heavy rains, the water from the Dismal Swamp would spread over the surface of the ditch," citing *R. R. v. Wicker, supra*, as establishing the principle that draining off surface water was one of the legal incidental damages" which is assessed in condemnation proceedings. *Adams v. R. R.*, 110 N. C., 325; *Fleming v. R. R., supra.* In *Mullen v. Canal Co.*, 130 N. C., 496, *Douglas, J.*, says: "In the present case the plain-

tiff occupies the singular position of being the upper and lower land-owner by virtue of the same piece of land." After describing the way in which the plaintiff was damaged, he says: "This is diversion, and it is now well settled that neither a corporation nor an individual can divert water from its natural course." In *Mizell v. McGowan,* 120 N. C., 134, *Faircloth, C. J.,* said: "The defendants are permitted not to divert, but to drain their lands, having due regard to (296) their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural stream through or by the lands of the plaintiff. This license must be conceded with caution and prudence." *Parker v. R. R.,* 123 N. C., 71.

We conclude, therefore, that the defendant, by entering upon and occupying plaintiff's land for railroad purposes, acquired, at the end of two years from the construction of the road, an easement permitting it to use one hundred feet from the center on either side for railroad purposes, which includes the right to construct the road-bed and to carry from it by the use of drains, carefully constructed, the surface water accumulating on the right of way. In exercising this right, care must be taken to avoid, by the use of all reasonable means, all unnecessary damage to the lands over which it has a right of way. The land-owner must have known, when he acquiesced in the acquisition of the easement by refraining from suit, that the company would be compelled to protect its road-bed and track from surface water. He knew the "lay" of his land and what effect the construction of the road would have upon the flow of the water and the means necessary to prevent ponding and injuring the upper land and the road-bed. He made no complaint for sixteen years, during which he says there was a wooden trunk carrying the surface water in the same quantity and through the same land as the pipe does. He says, and this is self-evident, that the new drain does not increase the flow of the water, and he further says that the drain is about the lowest point and is where the water would naturally flow.

The contention of the plaintiff is well stated in the brief of his counsel, saying: "Plaintiff alleges that the defendant should have carried the water, collected in its side ditches, to the branch on the west or the ditch on the east or trunked it to the Yadkin River on the (297) south, about one hundred yards distant from the railroad. And, in not doing this, the construction and drainage of the road was negligently and improperly done."

Neither of these contentions were submitted to the jury. They were instructed that if the water was concentrated by flowing down the side ditches at the trunk and permitted to go through the trunk onto plain-

tiff's land, defendant was liable. This view eliminated the question of negligence and withdrew from the jury the fact that defendant had acquired an easement to drain the surface water by carrying it through the road-bed, provided there was no other reasonably convenient way to dispose of it and that there was no negligence in the construction of the drain. It is not clear from the testimony of plaintiff whether defendant could not, by the exercise of reasonable care and without unreasonable expense, have carried the water to the branch and thereby disposed of it without injury to plaintiff. He says in his direct evidence that the branch was lower than the point at which the trunk was placed. In his cross-examination he says otherwise.

We think that the true test of defendant's liability is whether the means adopted were reasonable, or such as a prudent man so situated, having regard to his own and his neighbor's rights and property, would have taken to dispose of the surface water.

It may be that, if railroad companies were required to condemn or at least institute proceedings for that purpose, before constructing their roads, etc., and have their rights and duties settled, many of the difficult and perplexing questions which have arisen would have been avoided. The policy of the State, when the construction of railroads first attracted attention, was otherwise. Conditions have changed, lands have increased in value and rights deemed of little value when the
(298) roads were built have become of importance. The courts, while endeavoring to have the law work out substantial justice, cannot change their decisions to meet these conditions.

The defendant is entitled to drain the surface water from its road-bed, subject to the limitation that it does so without negligence and unnecessary injury to the lands of plaintiff. Of course, what we have said has no application to lands over which rights of way have not been acquired. These questions have been discussed and settled in other cases.

This conclusion results in a new trial. It may be proper to say that the real questions in controversy could be more clearly presented by a reformation of the pleadings. It does not very clearly appear what the plaintiff's cause of action is or the damage which he claims. The proper issues in such cases may be found in *Brown v. Power Co.*, 140 N. C., 334, and *Candler v. Electric Co.*, 135 N. C., 12. In this way the plaintiff recovers for damage up to the time of the trial, not exceeding five years, and for the permanent easement which is acquired by the payment of the judgment. The issues thus framed would eliminate the exceptions to his Honor's rulings upon the question of damages.

New Trial.

Cited: Earnhardt v. R. R., 157 N. C., 364; *R. R. v. McLean*, 158 N. C., 500.

(299)

WEBB v. TRUSTEES.

(Filed 11 December, 1906.)

Contract to Purchase Bonds—Approval of Attorney—Condition Precedent—Preliminary Negotiations.

1. Where the plaintiff proposed to purchase certain bonds issued by the defendant, "when legally issued to the satisfaction of our attorney," which proposition was accepted by the defendant, the approval of the attorney selected to pass upon the validity of the bonds, honestly and fairly expressed, was a condition precedent to the completion of the purchase.
2. The correspondence or negotiation leading up to a proposition to purchase bonds is not material, where the proposition made by plaintiff and accepted by defendant was the result of such negotiation, and their relative rights and liabilities must be ascertained and declared upon the plain and unambiguous language found therein.

ACTION by C. A. Webb, doing business as C. A. Webb & Co., against Board of Trustees of the Morganton Graded School District, heard by *O. H. Allen, J.*, and a jury, at the June Term, 1906, of BUNCOMBE.

The Legislature of North Carolina by chapter 455, Laws 1903, incorporated the Morganton Graded School, naming trustees thereof, and by chapter 174, Laws 1905, authorized the said trustees to submit to the voters of the said Morganton School District a proposition for the issue of school bonds to the amount not exceeding $20,000, running forty years from date of issue, bearing interest at a rate not exceeding six per cent. At an election held pursuant to the provisions of said act, said trustees were authorized to issue the said bonds in accordance with the said proposition. Pursuant thereto the said trustees advertised for bids for said bonds to the amount of $15,000.

On 27 July, 1905, the plaintiff, C. A. Webb, doing business under the firm name and style of C. A. Webb & Co., submitted to said board a proposition to buy said bonds, as follows: "For the (300) fifteen thousand dollars of coupon bonds of Morganton Graded School District, due and payable forty years from date, with option of prior payment at the expiration of twenty years from date, drawing interest at the rate of five per cent, payable semi-annually, both principal and interest payable at the First National Bank of Morganton, to be dated 1 September, 1905, we will pay you par and interest, and a premium of $630 and furnish free blanks upon the delivery of the same to us at Asheville, when legally issued to the satisfaction of our attorneys. We herein enclose certified check for $500 as guarantee to faithfully carry out this proposition."

At the time of submitting said proposition plaintiff enclosed a certified check on the Battery Park Bank of Asheville for $500, endorsed to

the president of the board of trustees, as follows: "Pay to the order of John H. Pearson upon our failure to comply with our contract this day made for the purchase of fifteen thousand dollars Morganton Graded School bonds. (Dated) July 27, 1905."

At the time of said proposition the defendant trustees were in correspondence with a number of bankers and brokers, dealers in securities of that character. Without advising with counsel, said trustees had, before that time, offered to sell bonds maturing in twenty years instead of forty years; the plaintiff instead of expressing a preference for bonds running twenty years, was of the opinion that said trustees were not authorized to issue said bonds, but did have authority to issue the bonds due and payable forty years from date, with option of prior payment at the expiration of twenty years from date. Immediately upon filing said proposition the said trustees ceased to negotiate with the proposed purchasers of its school bonds, and caused publication to be made that the said bonds had been sold to the plaintiff; the plaintiff submit-
(301) ted to his attorneys in the city of Boston a certified copy of the act authorizing the said issue of bonds and all other certified records which had, at that time, come into the hands of the plaintiff, which tended to show the legality of said bonds, with a request that said attorneys render a legal opinion in respect to the legality thereof. That on 8 August, 1905, the said attorneys, Storey, Thorndyke, Palmer & Thayer, gave to the plaintiff their opinion in writing, saying: "The statute provides for bonds 'running forty years from date of issue' and the notice of election provides for bonds 'to run forty years from date of issue.' In our opinion the bonds must run for forty years without option of prior payment. This result, apparently, does not coincide with your contract, or the contention of the board. Awaiting the further papers which you are to send us, and also awaiting your instructions as to whether in the circumstances we shall proceed to complete the examination, we are, etc." Immediately upon receipt of said opinion, plaintiff submitted same to defendant Board of Trustees, advising said defendant that because of the failure of said attorneys to approve and pass the validity of the character of bonds mentioned in said contract said plaintiff would not take up and pay for the bonds mentioned in said contract unless the defendant would submit the facts with reference to said maturities to the Superior and Supreme Courts of North Carolina for an early decision upon the question as to whether said bonds should run for a period of forty years or could be issued so as to provide for an optional payment at the expiration of twenty years. Said proposition was declined by said board. The said board sent said check to the Battery Park Bank at Asheville for collection and withholds the same, refusing to surrender to the plaintiff. Subsequently the

defendants sold the said bonds to the amount of $15,000 for a premium of $2.50 on the $100.

Plaintiff introduced the deposition of Henry Ware, Esq., a member of the firm of Storey, Thorndyke, Palmer & Thayer, who (302) testified that he had been engaged for over nine years in examining records and papers relating to municipalities in North Carolina. That he examined the records, etc., relating to the issue by the defendant trustees, at the request of the plaintiff, and was of opinion that the bonds issued either in accordance with the contract of purchase, that is, payable forty years from that date, with the option of prior payment at the expiration of twenty years, would not be, or have been, legally authorized, for the reason that the statute authorizing the bonds required them to run forty years from date, and did not authorize said trustees to make them payable at an earlier date, either absolutely or at its option. That he communicated said opinion to the plaintiff on 8 August, 1905. He says: "I gave the said opinion in absolute good faith, honestly believing that I was correct in the same, and I still so believe."

The defendant moved for judgment upon the pleadings, and this being denied, there was an exception. Thereupon his Honor submitted the following issue to the jury: "Did the attorneys advise against the legality of the bonds as alleged in the fifth article of the complaint? Answer: Yes."

There were certain exceptions to the testimony and the rulings of his Honor specifically set forth in the assignments of error and appearing in the opinion. Judgment being rendered for the plaintiff, the defendants duly excepted, and appealed.

Avery & Erwin, C. A. Webb, and *W. C. Newland* for the plaintiff.
Avery & Avery for the defendant.

CONNOR, J., after stating the case: The terms of the proposition made by plaintiff to purchase the bonds issued by defendant, "when legally issued to the satisfaction of our attorneys," are plain and unambiguous. Similar provisions are frequently found in con- (303) tracts for purchasing bonds, loaning money, buying stocks, building houses, purchasing land, etc. They are regarded as both wise and reasonable, and are uniformly sustained by the courts. In regard to the purchase of municipal bonds, the value of which for sale on the market is so largely dependent upon the approval of counsel skilled and learned in the laws controlling their issue, it is a most prudent provision. In the light of the frequent litigation growing out of the issue of such bonds, often disastrous to holders, to purchase them without some such

protective provision would be imprudent and unsafe. However this may be, parties have the legal right to make such contracts, and it is the duty of the courts to give the language a fair and reasonable interpretation. When so interpreted, we can have no doubt that the approval of the attorneys, as to the legality of the issue, honestly and fairly expressed, was a condition precedent to the completion of the purchase. We may not interpolate into it any other language or give it any other construction. It is uniformly held by the courts that, in the absence of any allegation and proof of bad faith or arbitrary conduct on the part of the person selected to pass upon the validity of the bond or performance of the contract on the part of the person seeking its enforcement, his approval is a condition precedent and is essential to the right to demand performance. It is usually held that when it appears from the pleadings that such provision is a part of the contract, the failure to aver compliance is demurrable.

In *Young v. Jeffreys,* 20 N. C., 357, it appeared that certain persons had made subscriptions for the purpose of building a Methodist Church. The work was to be done according to specifications and accepted by the Commissioners appointed to pass upon it. The objection being made to the payment of the subscriptions that the work had not been accepted, and that such acceptance was a condition precedent to
(304) the payment, *Gaston, J.,* sustaining a motion for judgment by defendants, said: "There is nothing unreasonable, much less illegal, in such a condition. Whether a work of art has been done with proper materials and in a workmanlike style is an inquiry on which honest differences of opinion may prevail even among persons skilled in the art, and on which men of ordinary pursuits are very unfit to pass. It is, therefore, in agreements for works of this kind, a prudent and common stipulation for the prevention of controversies that the construction of the work shall be determined by some persons in whose judgment the parties have confidence. If, however, the judgment of the forum appointed by the parties is to be disregarded, or revised by a court and jury, the stipulation is unmeaning." Wharton Const., 593. If the contract is to be performed to the satisfaction of another, the decision of such person, if honest, is final, no matter how unreasonable. *Brown v. Foster,* 113 Mass., 136. In *Church v. Shanklin,* 95 Cal., 626, the contract was made to depend upon the perfecting title to certain property "to the satisfaction of Church & Cory, attorneys." *Patterson, J.,* said: "The record fails to show that Church & Cory refused to express satisfaction with the plaintiff's title through any fraudulent or improper motive. * * * It was doubtless the object of the parties to avoid disputes and expensive litigation; certainly some effect must be given to the stipulation contained in the agreement. To hold that the

opinion of the Court as to the validity of the title can be substituted for that of the arbitrators, would defeat the intention of the parties and, in effect, make a new contract for them. This the Court has no right to do. The parties saw fit to make Church & Cory the umpires between them, and if the latter exercised their best judgment in good faith and with an honest intention of determining the question as to the validity of the title, their conclusion is final and binding."

In *Mich. Stone Co. v. Harris,* 81 Fed., 928, the same question arose upon the construction of a contract for the purchase of (305) municipal bonds, the language being: "We to furnish you with certified transcript of proceedings evidencing legality of issue to the satisfaction of your attorneys prior to the delivery of same." *Judge Lurton* said: "The subject-matter of this contract was the negotiable bonds to be issued for street improvements to be made under a contract between the city and the plaintiff in error. They had not been issued when this agreement was entered into. It was a most reasonable and prudent thing for proposing purchasers to stipulate for some security against the invalidity of such bonds before being required to receive and pay for them. * * * The plain meaning of this contract was: (1) That plaintiffs in error were to furnish certified copies of the proceedings under which these bonds were issued. (2) Defendants in error were to fairly and honestly submit this record, when furnished, to the judgment of the counsel selected by them. (3) The counsel thus selected must not capriciously and arbitrarily reject the bonds, but on the record, honestly and fairly give his judgment as to their legality. * * * The buyers employed counsel, a gentleman particularly skilled in the matter of the validity of municipal bonds, and submitted this evidence to him and procured his opinion. * * * The question of the validity of the bonds was to be settled by the opinion of a third person, whose judgment was to be a legal opinion based upon the law and facts touching these bonds. Neither party would be concluded by an opinion rendered arbitrarily and without the honest intent of deciding fairly and rationally. The contract seems to come fairly within the principle applicable to contracts under which settlements between parties are made dependent upon the certificate of some third person. The rule in such cases is that, in the absence of fraud, or such gross misconduct as would necessarily imply bad faith, or the failure to exercise an honest judgment, the action of such third person should con- (306) clude the parties." *Kihlberg v. U. S.,* 97 U. S., 398; *R. R. v. March,* 114 U. S., 549; *Averett v. Lipscomb,* 76 Va., 404.

There is no suggestion that the gentlemen selected by plaintiff's attorneys to pass upon the validity of the bonds were not competent or that they did not honestly and in good faith investigate and give their

opinion upon the question submitted to them pursuant to the contract. While we have not undertaken to investigate or express any opinion respecting the validity of the bonds proposed to be issued, containing the twenty-year option, we regard it as sufficiently serious to arrest attention and, in the absence of controlling authority, cause counsel to decline to express satisfaction of their validity. Certainly the question cannot be said so free from doubt as to suggest an arbitrary refusal to approve them. We do not think that the correspondence or negotiation leading up to the proposition material. The proposition made by plaintiff and accepted by defendant was the result of such negotiation, and their relative rights and liabilities must be ascertained and declared upon the plain and unambiguous language found therein. We concur with his Honor's rulings upon the several exceptions. The issue submitted to and found by the jury, in the light of the contract, settled the right of the plaintiff to the relief demanded. The exceptions to the answers of Mr. Ware cannot be sustained. Nor was the proposed testimony of Mr. Ervin material. The judgment was correctly rendered upon the pleadings, and the verdict must be affirmed.

No Error.

(307)

MINING COMPANY v. COTTON MILLS.

(Filed 11 December, 1906.)

Rights to Cut Timber—Grant—Reservation—Time for Removal—Expiration.

1. Whether the right to cut timber is a grant, or a reservation, it expires at the time specified. When no time is specified, a grantee of such right takes upon the implied agreement to cut and remove within a reasonable time, whereas when a grantor of the fee reserves or excepts the timber, and there is no limitation to indicate when the reservation shall expire, then the grantee must give notice for a reasonable time that the grantor must cut or remove the timber included in his reservation.
2. Where land was conveyed in fee to plaintiff "with all timber reserved" by the grantor, and it was stipulated that when the land was divided into lots and the erection of any building was begun on any lot, then the grantor "shall have no further right to any timber upon said lot," the Court erred in holding that the plaintiff can recover of the defendant for timber cut on any lot before the happening of the event which it was agreed should put an end to the reservation.

ACTION by the Ormand Mining Company and others against Bessemer City Cotton Mills and others, heard by *Bryan, J.*, and a jury, at the February Term, 1906, of GASTON. From a judgment for the plaintiff, the defendants appealed.

O. F. Mason and *Burwell & Cansler* for the plaintiffs.
Tillett & Guthrie for the defendants.

CLARK, C. J. The plaintiff holds, under mesne conveyance, certain lands and mineral rights from one Pinchback, whose deed to plaintiff's grantor contains the following exceptions or reservation: "All the woods and timber is reserved by me," with the addition that if the grantee should "divide up the land referred to in lots and begin the erection of any building on any lot, then I shall have no further right to any timber *on said lot* after any building is begun."

It is true, as contended by the plaintiff, that "a deed purporting to convey all the wood and timber therein described vests in the (308) grantee a present estate of absolute ownership in said timber defeasible as to all timber not removed within the time required by the terms of the deed." *Lumber Co. v. Corey,* 140 N. C., 462; *Hawkins v. Lumber Co.,* 139 N. C., 160; *Bunch v. Lumber Co.,* 134 N. C., 116.

It is also true, as further contended by the plaintiff, that when in a contract for sale of standing timber "no time is specified within which it shall be cut and removed, the law presumes this shall be done within a reasonable time."

But that is not this case. Here the land was conveyed in fee with an exception or reservation of the timber. In such case, if a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or expiration of the time—as here, upon beginning "the erection of any building upon any lot." If there is no limitation to indicate when the reservation or exception shall expire, then the grantee must give notice for a reasonable time that the grantor must cut or remove the timber included in his reservation, and if this is not done after such reasonable notice then the reservation or exception falls and all rights thereunder cease and determine.

Whether the right to cut timber is a grant, or a reservation, it expires at the time specified. When no time is specified a grantee of such right takes upon the implied agreement to cut and remove within a reasonable time. He has bought the timber for that purpose, whereas when a grantor of the fee reserves or excepts the timber, he is not providing for timber-cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee giving notice for a reasonable time so that the grantor may elect to cut or sell this right to another.

It may be difficult, perhaps, to reconcile all the decisions, but we think this is a summary of the true, just and equitable principles applying to such contracts. As such contracts have greatly in- (309) creased in number and importance, it will be more useful to thus state plainly and clearly the rules we think applicable and by which we shall be guided, than attempt to reconcile all the precedents.

In this contract, the event upon which the reservation should termi-

nate is stipulated for, and is when the land is divided into lots and the erection of any building is begun on any lot, then the grantor "shall have no further right to any timber upon said lot." In holding that the plaintiff can recover of the defendant, who is assignee of the reservation for timber cut on any lot before the happening of the event which it was agreed should put an end to the reservation, there was

Error.

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

Cited: *Midyette v. Grubbs,* 145 N. C., 88; *Lumber Co. v. Smith,* 146 N. C., 161; *Hornthal v. Howcott,* 154 N. C., 230; *Bateman v. Lumber Co., Ib.,* 251; *Kelly v. Lumber Co.,* 157 N. C., 177; *Byrd v. Sexton,* 161 N. C., 572.

ROBERTS v. ROBERTS.

(Filed 11 December, 1906.)

Partition—Consent Decree—Report of Commissioners—Exceptions—Decree of Confirmation Without Notice.

Where a proceeding for partition was brought in 1881 and upon issues raised was transferred for trial to the Superior Court and a consent decree was entered at June Term, 1887, appointing commissioners for partition, who filed their report with the Clerk in 1887, and no exceptions in any form were ever filed to its confirmation and a decree confirming the report was procured at the April Term, 1906, without giving special notice to the defendant or his counsel: *Held,* that the defendant's motion to set aside the decree of confirmation was properly denied.

PROCEEDING for partition by W. S. Roberts against H. C. Roberts, heard by *O. H. Allen, J.,* at the August Term, 1906, of BUN-
(310) COMBE, upon a motion by the defendant to set aside a decree of confirmation. From the order denying the motion, the defendant appealed.

Frank Carter, Moore & Rollins and *H. C. Chedester* for the plaintiff.
N. Y. Gulley and *W. P. Brown* for defendant.

BROWN, J. It appears from the record and findings by the Court below that on 19 January, 1881, the plaintiff brought a special proceeding against the defendant before the Clerk of the Superior Court for the purpose of partitioning certain land between the plaintiff and defendant which they held as tenants in common. Issues of fact having been raised by the pleadings, the case was transferred for trial to the

Superior Court. It was regularly called for trial at June Term, 1887, and a jury was empaneled to try it. After the jury had been empaneled, the judgment which appears in the record, appointing commissioners for partition, was entered by consent of the parties. The commissioners so appointed partitioned the land between plaintiff and defendant, and filed a report of their proceedings with the Clerk of the Court on 30 July, 1887. No exceptions were ever filed and no objection in any form made, so far as the record discloses, to the confirmation of the report. At April Term, 1906, without giving special notice to the defendant or his counsel, the plaintiff procured an order confirming the report which had been filed since 30 July, 1887.

The contention of the defendant is that the proceeding for partition was not pending either in the Superior Court in term or before the Clerk, but that it had been abandoned nineteen years before, and was pending nowhere. We are of opinion that his Honor very properly denied the motion.

There was no discontinuance of the proceeding for lack of continuous process or for any other reason. *Penniman v. Daniel,* 91 N. C., 431. The consent decree was a final judgment of the Court ad- (311) judicating the rights of the parties to a partition. If the cause was pending before the Clerk, then no order of confirmation was necessary when the report was filed in 1887. If no exception thereto was filed in twenty days, the report stood confirmed by law without a formal decree. The Code of 1883, sec. 1896.

If we regard the proceeding as pending in the Superior Court in term, by virtue of chapter 276, Acts 1887, then the defendant was bound to take notice of such orders and decrees as were made in the orderly course of legal procedure in term-time. No special notice was necessary.

Inasmuch as no exceptions were filed to the report of the commissioners during the term which followed the filing of the report, the plaintiff had a right to a decree of confirmation of this decree.

The order made in 1906 by *Judge Moore* in term-time may be justly considered as entered *nunc pro tunc,* and was no more than the plaintiff was clearly entitled to, even if necessary. *Bright v. Sugg,* 15 N. C., 492; *Long v. Long,* 85 N. C., 415.

Affirmed.

(312)

SHAW v. RAILROAD.

(Filed 11 December, 1906.)

Railroads—Passengers Riding on Platform—Contributory Negligence—Announcement of Station.

1. By virtue of Revisal, section 2628, the rule of a railroad company prohibiting passengers from going on the platform while the train is in motion, is given, when the statute has been complied with, the force and effect of a law of the State prohibiting passengers from going on the platform of moving trains, and barring a recovery for injuries sustained under such circumstances.
2. An instruction that Revisal, section 2628, does not apply if the plaintiff entered upon the platform in *bona fide* belief that the train was not moving, and if a reasonably prudent person under similar circumstances would have so believed and acted, was erroneous.
3. The mere announcement of the name of a station is not an invitation to alight; but, when followed by a *full stoppage* of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers.

CLARK, C. J., and HOKE, J., dissenting.

ACTION by Mrs. Bessie Shaw against Seaboard Air Line Railway Company, heard before *Bryan, J.*, and a jury, at the March Term, 1906, of MECKLENBURG.

This was a civil action for the recovery of damages for injuries sustained by plaintiff as the result of an alleged fall from the front platform of one of the defendant's passenger cars while a passenger thereon on the night of 26 February, 1905, at a point about three-quarters of a mile west of Matthews, N. C., which fall, it is claimed, was caused by the sudden and violent jerking of the train. The Court submitted the usual issues of negligence, contributory negligence and damage. The jury found the issues for the plaintiff and assessed her damages. From the judgment rendered, defendant appealed.

(313) *Stewart & MacRae* and *Tillett & Guthrie* for the plaintiff.
Burwell & Cansler for the defendant.

BROWN, J. Plaintiff was a passenger on defendant's passenger train going to Matthews, N. C. In the car in which she was traveling was the following printed notice posted up at the time in a conspicuous place:

"NOTICE! Passengers are prohibited from going on PLATFORMS or between CARS while the train is in motion, and are warned not to allow their HEADS or LIMBS to project from CAR WINDOWS."

The evidence is conflicting, but there is much evidence tending to prove that plaintiff went out on the platform of the car and was injured thereon while the train was moving and before it had come to a stop.

Section 2628, Revisal of 1905, reads as follows: "In case any passenger on any railroad shall be injured while on the platform of the car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, said company shall not be liable for the injury: *Provided,* said company, at the time, furnishes room inside its passenger cars sufficient for the proper accommodation of its passengers."

It is not contended that plaintiff went out on the platform for lack of room inside the car, because it appears from her own testimony that she had a seat; nor did she go out at the invitation of the defendant's agent. Her testimony is that the train was not in motion when she went on the platform.

The following instruction was given by the Court, to which defendant duly excepted: "If the jury shall find that, when the plaintiff went upon the platform, she did so in the *bona fide* belief that the train was not in motion, but that it had come to a full stop, and that a reasonably prudent person under the same circumstances would have so believed and so acted, then you are instructed that section 2628 (314) of the Revisal of 1905 would not apply, although the train had not actually come to a full stop; and, in this view, if you shall find that the defendant was guilty of negligence, as alleged in the complaint, you will answer the first issue 'Yes.'"

The rule of the defendant company, which we have quoted, is given, when the terms of the statute have been complied with, the force and effect of a law of the State prohibiting passengers from going out on the platform of moving trains, and barring a recovery for injuries sustained under such circumstances. In other words, when the railroad company complies with the statute and the passenger voluntarily violates the rule posted for his protection, and he is consequently injured, the law refuses him a right of action. The passenger's conduct is not to be governed entirely by the doctrine of contributory negligence as expounded by the courts, but rather in the light that there is no actionable negligence—no cause of action. The statute is made for the protection of passengers as well as for that of the railroad company, and specifically relieves the company from any liability when the passenger violates its provisions.

The vice in the quoted instruction is that it gives to the passenger the benefit of the rule of the prudent man as if the matter were being considered under the second issue and solely in the light of contributory

negligence. The instruction reads into the statute something that is not there, and practically places upon the railroad company the responsibility for the passenger's error. However inadvertent such error, the passenger, and not the carrier, is to blame. His Honor assumes that the train was moving (how fast he did not state), and declares that the statute does not apply if the plaintiff entered upon the platform in the *bona fide* belief that the train was not moving, and if a reasonably prudent person under similar circumstances would have so be-
(315) lieved and so acted. This practically nullifies the force and effect of the statute and leaves it for the jury to determine when they will apply the statute and when not. It is a very simple and easy matter by observing outside objects or the earth itself to tell when a train is at a standstill, and it imposes no hardship upon a passenger to require him to be certain as to that before entering upon the platform. The carrier owes no duty to be upon the lookout for passengers who violate the printed rule and go on the platform when prohibited, and the engineer and those in charge of the train have a right to suppose that passengers will remain in the car until it comes to a full stop, and they have a right to act accordingly. The statute contains no exception to its general provision, and in plain terms relieves the company from liability in the case of a passenger injured while on the platform of a moving train when the company, as in this case, has complied with its terms.

In *Denny v. R. R.,* 132 N. C., 340, it is held that a passenger who voluntarily goes upon the platform of a moving train for the purpose of alighting at the station, and is injured by reason of a jerk in the train, is not entitled to recover therefor, and *Mr. Justice Connor,* speaking of the duty of the engineer, says: "He cannot be supposed to know or anticipate, that passengers, *in defiance of the rules,* have gone upon the platform and are standing upon the steps of the car while in motion." See, also *R. R. v. Hawk,* 72 Ala., 112. In the case before us as in *Denny's case,* there is no suggestion that the conductor was upon the platform and no evidence that plaintiff was invited to go out there preparatory to leaving the train.

The fact that the porter called out the station name before, reaching the station was no invitation to go upon the platform, for at that time the train was running rapidly, and only after the announcement
(316) did it begin to slow down. In *Smith v. R. R.,* 88 Ala., it is said: "The mere announcement of the name of a station is not an invitation to alight; but, when followed by a *full stoppage* of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. * * * Comparing all the cases, we deduce that, when the name of the station is called, and, soon thereafter,

the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing-place." To the same effect are the following cases: *England v. R. R.,* 21 N. E., 1; *R. R. v. Holmes,* 97 Ala., 332; *Mitchell v. R. R.,* 51 Mich., 236; *R. R. v. Green,* 25 Am. St., 255; *Minock v. R. R.,* 56 N. W., 870.

It is contended by defendant that there is a material variation between the allegation of the complaint and plaintiff's proof, in that she alleges in her complaint that the train was moving when she entered on the platform, and in her testimony she states that it was at a standstill. It is unnecessary that we consider this, as the complaint may be amended before another trial.

New Trial.

HOKE, J., dissenting: I cannot concur in the decision of this case, and am of opinion that by an erroneous application of a wholesome principle the decision of the Court may work great injustice to the plaintiff in the further trial of the cause.

The objection urged against the validity of the present trial and held for error in the opinion of the Court is that the charge of the Judge contravenes a rule of the company made and posted pursuant to the statute, Revisal 1905, 2628, which forbids passengers from going on the platform when the train is in motion. (317)

I think the statute is a wise one, and the rule a reasonable regulation when reasonably interpreted; but I cannot think that any correct or reasonable interpretation of this rule would uphold or sustain the objection made to the charge on the facts of the present case.

These facts show that about a mile from Matthews Station there had been a washout which had been recently repaired, and the employees of the defendant had been instructed, or were accustomed to stop or slow down at this place. There was no testimony that plaintiff was aware of this custom or of these instructions.

The theory and testimony of the plaintiff was that at the time of the occurrence plaintiff was a passenger on the defendant road, going from Charlotte to Matthews, a station about ten miles out, in the night-time. On approaching Matthews, near which town she lived, the porter on the train came through the first-class car where plaintiff was and called out "Matthews." The train immediately began to slow down, and plaintiff got up from her seat and started to go out. She had her grip in her hand and her baby on her arm as she went towards the front door; and by the time the plaintiff had reached the front door the train had almost stopped, and when witness got to the platform it had stopped. The train

then gave a violent jerk and plaintiff was thrown down and seriously injured.

Another witness for the plaintiff said that the train had slowed up and looked to him like it stopped when it got even with the washout, and then gave a sudden jerk and went forward.

Yet another witness for plaintiff stated that the train had gotten very slow at the washout, but he did not think that the train had quite stopped.

The theory of the defendant was that the train had never
(318) gotten slower than five miles an hour at this point, the testimony of the defendant being that it was running from five to ten miles an hour.

Presenting the theory and testimony of the defendant, the Court charged the jury, among other things, that the general rule is that passengers who are attempting to go on or off a moving train in violation of the rules of the railroad company cannot recover for injuries received by them. This being so, if the jury find that at the time plaintiff was injured there was a printed notice posted up in a conspicuous place warning passengers not to go on the platform while the train was in motion, and plaintiff went upon the platform, under the erroneous impression that it was slowing up for her station and while upon said platform plaintiff was thrown therefrom as a result of a sudden jerk or movement of the train, which was slowing up for a washout, then the Court charges that the plaintiff was guilty of contributory negligence in going on the platform while the train was slowing up; which negligence on her part would be the proximate cause of the injury, and the jury should answer the second issue "Yes." That even though the jury should find that the defendant was guilty of negligence in failing to warn the plaintiff that the train was slowing for the washout, and not for the station, or in causing the train to be suddenly and violently jerked forward while at the washout, yet, if the jury find that plaintiff went on the platform of the car while it was in motion in violation of the printed regulation of the company, posted in a conspicuous place in the car, and was injured on account of a sudden jerk or movement of the car while on the platform preparing to alight, then the Court charges the jury that the plaintiff was guilty of contributory negligence, which would be the proximate cause of the injury.

Again, if the jury find, by the greater weight of the evidence, that there was a rule properly posted in the car, forbidding passengers
(319) to go on the platform while the train was in motion, and she went on the platform while the train was running from five to ten miles an hour and was thrown, in that event she would be guilty of contributory negligence.

In presenting the theory and evidence for the plaintiff, the Court charged the jury as follows:

"If the jury shall find, by the greater weight of the evidence, that shortly before reaching Matthews, on the night referred to in the complaint, the defendant's employee went through the passenger coach in which the plaintiff was riding and called 'Matthews,' and that immediately thereafter the train began to slow up, and gradually ran slower and slower, until it came to a full stop, and that the plaintiff, while the train was slowing up, went towards the platform, believing that the train had stopped for the station, and in so doing acted as a reasonably prudent person would have acted under the same or similar circumstances, and while so upon the platform the train, without warning to her, was suddenly jerked forward by the defendant's employees, and by reason of said sudden jerking forward the plaintiff was thrown from the said platform to the ground, and thereby injured as alleged in the complaint, then the jury are instructed that this was negligence on the part of the defendant, and they will answer the first issue 'Yes.'"

And further, at the request of the plaintiff, gave the following special instructions:

"If the jury shall find that, when the plaintiff went upon the platform, she did so in the *bona fide* belief that the train was not in motion, but that it had come to a full stop, and that a reasonably prudent person, under the same circumstances, would have so believed and so acted, then you are instructed that section 2628 of the Revisal of 1905 would not apply, although the train had not actually come to a full stop; and, in this view, if you find that the defendant was guilty of negligence, as alleged in the complaint, you will answer the first issue 'Yes.'" (320)

We have held, in several well-considered decisions in this State, that the charge to the jury must be considered as a whole in the same connected way in which it was given, and on the presumption that the jury did not overlook any portion of it; and if, when so considered, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

Applying this rule to the charge now considered, I think, by fair intendment, it could only mean that while the plaintiff could not recover if she entered on the platform when the train was in motion in violation of a rule of the company properly posted, yet the rule would not apply if she took that position after the porter had called the station and when the train, immediately after such call, had come to a stop, or so near it that the plaintiff, in the exercise of reasonable care, could not discover whether it had stopped or not.

So interpreted, I think the charge a correct one on the facts presented, and that the rule only applies and prevents recovery where the passenger voluntarily goes on the platform when the train is perceptibly in motion; and does not, and was never intended to apply to cases like the present, where the passenger goes on the platform by the implied invitation of the defendant's employees when its train had come to a stop, or so nearly so that the passenger could not tell whether it was moving or not.

The opinion of the Court, as I understand it, in upholding a contrary view, applies and extends the rule to a case which is not in its spirit nor within its letter, by any fair or reasonable construction; and, in its practical effect, may, and frequently will, enable a carrier, by invitation of its employees, reasonably relied upon, to entice a passenger to his hurt, injure him by gross negligence and escape with impunity.

(321) The interpretation put upon this rule and statute is not only not grounded in right reason, but is not supported by any well-considered authority.

There are several decisions which hold that the mere call of a station does not amount to an invitation to a passenger to go on the platform for the purpose of alighting while the train is still in motion. But no such decision was made on facts similar to those presented in the case we are considering: where the porter called the station, the train slowed up, and either stopped or came so near it that its motion could not be observed. The better considered authorities hold that this amounts to an implied invitation to the passengers to step on the platform for the purpose of alighting; and if, in so doing, a passenger is injured by the negligence of the company's employees, the plaintiff can recover.

In *R. R. v. Meyers,* 62 Fed., 367, being a decision of the Court of Appeals of the Seventh Circuit, *Fuller,* Circuit Judge, *Jenkins,* Circuit Judge, and *Grosscup,* District Judge, present and taking part in the decision, it was said:

"It is urged that there is exemption from liability here by reason of the provision of the statute of Indiana (Rev. St., 3928), which declares: 'In case any passenger on any railroad shall be injured on the platform of a car, or any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger-car then in the train, such company shall not be liable for the injury, provided said company at the time furnished cars sufficient for the proper accommodation of the passengers.'

"It was found by the jury that, on the inside of the door of the car in which the defendant in error was riding, the company had

(322) placed a notice warning passengers from riding on the platform

when the train was in motion. This statute was obviously intended to absolve the company from responsibility for damages to passengers imprudently and improperly standing or riding upon the platform; but we cannot conceive that it was designed to apply to a case of a passenger justifiably leaving a car, the platform being the only mode of egress, and the defendant in error being there by invitation of the servant of the company for the purpose of alighting, and was not, we think, riding upon the platform within the meaning of the statute"—citing *Buel v. R. R.*, 31 N. Y., 314; *R. R. v. Miles,* 88 Ala., 256.

And in 6 Cyc., 638, it is said: "It will, in general, constitute negligence on the part of a passenger who violates a regulation made by a carrier with reference to the safety of passengers, and for an injury resulting from such violation he cannot recover. But the passenger may properly rely on the discretion of the person in charge of the conveyance as to what would be safe conduct: thus, while it is usually in violation of the rules to ride on the platform of a moving train, yet, if this is by the express or implied direction or consent of the person in charge of the train or car, it will not be imputed to the passenger for negligence."

And in 5 A. and E., 678, in note 1, it is said: "The regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and cannot maintain an action to recover damages. But the passenger who remains there only long enough to ascertain that the train had not stopped does not violate the regulation prohibiting passengers from riding on the platform."

These authorities, I think, state the correct doctrine, and, applied to the facts of the case before us, will show that the trial (323) has been free from reversible error.

There could be no better illustration of the wisdom of this position than the facts disclosed in the record.

As heretofore stated, the plaintiff, on the train for the second time in her life, ignorant of any washout or of any directions or custom of the company to make a stop at the washout, hears the porter call "Matthews," the station to which she was going. The train immediately slowed up. The plaintiff, acting on the call, in connection with the slower motion of the train, goes to the door for the purpose of alighting, and when she steps on the platform the train is at a standstill, or so near it that, in the exercise of ordinary care, she cannot tell that it is in motion.

It was in presenting this theory and the evidence tending to support

it that the alleged error was committed; and it seems to me that a mere statement of the testimony is a complete answer to the position.

I am of opinion that, both on reason and authority, the verdict and judgment should be upheld.

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

Cited: Darden v. R. R., 144 N. C., 2; *Smith v. R. R.*, 147 N. C., 451; *Wagner v. R. R., Ib.*, 328; *Kearney v. R. R.*, 158 N. C., 530; *Thorp v. Traction Co.*, 159 N. C., 37.

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LUMBER COMPANY v. RAILROAD.

(Filed 11 December, 1906.)

Railroads—Fires—Defective Spark-Arresters—Foul Right-of-Way—Negligence —Burden of Proof.

1. Where fire is set out by sparks from a defective engine, or one not having a proper spark-arrester, or because operated in a careless manner, the company is liable for the negligence, whether the fire originates on or off the right-of-way.
2. Where the engine is properly operated, is not defective, and has a proper spark-arrester, but fire originates on the right-of-way because it is in a foul or neglected condition, the company is liable.
3. In an action for damages for negligently setting fire to plaintiff's lumber by sparks from defendant's engine, the Court properly charged that if the fire was set out by the engine, the burden was on the defendant to show that it was equipped with a proper spark-arrester—a matter peculiarly within its knowledge.

ACTION by North Fork Lumber Company against Southern Railway Company, heard by *O. H. Allen, J.*, and a jury at the September Term, 1906, of BUNCOMBE. From judgment for the plaintiff, the defendant appealed.

Charles E. Jones and *Zebulon Weaver* for the plaintiff.
Moore & Rollins and *C. A. Webb* for the defendant.

CLARK, C. J. A pile of lumber belonging to the plaintiff was burned while under a shed on the defendant's right of way. The side of the shed next to the railroad track was open, and the eaves were about the height of the smokestack of a locomotive. The public and the defendant used the shed for loading and unloading, and not long before this fire others than the plaintiff had used it for a worshop, and some shavings had accumulated there. It was in evidence that the defendant's loco-

motive passed, throwing a great many sparks and of unusual size, much larger than would be thrown by an engine with a proper (325) spark-arrester. Within fifteen or twenty minutes after this locomotive passed, fire was first seen, and it was burning among the shavings. It is not shown that either the plaintiff or the defendant had actual knowledge that the shavings were under the shed, but "any one passing along the road could have seen them."

The liability of railroads for setting out fire is summed up under three heads in *Williams v. R. R.*, 140 N. C., 624; but, indeed, it may be stated under two, to wit:

1. When the fire is set out by sparks from a defective engine, or one not having a proper spark-arrester, or because operated in a careless manner, the company is liable for the negligence, whether the fire originates on or off the right of way.

2. Where the engine is properly operated, is not defective, and has a proper spark-arrester, but fire originates on the right of way because it is in a foul or neglected condition, the company is liable.

In the present case the Judge charged that if the state of facts, stated under the first head, occurred, to wit, that the sparks were emitted by a defective spark-arrester, the jury should find the first issue "Yes." The jury so found. We do not see that the defendant has any cause to complain that the second head, the alleged negligence from allowing the accumulation of shavings on the right of way, was not also presented. The plaintiff alone could complain of that. If the fire was set by reason of a defective spark-arrester, it was immaterial whether or not the defendant allowed an accumulation of inflammable material on the right of way. Under the charge of the Court on the second issue, the jury found that the plaintiff was not responsible for the accumulation of shavings, or, if it was, that the proximate cause was the defective spark-arrester.

The Court properly charged that if the fire was set out by the locomotive, the burden was on the defendant to show that (326) it was equipped with a proper spark-arrester—a matter peculiarly within its knowledge. 13 A. and E. (2 Ed.), 498, which cites the English, Federal and State cases.

No Error.

Cited: Whitehurst v. R. R., 146 N. C., 592; *Deppe v. R. R.*, 152 N. C., 83; *Currie v. R. R.*, 156 N. C., 423; *Hardy v. Lumber Co.*, 160 N. C., 118.

BANK v. HAY.

(Filed 11 December, 1906.)

Principal and Agent—Contracts by Agent—Liability of Principal—Estoppel—Negotiable Instruments—Authority to Draw—Acceptance—Correspondence.

1. When one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal.
2. The principal is liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority.
3. The principal may also, in certain cases, be estopped to deny that a person is his agent and clothed with competent authority or that his agent has acted within the scope of the authority which the nature of the particular transaction makes it necessary for him to have.
4. The authority to draw, accept or endorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished.
5. A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.
6. Where the letters, upon which the plaintiff bank relied as authority to an agent to make the draft which it cashed, show that the alleged authority to draw was nothing more than private instructions by the principal to his agent as to how he should conduct this part of the business, and were not to be used as a basis of credit to the agent, the Court properly nonsuited the plaintiff.

(327)

ACTION by Bank of Morganton against T. T. Hay, heard by *O. H. Allen, J.*, and a jury, at the June Term, 1906, of BURKE.

The plaintiff brought this action to recover sixty dollars, the amount of a draft which was drawn on 16 March, 1905, by H. L. Hinson on the defendant, payable to its order five days after sight. The defendant refused to accept and pay the draft upon the ground that Hinson had no authority to draw it. The plaintiff alleged that he did have authority to draw the draft as the agent of T. T. Hay & Bro., of Raleigh, N. C., of which firm the defendant is a member. To show that such authority existed, the plaintiff introduced in evidence three letters written by T. T. Hay & Bro. to Hinson, as follows:

RALEIGH, N. C., 24 January, 1905.

H. L. HINSON, *Morganton, N. C.*

DEAR SIR:—I am just in receipt of your letter, and will say that we are not at all discouraged, for we know you are coming to the point with

some good applications soon. I had entirely overlooked your check, and now beg to enclose same to you. I think it will be well for you to draw on us at stated times or write a few days in advance and remind us of it in order that you may not be embarrassed. I will send you supplies asked for in your letter by tomorrow's mail.

Yours very truly,
T. T. HAY & BRO.

RALEIGH, N. C., 1 Feb., 1905. (328)

MR. H. L. HINSON, *Morganton, N. C.*

DEAR SAR:—It appears to us that you have been in Morganton long enough to find out whether or not you can do any work there or not, and we therefore write to know what are, really, your prospects. It is no use, in my opinion, for an agent to stay in a town indefinitely unless there is something in sight, for you have been there about three weeks and we have not had the pleasure of seeing a single application. Write me fully by return mail on this point, and let me know what we may expect from Morganton, and if the chances appear to be against you we want you to try some other place, for we must count on results and not what prospects may be in sight.

Yours very truly,
T. T. HAY & BRO.,
General Agents.

RALEIGH, N. C., 7 March, 1905.

MR. H. L. HINSON, *Morganton, N. C.*

DEAR SIR:—Your draft for $20 was received this morning and will be paid, but I would like very much for you to write what the prospects are in Morganton, for unless you do something pretty soon the advance account will be so large that you will be unable to make it up the way of commissions. We do not mind spending money for the business if we get anything in return, but it does not appear to me a good proposition for you to spend several months in one place with no prospect of sufficient business to cover the outlay; therefore, I am writing you again this morning to let me hear from you in regard to this matter, and to move to another point unless you have some good business absolutely in sight.

Yours very truly,
T. T. HAY & BRO.,
General Agents.

The three letters were the only ones selected by the plaintiff from all the letters in the correspondence between Hay & Bro. (329) and Hinson which were produced by the defendant upon notice

from the plaintiff, and were the only letters seen by the plaintiff or its cashier prior to the drawing of the draft.

W. E. Walker, a witness for the plaintiff, testified: "I am cashier of the Bank of Morganton, and was on 16 March, 1905. I knew H. L. Hinson, who was an insurance agent representing the Phœnix Life Insurance Company. He was here about three months. On 16 March, 1905, I cashed a draft for him, which was drawn on T. T. Hay & Bro., of Raleigh, of which firm the defendant was a member. The draft was for sixty dollars. [The witness produced the draft in suit.] I cashed this draft on the faith of a letter written by T. T. Hay & Bro. to H. L. Hinson, which Mr. Hinson showed me. This letter was dated 24 January, 1905. On the faith of the statements contained in this letter I cashed this draft, and T. T. Hay & Bro. refused to pay same. Hinson while in Morganton showed me two other letters from T. T. Hay & Bro. [Letters of 1 February, 1905, and 7 March, 1905.] I saw these three letters from Messrs. T. T. Hay & Bro. to Mr. Hinson before I cashed his draft."

Here plaintiff proposed to show that at the time said draft was drawn by Hinson and cashed by the bank, that Hinson stated to witness that he needed the sixty dollars for his expenses as agent for the defendant.

Plaintiff also proposed to prove by the witness that prior to this time he had cashed several drafts drawn by said Hinson on T. T. Hay & Bro., and that said drafts had always been paid.

Plaintiff also proposed to prove that the said Hinson stated to witness at the time the sixty-dollar draft was cashed that he needed the money to pay his expenses to Asheville and while at that point as agent.

Plaintiff also proposed to prove that in general appearance and (330) demeanor Hinson appeared to be a gentleman.

All this evidence was objected to, and excluded by the Court, and the plaintiff excepted.

Continuing, the witness testified: "I had a conversation with T. T. Hay, one of the members of T. T. Hay & Bro., some time in the month of October, 1905, about this matter. Mr. Hay told me in the conversation that Hinson had been his agent and had gotten the best of him. I cashed this draft on the faith of the defendant's letter to Hinson, dated 24 January, 1905, and because similar prior drafts had been paid."

At the close of the evidence defendant moved for judgment as of nonsuit under the statute. The motion was sustained, and judgment of nonsuit was entered. The plaintiff excepted and appealed.

S. J. Ervin for the plaintiff.

Avery & Avery for the defendant.

WALKER, J., after stating the case: There is a general rule that when

one deals with an agent it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule it is said every principal would be at the mercy of his agent however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him. *Biggs v. Ins. Co.*, 88 N. C., 141; *Ferguson v. Mfg. Co.*, 118 N. C., 946.

The principal is held to be liable upon a contract duly made by his agent with a third person: 1. When the agent acts within the scope of his actual authority. 2. When the contract, although (331) unauthorized, has been ratified. 3. When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term "apparent authority" including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been entrusted to him; and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon of which the person dealing with his agent has not notice. The principal may also, in certain cases, be estopped to deny that a person is his agent and clothed with competent authority, or that his agent has acted within the scope of this authority which the nature of the particular transaction makes it necessary for him to have. Tiffany on Agency, 180, *et seq.; Biggs v. Ins. Co., supra.*

The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident, to the business. It will not be deemed a necessary incident, though, unless the purpose of the agency cannot otherwise be accomplished. When the power is expressly conferred, it must be strictly pursued; and unless the apparent exceeds the actual authority of the agent, paper executed by him will not bind his principal if the agent materially departs from the terms of his authority in regard to the amount or the time of the paper or its character in other respects. Where the power exists, it is of course confined to the business of the agency, and does not authorize the making of paper for the benefit of the agent or the making of accommodation paper, and any contract so made will not be binding upon the principal, unless it may be he has in some way precluded (332) himself from pleading the want or excess of authority or from

otherwise repudiating the act of his agent. Tiffany on Agency, p. 215, sec. 48.

When applying the general principles in the law of agency to the case of an agent who draws a check or draft on his principal in order to ascertain what is the liability of the principal, which is the question herein presented, we may derive some aid from what this Court has said with special reference to the promise and corresponding legal duty of the principal to accept and honor the paper, in adopting the general rule as laid down by *Chief Justice Marshall,* for the Court, in *Coolidge v. Payson,* 2 Wheaton, 66, in regard to liability on commercial paper. When speaking of the distinction attempted to be drawn by some of the courts between a promise to accept made before and one made after the bill is drawn, the Court says: "The Court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now this credit is given as entirely by a letter written before the date of the bill as by one written afterwards." The general rule is then declared in these words: "Upon a review of the cases which are reported, the Court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." *Nimocks v. Woody,* 97 N. C., 5. Decisions of courts of high authority are cited in that case to sustain the rule. It had been formerly decided otherwise in England by the Court of Exchequer in the leading case of *Bank v. Archer,* 11 M. & W., 383, and also by some of the courts of this country, and they held that a promise made in writing to accept
(333) and pay a draft, yet to be drawn, for a specified amount, and communicated to one who, upon the faith of the promise, becomes the payee of it, when drawn for value, is not an acceptance in law, so that an action upon the draft can be maintained by the holder for value. But the rule here, as we have shown, has been settled the other way, and the original English rule seems to have been the same way. *Pillans v. Van Microp,* 3 Burr, 1663; *Pierson v. Dunlop,* Cowp., 57 L.; *Mason v. Hunt, Doug.,* 284, 287; Byles on Bills (16 Ed.), 260; though it was somewhat modified later by confining the liability of the drawee, who had given the authority to draw, to the person who was intended to take the bill on the credit of a promise to accept, *Miln v. Prest,* 4 Campb., 393; resulting finally in the doctrine as stated in *Bank v. Archer, supra,* and *Johnson v. Collins,* 1 East, 98. See, also, Eaton & Gilbert on Com. Paper, secs. 147 and 148. In applying this principle, it has been said that, first, the promise to accept and pay should be made within a reasonable time before the bill is drawn, for

otherwise the drawer will be presumed to have declined to act on the authority granted him to draw, and the drawee will not be construed to have intended an indefinite liability; and second, the promise must so describe the bill that there can be no doubt of its application to it. 1 Daniel Neg. Instr. (5 Ed.), sec. 560. Mr. Daniel says, also, that high authorities go further, and declare that the promise must put its finger, so to speak, upon the specific bill; and that otherwise, if the promise be broken, the promisor may be sued by the drawer for breach of the promise to accept; but he cannot be sued by any one as acceptor. It is further said that while it should clearly appear that the bill corresponds to the promise (and is therefore protected by the authority), it is not perceived that there should be required any nicety of description or exact correspondence between the two, either as to number, amount, date, or otherwise. "The burden of proof is upon the holder to (334) establish that by comparing the face of the bill with the promise, or the bill in connection with the transaction in which it is drawn with the promise, that it comes fairly and reasonably within its terms. This done, there can be no reason why the promisor may not be sued as an acceptor, as well as for breach of promise to accept. In either case the correspondence of the bill with the promise must be proved, and a cause of action existing there does not seem to be any sufficient reason for determining that the character of the proof must shape its form, and also determine whether it shall be brought by the holder of the bill who has taken it on the faith of the promise, or by the drawer, whose just expectations have been disappointed. The doctrine that the drawer may sue for breach of promise to accept when the bill is not accurately described in the promise, but that such promise does not operate as an acceptance, has been well said to rest on a distinction without a difference." 1 Daniel Neg. Instr. (5 Ed.), sec. 561. This is, he says, the doctrine as formulated in the decisions of several of the States, New York among them, when citing and commenting upon *Coolidge v. Payson,* 2 Wheaton, 66; *ibid.,* secs. 560, 561, and 562, where the cases are collected and examined. *Bank v. McFarlan,* 5 Hill (N. Y.), 432, and 3 Denio, 553; *Bank v. Burleigh,* 74 Hun., 400; *Parker v. Greenlee,* 2 Wend., 545; *Greenlee v. Parker,* 5 Wend., 414; *Bank v. Ely,* 17 Wend., 508. This view, he further says, is admirably stated in *Nelson v. Bank,* 48 Ill., 39, in which is cited as an authority in point the case of *Bissell v. Lewis,* 4 Mich., 450. See, also, *Lonsdale v. Bank,* 18 Ohio, 126; *Russell v. Wiggin,* 2 Story, 213; *Cassel v. Dows,* 1 Blatchf., 335; *Storer v. Logan,* 9 Mass., 55; *Brinkman v. Hunter,* 73 Mo., 172.

Let us now consider the proposition involved in this case in the light of the foregoing principles. We do not think it can make any material difference whether we test it by the law of agency or by (335)

that of negotiable instruments—the result must be the same in either case. Nor is it necessary to adopt as law in this State the view expressed by Mr. Daniel, in regard to *Coolidge v. Payson,* in so far as it may be at variance with the principle as stated in that case, or may seem to go beyond it. Even in that view we must reach the same conclusion.

The plaintiff's cashier testified that while he had seen the letters of 1 February, 1905, and 7 March, 1905, "he cashed the draft on the faith of the defendant's letter to Hinson, dated 24 January, 1905, and because similar prior drafts had been paid." He was not, therefore, misled to the prejudice of the bank by anything that is said in the two letters of February and March. They may, though, be still considered on the question of the authority of Hinson to draw the draft. There is one thing that appears prominently in those two letters, namely, the fact that Hay & Co. were not pleased with the prospect of their agency at Morganton and were complaining of the agent's failure to secure any business, while the expense account had grown until it had about reached the limit justified by any reasonable expectation of commissions to offset it or to cover the outlay. They also furnish the only evidence we have of the usual amount of the agent's drafts on his principal, to wit, twenty dollars. After all this, Hinson, just one week from the date of the last letter, draws the draft in suit for three times the amount of his last draft, and for expenses, not already incurred, but those likely to arise thereafter in another place. The case shows that all of the letters in the correspondence were delivered to plaintiff in response to his notice to produce them, and he selected only the three which were put in evidence. The letter of 7 March, 1905, calls upon Hinson to give an account of his agency, but it does not appear that he did so, nor is it shown (336) that he ever was instructed to go to Asheville, or notified Hay & Bro., of his intention to do so or of his purpose to draw on them for $60. It is true the cashier testified that similar drafts had before been paid. When, to whom, and for what amount? If to this bank and for as much as sixty dollars, or anything approximating that amount, why were they not produced? They may have been similar in other respects, without being at all identical in amount. Let it be assumed, for the sake of argument, that the payment of prior drafts was evidence of the agent's authority to draw this one, which may be questioned (*Marriner v. Lumber Co.,* 113 N. C., 52), unless the facts established such a course of dealing between the parties theretofore as would lead a reasonably prudent man to believe that the agent possessed the requisite authority, or, in other words, as would give him the apparent authority, or estop the alleged principal from denying that he had full authority. *Hay v. Assn., ante,* 256; *McGraw v. Ins. Co.,* 78 N. C.,

149; Story on Agency, secs. 95 and 260. Hay & Bro. could not have known from the face of the drafts thus paid by them that they had been cashed by the plaintiff bank, as that fact would not be indicated on the draft. If they had been forwarded through the bank at Morganton to a bank at Raleigh, merely for collection, they would present the same appearance when received by Hay & Bro. as if they had been cashed by the plaintiff bank. The principal might be willing to give his agent authority to draw for his expenses, provided he forwarded the drafts for collection, when he would not risk such an authority with the agent if his drafts were to be cashed by a bank. In the latter case, the principal might be cut off from defense against his agent which in the former he would have.

Without specifying the particular advantages the principal would have when the dealings are confined strictly between himself and his agent without the intervention of a third party, we may (337) say generally that the doctrine of apparent authority or of estoppel would not enter into such a business relation to the prejudice of the principal where no actual authority existed. The principal could also take advantage of the state of his account between himself and his agent, or of the agent's misconduct, and there are other conceivable defenses he might have against the agent which would not avail him as against an innocent third party.

We have referred to this view of the case for the purpose of remarking that the correspondence between Hay & Bro. and their agent, Hinson, seems to confer an authority, not to have drafts on them cashed at a bank, but to draw for his expenses and forward the drafts for collection. The letter of 24 Jan. clearly shows this to have been what was meant. The only object in having him draw at stated intervals was to remind Hay & Bro. that the installment for expenses was due, for in that letter they tell him to draw or to write a few days in advance so that they would be reminded to send the check. The letters show that the alleged authority to draw was nothing more than private instructions by Hay & Bro. to their agent as to how he should conduct this part of the business.

The power to bind the principal by the making or endorsing of negotiable paper is an important one, not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the object of the agency, and the person dealing with the agent must, subject to the principles heretofore stated, see to it that his authority is adequate. Mechem on Agency (1889), secs. 389-393. We cannot read the correspondence to be found in this case without being

convinced that there was enough upon its face to put the plain-
(338) tiff bank upon its guard and to cause an inquiry to be made into the agent's authority before cashing his draft. Further, we think that the instructions were intended to be private and confidential and not as the basis of credit to be extended to the agent nor as an authority to him to obtain cash from a bank upon drafts to be drawn by him, nor by fair and reasonable implication did they authorize Hinson to make the draft in question. By comparing the correspondence with the draft, the latter appears at least to be a little out of the ordinary and should have excited suspicion as to the agent's assumption of authority to draw.

It follows from all we have said that the plaintiff's right to recover can be maintained neither upon any well-settled principle in the law of agency nor yet upon any in the law of negotiable instruments, either before or since the adoption of our statute, Revisal, ch. 54.

There was certainly no harm done the plaintiff when the Court excluded the proposed evidence as to what the agent stated at the time he drew the draft and received the money thereon, namely, that he needed the money to pay his expenses at Asheville while there as agent. His Honor took the correct view of the case and properly directed a nonsuit upon the evidence.

No Error.

Cited: *Swindell v. Latham,* 145 N. C., 149; *Metal Co. v. R. R., Ib.,* 297; *Bank v. Ins. Co.,* 150 N. C., 774; *Bank v. Drug Co.,* 152 N. C., 146; *Bowers v. Lumber Co., Ib.,* 608; *Thompson v. Power Co.,* 154 N. C., 20; *Williams v. R. R.,* 155 N. C., 271; *Trollinger v. Fleer,* 157 N. C., 88; *Hall v. Presnell, Ib.,* 292; *Bank v. Oil Co., Ib.,* 312; *Stephens v. Lumber Co.,* 160 N. C., 112; *Dewberry v. R. R., Ib.,* 160; *Bank v. McEwen, Ib.,* 420; *Latham v. Field,* 163 N. C., 360; *Wynn v. Grant,* 166 N. C., 47.

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PARKER v. INSURANCE COMPANY.

(Filed 11 December, 1906.)

Appeal and Error—Presumptions—Findings of Fact—Insurance Companies—Service of Summons—Fire Policy—Inconsistent Defenses—Iron-safe Clause—Proofs of Loss—Nonsuit—Limitation of Actions.

1. An exception to the Court's refusal to dismiss an action against a foreign insurance company because the summons was not served on the State Insurance Commissioner as required by Revisal, section 4750, cannot be sustained, where the trial Judge found no facts and it does not appear affirmatively that the company is licensed to do business in this State.

2. In the absence of any statement of the facts by the trial Judge, this Court must presume, in support of his ruling, which is presumed to be correct, that he found as a fact that the defendant was not duly licensed, and that Revisal, section 4750, did not apply, but that the process had been properly served under Revisal, section 440.
3. Upon a motion to dismiss an action because the summons had not been properly served, the defendant had the right to have the facts stated by the Judge, but in the absence of any request to the Judge so to do, his failure to state them was not error.
4. In an action to recover a loss under a fire insurance policy, the defendant having denied its liability to the plaintiff on the policy by alleging that there was a violation of the Iron-safe Clause, whereby the policy became null and void, it cannot now successfully plead the failure of the plaintiff to file proofs of loss and defeat his recovery, as the defense is inconsistent with that of noncompliance with the Iron-safe Clause.
5. In an action to recover a loss under a fire insurance policy, where the Iron-safe Clause allows thirty days for making the inventory and the books are not required to be opened until the inventory is completed, the defendant cannot avail itself of any alleged violation of any provision in the Iron-safe Clause, where the fire occurred within thirty days after the policy was issued.
6. Under Revisal, section 4809, which provides that no insurance company shall limit the time within which an action may be commenced to less than one year after the accrual of the cause of action, or to less than six months from the time a nonsuit is taken in an action brought upon the policy within the time originally prescribed, where a suit was commenced upon the policy in controversy within twelve months after the accrual of the cause of action, and a nonsuit was taken, but the record in that case, which was put in evidence, does not show when the nonsuit was entered, it will be presumed, in favor of the Court's ruling, to have appeared that it was done within six months prior to the date on which this action was commenced.

(340)

ACTION by W. P. Parker and another against Continental Insurance Company, heard by *O. H. Allen, J.*, and a jury, at the June Term, 1906, of BURKE.

This action was brought to recover the sum of $1,500 alleged to be due on a fire insurance policy, issued 8 November, 1901, by the defendant to the plaintiff, on a stock of goods, which were destroyed by fire 18 November, 1901. The summons was issued 14 May, 1904, and served on Avery & Ervin, local agents of the defendant company at Morganton. The defendant entered a special appearance and moved to dismiss the action because the summons had not been properly served and the defendant was not therefore before the Court. This motion was based on the ground that the defendant is a foreign corporation, and the summons should therefore have been served on the State Insurance Commissioner as required by Laws 1903, ch. 438, sec. 6 (Revisal, sec. 4750), where such a company has been licensed to do business in this State. The Court overruled the motion, but without finding any facts. Defendant excepted to the ruling.

The defendant denied its liability on the policy, upon these several grounds:

1. That no proofs of loss had been filed, the policy providing that the loss shall not be payable until sixty days after such proofs have been received.

2. That the plaintiff had not complied with the provisions of the iron-safe clause contained in the policy, by making an inventory of the stock of goods, and keeping a set of books showing a complete record of
(341) the business and by preserving the inventory and books securely locked in a fire-proof safe. The policy requires the inventory to be taken within thirty days after the date of the policy, unless one had already been made within the twelve months prior thereto, and directs that the books shall show the condition of the business from the date of the inventory.

3. That this action was brought on 7 May, 1904, nearly two years and a half after the fire, which occurred on 18 November, 1901, whereas the policy requires that any action thereon shall be commenced within twelve months next after the fire. A suit for the same cause of action was brought 26 February, 1902, in which it appears, at least inferentially, that a nonsuit was taken and this action was brought within six months afterwards.

There was evidence tending to show that proofs of loss were filed with the company's agent in January or February, 1902, and that $20 had been paid to the agent, it being the balance due on the premium, and also evidence as to the loss and the value of the goods which had been destroyed by the fire. The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

J. F. Spainhour for the plaintiff.
Avery & Ervin for the defendant.

WALKER, J., after stating the case: The motion to dismiss the action was properly denied. The Revisal, sec. 4750, does require service of legal process upon any foreign insurance company, licensed to do business in this State, to be made by leaving the same with the Insurance Commissioner, and it provides that in such a case no other service shall be valid. But it does not appear affirmatively in this case that the defendant is a licensed company. In the absence of any statement of the facts by the presiding Judge, we must assume that he found such
(342) facts as would sustain his ruling. *Whitehead v. Hale,* 118 N. C., 601. Error in the decisions of the lower Court is never presumed here, but the contrary, and he who alleges such error must show it. The defendant had the right to have the facts stated by the Judge,

but in the absence of any request from it to the Judge so to do, the failure to do so was not error. *Millhiser v. Balsley,* 106 N. C., 433; *Holden v. Purefoy,* 108 N. C., 163; *Carter v. Rountree,* 109 N. C., 29; *Smith v. Whitten,* 117 N. C., 389. We must, therefore, presume that his Honor found as a fact that the defendant was not duly licensed and that section 4750 of the Revisal did not apply, but that the process had been properly served under the Revisal, section 440. There may be a presumption that the defendant was licensed, as the law never presumes a wrong to have been committed or that a person willfully violates the law, and even if it exists it is not a conclusive presumption, but may be rebutted; and we must again assume that the Judge found that it was contrary to the fact. In *Fisher v. Ins. Co.,* 136 N. C., 218, it was admitted that the defendant was not licensed and that the Act of 1903, ch. 438 (Revisal, sec. 4750), did not therefore apply. But that case is, in principle, an authority for our ruling in this one, though the service was there made on the secretary of the Corporation Commission, as we assume in this case the existence of a fact which was admitted in that case.

The defendant having denied its liability to the plaintiff on the policy by alleging that there was a violation of the iron-safe clause, whereby the policy became null and void, it cannot now successfully plead the failure of the plaintiff to file proofs of loss and defeat his recovery. It cannot blow hot and cold, so to speak, at one and the same time. When it insists that proofs should have been filed, it asserts, of course, the validity of the policy; for why file proofs of loss under a void policy? There can be no loss under such a policy. This defense, (343) therefore, is inconsistent with that of noncompliance with the iron-safe clause, which implies that the policy is invalid. The one necessarily excludes the other, and in the sense that an election must be made between them. This is a most just and reasonable rule, and we have held, in accordance with it, that a denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss. *Gerringer v. Ins. Co.,* 133 N. C., 407. If the plaintiff had made the required proof, he would have been met with the denial by the defendant of any liability whatever for the loss. It would be unjust to permit the company thus to trifle with a policyholder. We are not speaking of inconsistent pleas, which are allowable, but of defenses which are in substance opposed to each other.

The defendant is not any more fortunate in its next defense. It appears that the policy was issued on 8 November, 1901, and the fire occurred on 18 November, 1901, within the thirty days after the policy was issued. The iron-safe clause allows thirty days for making the inventory, and the books are not required to be opened until the

inventory is completed, for the record of the business, as shown by the books, must date from the completion of the inventory, or from the expiration of the thirty days allowed in making it. So the full time for doing neither one of these acts had elapsed when the fire occurred. We have decided in a case having all the essential features of this one, so far as this defense is concerned, that in such circumstances the defendant cannot set up any breach of the stipulations in the iron-safe clause, because there has been no such breach and could not have been any. *Bray v. Ins. Co.*, 139 N. C., 390.

The remaining position of the defendant is equally untenable. This action was commenced within six months after the discontinuance of the former action upon the same policy, even if it had been discon-
(344) tinued, which does not appear very clearly in the record. The Revisal, sec. 4809, provides that no insurance company shall limit the time within which an action may be commenced to less than one year after the accrual of the cause of action, or to less than six months from the time a nonsuit is taken in an action brought upon the policy within the time originally prescribed. Such a stipulation in the policy is a contractual limitation, and has been held by this Court to be valid when it does not conflict with any provision of the statute. *Dibbrell v. Ins. Co.*, 110 N. C., 193; *Muse v. Assurance Co.*, 108 N. C., 240. But the law has been changed by the Legislature, as we have shown, since the decision in *Muse's case*, in which it was held that the suit must be brought within twelve months after the loss occurred and not afterwards, and it must be the same suit which was commenced within that period and prosecuted to judgment, and not a new suit brought upon nonsuit taken in a former action which was itself begun within the twelve months. Revisal, sec. 4809. In this case the facts are that a suit was commenced within the twelve months and a nonsuit taken therein, but when it was entered is not distinctly shown. The record in the action "in which the nonsuit was entered" was put in evidence, but it does not accompany the transcript. We must assume that it appeared from that record, and the one in the present case, that this suit was brought within six months after the nonsuit, because that finding of fact sustains the Court's ruling, and we do not presume error, as we have already said in considering a former exception.

The defenses set up in this case are of an extremely technical character. They were sufficient, indeed, if they had been supported by the necessary proof, and the defendant, for its own protection, had a perfect right to plead them. But we will not make any inferences in its favor in order to supply defects in the evidence. So far as the merits of the defenses are concerned, it seems that there was some evi-
(345) dence for the jury upon the question of waiver, which his Honor

submitted to them, and they have found against the defendant. But however this may be, it does appear that the plaintiff has paid the consideration for the insurance and has sustained a loss, and that he has substantially complied with the terms and conditions of the policy. When this is shown, and there has been good faith on the part of the insured, there is no reason why the law should require anything more. *Willis v. Ins. Co.*, 79 N. C., 285.

No Error.

Cited: Coggins v. Ins. Co., 144 N. C., 10; *Heilig v. Ins. Co.*, 152 N. C., 360; *Huggins v. Waters*, 154 N. C., 446; *Millinery Co. v. Ins. Co.*, 160 N. C., 135.

(346)

STEADMAN v. STEADMAN.

(Filed 11 December, 1906.)

Ejectment—Estoppel—Wills—Probate—Limitations—Declarations of Grantor—Evidence—Construction of Will.

1. Where the jury, by their verdict, have established that both plaintiff and defendant claim the land in controversy under the same testator, the defendant is, for the purposes of this action, estopped from questioning the title of the common grantor.
2. Where in an action of ejectment it appears that the testator died in 1857, and there was an attempted probate of his will at that time which was invalid because it did not comply with the law as it then existed, the will, upon a second probate in 1906 in compliance with the requirements of Revisal, section 3127, clause 3, having been duly recorded, was properly admitted as evidence.
3. In the absence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven, and when duly proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it.
4. In an action of ejectment, a party who claims under a deed from a devisee in a will cannot question the validity of the probate of the will.
5. In an action of ejectment, the declarations of defendant's grantor while in possession of the property to the effect that she held under the will of her father, are competent as characterizing and accompanying the possession of the declarant.
6. Where a will provided, "It is my will that my eldest daughter, Susannah, and my son James shall have a certain tract of land lying on the waters of Dills' Creek, to be equally divided in value between them; and then also one other tract lying on the waters of Jarrett's Creek. It is my will that my son John and daughters Mary and Margaret be equal sharers in said tract of land during their natural life": *Held*, that all of the devisees being dead, the heirs at law of James and Susannah are the owners of the entire interest in the second or Jarrett tract, and the Court erred in holding that the testator died intestate as to this tract after a life-interest therein to his children.

ACTION of ejectment by Sarah Steadman and others against W. R. Steadman and others, heard by *Justice, J.*, and a jury, at the April Term, 1906, of RUTHERFORD.

There was evidence offered showing:

That Joseph Steadman died in Rutherford County in 1857, leaving a last will and testament, signed Joseph (X) Steadman, and witnessed by two subscribing witnesses.

That Joseph Steadman left six children and heirs at law: Susannah and James A. Steadman, John, Sarah, Margaret, and Mary Steadman.

That all the devisees mentioned in the will were dead at the time of the action brought; John, Sarah, Mary, and Margaret having died without issue.

At the death of Margaret, she left a last will and testament devising her property to her sister Mary, who died not long before the institution of this suit.

The tract of land, the subject of this controversy, is the second or 150-acre tract mentioned in the will of Joseph Steadman, and the language of the will pertinent to the questions involved as follows:

"It is my will that my eldest daughter, Susannah, and my son
(347) James A., shall have a certain tract of land containing one hundred acres lying on the waters of Dill's Creek, to be equally divided in value between them, and then also one other tract containing one hundred and fifty acres, lying on the waters of Jarrett's Creek. It is my will that my son John and daughters Mary and Margaret be equal sharers in said tract of land during their natural life. It is my will that my daughter Sarah shall have equal in value with my son John and daughters Mary and Margaret, to be paid out of the other portion of my estate, due allowances to be made by my daughter Susannah and son James A. and daughter Sarah for property already received. And all other property (except the mare which I now own) to be equally divided between my son John and daughters Mary and Margaret."

The plaintiffs, who claim the land under this will, are the children and heirs at law of Susannah and James A., two of the devisees named in the will.

The defendants claim under a deed from Mary, one of the devisees named in the will.

Issues were submitted that were responded to by the jury as follows:

1. Did John Steadman, Margaret Steadman and Mary Steadman claim title to the land described in the complaint under Joseph Steadman? Answer: Yes.

2. Are the plaintiffs the owners in fee and entitled to the possession of the land described in the complaint? Answer: Yes; eleven-fifteenths.

3. Is the defendant in the unlawful and wrongful possession thereof? Answer: Yes.

4. What damages, if any, have plaintiffs sustained by reason of defendant's wrongful and unlawful possession? Answer: Fifteen dollars for each year; total, $30.

On the verdict, the Court gave judgment in favor of plaintiffs for eleven-fifteenths of the land in controversy. (348)

Both plaintiffs and defendants excepted and appealed.

S. Gallert for plaintiff.

McBrayer & McBrayer and *B. A. Justice* for defendant.

DEFENDANTS' APPEAL.

HOKE, J., after stating the case: The jury, by their verdict, having established that both plaintiffs and defendants claim the land in controversy under Joseph Steadman, the alleged testator, the defendants are, for the purposes of this action, estopped from questioning the title of the common grantor; and can, in any event, only claim the estate that may have come to them by reason of the deed from Mary Steadman, the devisee, or one of the heirs at law of her father, the said Joseph.

Defendants object to the validity of this trial, and assign for error:

1. That the Court admitted in evidence the paper-writing purporting to be the last will and testament of Joseph Steadman. This paper-writing bearing date 28 November, 1857, signed by Joseph (X) Steadman and attested by two witnesses, Joseph Owens and Drewry McDaniel, when offered as evidence, had thereon two probates, one bearing date December, 1857, in which it is shown that "Drewry McDaniel, one of the subscribing witnesses, upon being duly qualified, proved the due and solemn execution of the will; and the second, bearing date 12 April, 1906, set out *in extenso* in the record, and in all things complying with the requirements of Revisal 1905, sec. 3127, clause 3, which provides as follows:

"In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of (349) the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient."

The first probate was invalid, because at the time it was taken proof by one of the subscribing witnesses, without more, was not sufficient proof of a will. This was all that had been required under the Revised

Statutes for proof of a will in common form in the first instance; Revised Statutes, ch. 122, sec. 6; but the Revised Code, which went into effect on 1 January, 1856, required that a written will with witnesses should be proved by the oath of two of the subscribing witnesses, if living, etc. Revised Code, ch. 119, sec. 15.

At the time the will was proven, The Code had probably not been universally distributed; or, what is more likely, the Courts of Pleas and Quarter Sessions had not become familiar with the changed method.

Whatever may have been the reason, the first probate did not comply with the law as it then existed; and, standing alone, would not justify the admission of the will in evidence.

The plaintiff, recognizing that this probate was not in compliance with the statute, then offered proof establishing the second probate, which in all things complied with the requirements of the law, showing that one of the subscribing witnesses was dead and the other had for many years been a nonresident.

It is objected to this proof that the same is too late, and cannot now be received; but the authorities do not support this position.

In the absence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven. Gardner on Wills, p. 314.

In *Haddock v. R. R.*, 146 Mass., 155, a will was admitted to probate sixty-three years after the death of the testator.

(350) And while the will does not operate to pass property till proven, as required by law, when it is so proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it. Underhill on Wills, 21, note 3; citing *Graves v. Mitchell,* 90 Wis., 316; *Coggeshall v. Home,* 18 R. I., 696. See, also, *Scott v. West,* 63 Wis., 529.

Nor does the attempt to prove the will in accordance with the law as it formerly existed affect the present probate, which, in all things, complies with the present law. *Morgan v. Bass,* 25 N. C., 243.

Nor, in any event, could the probate be questioned by one who claims under the will by this indirect method. *London v. R. R.,* 88 N. C., 585; *Hampton v. Hardin,* 88 N. C., 592.

The probate of this will being valid, and the same having been duly recorded, the will was properly admitted as evidence.

Defendant further objects that the Court admitted in evidence the declarations of Mary Steadman while in possession of the property, to the effect that she held under the will of her father, Joseph.

These declarations are competent as characterizing and accompanying the possession of the declarant, and were also properly received. *Nelson v. Whitfield,* 82 N. C., 46; *Bivins v. Gosnell,* 141 N. C., 341.

There is no reversible error to defendants' prejudice shown in the record, and on their appeal the judgment is affirmed.

No Error.

PLAINTIFFS' APPEAL.

HOKE, J. As heretofore stated, the verdict having established that both parties claim under Joseph Steadman, and the will of Joseph Steadman, making some disposition of the property, having been properly proven and admitted in evidence, the rights of the parties on this appeal will depend on the correct construction of this (351) will.

The language of the will pertinent to the questions involved here is as follows:

"It is my will that my eldest daughter, Susannah, and my son James, shall have a certain tract of land containing one hundred acres, lying in the waters of Dills' Creek, to be equally divided in value between them and then also one other tract containing one hundred and fifty acres, lying on the waters of Jarrett's Creek. It is my will that my son John and daughters Mary and Margaret be equal sharers in said tract of land during their natural life."

The land in controversy, is the second, or Jarrett tract, and the Judge below, in construing the will, in effect decides that the testator died intestate as to the remainder of this tract after a life-estate therein to his children; but we do not think this is the correct interpretation of the will.

It is an accepted principle that the presumption is against intestacy. Underhill on Wills, 617; *Blue v. Ritter,* 118 N. C., 580.

And another principle has long been incorporated into our statute law, that a devise to a person shall be construed to be in fee-simple unless it shall plainly appear that the testator intended an estate of less dignity. Revisal 1905, sec. 3138.

This will, in express terms, devises the Jarrett tract of land to Susannah and James A. Steadman; which, under this statute, would give them the land in fee. And while the clause which immediately follows imposes a life-estate in favor of John, Mary, and Margaret, whether such estate is to these three or to them as tenants in common with James and Susannah, the result is the same. The subsequent clause only creates a life-estate; and all of the devisees of such estate being dead, the children and heirs at law of James and Susannah, to whom the fee-simple was given by the prior clause, at the death of the life-tenants, became, and are now, the owners of the land. (352)

Mary, being only a life-tenant, her deed would only convey to the grantees such estate as she had; and on her death, which occurred

about six months before suit commenced, the rights of the children and heirs at law of James and Susannah, who held in remainder, would become absolute, giving them the title and right to the immediate possession of the property. *Smithwick v. Biggs,* 23 N. C., 281; *Brothers v. Brothers,* 44 N. C., 265.

Nor do we think the idea advanced, that the testator evidently wished his children to share equally in his estate, changes the result. Such a general intent is sometimes helpful where the language of a will is of doubtful import; but an indefinite, general intent cannot avail, and is never allowed, to change or control a devise express in its terms and without doubt as to its meaning. *Crissman v. Crissman,* 27 N. C., 498; *Long v. Waldraven,* 113 N. C., 337.

It will be noted, too, that the clauses of the will from which this general intent is inferred rather tend to show that such equality as was contemplated was intended to arise from other portions of the estate, and was not designed, and should not be permitted, to affect the construction of the devise involved in this litigation.

The Court is of opinion, and so holds, that on the facts presented, a proper construction of the will of Joseph Steadman places the entire interest in the land in dispute in the plaintiffs, who are children and heirs at law of James A. and Susannah Steadman, and the Judge below should have so instructed the jury.

For the error pointed out, there will be a new trial on the second issue, and it is so ordered.

Partial New Trial.

Cited: *Boggan v. Somers,* 152 N. C., 396; *In re Dupree,* 163 N. C., 259.

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MARTIN v. BRISCOE.

(Filed 11 December, 1906.)

Confession of Judgment—Requisites of Affidavit—Estoppel—Dormant Judgment—Revival—Appeal from Clerk—Practice.

1. Confession of judgment under Revisal, section 581, requires that there should be a statement in writing signed by the defendant and verified by his oath and stating: (1) the amount for which judgment may be entered, and authorizing its entry; (2) if for money due, a concise statement of the facts out of which the debt arose, and it must show that the sum confessed is justly due, but the statement that the controversy is real and the proceedings in good faith is not required as it is in a "controversy submitted without action."
2. Where the confession of judgment sets out that the amount of $823.15 is due plaintiff by defendant for part of "bills of goods bought from

paintiff by defendant and received by him between 1 January, 1896, and October, 1896," and said amount is "part of bills of groceries bought in the time named," this is sufficient, in the absence of any attack by a creditor, where the debtor himself, after an acquiescence of six years, is urging a defect in his own confession of judgment, with no suggestion of any fraud or imposition in securing the confession nor any denial of the debt, and should the judgment be held invalid the debt would be barred.

3. Where a motion to revive a dormant judgment was before the Judge by appeal, it was optional with him to reverse the Clerk and remand the case to him with directions how to proceed, or himself to grant the motion to revive the judgment and to order execution to issue.

CONNOR and WALKER, J.J., dissenting.

ACTION by J. S. Martin & Son against W. L. Briscoe, pending in RUTHERFORD, and heard by *Justice, J.*, resident Judge, on 28 September, 1906.

This was a motion upon affidavit and notice to revive a dormant judgment. The defendant had confessed judgment in favor of the plaintiff as follows:

NORTH CAROLINA—Rutherford County.

In the Superior Court, November Term, 1896. (354)

J. S. MARTIN & SON *v.* W. L. BRISCOE.

That there is due from him to the plaintiffs above named the sum of eight hundred and twenty-three dollars and fifteen cents ($823.15).

That the amount is partly due from defendant to plaintiffs for bills of goods bought from plaintiffs by the defendant and received by him during the time elapsing between 1 January, 1896, and October, 1896, and that the amount of eight hundred and twenty-three dollars and fifteen cents is part for bills of groceries bought in the time named.

And the defendant, W. L. Briscoe, hereby confesses judgment in favor of plaintiffs for the sum of eight hundred and twenty-three dollars and fifteen cents, and hereby authorizes the Court to enter judgment against him and in plaintiffs' favor for the amount.

W. L. Briscoe, the defendant above named, being sworn, makes oath that the facts set forth in the foregoing confession of judgment is made in good faith. W. L. BRISCOE.

Sworn to and subscribed before me, this 14 November, 1896.

T. C. SMITH, C. S. C.

On the back of same the following entry of judgment:

Whereas the defendant, W. L. Briscoe, has filed the foregoing statement and affidavit, it is adjudged by the Court that the plaintiff recover of the defendant the sum of eight hundred and twenty-three and 15-100

dollars ($823.15), together with three dollars ($3) costs of this confession of judgment.

This 14 November, 1896. T. C. SMITH,
Clerk Superior Court for Rutherford.

The defendant contends that the original affidavit of W. L.
(355) Briscoe, the defendant, was not sufficient to authorize the entry of judgment by confession, and that such judgment was void for the want of jurisdiction.

Upon hearing the cause the Clerk of the Superior Court held the judgment invalid and refused to revive it. On appeal, this was reversed, and the defendant appealed.

B. A. Justice for the plaintiff.
McBrayer & McBrayer for the defendant.

CLARK, C. J. This is a "judgment confessed" under Code, 570, now Revisal, 580, and not a "controversy submitted without action" under Code, 567, now Revisal, 803. Hence, the authorities cited upon the construction of the latter section have no application. "Confession of judgment" does not require, like the "submission of a controversy without action," that the affidavit shall set out that the controversy is real and the proceedings are in good faith, though the latter statement is in fact made in the affidavit in this case. It is sufficient (Rev., 581) that there should be a statement in writing signed by the defendant and verified by his oath and stating: (1) the amount for which judgment may be entered, and authorizing its entry; (2) if for money due, a concise statement of the facts out of which the debt arose, and it must show that the sum confessed is justly due.

There can be no controversy raised except as to whether there is "a concise statement of the facts out of which the debt arose" and which "shows that the sum confessed is justly due." The confession is not very skilfully drawn, but it does set out that the amount of $823.15 is due plaintiff by him for part of "bills of goods bought from plaintiffs by defendant and received by him between 1 January, 1896, and October, 1896," and said amount is "part of bills of groceries bought in the time named."

It would seem that this was a sufficient statement of "the facts
(356) out of which the debt arose," and "shows that the sum confessed is justly due," especially in view of the fact that there is no objection here to the validity of this judgment by any creditor, but it is the debtor, the defendant, who is urging a defect in his own confession of judgment, and is seeking thereby to impeach his own affidavit that the debt was due and his authorization that judgment be entered against

himself, and this after acquiescence in said judgment for nearly six years. There is no suggestion of fraud or imposition in securing the confessing of judgment or any denial that the debt was not then due, nor any denial of the plaintiffs' affidavit that it has not been paid since. Should the defendant set aside this confession of judgment the statute would now be a bar to the debt.

In *Smith v. Smith,* 117 N. C., 348, which was a proceeding by an administrator of the confessing debtor, representing creditors to set aside a judgment confessed, there was no statement in the confession that the debt was due, nor of any "facts showing that the debt was still due." Here it is explicitly stated in the defendant's affidavit that the amount confessed "is due." In *Bank v. Cotton Mills,* 115 N. C., 508, it was held that when the confession of judgment is for "goods sold and delivered," that is sufficient to show the debt was justly due, without stating "time of sale (though this was given here), quantity, price and value of the goods." In that case it was also held that filing such confession of judgment is equivalent to authority to enter judgment. In the present case there is express authority to enter judgment, and his Honor properly allowed the motion to revive the judgment and to issue execution.

We would not be understood as passing upon the question of the validity of such judgment confessed if it were attacked by a creditor, or even if the defendant had assailed it on the ground of fraud or imposition or denied the debt. We place this decision upon (357) the ground of estoppel—the original affidavit by defendant that the debt was due the plaintiff, his acquiescence in the judgment for six years, his failure in this proceeding to deny the plaintiffs' allegation (made under oath) that the debt is still due, the absence of any averment by defendant of fraud, mistake or imposition, and the fact that if the judgment should be now held invalid, at defendant's instance, for informality, after having been entered at defendant's request, he would be protected by the statute of limitation.

The case being before the Judge by appeal, it was optional with him to reverse the Clerk and remand the case to him with directions how to proceed, or himself to grant the motion to revive judgment and to order execution to issue. *Faison v. Williams,* 121 N. C., 152; *Roseman v. Roseman,* 127 N. C., 497; *Ewbank v. Turner,* 134 N. C., 80.

Affirmed.

HOKE, J., concurs in result.

CONNOR, J., dissenting: I regret that I cannot concur in the opinion of the majority of the Court in this case. This Court has uniformly

held, beginning with *Davidson v. Alexander,* 84 N. C., 621, that a judgment confessed pursuant to the provision of section 803 of the Revisal is invalid unless the requirements of the statute be strictly complied with. I do not think that, tested by what is said in that case, and every other decision of the Court which follows and approves it, the record before us is in accordance with the statutory requirement, that it must state concisely the facts out of which the indebtedness arose. We have in this case a statement "that the amount is partly due from defendant to plaintiffs for bills of goods bought from plaintiffs by the defendant and received by him during the time elapsing between
(358) 1 January, 1896, and October, 1896, and that the amount of $823.15 is part for bills of groceries bought in the time named."

There is a painful uncertainty in respect to the facts out of which the alleged indebtedness arose. It is said that it is "partly due" and that the amount is "part for bills of groceries." The very pertinent inquiry arose, What part of it is due for goods bought and what part is for bills of groceries? There is nothing in the statement which gives the slightest response to this inquiry. As was said by *Ruffin, J.,* in *Davidson v. Alexander, supra,* "The object of the statute in this is to protect the other creditors of the debtor; to enable them not only to see the extent of his liabilities but to test the *bona fides* of this particular debt to which he is giving a preference; and that they may have full opportunity to do this, the parties are commanded to spread upon the record specifically the circumstances and business transactions out of which it originated. A mere statement that the defendant is indebted to the plaintiff in a sum certain arising from the acceptance of a draft, of which the following is a copy, etc., falls far short of the demands of the statute." The language of the learned Justice is applicable to the record in this case. "Compared with these requirements, how meager is the information as to the consideration of the debt and the transaction out of which it grew, is the statement of the debtor when confessing the judgment under consideration." What is there in this statement of facts which would enable a creditor to institute an investigation to ascertain the *bona fides* of the debt? He is told that the amount for which judgment is confessed is "partly due" and is "part for" bills of groceries, etc. He would seek in vain for any information given him by the record by which he would be enabled to test the validity of the judgment. This Court has with absolute uniformity applied the principle announced in *Davidson v. Alexander, supra.* In *Davenport v. Leary,* 95 N.
(359) C., 203, the judgment was declared void because the confession of judgment did not embrace the account upon which it was based.

In *Smith v. Smith,* 117 N. C., 348, in which all the cases are reviewed, it is said, referring to the section of The Code in question:

"The proceeding is in derogation of common right, and, to prevent the perpetration of fraud in such cases, that section requires that the consideration be stated and that it appear that the amount for which the judgment is confessed is justly due. If the statutory requirements are not complied with the judgment is irregular and void because of a want of jurisdiction in the Court to render judgment, which is apparent on the face of the proceedings. * * * In the absence of such statement, or the statement at least of facts showing that the debt was still due, the judgment was properly held void, for without compliance with the statute *on the face of the proceeding the Court had no jurisdiction to enter up the judgment.*"

I cannot concur in the suggestion that any estoppel can arise against the parties to the judgment, because it is absolutely void, as the Court is without jurisdiction; hence, whenever it is called to the attention of the Court and any relief asked upon it, the application should be declined. While it may be conceded that leave to issue execution would not affect the rights of creditors to attack the judgment, it is at least a recognition of its validity which should not be had. In my opinion, there is no judgment upon which the Court can direct execution to issue.

WALKER, J., concurs in this dissenting opinion.

Cited: In re Wittkowsky, ante, 250.

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(360)

ASHEVILLE v. TRUST COMPANY.

(Filed 18 December, 1906.)

Municipal Corporations—Special Assessments—Legislative Power—Taxing Districts—Creation—Public Improvements—Cost, How Apportioned.

1. The power to levy assessments upon lots to which special and peculiar benefits accrue from a public improvement is conferred upon the city of Asheville by section 65, chapter 100, private Laws 1901.
2. In the exercise of the power of levying special assessments, the Board of Aldermen must lay off and define the limits of the districts within which they are to be made, and all property within said district shall bear its proportion of the cost upon the basis of special and peculiar benefits, as distinguished from those general benefits which accrue to it in common with all other property in the city.
3. Before a final order or judgment, fixing the amount which is to be paid by the owner, is made, the cost of the improvement should be ascertained and apportioned between the several pieces of property.

PROCEEDING by city of Asheville against Wachovia Loan and Trust Company, trustee, and F. M. Weaver, heard by *O. H. Allen, J.,* upon demurrer, at the September Term, 1906, of BUNCOMBE.

This is a proceeding instituted by the plaintiff, City of Asheville, pur-

suant to the provisions of its charter, Private Laws 1901, ch. 100, sec. 65, to widen West College Street and have damages and benefits, sustained by the property affected, assessed. Defendants, Wachovia Loan and Trust Company and Weaver, owners of a lot upon which benefits were assessed, excepted to the report of the jury, and from a judgment confirming same appealed to the Superior Court of Buncombe County. The exceptions were overruled, and defendants appealed to this Court.

The City of Asheville was incorporated by ch. 100, Private Laws 1901. Section 65 of said chapter provides: "Whenever, in the
(361) opinion of the Board of Aldermen of said city, it is advisable to obtain land or right of way therein for the purpose of opening a new street therein, or widening or straightening a street therein, or making culverts or waterways for carrying water out of any street therein, and said Board of Aldermen and the owner or owners of such land or right of way cannot agree as to the amount of damages consequent thereupon, as well as to the special advantage which may result to the owner or owners thereof, by reason of such opening, widening or straightening of street, or making such culvert or water-way, said Board of Aldermen may direct the Mayor of said city to issue, and he shall thereupon issue, his writ, under the seal of said city, commanding a policeman thereof to summon a jury of six freeholders of said city, unconnected by consanguinity or affinity with any of the persons supposed to be affected by said proposed improvement, in which writ the proposed improvement shall be fully described, and the persons who are supposed to be affected thereby shall be named. Such policeman shall, in obedience to said writ, summon a jury of six freeholders as aforesaid, and direct them to assemble at the Mayor's office in said city at a time by such policeman appointed, not less than twenty nor more than thirty days after the date of such writ. Such policeman shall also serve notice of the time of meeting of the jury upon all the persons who are named in such writ as supposed to be affected by such proposed improvement, at least fifteen days before the date appointed for the meeting of the jury. Such notice shall be in writing, and signed by said policeman, and addressed to the person or persons upon whom service thereof is made, and shall state the time appointed for such meeting of the jury, and designate briefly the proposed improvement, and may be issued as a single notice to all persons named in said writ, or as a separate notice to every one of them, or to any two or more of them. Such notice shall
be served upon the person or persons therein named, or his, her
(362) or their agent, by reading the same to him, her or them. Such policeman shall duly return such writ and all such notices with his return thereon in writing endorsed, together with any such order of the Mayor to said Board of Aldermen, at its next meeting after the

time appointed for the meeting of the jury aforesaid. At the time appointed for the meeting of the jury such policeman shall cause the jury to assemble at the office of the Mayor of said city, where every one of them shall be sworn by such Mayor or other competent person to faithfully, truly and impartially assess the damages, if any, which, in his judgment, will be done to the property of every person named in the writ, and will also assess any special benefit, advantage or enhanced value which will be caused to the property of any person named in the writ. Immediately after the jury shall have been so sworn they shall proceed, accompanied by such policeman, to view the land of every person named in the writ, and shall assess the damages, if any, to every one of the premises which they have viewed, and the special benefit, advantage, or enhanced value, if any, which will accrue by reason of said proposed improvement to every one of the premises which they have viewed. Said jury shall forthwith return to said Board of Aldermen, by filing it with the clerk thereof, a statement in writing, signed by every one of them, or a majority of them, in case they cannot agree, setting forth distinctly a full, itemized report of their proceedings, and stating separately the amounts of damages or special benefits, or both, as the case may be, which they have assessed to every one of the premises so viewed by them. At the first meeting of the said Board of Aldermen after a complete report or reports upon the matter in said writ ordered to be decided shall have been filed as aforesaid, said Board of Aldermen shall consider and pass upon such report or reports. If said Board of Aldermen shall determine that any item of damages so assessed is excessive, it may reject such report or reports, and (363) discontinue the proposed improvement, and in case of such discontinuance no other proceeding shall within three months thereafter be commenced for a similar purpose in relation to any of the premises affected thereby, or any part of the same, without the written consent of the owner thereof. It shall be competent for said Board of Aldermen, in passing upon any such report or reports, to decrease or remit any item or items of special benefit, advantage or enhanced value therein contained, if it think proper to do so. If said Board of Aldermen shall think proper, it shall order such report or reports, or such report or reports so modified by it, as to special benefits or advantages or enhanced value, approved, and the lands condemned in said proceedings shall vest in said city so long as they may be used respectively for the purpose of said improvement, so soon as the amount of damages assessed to them respectively, decreased by the amount of special benefit, advantage and enhanced value, so assessed against them respectively, shall have been paid or tendered to the owner or owners of such premises respectively, or deposited as hereinafter provided."

Provision is made for an appeal by any person dissatisfied with the report of the jury, and the order confirming same, to the Superior Court of Buncombe County.

Pursuant to the provisions of said charter, at a meeting of the Board of Aldermen of said city, a resolution was adopted declaring that, in the opinion of said board, it was advisable to obtain a strip of land, or right of way thereon, on the north side of West College Street, between North Main and Haywood streets, for the purpose of widening West College Street between the points named. The resolution sets out the width to which it was proposed to widen the street, referring to the survey made by the city engineer. It is also recited that it appears to the board that said board and the "owner or owners of such land or right
(364) of way cannot agree as to the amount of damages consequent thereon, as well as to the special advantage which may result to the owner or owners thereof by reason of such widening of West College Street." It was thereupon ordered that the Mayor issue his writ commanding a policeman to summon a jury of six freeholders in accordance with the provisions of the charter to assemble and view "the premises of all persons who are supposed to be affected thereby."

Pursuant to said resolution the Mayor issued his writ, in which the proposed improvement was fully described and the persons supposed to be affected thereby were named, commanding the policeman to summon a jury and to notify the persons named of the time and place of meeting, etc.

The jury met in accordance with the writ and discharged the duty imposed upon them, making report to the Mayor and Aldermen. Among other things, they found that the lots of defendants were specially benefited in the amounts named. At a meeting of the Board of Aldermen held subsequent to the date of filing said report, a resolution was adopted confirming said report, from which order the defendant appealed.

The record contains the following agreement in regard to the lot of defendants Wachovia Loan and Trust Company: "That the lot of land referred to in the notice of appeal herein, or any part thereof, was not obtained, taken, condemned, appropriated or used by said city in and for the widening of said street but the said lot of land above mentioned, and every part thereof, is situated and abutting on the south side of said street; that said street was not widened by the obtaining, taking, condemning, appropriating or using of any property on the south side of said street, but, on the contrary, said street was widened wholly by the obtaining, taking, condemning, appropriating and using of property on the north side of said street." And in regard to lots of appellant
(365) Weaver: "That the lots of land referred to in the notice of appeal herein, or any of them, or any part of them, was not ob-

tained, taken, condemned, appropriated or used by said city in and for the widening of said West College Street; that the said lots above mentioned, and all of them, and every part of them, are situated on the north side of North Water Street, in said city, and said lots or any of them, or any part of any of them, are not situated or abutting on said West College Street, but, on the contrary, are more than one hundred and sixty feet from said street."

The defendants filed the following demurrer to the pleadings: "Now comes the defendant in the above-entitled cause and demurs and says that upon the whole record herein, including ch. 100, sec. 65, of the Private Laws of North Carolina, Session 1901, and the agreed statement of facts, the plaintiff has no right, power or authority to assess or cause to be assessed against the property of the defendant any sum whatsoever."

From a judgment overruling said demurrer, defendants appealed.

Davidson, Bourne & Parker and *J. S. Styles* for the plaintiff.
Frank Carter and *H. C. Chedester* for the defendants.

CONNOR, J., after stating the case: The demurrer calls into question the right of the plaintiff under the powers granted in its charter to assess special benefits for the purpose of paying the cost of widening West College Street. The learned counsel for defendants stated in his argument that he did not deny the right of the Legislature to confer upon the city of Asheville the power to assess against property within said city the cost of public improvements by which such property received peculiar and special benefits. He insists: First, that the power is not granted; second, that if granted, it is invalid, because the (366) method provided for its exercise is not in accordance with the right of the land-owner, in that no taxing district is established, either by the charter or by the resolution of the Board of Aldermen; that the attempt to confer upon the Mayor the power to fix such district in his writ by naming such persons "as are supposed to be affected" is invalid. He also urges objections to the mode of procedure, which we will notice later.

The power to impose upon property the cost of public improvements, measured by the peculiar and special benefit sustained, has been settled beyond controversy. It is uniformly held that this power is based upon the right to tax, and not that of eminent domain. In *Baumann v. Ross*, 167 U. S., 548 (589), it is said: "The Legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be

assessed upon the owners of land benefited thereby," citing a large number of cases. Cooley on Tax., 1152. The subject was discussed, the authorities reviewed and the power sustained in an able opinion by *Mr. Justice Shepherd* in *Raleigh v. Pace,* 110 N. C., 32. It is equally well settled that "assessments being a peculiar species of taxation, there must be a special authority of law for imposing them. The ordinary grant to a municipal corporation of power to levy taxes for municipal purposes will not justify any other than ordinary taxes. This would follow from the general rule which requires a strict construction of all such grants; but the principle has peculiar force when applied to powers in themselves exceptional. And it is always held that such a power, when plainly granted, is to be construed with strictness, and as strictly pursued by the authorities, who are to levy the tax." 2 Cooley on Tax., 1158. The same principle is announced by Judge Elliott in his
(367) work on Roads (sec. 544), cited with approval in *Greensboro v. McAdoo,* 112 N. C., 359. While this most salutary principle is to be kept in view, it is also true that, if the power is given, the statute will not be declared invalid, because it does not specifically prescribe the details of the procedure to be pursued in its exercise. *Raleigh v. Pace, supra.* While the language employed in the charter is not so clear as might be desired, we are of the opinion that the intention of the Legislature to confer the power, both of eminent domain and to assess special benefits, is sufficiently shown. Some confusion arises from a failure to grant them separately.

The first portion of the section prescribing the preliminary steps for obtaining land or a right of way therein, for the purpose of opening or widening a street, when an agreement as to the amount of damages, as well as special benefits, which may result to the owner, cannot be had, if not explained by other parts of the section, would seem to sustain defendant's contention. When the duty of the jury is prescribed, we find that they are to be sworn to assess "the damages, if any, which will be done to the property of every person named in the writ," also to assess "any special benefit, advantage or enhanced value which will be caused to the property of any person named in the writ." They are directed, after being sworn, "to view the land of every person named in the writ and assess damage, if any, to every one of the premises which they have viewed and the special benefit, advantage and enhanced value, if any, which will accrue by reason of said proposed improvement to every one of the premises which they have viewed." The "persons named in the writ" are those "who are supposed to be affected" by the proposed improvement. This is, of course, to include not only those whose lands are to be taken, but those whose lands are to be "specially benefited." Thus the language used in the first portion of the section is ex-

plained and its scope enlarged. When the report is filed, the Board (368) of Aldermen are directed to consider and pass upon it. "If they shall consider that any item of damage is excessive, they may reject the report and discontinue the proposed improvement. If they consider that any item of benefits is excessive, they may decrease or remit the same." It thus clearly appears that the Legislature had in mind both the right of condemnation and of assessing benefits, and intended to confer both on the city of Asheville.

Provision is further made in case of an appeal: 1. When one whose land has been taken appeals, the damages assessed, less the benefits, shall be deposited with the Clerk of the Superior Court to await determination of the appeal. 2. When one against whom special benefits have been assessed appeals, the amount so assessed is declared to constitute a lien upon such land as of the time at which the board passed upon the report. Provision is made for enforcing the payment of the special benefit so assessed.

It is an elementary rule of construction that the entire statute, or at least so much of it as relates to the matter in controversy, must be read and the intention of the Legislature gathered therefrom and given effect. Unless the construction sustaining the power, as claimed by plaintiff, be given, much of the language found in section 65 becomes meaningless.

The defendant attacks the statute and the proceeding thereunder for that, (1) no taxing district is established within which the improvement is to be made and the special benefits assessed; (2) that no provision is made for ascertaining the cost of the proposed improvement and apportioning among the lots or pieces of property benefited.

For manifest reasons it is uniformly held that the Legislature must establish the district, or assign the duty to do so, either to the Board of Aldermen or commissioners to be appointed in some lawful way. It is impracticable to assess benefits upon property for local (369) improvements, unless the territory within which such property is located is, in some way or by some means, ascertained. It is not necessary that the boundaries of the district should be coterminous with any of the political divisions of the State. In *People v. Mayor, etc.*, 4 N. Y., 419, the district established for the assessment of special benefits was "the streets, avenues and squares within the first seven wards," etc. In *Busbee v. Commissioners*, 93 N. C., 143, the county of Wake is declared to be a taxing district for the purpose of levying an assessment to pay the cost of a common fence. In *Commissioners v. Commissioners*, 92 N. C., 180, the counties of Lenoir and Greene were combined into a taxing district for the same purpose. The principle finds recognition in our drainage laws. Rev., 3997. In *Baumann v. Ross*, 167 U. S., 589, *Gray, J.*, says: "The class of lands to be assessed for the purpose may

be determined either by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and may be made to consist of such lands and such only as the commissioners shall decide to be benefited." *Spencer v. Merchant,* 125 U. S., 345. In the statute under consideration, in *Irrigation Dist. v. Bradley,* 164 U. S., 112, commissioners were appointed to lay off irrigation districts.

While expressions found in opinions and authors sometimes indicate that without any territorially defined boundaries, assessments may be levied upon such parcels of land as the jury or commissioners think benefited, we find that usually, if not uniformly, some designation is made confining them to fixed limits. Such, certainly, is the result of our investigation of the statutes passed by the Legislature of this State. As we have seen, and as uniformly laid down by writers on the subject, the Legislature may, in the statute, fix the limits of the district, or if
(370) it deem best, confer this power upon the local authorities, or upon the commissioners or jury appointed to make the assessment. It is held by all of the authorities that when the district is created, by either of the lawful agencies, all of the property within such district must bear its proportionate part of the cost of the improvement measured by the special benefit accruing to it. It is generally held that fixing the limits of the district is a legislative function, and when exercised is not subject to review by the courts. "The whole subject of taxing districts belongs to the Legislature; so much is unquestionable. The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies; but in the latter case the determination will be by a body possessing, for the purpose, legislative power and whose action must be as conclusive as if taken by the Legislature itself. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive." Cooley on Taxation, 1258. Judge Cooley says that there are exceptions to this general principle, some of which he names.

Judge Elliott, conceding that the "numerical weight of authority overwhelmingly" sustains the general doctrine, says that he very much doubts "whether in any case the right of arbitrary decision, by the Legislature, can be defended on strict principle," and that he "cannot forbear suggesting that the judiciary ought not to, and, in truth, cannot

surrender its power to decide the questions affecting the right to impose special burdens on private property."

An interesting discussion of the general principles underlying the subject may be found in the very able opinions of the Court (371) in the case of *Norwood v. Baker,* 172 U. S., 269, and the subsequent cases modifying and, thought by some, overruling it. Few subjects have given the courts more anxious consideration. On the one hand is an evident desire to sustain the action of the Legislature and of legislative agencies in dealing with the subject, and yet equally evident is the recognition of the danger of wrong and injustice to the citizen by giving to such agencies arbitrary power. It is difficult to reconcile the doctrine in a legal system which so jealously guards the property rights of the citizen, by which personal property of inconsiderable value may not be taken by another citizen except after a trial in open Court with a jury to pass upon disputed facts and a Judge learned in the law to declare his legal rights, with that which permits a Board of Aldermen with no other guide than their judgment to impose burdens for benefits, real or supposed, upon his home, with no right to be heard and no power to review their judgment or correct their mistake. Learned Judges frequently admit that wrong and injustice may be done, but see no way by which the taxing power upon which, as we have seen, the right is based, may be controlled by the judiciary.

We have no disposition to make any departure from the generally accepted doctrine, but we deem it appropriate to say that, in administering the law and exercising the powers conferred, it is the duty of those entrusted with it to proceed with cautious and careful watchfulness of the substantial right of the citizen. We do not intend to suggest that the municipal officers in this case have not done so.

It is held in *Baumann v. Ross, supra,* that the duty to fix the limits of the taxing district may be imposed upon the same commissioners who assess the benefits. While we see no objection to this course, the district should be defined before the assessment is made. It would seem just that the zone of benefits should control the boundaries (372) of the district, and that all property in such district should be assessed to pay the cost, not to exceed the benefits accruing to it.

We are confronted with the fact that in the charter of plaintiff no provision is made for laying off the taxing or assessment district, nor does it appear that it was done by the jury. The Aldermen, deeming it conducive to the public welfare, decide to widen West College Street. They thereupon, in accordance with the charter, direct the Mayor to issue his writ to a policeman directing him to summon a jury and notify all persons "supposed to be affected" by the proposed improvement, thus empowering the Mayor, whose functions are not legislative, to select only

such persons as, in his judgment, he supposes to be affected. None others are to be notified; there is no direction to summon all who have property in the zone of benefits, nor is any such zone designated otherwise than by the names of persons named in the writ. What is there under this proceeding to prevent the Mayor selecting the lots of Mr. Weaver, lying on North Water Street, some two hundred feet from the street to be widened, and omitting the names of those who own lots between West College Street and Mr. Weaver? in which event the jury would have no right or power to assess the benefits accruing to such lots. It is obvious that, under the charter, the Mayor may arbitrarily impose upon such persons as he supposes affected the entire cost of the improvement. It does not appear by the record that the Mayor has omitted any lots which should be assessed. That the power to do so is given, renders the statute open to criticism.

The measure of liability of the entire property benefited is the cost of the improvement; therefore, each property-owner is interested in having each part of the whole assessed, to the end that if the total benefit exceeds the cost, the burden may be properly apportioned. When
(373) a taxing district or zone of benefit is fixed in advance of the assessment, this right is secured.

The defendants suggest that before any judgment can be entered against their property, the cost of the improvement should be ascertained. This contention, we think, is sound. The right to levy assessments for special benefits is not based upon the idea that the corporation may collect from property the total amount of such benefits and turn into the treasury the profit made by the improvement. The right which the city has is to collect "the whole or a part of the public improvement from the property benefited." *Spencer v. Merchant, supra.* This principle is clearly recognized in the charter of the plaintiff of 1891 (ch. 125, sec. 5), wherein the method of equalizing assessments for improving streets is prescribed. The cost is ascertained, and then apportioned between the abutting real estate. The present *Chief Justice,* discussing this statute in *Hilliard v. Asheville,* 118 N. C., 845, says: "It makes each street, or portion of a street, improved a taxing district by requiring the cost of the total improvement on each street to be ascertained." In that act, for the purpose of paying for the improvement, the "frontage" rule was adopted. This was sustained in *Raleigh v. Pace, supra.* The only difference between the two statutes, in that respect, is that in the charter of 1901 the benefit is to be ascertained by the jury, instead of the arbitrary "frontage" rule. In all other respects the principle involved is the same. While the question presented here is not raised in *Pace's case, supra,* it is manifest that the learned Judge did not overlook it. In speaking of the ordinance he says: "It very clearly pro-

vides for a taxing district, to wit: * * * This provision, as to the cost, very plainly implies that the expense of the improvement in the entire district had been previously estimated, and thus we have an apportionment between the abutting owners and the city," etc.
The principle is recognized in our legislation providing for (374) building fences around a district by directing the cost of the fence to be ascertained and the cost apportioned among the several tracts of land in the territory within the common fence; also in the drainage laws, Revisal, section 3997, wherein the cost of the work is first ascertained. It is not essential to the validity of a special assessment that the property abut the street to be improved. If within the zone of benefits, as fixed by the statute or the commissioners, it may be assessed as if on the street. Nor do we hold that the cost must be ascertained before the assessment is made. This would often be difficult; but before the final apportionment is made and judgment rendered, it is necessary that the cost be ascertained, for this is the limit of the power to impose assessments.

We are, upon careful consideration of the several questions presented by the demurrer and argued before us, of the opinion:

1. That the power to levy assessments, upon lots to which special and peculiar benefits accrue from a public improvement, is conferred upon the plaintiff by chapter 100, sec. 65, Private Laws 1901.

2. That in the exercise of the power of levying special assessments, the Board of Aldermen lay off and define the limits of the district within which they are to be made, and that all property within said district should bear its proportion of the cost upon the basis of special and peculiar benefits, as distinguished from those general benefits which accrue to it in common with all other property in the city.

3. That before a final order or judgment, fixing the amount which is to be paid by the owner, is made, the cost of the improvement be ascertained and apportioned between the several pieces of property.

The record comes to us upon an appeal from a judgment overruling a demurrer; hence, no final judgment appears in the record.
The demurrer does not raise any question regarding the amount (375) of benefit assessed, or the principle upon which it was assessed.
We find no objection to the statute by reason of the notice required to be given. The demurrer, in so far as it attacks the power of the plaintiff to levy special assessments for special benefits accruing to property by reason of public improvements, was properly overruled. For the reasons herein stated, the judgment rendered by the Board of Aldermen cannot be sustained, and in that respect there was error in the judgment overruling the demurrer.

The only portion of the order made by the Board of Aldermen which

is certified to this Court is that in which judgment is rendered against the defendant appellants. For the reasons given herein the order, as to them, must be set aside and vacated. If so advised, we can see no good reason why the board may not allot and define a taxing district, and proceed to have the benefits to the property within the district assessed in accordance with the provisions of the statute and the principles herein announced. The appellants will recover their costs in this Court.

ERROR.

Cited: *Sanderlin v. Luken,* 152 N. C., 741; *Tarboro v. Staton,* 156 N. C., 506, 507; *Justice v. Asheville,* 161 N. C., 72, 74.

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TANNING COMPANY v. TELEGRAPH COMPANY.

(Filed 18 December, 1906.)

Telegraphs—Delivery of Message—Damages Recoverable—Contract—Offer and Acceptance.

1. Where S. wrote to the plaintiff as follows: "Kindly advise us by wire Monday if you can use 1,500 creosote barrels between now and January 1st, at 95 cents, delivered in carload lots," and plaintiff filed with defendant on Monday a message addressed to S. as follows: "We accept your offer of 1,500 barrels as per yours of the 7th": *Held,* that the letter from S. was a mere "trade inquiry," and was not a legal offer binding on acceptance, and plaintiff's reply did not create a contract, and plaintiff is entitled to recover of defendant by reason of its negligence in the delivery of the message only nominal damages, to wit, the price of the message.
2. An acceptance, to bind the other party, must be unconditional and unqualified and must correspond exactly to the terms of the offer.

ACTION by the Cherokee Tanning Extract Company against the Western Union Telegraph Company, heard by *McNeill, J.,* and a jury, at the April Term, 1906, of CHEROKEE.

This is an action for damages alleged to have been sustained through negligence of the defendant in failing to transmit and deliver promptly a certain telegram. From a judgment in favor of the plaintiff, the defendant appealed.

Dillard & Bell for the plaintiff.

Merrick & Barnard and *F. H. Busbee & Son* for the defendant.

BROWN, J. There is no dispute as to the material facts. The evi-

dence shows that on 7 November, 1903, an agent of the Standard Oil Company at Wilmington, N. C., wrote to the plaintiff, at Andrews, N. C., a letter containing, among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and 1 Jan., at 95 cents each, delivered in carload lots." That the plaintiff received this letter on Monday, No- (377) vember 9, and at 7:30 p. m. of that day filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, N. C., and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 a. m., November 10. At the same time it wrote to plaintiff, the Oil Company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the Oil Company shortly before plaintiff's message. The plaintiff claims substantial damage. Defendant requested the Court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in *Hadley v. Baxendale,* 9 Exch., 341, but they must not be the remote, but the proximate consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the Oil Company created a contract between the two for the sale and delivery of 1,500 barrels at 95 cents each, then plaintiff can recover only nominal damages, for any other damages would necessarily be purely speculative or contingent. The language of *Brannon, J.,* in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made." *Beatty Lumber Co. v. Telegraph Co.,* 52 W. Va., 410. See, also, *Hosiery Co. v. Telegraph Co.,* 123 Ga., 216, and *Wilson v. Telegraph Co.,* 124 Ga., 131. The offer must (378) be distinct as such and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell,* 142 Mass., 442; *Beaupre v. Telegraph Co.,* 21 Minn., 155; 24 A. and E. Enc., 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *Mfg. Co. v. Felder,* 115 Ga., 408; 24 A. and E., 1030, note 1, and cases cited. "The offer must be one which is intended of itself to create

legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract." 1 Paige on Cont., sec. 26, and cases cited; Clark on Contracts, sec. 29.

In *Moulton v. Kershaw,* 59 Wis., 316, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full carload lots of 80 to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. and N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the salt, and plaintiff sued for damages. The Supreme Court of Wisconsin, sustaining a demurrer to the complaint, held that the communications between the parties did not show a contract; that the letter of the defendant was not such an offer as plaintiff could by an acceptance change into a binding agreement. See, also, *Smith v. Gowdy,* 90 Mass., 566.

The letter from the Oil Company to the plaintiff was a mere inquiry. *Walser v. Telegraph Co.,* 114 N. C., 440. It was evidently a (379) "trade inquiry" sent out by the Oil Company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations." *Lyman v. Robinson,* 14 Allen (Mass.), 254.

Again, the acceptance by the plaintiff was not in the terms of the offer. The acceptance was for 1,500 barrels. The Oil Company could not have compelled the plaintiff to take a less number. If the plaintiff regarded the Oil Company's letter as a valid offer, it should have replied that it would take what barrels the Oil Company had, not exceeding 1,500, as that company had offered no exact specific number. "An acceptance, to bind the other party, must be unconditional and unqualified and must correspond exactly to the terms of the offer." 24 A. and E., 1031, 1032, and cases cited 1 Parsons Cont., 476, 477. As the plaintiff's message to the Oil Company seasonably delivered would not of itself have effected a legal contract between the plaintiff and the Oil Company for the delivery of 1,500 barrels at 95 cents each, it follows that any other than nominal damage would be purely speculative. The Oil Company might have delivered the barrels, and then again it might not have done so. It might have delivered 1,500, and again it might have delivered a much less number. Its letter specified no exact number, and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages,

it is unnecessary to consider the exceptions to his Honor's rulings on the issue of negligence. We award a new trial upon the second issue relating to the damages.

Partial New Trial.

Cited: *Mfg. Co. v. Tel. Co.*, 152 N. C., 162; *Newsome v. Tel. Co.*, 153 N. C., 155; *Clark v. Lumber Co.*, 158 N. C., 145; *Elks v. Ins. Co.*, 159 N. C., 626; *Hall v. Jones*, 164 N. C., 200.

(380)

RAILROAD v. BAILEY.

(Filed 18 December, 1906.)

Condemnation Proceedings—Interlocutory Order—Premature Appeal.

An appeal from the order of the Clerk appointing commissioners in a condemnation proceeding in pursuance of Revisal, section 2580, is premature, and an order of the Judge below remanding the cause to the Clerk is interlocutory, and no appeal lies therefrom to this Court.

SPECIAL PROCEEDING for condemnation by the Carolina and Tennessee Railroad Company against J. S. Bailey and others, pending in SWAIN, and heard by *W. R. Allen, J.*, at chambers, by consent, at Asheville on 31 October, 1906, upon appeal taken by defendant from an order of the Clerk of the Superior Court appointing commissioners. From an order of his Honor dismissing the appeal from the order of the Clerk as premature, the defendant appealed.

Charles M. Busbee and *F. H. Busbee* for the plaintiff.
J. S. Adams for the defendant.

BROWN, J. We think his Honor ruled correctly in dismissing the appeal as premature and properly remanded the cause to the Clerk to be proceeded with under the order appointing commissioners, which had been made by the Clerk in pursuance of the statute, Revisal, sec. 2580. In the case of *R. R. v. Newton*, 133 N. C., 132, it is decided that an order of the Superior Court in condemnation proceedings, remanding the cause to the Clerk that he may hear the same, is interlocutory and no appeal lies therefrom to the Supreme Court, though a plea in bar was filed by the defendant. That no appeal can be taken at such stage in condemnation proceedings, viz., when the Judge below remands the cause to the Clerk, has been repeatedly adjudged before the (381) case of *R. R. v. Newton*. *Telegraph Co. v. R. R.*, 83 N. C., 420; *R. R. v. R. R.*, 83 N. C., 499; *R. R. v. Warren*, 92 N. C., 622.

Appeal Dismissed.

BOURNE v. SHERRILL.

(Filed 18 December, 1906.)

Contracts—Collateral Agreements—Parol Evidence—Consideration—Statute of Frauds.

Where at the time a lot was conveyed to the defendant, as an inducement thereto and in part consideration for the sale and delivery of the deed, the defendant then agreed with plaintiff that if he did not build on the lot, but resold it, plaintiff was to have the profits realized on such resale: *Held*, that such agreement could be shown by oral evidence and did not come within the statute of frauds and was not without consideration.

ACTION by Louis M. Bourne against R. G. Sherrill, heard by *O. H. Allen, J.*, and a jury, at the September Term, 1906, of BUNCOMBE.

Issues were submitted and responded to by the jury as follows:

1. Did the defendant agree with the plaintiff that if he would sell him the lot, that in the event he did not build on it but sold it, the plaintiff was to have the profits? Answer: Yes.

2. If so, what profit did the defendant derive from the sale of the lot? Answer: $263.04, with interest.

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

(382) *Locke Craig* for the plaintiff.
Julius C. Martin for the defendant.

HOKE, J. There was evidence of plaintiff tending to show that plaintiff sold and conveyed to defendant a lot in Asheville for which he had been offered a larger price by another, under assurance that defendant desired to build on the lot as a home for himself and wife.

That at the time the lot was conveyed to defendant, as an inducement thereto, and in part consideration for the sale and delivery of the deed, defendant then agreed that if defendant did not build, but resold the lot, that plaintiff was to have the profits realized on such resale.

That shortly after obtaining the title, the defendant resold the lot at a profit, and plaintiff instituted the present suit to recover the profits pursuant to the agreement.

Defendant objected to the introduction of any and all of this testimony and to any recovery predicated thereon, on the grounds (1) that the agreement was without consideration; (2) that the same contradicted the deed; (3) that the contract was invalid under the statute of frauds, the same being a contract concerning realty, and required to be in writing.

The decisions of this State are against the defendant on each of the propositions advanced by him. *Michael v. Foil,* 100 N. C., 178; *Sprague v. Bond,* 108 N. C., 382.

The consideration arose at the time of the sale, and as part inducement thereto.

The conveyance, the purpose of which was to pass the title, is allowed its full operation, and is therefore in nowise contradicted. And the agreement enforced by this recovery attached to the proceeds from and after the sale, and was not therefore, concerning land, or any interest therein, within the meaning of the statute of frauds.

In *Michael v. Foil, supra,* it was held: "At the time of the delivery of a deed for land, and as a part of the inducement for (383) its execution, it was orally agreed between the vendor and vendee, that if the vendee should sell the mineral interest in the land during vendor's life he would pay the vendor one-half of the amount received therefor: *Held,* that such agreement could be shown by oral evidence, and did not come within the statute of frauds."

In *Sprague v. Bond, supra,* it was held as follows: "S., being the owner of certain lands, conveyed them by deed absolute to B., upon the parol promise of the latter, from the proceeds of any sale the vendee might make, after paying expenses, etc., the vendor should be paid a part: *Held,* not to be within the statute of frauds." And *Shepherd, Judge,* delivering the opinion, said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the land, as there was no enforcible trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced."

This last opinion refers with approval to *Hess v. Fox,* 10 Wendell, 436, in which *Savage, C. J.,* delivering the opinion in a similar case, said: "No question can arise on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promiser."

These authorities are decisive against defendant, and the judgment below is affirmed.

No Error.

Cited: *Godwin v. Bank,* 145 N. C., 331; *Brown v. Hobbs,* 147 N. C., 76; *Bailey v. Bishop,* 152 N. C., 385; *Bogden v. Gibson,* 165 N. C., 19.

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MATTHEWS v. FRY.

(Filed 18 December, 1906.)

Findings of Fact by Judge—Exceptions—Conclusiveness—Appeal—Reversal.

1. Where the parties waived a jury trial and agreed that the Judge should find the facts and enter judgment thereon, and the Judge found the facts and entered judgment in favor of the defendant, and upon appeal this Court was of opinion that upon the facts found judgment should have been entered in favor of the plaintiff, and entered its order "Reversed": *Held,* that upon presentation of the certificate of opinion the Court below properly entered judgment for the plaintiff, and the defendant's motion for a trial *de novo* on the ground that some of the findings of fact had been made without any evidence to support them, came too late, he having acquiesced in the findings without exception.
2. The findings of fact by the Judge, when authorized by law or consent of parties, are as conclusive as when found by a jury, if there is any evidence.

ACTION by John G. Matthews against A. M. Fry and another, heard by *W. R. Allen, J.,* and a jury, at the August Term, 1906, of SWAIN. From the judgment rendered, the defendant appealed.

Dillard & Bell and *Bryson & Black* for the plaintiff.
Shepherd & Shepherd and *C. W. Rowe* for the defendant.

CLARK, C. J. "The parties waived a jury trial and agreed in writing that the Judge should find the facts and enter judgment thereon, as upon the facts so found he might decide the law to be." The Judge found the facts and entered judgment thereon in favor of the defendant. Upon appeal, *Matthews v. Fry,* 141 N. C., 582, this Court was of opinion that upon the facts found judgment should have been entered in favor of the plaintiff, and entered its order "Reversed." When the certificate of opinion was presented in the Court below the plain-
(385) tiff moved for judgment in accordance therewith. The defendant resisted this judgment and asked for trial *de novo* and insisted that some of the findings of fact had been made by the Judge without any evidence to support them.

The judgment was properly entered for plaintiff in accordance with the mandate of this Court to reverse the judgment. *Summerlin v. Cowles,* 107 N. C., 462; *Bernhardt v. Brown,* 118 N. C., 711. The findings of fact by the Judge when authorized by law or consent of parties are as conclusive as when found by a jury, if there is any evidence. *Branton v. O'Briant,* 93 N. C., 103; *Roberts v. Ins. Co.,* 118 N. C., 435; *Walnut v. Wade,* 103 U. S., 688. If there was any ground to except to such findings because without evidence to support the finding, upon

any point, or for any other cause, the defendant should have done so and have brought up his side of the case also when the plaintiff appealed, or at least he should have entered an exception so as to preserve his rights. It is not unusual for both parties to appeal. Having acquiesced in the findings of fact without exception, it is too late to except now.

If the defendant was dissatisfied with the ruling of this Court upon the law, his remedy was by a petition to rehear—which he did, and the petition was disallowed—and not by a motion for a new trial in disregard of the mandate of this Court.

Affirmed.

Cited: *Stokes v. Cogdell,* 153 N. C., 182; *State's Prison v. Hoffman,* 159 N. C., 568; *Buchanan v. Clark,* 164 N. C., 60; *Eley v. R. R.,* 165 N. C., 79.

(386)

HELMS v. TELEGRAPH COMPANY.

(Filed 18 December, 1906.)

Telegraphs—Mental Anguish—Evidence—Damages—Undisclosed Beneficiary.

1. In an action for damages for mental anguish on account of defendant's failure to promptly deliver the following telegram: "Mother very sick; come at once," signed by plaintiff's son, where the evidence shows that plaintiff's son, twenty-six years old, filed the telegram with the defendant's operator, who asked for the number and street of the sendee; that the son told the operator that he did not know the address, but that his father knew it; that he went back to his father and got the address; that the operator knew the son and his father; that the son told the operator that the sendee was his brother-in-law; that the plaintiff sent his son to send the telegram and gave him the money to pay for it, but the son failed to so inform the operator: *Held,* there was no evidence which charged the defendant with knowledge that the son filed the telegram as agent of and for the benefit of his father.
2. A party who is not mentioned in a message or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish.

CLARK, C. J., dissenting.

ACTION by M. A. Helms against Western Union Telegraph Company, heard by *Peebles, J.,* at the October Term, 1906, of MECKLENBURG.

This action was instituted by the plaintiff to recover damages for mental anguish on account of the failure of the defendant to promptly deliver to his son-in-law, at Charlotte, N. C., a message which the plain-

tiff had sent through John Helms from Pineville, N. C., in the following words:

"WILL HELMS, *Charlotte, N. C.*
"Mother very sick. Come at once.

"JOHN HELMS."

From verdict and judgment rendered, defendant appealed.

(387) *Burwell & Cansler* for the plaintiff.
Tillett & Guthrie for the defendant.

BROWN, J. The exceptions of the defendant to the evidence and to the charge of the Court raise two questions for our consideration: 1. Is there any evidence which charges the defendant with knowledge that John Helms filed the telegram as the agent of and for the benefit of his father, M. A. Helms? 2. Can this plaintiff sustain an action for damages for mental anguish without proving such fact?

As to the first contention of the defendant, we think the evidence tends to prove that John Helms, twenty-six years old, and the son of M. A. Helms, filed the telegram with the operator at Pineville; that the operator asked for the number and street of the sendee; that John Helms said he did not know it; that the operator said he could not send the message until he got the address; that John Helms went back to his father and got the address; that he told the operator that his father knew the street number; that the operator knew John Helms and also knew the plaintiff; that John Helms told the operator that the sendee, Will Helms, was his brother-in-law, and that the plaintiff sent John Helms to send the message and gave him the money to pay for it, but John Helms failed to so inform the operator.

We think there is nothing in the evidence which could reasonably charge the defendant with knowledge that the plaintiff was the real beneficiary and that his son was acting as his agent in sending the message. There is nothing in the evidence or on the face of the message which charges the defendant with notice that M. A. Helms, the plaintiff, may suffer mental anguish if the telegram is unreasonably delayed. *Tel. Co. v. Kirkpatrick,* 76 Tex., 217.

As to the second contention, we are likewise of opinion with the defendant. The overwhelming weight of authority is to the effect that a party who is not mentioned in a message or whose interest therein
(388) is not communicated to the company cannot recover substantial damages for mental anguish. *Squire v. Tel. Co.,* 98 Mass., 237; *Tel. Co. v. Proctor,* 25 S. W. Rep., 813; *R. R. v. Seals,* 41 S. W., 841; *Elliott v. Tel. Co.,* 75 Texas, 18; *Tel. Co. v. Brown,* 71 Tex., 723.

This doctrine is nowhere more emphatically declared than by the Supreme Court of Texas, where the doctrine of mental anguish is supposed to have originated. In *Tel. Co. v. Gotcher,* 53 S. W., 685, that Court affirmed its former ruling to the effect that a party whose interest in the telegram was not made known to the company could not recover. There appears in this opinion the significant statement by the Court that the Court had "already expressed its disinclination to extend the right of recovery in this class of cases beyond the limits already fixed by the decisions of this Court." In *Davidson v. Tel. Co.,* 54 S. W., 830, and *Morrow v. Tel. Co., ibid.,* 853, the Court of Appeals of Kentucky held that a party whose name was not mentioned in the message could not recover for mental anguish.

In *Rogers v. Tel. Co.,* 51 S. E., 773, the Supreme Court of South Carolina, after referring to the rule of *Hadley v. Baxendale* as controlling these mental anguish cases, then proceeded to hold that the party whose interest was not disclosed could not recover. The headnote correctly digests the opinion in these words: "Where a husband sends a telegram to his wife's mother, and it does not show on its face that it is for the benefit of his wife, and it is not alleged in the complaint that the telegraph company had notice that the telegram was sent for the benefit of the wife, the complaint fails to show that she was entitled to damages for failure to deliver."

In *Poteet v. Tel. Co.* (S. C.), 55 S. E., 113, *Mr. Justice Woods,* speaking for that Court, discusses the matter with much clearness of expression: "In cases of this character the suit is usually for the tort committed in breach of the public duty owned to the plaintiff; but the duty springs out of the contract and depends on it, for mani- (389) festly the defendant owes no public duty concerning a particular telegram except to those for whom or in whose behalf it has undertaken to transmit it. All others are of the outside public, and damages which they incidentally suffer cannot by any stretch be regarded the natural and proximate result of failure to transmit a particular telegraphic message. The contract fixes the relation, and he who sues for tort based on contract must show privity with the party to be charged by connecting himself with the contract as a party or a known beneficiary. In further support of this view, it may be remarked that as to the subject-matter of a telegram it is too well established for discussion, before there can be a recovery the telegraph company must have notice that the particular result alleged as the basis of the claim was to be apprehended from delay in transmission. The same principle makes it necessary to recovery that there should be notice to the company of the beneficial interest of the particular person who claims compensation for

suffering." In his opinion the learned Justice cites a large number of authorities in support of his views.

The right of the sendee to recover of a telegraph company for error or negligence in the transmission or delivery of a telegram is altogether denied in Great Britain. *Playford v. Tel. Co.*, L. R., 4 Q. B., 706. In this country the English doctrine does not generally prevail. Here the weight of authority holds that the sendee may recover in his own name such damage as he may have sustained by reason of negligence when the message was intended for his benefit and it was apparent on the face of the message or the company otherwise had knowledge of it. 2 S. & R. Neg. (5 Ed.), sec. 543; Joyce Elec. Law, sec. 1008; *Frazier v. Tel. Co.*, 67 L. R. A., 320.

The same principle applies where the message is sent for the benefit and at the instance of any one whose name does not appear on its
(390) face. The well-known rule laid down in *Hadley v. Baxendale*, 9 Exch., 345, decided in 1854, has been applied by the Supreme Court of the United States to telegraph cases, and it is held that where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably occupy, the measure of damages for negligence is the sum paid for sending. *Primrose v. Tel. Co.*, 154 U. S., 29; *Hall v. Tel. Co.*, 124 U. S., 444.

Our own Court has adopted the same principles of law as applicable to this class of cases. In a well-considered opinion in *Williams v. Tel. Co.*, 136 N. C., 82, *Mr. Justice Walker* says: "The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service." In *Cranford v. Tel. Co.*, 138 N. C., 162, the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it and was not brought to the attention of the company, and it is specifically held that "there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message." See, also, *Kennon v. Tel. Co.*, 126 N. C., 232.

In conclusion, we regard it as well settled in this Court now as well as in all other courts whose decisions we have examined, that where there is a delay in the delivery of a telegram, the telegraph company is not liable for the mental anguish of every one suffering by the failure to deliver the message, but only to those for whom or in whose behalf it

has undertaken to transmit it. We will not undertake to reconcile *Cashion v. Tel. Co.*, 124 N. C., 459, with the principles herein (391) laid down. Whatever there may be that is conflicting with them in that case we regard as having been heretofore disregarded and practically overruled. We are of opinion that the plaintiff is entitled to recover nominal damages only, viz., the price paid for the message.

New Trial.

CLARK, C. J., dissenting: On 18 December, 1905, the plaintiff's wife became ill at their home in Pineville, N. C., and the plaintiff directed his son, John Helms, to go to the telegraph office and send a message to his son-in-law, Will Helms, who resided in Charlotte, and tell him that plaintiff's wife was very sick, and wanted him to come, and come at once. Accordingly John Helms delivered for transmission the following telegram:

"WILL HELMS, *Charlotte, N. C.*
"Mother very sick. Come at once. JOHN HELMS."

The jury found that the defendant negligently delayed the transmission of this telegram, and the defendant's brief states the facts as above and adds that there is no question raised on this appeal as to the negligence. The plaintiff brought this suit to recover damages for mental anguish caused by the failure of the said Will Helms and also the wife of Will Helms (she being the daughter of the plaintiff) to reach the bedside of the plaintiff's wife before her death, and be present with him after that time. It was in evidence that the plaintiff sent his son, John Helms, to the telegraph office for the purpose of sending said message and gave him the money to pay for it; that the operator knew John Helms and his father and their relationship; that the operator refused to send the message without information as to the street number of sendee, and that thereupon John Helms said that he would go back to the house of his father and get the address, which he (392) did, and gave it to the operator.

The chief defense relied on is that it does not appear that the operator was told (except inferentially) that the message was sent by John Helms, as agent for his father. When a telegraph company fails to deliver a message or to deliver it promptly, this is more than a breach of private contract, for the company could not refuse to accept and send the message. It is a tort and a breach of a public duty. It is commonly described as a tort arising out of a breach of contract.

In *Green v. Tel. Co.*, 136 N. C., at p. 492, *Douglas, J.*, said, speaking for a unanimous Court: "In the words of a great English Judge, 'a

breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.' This has been expressly held by this Court in *Cashion v. Tel. Co.,* 124 N. C., 459; *Laudie v. Tel. Co., ibid.,* 528, and *Cogdell v. Tel. Co.,* 135 N. C., 431."

Whether the message, as to which there is such default, is one whose default causes pecuniary loss or mental anguish, the party entitled to sue must be the "real party in interest," and comes within one of two categories: either (1) a party to the contract or (2) a beneficiary named therein.

1. He may be a party to the contract by being either the sender whose name is signed to the message, or the principal (whether disclosed or not) who paid for the message or by whose order the message was sent. Whether the breach caused pecuniary loss or mental anguish, the telegraph company must have contemplated that damages would accrue to the real sender of the message. *Qui facit per alium facit per se.* Whether his name was signed to the message or not, it is the damage that would accrue to *him,* if any, which the company contemplated that it would incur by its negligence. It is not to be thought that a public corporation would be more faithful in sending a message for one (393) party than another. *Tel. Co. v. Broesche,* 72 Tex., 654. Very frequently the signer of the message (as in this case) is a mere agent, a messenger, and in such cases he receives no damages and can recover none. The company is not thereby shielded, but is responsible to the "real party in interest," the principal, by whose order the message was sent, for the damage he sustained, whether pecuniary loss or mental anguish, when the face of the message disclosed that the failure to deliver would be likely to cause the loss of money, *Cannon v. Tel. Co.,* 100 N. C., 300, or mental suffering, *Young v. Tel. Co.,* 107 N. C., 372. That is the gist of it. The real sender of the message is entitled to recover whether his name is signed thereto or an agent signs his own name. Whether the real or the nominal sender is the plaintiff is a mere matter of proof, as is the plaintiff's relationship to the sick or dying person named in the message. When that is shown, it is his loss, of course, which is the measure of damages. He is the real contracting party.

2. Sometimes the sender of the message, whether he sends it in his own name or sends it in the name of his agent, is not the real party in interest. In such case the sender cannot sue, *Pegram v. Tel. Co.,* 100 N. C., 36; but the beneficiary of the message may, if the fact that he is the beneficiary appear upon the face of the message. This may be either the sendee or one named in the message. This is upon the principle laid down in *Gorrell v. Water Co.,* 124 N. C., 328, and cases following it, "that one for whose benefit a contract is made may sue for its breach or its enforcement."

Thus, either (1) the maker of the contract, whether he contracts in his own name or in the name of an agent, can sue for whatever damage he sustains, or (2) the beneficiary of the contract who is contemplated as such on the face of the message, can sue. Of course, a person who is neither a party, as principal or agent, to the contract, nor a beneficiary named therein, cannot recover. *Cranford v. Tel. Co.,* (394) 138 N. C., 164.

Accordingly, our reports show that in the great majority of the cases the action has been brought by the beneficiary named in the message, usually the sendee, but sometimes one referred to in the message. In the other cases, the action has always been brought by the contracting party—this being sometimes the signer of the message and sometimes the undisclosed principal, with whose money or by whose order the telegram was delivered to the telegraph company for transmission.

The action was brought by—

Sender: Kennon v. Tel. Co., 126 N. C., 232; *Bennett v. Tel. Co.,* 128 N. C., 103; *Bright v. Tel. Co.,* 132 N. C., 318; *Williams v. Tel. Co.,* 136 N. C., 82; *Green v. Tel. Co., ibid.,* 506; *Hancock v. Tel. Co.,* 137 N. C., 499; *Hall v. Tel. Co.,* 139 N. C., 370; *Gerock v. Tel. Co.,* 142 N. C., 22; *Hancock v. Tel. Co.,* 142 N. C., 163.

Sender and sendee: Andrews v. Tel. Co., 119 N. C., 404; *Dowdy v. Tel. Co.,* 124 N. C., 523; but it has been since strongly intimated that it is a misjoinder for two persons, suing each for his own mental suffering, to unite in the same action, *Morton v. Tel. Co.,* 130 N. C., 303.

Undisclosed principal of sender, seven cases: *Thompson v. Tel. Co.,* 107 N. C., 450; *Cashion v. Tel. Co.,* 123 N. C., 269; *s. c.,* 124 N. C., 464 (fully discussed); *Laudie v. Tel. Co., ibid.,* 532; *Laudie v. Tel. Co.,* 126 N. C., 434; *Hood v. Tel. Co.,* 135 N. C., 622; *Hamrick v. Tel. Co.,* 140 N. C., 151 (in this last a new trial was given on another point, but there was no objection on this point suggested by the Court).

Sendee: Young v. Tel. Co., 107 N. C., 371; *Thompson v. Tel. Co., ibid.,* 456; *Brown v. Tel. Co.,* 111 N. C., 187 (pecuniary loss); *Lewis v. Tel. Co.,* 117 N. C., 436; *Havener v. Tel. Co., ibid.,* 541; *Lyne v. Tel. Co.,* 123 N. C., 130; *Hendricks v. Tel. Co.,* 126 N. C., 305; *Rosser v. Tel. Co.,* 130 N. C., 251; *Hunter v. Tel. Co., ibid.,* 607; (395) *Meadows v. Tel. Co.,* 131 N. C., 74; *s. c.,* 132 N. C., 41; *Efird v. Tel. Co., ibid.,* 268; *Hinson v. Tel. Co., ibid.,* 460; *Higdon v. Tel. Co., ibid.,* 726; *Bryan v. Tel. Co.,* 133 N. C., 604; *Cogdell v. Tel. Co.,* 135 N. C., 431; *Hunter v. Tel. Co., ibid.,* 459; *Dayvis v. Tel. Co.,* 139 N. C., 82; *Alexander v. Tel. Co.,* 141 N. C., 76; *Whitten v. Tel. Co., ibid.,* 362; *Mott v. Tel. Co.,* 142 N. C., 532; *Harrison v. Tel. Co., ante,* 147; *Shepard v. Tel. Co., ante,* 244.

Beneficiary named in message (these are really cases of disclosed

principals, but who neither paid for nor ordered the sending of the messages): *Sherrill v. Tel. Co.*, 109 N. C., 527; *s. c.*, 116 N. C., 656; *s. c.*, 117 N. C., 354; *Green v. Tel. Co.*, 136 N. C., 489; *Carter v. Tel. Co.*, 141 N. C., 375; *Kernodle v. Tel. Co., ibid.*, 437.

In *Cranford v. Tel. Co.*, 138 N. C., 165, it is clearly shown that one who suffers loss (it must be immaterial whether it is a money loss or mental suffering) by the failure to deliver a telegram cannot recover damages on that account unless he also shows that he is a party to the contract (either as sender or as principal) or beneficiary (by being named therein or the sendee). The language of the Court is, after quoting *Cashion v. Tel. Co.*, 123 N. C., 267, and 124 N. C., 459, and *Laudie v. Tel. Co.*, 124 N. C., 528: "In each of those cases we need only say, without discussing the principle upon which they rest, there was abundant evidence to show that the message was sent for the benefit of the plaintiff" (the undisclosed principal) "the sender merely acting as her agent, while in this case there is no such evidence."

That language exactly applies here. The principle stated in those cases cited in *Cranford's case* has been recognized by this Court seven times, as above stated. It is reasonable, logical and just, and there is no reason why we should overrule them. Besides the seven de-
(396) cisions above referred to, it was said in *Sherrill v. Tel. Co.*, 109 N. C., 533: "The plaintiff can therefore maintain this action both because his sister was his agent for the purpose of sending the telegram and because he was the beneficial party." Yet in that case the plaintiff had not directed the sending, and paid for the message, as in this case, but had merely left authority to telegraph in case of sickness, and had no knowledge of the message being sent until long afterwards. "The message may be written out, signed and delivered by an agent." Scott & Jarnagan on Telegraphs, 161. "The contract is not necessarily with the party whose name is signed to the message." *Ibid.*, 177.

Here, the evidence discloses that in truth the plaintiff sent the message through the agency of his son, and paid for it. The relationship of the principal and his agent was known to the operator. The message concerned the critical illness of the plaintiff's wife and was sent to the husband of his daughter, and John Helms told the operator that he "would go back" to his father and get the sendee's street number, and did so. All these were pregnant circumstances to give the defendant notice that the message was sent by the plaintiff's order. But, if that were not so, the above authorities, several in number, hold, unless all are overruled, that the plaintiff, if an undisclosed principal, can recover for the default in the delivery of a message. The defendant relies upon *Cranford v. R. R.*, 138 N. C., 165. But that case, instead of overruling *Cashion's* and *Laudie's cases*, cites them as not being in conflict with

itself. *Cranford's case* rested on three propositions: (1) That the message, so far as the evidence disclosed, was sent solely for the benefit of the husband of the plaintiff; (2) that there was no evidence that the defendant knew that such a person as the *feme* plaintiff existed; (3) that there was no evidence that the message was sent for her benefit. The lack of evidence in the foregoing particulars was the (397) controlling factor in the decision of that case.

In the case at bar it affirmatively appears by the uncontradicted evidence (1) that the message was sent and paid for by the plaintiff; (2) that the operator knew the relationship between John Helms and the plaintiff, and his attention was called to it before the message was sent, by the son saying he "would go back" to his father and get the sendee's street number; and (3) that the message was sent for the plaintiff's benefit. In *Cranford's case* it is said: "Nor is there any evidence that the message was in fact intended for the benefit of the *feme* plaintiff. The defect in the proof last mentioned is sufficient of itself to defeat the plaintiff's recovery."

To sum up, it is not necessary that the company should have notice, at the time, who is the real sender. Its duty is the same, whether the sender, sendee or principal of the sender is the "real party in interest." It is sufficient if the telegram on its face gives notice that failure to deliver will cause mental suffering or pecuniary loss, and that at the trial the evidence shall show that such damages accrued to the plaintiff, who shall further show that he was the real (not the mere nominal) sender of the dispatch, or that it was sent for his benefit as sendee or beneficiary named in the message. That the undisclosed principal can recover is held, *Harkness v. Tel. Co.*, 73 Iowa, 190, 5 Am. St., 672; *Tel. Co. v. Broesche*, 72 Tex., 654, 13 Am. St., 843.

No case has been cited and it is believed that none can be found which denies the right of the real sender, he who orders the message sent and pays for it, to recover damages for failure to deliver, whether he was known to the company or not, and whether the damages are for money lost or mental suffering, caused by the defendant's negligence. At least seven times this Court has ruled that such principal, being the real party to the contract, can recover. The cases cited in the opinion of *Brown, J.*, of *Morrow v. Tel. Co.*, and the others, (398) which hold that a plaintiff whose name is not mentioned in the message cannot recover, refer to *beneficiaries* of the message, and are in exact accord with what is said in this dissent. Those decisions do not disqualify the real party to the contract, the principal who paid for and sent the message, and whose agent signed it. This view is sustained by the text and cases cited in Jones Telegraphs, sec. 469.

Tel. Co. v. Broesche, 72 Tex., 654, holds that it is immaterial that the

telegraph company is not informed by the signer of the message that it is sent in behalf of and paid for by an undisclosed principal. The company is liable to the latter for any mental anguish caused by its negligence.

Cited: *Holler v. Tel. Co.*, 149 N. C., 339, 345; *Peanut Co. v. R. R.*, 155 N. C., 155; *Thomason v. Hackney*, 159 N. C., 301.

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KIMBERLY v. HOWLAND.

(Filed 18 December, 1906.)

Negligence—Issues—Blasting—Dynamite—Evidence—Fright, Injuries Caused By—Wrecked Nervous System—Husband and Wife—Injury to Wife—Loss of Society—Right of Action of Husband.

1. Where the issues submitted presented every phase of the case, and are such as arise upon the pleadings, and are a sufficient basis for the judgment rendered, and the defendant was given the opportunity to present every defense he had, his exception to the issues submitted is without merit.
2. In an action for an injury from an alleged negligent blasting, where plaintiff's evidence tends to prove that defendant was blasting rock with dynamite on the outskirts of the city about 100 yards from a street and 175 yards from plaintiff's residence, and in close proximity to other houses, and that a rock weighing 20 pounds, from one of the blasts, crashed through plaintiff's residence; that defendant's foreman was not an expert blaster, and was absent a part of the time; that his assistants had but little experience; that the blast was fired off without being properly smothered; that smothering is a safe method usually employed in such operations, and had it been properly done on this occasion the injury could not have well resulted: *Held*, that this evidence of negligence was amply sufficient to have been submitted to the jury.
3. While the defendant did not know at the time he fired the blast that the *feme* plaintiff was lying in bed at her home in a pregnant condition, and could not foresee the exact consequences of his act or the form of injury inflicted, he ought in the exercise of ordinary care to have known that he was subjecting plaintiff and family to danger, and to have taken proper precautions to guard against it.
4. Mere fright, unaccompanied or followed by physical injury, cannot be considered as an element of damage; but where the fright occasions physical injury not contemporaneous with it, but directly traceable to it, a right of action for such injury, resulting from a negligent act, arises.
5. Where the plaintiff's evidence shows that the wife was lying on her bed heavy with child at the moment the rock crushed through the roof of her home, and though it did not strike her, it greatly shocked her nervous system, and nearly caused a miscarriage, and that she has never recovered from the effects of it: *Held*, that she has a right of action for the physical injury sustained—a wrecked nervous system—resulting from negligence, whether willful or otherwise.

6. Where the injury to the wife is of such a character that the husband is deprived of the society or services of his wife, he may recover therefor, and may sue in his own name; and if the injuries are permanent he can recover such sum as will be a fair compensation for the future diminished capacity for labor on the part of the wife.

ACTION by T. M. Kimberly and wife against R. S. Howland, heard by *W. R. Allen, J.*, and a jury, at the June Term, 1906, of BUNCOMBE.

The plaintiffs brought two distinct actions for an injury to the *feme* plaintiff by reason of the negligence of the defendant in conducting certain blasting operations. The husband sued for the loss of his wife's services. The two actions were consolidated and tried together upon the following issues:

1. Was the defendant negligent, as alleged? Ans. Yes.

2. If so, was the plaintiff Janie Kimberly injured thereby? Ans. Yes. (400)

3. What damage, if any, is plaintiff Janie Kimberly entitled to recover? Ans. $3,500.

4. What damage, if any, is plaintiff T. M. Kimberly entitled to recover? Ans. $700.

From the judgment rendered, defendant appealed.

Thomas A. Jones for the plaintiffs.

Merrimon & Merrimon for the defendant.

BROWN, J. The defendant excepted to the issues submitted by the Court and tendered the following: 1. Were the injuries alleged in the complaint the immediate, natural and necessary consequences of the alleged blasting? 2. Were the alleged injuries to the plaintiff such as might naturally and probably occur from the alleged negligence, and were they such as should have been in contemplation of the defendant with reasonable certainty? 3. Was the alleged physical injury the natural and proximate result of the alleged fright?

The issues submitted by the Court presented every phase of the case and are such as arise upon the pleadings, and are approved by precedent as appropriate in such cases. The defendant was given the opportunity to present every defense he had and every proposition of law and fact embraced in the issues tendered by him. Not only was he given a fair opportunity to present his views of the law and facts, but the record shows that he did so present them. The issues submitted are also a sufficient basis for the judgment rendered. *Wright v. Cotten,* 140 N. C., 1; *Wilson v. Cotton Mills,* 140 N. C., 52.

The chief contention made by the learned counsel for the defendant in his argument is that in no view of the evidence can either plaintiff

recover, and, therefore, the motion to nonsuit should have been
(401) sustained. As the right to recover anything on the part of the husband is dependent upon the liability of the defendant to the wife, we will consider her case first.

It is contended: 1. That the evidence discloses no negligent act. 2. That the defendant's agents could not have reasonably foreseen the consequences of their acts. 3. That the injury complained of by the wife was the result of fright only, for which no recovery can be had.

The plaintiffs offered evidence tending to prove that defendant was blasting rock with dynamite on the outskirts of the city of Asheville about 100 yards from Charlotte Street and 175 yards from plaintiff's residence, and in close proximity to other houses. A rock from one of the blasts, weighing about 20 pounds, crashed through a portion of plaintiffs' residence. It was further in evidence that defendant's foreman was not an expert blaster, and that a part of the time the blasting was going on he was absent, and that his assistants had but little experience. It was in evidence that the blasts were fired off without being properly "smothered," and that "smothering" is a safe method usually employed in such operations, and that had it been properly done on this occasion the injury to plaintiffs' residence could not well have resulted.

We think the evidence of negligence amply sufficient to have been submitted to the jury. *Blackwell v. R. R.*, 111 N. C., 151. We think, furthermore, that a man of ordinary prudence should have foreseen the probable consequences of blasting with dynamite in such a neighborhood without properly smothering the blast. Persons using such an inflammable and powerful instrumentality as dynamite are charged with knowledge of its probable consequences which they could by reas-
(402) onable diligence have acquired. The defendant knew he was blasting in a populous neighborhood and that plaintiff's dwelling was nearby. If the evidence offered by plaintiff is to be believed, the workmen were unskilful and the blasts deficiently smothered so as to fail to properly confine their effect. It is true defendant did not know at the time he fired the blast that the *femè* plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwelling-house and that in well-regulated families such conditions occasionally exist. While the defendant could not foresee the exact consequences of his act, he ought in the exercise of ordinary care to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it. *Gates v. Latta*, 117 N. C., 189; Watson on Damages, sec. 4; 19 Cyc., 7, and cases cited; *Blackwell v. R. R., supra.*

The authorities seem to agree that if the tort is wilful and not merely negligent, the wrong-doer is liable for such physical injuries as may

proximately result, whether he could have foreseen them or not. We do not base our decision upon any evidence of a wilful wrong, for there is none. The defendant was engaged in a lawful act, and if prosecuted with due care he would not be liable; and due care means in a case of this sort a high degree of care. We bear in mind the distinction between wilful wrong-doing and those consequences flowing from simple negligence, so clearly stated by *Mr. Justice Walker* in *Drum v. Miller,* 135 N. C., 208: "In the one case he is presumed to intend the consequences of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, *in form,* foreseen."

We, therefore, conclude that, while there is no evidence of a wilful wrong, the defendant should have reasonably fore- (403) seen the result of his negligence. No human being could foresee the exact form of the injury inflicted, but ordinary prudence could foresee that there was danger to plaintiffs and their household unless the blast was securely confined.

It has been argued in this case by defendant's counsel with much earnestness and ability, backed by most respectable authority, that the *feme* plaintiff's injuries, if she sustained any, were the result of fright without any contemporaneous physical injury, and that she cannot recover for them. This brings us to the consideration of a question concerning which there is much conflict among the authorities. We will not undertake to either reconcile or review them. All the courts agree that mere fright, unaccompanied or followed by physical injury, cannot be considered as an element of damage. In a very exhaustive note by Judge Freeman to *R. R. v. Hayter,* 77 Am. St., 860, all the authorities are collected. But where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided. The testimony offered in behalf of the plaintiffs tends to prove that the wife was lying on her bed heavy with child at the moment the rock crashed through the roof; that although it did not strike her, it greatly shocked her nervous system and nearly caused a miscarriage, and that she has never recovered from the effects of it. If this testimony is believed, the injury to the wife was a physical injury resulting from shock and fright and directly traceable to it. There is much conflict of evidence, but plaintiffs' testimony tends to prove that had not the rock crashed through the roof she would not have endured the nervous physical pain and suffering which has followed. The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when "out (404)

of tune" cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter. A recent writer on the subject trenchantly says: "To deny recovery against one whose wilful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent indeed if it shall be entitled to respect." Case and Comment, August, 1906. A text-writer of repute says: "The preferable rule on this subject is, in our opinion, that if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries resulting directly from mental disturbance, there should be a recovery for the anguish of mind and its consequent physical loss, irrespective of contemporaneous bodily hurt." Watson on Damages for Personal Injuries, sec. 405. We think the able Judge who tried this case in the Court below clearly stated the law, as we administer it, when he said: "While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this issue. There must be an injury, as explained to you, and this injury must have been the natural and direct result of the negligent act of the defendant and one (405) which should have been foreseen by the defendant by the exercise of ordinary care." *Watkins v. Mfg. Co.*, 131 N. C., 537, and cases cited; *Bell v. R. R.*, L. R., 26 Ir.; *Purcell v. Railway*, 48 Minn., 134.

It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name. 15 A. & E. (2 Ed.), 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the Court so charged the jury and directed them to allow nothing on that account. His Honor also correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife, and that the injury

inflicted was of such a character as to deprive the husband of her society, services, aid and comfort. The Court further charged that if the injuries are permanent the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction we think is correct and supported by authority. 6 Thompson Negligence, secs. 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the Judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor under all the circumstances of the case.

We have carefully examined all the exceptions in the record, although we comment only on such as we think proper. The (406) case appears to us to have been well and fairly tried, and we find no reversible error in any of the rulings or instructions of the Court.

No Error.

Cited: *Settle v. R. R.*, 150 N. C., 644; *Hunter v. R. R.*, 152 N. C., 689; *Roberts v. Baldwin*, 155 N. C., 281; *May v. Tel. Co.*, 157 N. C., 422; *Arthur v. Henry, Ib.*, 440; *Garrison v. Machine Co.*, 159 N. C., 288; *Anderson v. R. R.*, 161 N. C., 466; *Hinton v. Hall*, 166 N. C., 481.

GREEN v. GREEN.

(Filed 18 December, 1906).

Divorce—Alimony—Contempt—Appeal—Former Decision.

1. Where plaintiff obtained a judgment of divorce from bed and board against defendant, and the defendant was ordered to convey a one-fourth interest in a certain tract of land to a trustee for the use and benefit of plaintiff or pay into the Clerk's office $250 for the same purpose, the land to be leased by the trustee or sold and the proceeds applied to the support of plaintiff, the execution of a quit-claim deed by defendant to the trustee was not a compliance with the order, where it was afterwards discovered that defendant had, prior to the judgment of separation, conveyed all of his interest in the land to his son; and an order adjudging him in contempt and committing him to jail until he had complied with the order of alimony was proper, the Court having found that he was fully able to comply.
2. Where the defendant was adjudged in contempt and the ruling was affirmed on appeal, and upon the presentation of the certificate of this Court, the Court below affirmed the former order in every particular and directed the same to be executed, the defendant cannot, by a second appeal, review the former decree of this Court.

GREEN *v.* GREEN.

ACTION by Maggie V. Green against John A. Green, heard by *McNeill, J.*, and a jury, at the February term, 1906, of JACKSON.

This is an attachment for contempt for failing to comply with an order of the Court for alimony. The *feme* plaintiff obtained a judgment of divorce from bed and board against the defendant at May Term, 1904, of the Superior Court, when *Judge Jones*, in the judg-
(407) ment of separation, after finding the necessary facts, ordered that the defendant convey a one-fourth interest in a certain tract of land to V. F. Brown in trust for the use and benefit of the plaintiff and her child or pay into the Clerk's office two hundred and fifty dollars for the same purpose, the land to be leased by the trustee and the rents applied to the support and maintenance of the plaintiff and her child, or that it be sold and the proceeds applied in like manner. The defendant executed a quit-claim deed to the trustee for the land. It was afterwards discovered that he had conveyed the land to his son in October, 1900. The trustee demanded possession of the defendant and his son, who refused to let him into possession, the defendant at the time denying that he owned any interest in the land and his son asserting sole ownership in himself.

At March Term, 1905, *Judge Shaw* issued a rule, requiring the defendant to show cause why he should not be attached for contempt for failing to comply with the order of *Judge Jones*. The hearing of this rule was continued for the defendant to answer, but he has never answered the same. *Judge Shaw* found as a fact that the defendant had not in any way complied with the said order, although he was fully able to do so, and especially that he could pay the two hundred and fifty dollars, and that he had wilfully and contemptuously failed to do so. He thereupon adjudged the defendant in contempt of the Court for refusing to obey its order, and further adjudged that he be imprisoned in the county jail until he had complied with the same. The defendant appealed, and at Spring Term, 1906, of this Court the order of *Judge Shaw* was affirmed (*per curiam*), 140 N. C., 651.

At May Term, 1906, the matter came on to be heard before *Judge McNeill* upon the certificate of this Court and the motion of the defendants to have satisfaction of *Judge Jones'* order entered of record. *Judge McNeill*, upon a review of the orders and facts in the case, held that the defendant had not complied with the order of *Judge*
(408) *Jones*, and denied his motion. He thereupon affirmed the order of *Judge Shaw* and directed that it be executed. It appeared that the defendant had complied with the order of *Judge Jones* in all respects except as to that part of it relating to the execution of the deed or the payment of the money in lieu thereof.

The defendant excepted to *Judge McNeill's* order, and appealed.

Walter E. Moore and *Shepherd & Shepherd* for the plaintiff.
W. T. Crawford and *F. E. Alley* for the defendant.

WALKER, J., after stating the case: The only contention made in this Court by the defendant's counsel was that he fully complied with the order of *Judge Jones* when he executed the deed to the trustee therein appointed. In support of this position, it was argued that *Judge Jones* necessarily found as a fact that the deed from the defendant to his son was fraudulent and void, because he recited in his order that it appeared the defendant owned a one-half interest in the land. We do not think that any such inference can reasonably be deduced from that recital, when it is considered with the context of the order, as it should be. It is clear that the recital was based upon the fact that on 10 March, 1899, a deed for the one-half interest had been made by John N. Hunter to the defendant (the other half having been conveyed to his son by the same deed), and the admission of the parties that the defendant was, at the time the order was made, the owner of the one-half interest acquired by the deed. But, evidently, *Judge Jones* did not know of the subsequent deed of the father to the son, or he would not have made such a recital, as the defendant's representation that he owned an interest in the land was not true. It would appear that the defendant was concealing the existence of this deed from the Court and from his wife, and attempted to commit a fraud in doing so. He knew that he (409) had made the deed to his son, and he must have known that the Court and his wife were ignorant of the fact. The recitals in the order of *Judge Jones* all tend conclusively to show it. But however this may be, whether he was guilty of an intentional or fraudulent concealment or not, we do not think he has complied with the order. He was required to convey a one-fourth interest to the trustee, whereas it turned out that, when he made the deed, he had no such interest to convey. He had, before that time, conveyed all of his interest to his son. Perhaps this was his reason for making the deed in the form of a quit-claim. The law and the Court intended not merely a colorable, but a real and substantial compliance with the order. We would mock at this plaintiff's calamity and turn her away empty-handed, when she is entitled to relief, should we hold that there had been any genuine attempt by the defendant to comply with the order. We have found no evidence in this record of any fraud committed by the defendant when he conveyed to his son; and besides, if his deed was fraudulent and void as to the plaintiff, the Court did not intend that, under its order, she was not to receive the use and benefit of the land, but instead get a lawsuit. Besides, should the defendant be permitted to plead his own fraud, in order to delay and vex the plaintiff, whose claim for alimony is at least meritorious? The pur-

pose was that a *good* title to the one-fourth interest should be conveyed to the trustee; for how could he well lease the land or sell it without such a title? The Court assumed that the defendant had a valid title, for otherwise it would simply have ordered payment of the money. No other conclusion can be legitimately drawn from the facts.

But *Judge Shaw* had adjudged the defendant in contempt and ordered him to stand committed until he had complied with the
(410) order. His ruling was affirmed by this Court on appeal. It has not been modified by *Judge McNeill,* but on the contrary affirmed in every particular, and the said order was directed by him to be executed. The defendant cannot, by a second appeal, review the former decree of this Court. *Pretzfelder v. Ins. Co.,* 123 N. C., 164.

Judge McNeill found as a fact that the defendant had denied that he had any title to the land or any interest therein, when the trustee demanded possession of him and his son. How, in the face of this finding, can he now ask to have it entered of record that he had complied with the order of the Court? As he was not able to make the requisite title, he should have paid the money into Court according to the terms of the orders of *Judge Shaw* and *Judge McNeill.* This is what they clearly meant should be done, unless he had otherwise complied with the order by securing a good title to the one-fourth interest, and conveying that interest to the trustee. Not having done so and not proposing to do so, he was manifestly if not flagrantly disobeying the order, and was therefore acting in contempt of the authority of the Court, for which conduct he was properly adjudged to be committed. *Pain v. Pain,* 80 N. C., 325.

No Error.

Cited: Holland v. R. R., ante, 437; *Roberts v. Baldwin,* 155 N. C., 280.

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(411)

McAFEE v. GREEN.

(Filed 18 December, 1906).

Deed to Trustee—Surplusage—Trusts and Trustees—Substituted Trustee—Contingent Remainders—Private Sale.

1. Where land was conveyed to a grantee "as trustee" with *habendum* to "his own use and behoof," and no other use is declared than such as would attach by operation of law, the deed reciting the payment of the purchase-money by the grantee, the word "trustee" is surplusage, and a deed by the grantee, not signed as trustee, conveyed the legal and equitable title in fee, and upon his death there was nothing left in him to vest in his heirs.

2. Under Rev., sec. 1037, where a trustee dies, all of the parties in interest may join in a petition to the Superior Court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee—so far as it is competent for the Court to confer them.

3. Under Rev., sec. 1590, upon the application of all the parties in interest, the trustee representing contingent remaindermen, the Court can direct a sale of the land, and the Court has power to order the sale to be made privately, where it appears to be promotive of the interests of the parties.

CONTROVERSY without action, by Cora McAfee and others against Natt Green and his wife, heard by *O. H. Allen, J.*, at the September Term, 1906, of BUNCOMBE.

This was a controversy submitted without action upon the following agreed facts: On 6 May, 1889, C. E. Graham, being the owner of the land in controversy, together with his wife, executed deeds of conveyance therefor to W. L. McAfee as trustee. The *habendum* of said deed is in the following words: "To have and to hold the above-described land and premises, with all the appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns, to the only use and behoof of him and his said heirs and assigns forever." No other or further trusts were de- (412) clared in said deeds.

On 26 September, 1889, the said W. L. McAfee, trustee, and his wife, Cornelia McAfee, executed to Platoff Zane a deed conveying said real estate in fee simple, no trust being declared in said deed. That on 6 December, 1889, the said Platoff Zane, describing himself as trustee, executed a deed to the said W. L. McAfee, trustee, for the said real estate, upon the following trust, to wit:

"But this conveyance is made in trust for the sole and separate use of the said Cornelia McAfee during her natural life, free from the control and disposal of her husband, the said William L. McAfee, except as herein provided, and so that the said property shall not be subject to the debts and liabilities of her said husband; and if the said William L. McAfee shall be living at the time of the death of the said Cornelia, then after her death, in trust for the said William L. McAfee during his natural life; and from and after the death of them, the said William and Cornelia, in trust for such of the daughters of the said Cornelia and William, namely, Blanche, the widow of Thomas C. Acheson, Mary, the widow of Sylvester M. Hamilton, and Cora McAfee, as shall then be living, and the children of such of them as might then be dead, that is to say, to each of them the said Blanche, Mary and Cora, who should be living at the time of the death of the survivor of them, the said William and Cornelia, an equal undivided share during her natural life, for her sole and separate use, free from the control and disposal of and not to be

subject to the debts or liabilities of any future husband; but if at the time of the death of the survivor of them, the said William and Cornelia, or either of them, the said Blanche, Mary and Cora, should be dead, leaving a child or children then living, such child or children shall take and have absolutely in fee simple the same share which his, her or their mother would if then living have been entitled to as
(413) aforesaid for her natural life, and the share to which either of them, the said Blanche, Mary and Cora, may become entitled to as aforesaid, for her natural life, shall upon her death vest absolutely and in fee simple in her child or children living at the time of her death, or if there should be no such child then living, in her heirs at law."

Power was conferred upon said trustee to sell and convey the property and hold the proceeds thereof upon the same trusts therein set out.

The said W. L. McAfee died during the year 1890. That thereafter the said Cornelia McAfee, Cora, Blanche Acheson, Cornelia Acheson, Maude Hamilton, Blanche Hamilton, and Mrs. Mary Hamilton duly filed their petition before the Clerk of the Superior Court of Buncombe County for the purpose of having a trustee appointed in lieu of the said W. L. McAfee. That pursuant thereto, the said Clerk made a decree appointing the said Cornelia McAfee trustee in lieu of the said William L. McAfee, deceased, vesting in her the title to said land, upon the same trust declared in said deed. The said Cornelia thereafter died, and the said Blanche Acheson died, leaving as her only children and heirs at law, Blanche Acheson and Cornelia Acheson. The said Mary Hamilton thereafter died, leaving Blanche Hamilton and Maude Hamilton as her only heirs at law, all of whom are more than twenty-one years of age. The plaintiff Cora McAfee has no children, and is the only living child of W. L. and Cornelia McAfee, and, in default of issue, her said nieces would be her heirs at law.

The owners of said property have been offered by defendants Natt Green and wife the sum of $35,000 therefor and have agreed to sell and convey the same to said parties for said sum, which they regard as a fair price for said property. It appears that the said parties own other real estate in the city of Asheville, subject to the same limita-
(414) tions, which is unimproved and yielding no income. That if the same were improved by the erection of buildings thereon, it would yield to the said parties an income.

In a proceeding instituted by the said Cora against the other parties, owners of said land, in the Superior Court of Buncombe County, an order was made at September Term, 1906, appointing H. T. Collins guardian *ad litem* to represent such children as might be born to the said Cora McAfee and after her death be entitled to said interest in the

property in remainder. At the said term of said Court the said H. T. Collins was also appointed trustee, with power and direction to hold said title to said land upon the same trust set out in the said deed, bearing date 6 December, 1889. He was further authorized and empowered to discharge the trust set forth in said deed, Cora McAfee being the owner of the one-third undivided interest in said property. H. T. Collins, guardian and trustee, duly filed answer in said proceeding admitting the facts hereinbefore set out.

At the said term of said Court an order was made in which George H. Wright, Esq., was appointed referee with direction to inquire into the facts concerning said offer to sell said land and take testimony thereupon and to report whether, upon such facts, the interests of the said parties, especially the said Cora McAfee, would be enhanced by the sale of the property and whether or not the price offered therefor was just and fair, etc. Thereafter the said referee made his report to the Court, from which it appeared that he had taken testimony in respect to the matters submitted to him, and that he found the facts, as hereinbefore set forth, to be true, and further that the interest of the parties would be materially promoted by a sale of the property and the reinvestment of the proceeds derived therefrom. Thereupon the said Court made a decree reciting the facts hereinbefore set forth, in which it was "ordered and adjudged that H. T. Collins, of Asheville, N. C., (415) be and he is hereby appointed commissioner of this Court, and is ordered and directed, as such commissioner, to sell and convey immediately at private sale to Natt Green and wife, Mary R. Green, of Asheville, N. C., said one undivided one-third interest in said property, at the price of eleven thousand, six hundred and sixty-six and two-thirds dollars ($11,666.67); and he is further ordered and directed, as such commissioner, to execute and deliver, upon the payment of such purchase-money, a deed of conveyance in due form, conveying to said Natt Green and wife, Mary R. Green, their heirs and assigns, said undivided one-third interest in said land and property." He was further ordered, after paying the costs of the proceedings, to hold the remainder of the proceeds of said sale, one undivided one-third interest of the said Cora McAfee, as said commissioner, until further order of the Court in the premises, etc. It further appeared that all the other parties, owners of said land, to wit, Blanche Acheson, Cornelia Acheson, Blanche Hamilton, and Maude Hamilton, had executed a deed, conveying their two-thirds interest in said property to the defendants Natt Green and wife. It was thereupon adjudged and decreed by the Court, that upon the payment of the said $35,000, purchase-money as aforesaid, to the said parties, deeds therefor, as set out in the record, be delivered to the defendants, Green and wife. To this judgment, the defendants excepted and appealed.

Julius C. Martin for the plaintiffs.
Wells & Swain for the defendants.

CONNOR, J., after stating the case: The defendants' counsel except to the judgment herein, for that:

1. The deed from McAfee to Zane is not signed as trustee. The land is conveyed by Graham to McAfee "as trustee" with *habendum* (416) to "his own use and behoof." No other use is declared than such as would attach by operation of law, the deed reciting the payment of the purchase-money by the grantee. The word "trustee" is therefore surplusage not affecting the legal title conveyed by the operative words of the deed.

2. That upon his death, the heirs of the trustee hold the legal title. This is true when the legal and equitable estates are separated and the trustee does not convey the legal title. *Clayton v. Rose,* 87 N. C., 106, and many other cases in our Reports, the last of which is *Cameron v. Hicks,* 141 N. C., 21. Hence, the legal and equitable estates were in McAfee in fee; when he conveyed to Zane all of the estate which he had, there was nothing left in him to vest in his heirs.

3. The trustee may be appointed by the Court, upon death of original trustee; hence, deed from substituted trustee is necessary to perfect the title. As we have seen, the legal title vested in Zane by deed from McAfee, and by Zane's deed to McAfee of 6 December, 1889, it revested in him upon the trusts therein declared. Upon the death of McAfee, the legal title descended to his heirs at law, subject to the trusts declared, to wit: for Mrs. McAfee for life, remainder for themselves, subject to the limitations contained in the deed from Zane to McAfee. As Mrs. McAfee, upon the death of her husband, became discovert, but for the contingent remainder, the legal title, by operation of the statute of uses, would have vested in her for life and in her daughters in fee, thus combining both estates and making a perfect legal title.

The parties, we presume, being so advised, filed their petition in the Superior Court, pursuant to section 1037, Rev., to have a new trustee appointed. All of the parties in interest joined in the petition, and upon the passing of the decree Mrs. Cornelia McAfee became the trustee, holding the legal title upon the same trusts as the original trustee, so far as it was competent for the Court to confer them. It is (417) doubtful whether the power to sell and invest the proceeds conferred upon W. L. McAfee, being one of personal confidence, involving the exercise of discretion, vested in the substituted trustee. *Young v. Young,* 97 N. C., 132; *Baker v. McAden,* 118 N. C., 740. This is not material here, because all parties in interest joined in requesting the appointment of a new trustee and no attempt is being made by the

trustee to execute the power of sale conferred upon the original trustee. It is not very material whether the decree of the Clerk, substituting the new trustee, be erroneous or not, because no action was taken by Mrs. Cornelia McAfee, as trustee, affecting the title, and upon her death the legal title, if divested by the decree, immediately revested in the same persons as her heirs at law. Upon the death of Mrs. Acheson and Mrs. Hamilton, two-thirds undivided interest vested in fee in their daughters, merging the legal and equitable estates, thus putting an end to all limitations upon their two-thirds interest. Assuming, as the parties have done, that upon the death of Mrs. Cornelia McAfee, the new trustee, that the legal title to one-third undivided interest descended to her heirs at law, her grandchildren and Cora McAfee in trust for said Cora in fee, subject to be divested by birth and survival of issue, it was clearly competent upon the application of all parties in interest, to appoint a new trustee to hold the legal title to preserve contingent remainders. Having done so, we can see no reason why, independently of the Statute of 1903, Rev., 1590, the Court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, could not direct a sale of the land. This was held in *Overman v. Tate,* 114 N. C., 571, and the authorities reviewed in *Springs v. Scott,* 132 N. C., 548. To prevent any possible doubt of the existence of the power and to provide for its exercise and protect the interest of all parties in remainder, whether in *esse* or not, the Act of 1903, being section (418) 1590, Rev., was passed: "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the Superior Court at term-time, which proceeding shall be conducted in the manner pointed out in this section." The manner of procedure is specifically pointed out.

The facts set out in the record bring this case clearly within the language and purpose of the statute as construed in *Hodges v. Lipscomb,* 133 N. C., 199. The purpose of the statute was clearly pointed out by the *Chief Justice* in his well-considered opinion in that case, and we can add nothing of value thereto. In *Smith v. Gudger,* 133 N. C., 627, we again construed the statute and disposed of the same exception made here, saying: "To the suggestion in the demurrer that all persons who might, in any contingency, have an interest therein are not made parties, it is sufficient to say that the Act of 1903 was passed expressly to meet the difficulty therein suggested." *Anderson v. Wilkins,* 142 N. C., 154. The statute is so manifestly in accordance with a sound public policy, as well as the promotion of private right and interests, that we have not hesitated to give it such a construction as effectuates the inten-

tion of the Legislature. In a country such as ours the highest public and private interests are promoted by removing obstructions to alienation and giving security to titles. To the exception that the sale is directed to be made privately, it is sufficient to cite *Rowland v. Thompson,* 73 N. C., 504; *Barcello v. Hapgood,* 118 N. C., 712. The power of the Court to order the sale to be made privately, when it appears to be promotive of the interests of the parties, has been too frequently adjudged by this Court to be considered an open question. The proceeding has been conducted with careful regard to the statute and the
(419) course and practice of the Court.

Upon a careful consideration of the entire record and the exceptions of defendants, we find no error. The judgment must be

Affirmed.

Cited: Smith v. Miller, 151 N. C., 627; *Thompson v. Rospigliosi,* 162 N. C., 153; *Bullock v. Oil Co.,* 165 N. C., 67, 68.

STANFORD v. GROCERY COMPANY.

(Filed 18 December, 1906.)

Malicious Prosecution—Abuse of Legal Process, Elements of—Issues—Probable Cause—Malice—Declarations of Agent—Knowledge of Agent—Imputed Knowledge—Indictment—Party Bound Over—Prima Facie Case—Damages: Compensatory, Punitive—Attorney's Fee.

1. In an action for malicious prosecution, it must be shown that an action or proceeding has been instituted without probable cause, from malice, and that damage has been sustained, and that the proceeding has terminated.
2. In an action for malicious abuse of process, there must be shown (1) an ulterior purpose, and (2) some act done in the use of the process not proper in the regular prosecution of the case; but it is not necessary to show a want of probable cause, nor that the proceeding has terminated.
3. Where the complaint endeavors to set up two causes of action—one for malicious prosecution and the other for malicious abuse of process—but the evidence shows that the plaintiff's entire grievance arises from a criminal prosecution for embezzlement, in which he was arrested and bound over to Court, and there is no evidence that the defendant did or attempted to do any act in the criminal proceeding which was contrary to the orderly and regular prosecution of the case, an issue addressed to the cause of action for malicious abuse of process should not be submitted.
4. In an action for malicious prosecution in causing the arrest of plaintiff on a charge of embezzling goods which defendant claimed had been consigned and plaintiff claimed had been sold outright, the state-
(420) ments made by defendant's salesman who affected the sale and just after the sale, to defendant's manager, who swore out the warrant, as to the nature of the trade under which the goods were passed

to plaintiff, were competent both as corroborative of the salesman and substantive testimony on the question whether the defendant's manager, in taking out the prosecution, had probable cause for so doing and whether he acted in good faith.

5. The principle that knowledge of the agent will be imputed to the principle does not apply where the question is as to the responsibility for instituting a criminal prosecution, dependent in part on what the principal understood the trade to be which the agent had made, from information reasonably relied on by him, nor does the principle of imputed knowledge apply when it would be against the interest of the agent to make the disclosure.

6. In an action for malicious prosecution, where the wrong charged against the defendant was in taking out a warant and causing plaintiff's arrest, the declarations of the defendant made to the justice of the peace at the time the warrant was procured are admissible as substantive testimony as part of the *res gestæ*.

7. In an action for malicious prosecution, where a committing magistrate has bound over a party, or a grand jury has returned a true bill against him, such action *prima facie* makes out a case of probable cause, and the jury should be directed to consider the evidence as affected by this principle.

8. In an action for malicious prosecution, an instruction that if the jury find that the defendant sold the goods straight-out to the plaintiff, and that the defendant had him arrested for the purpose of collecting the debt, they would answer the issue of malice in favor of the plaintiff, because that would be a wrongful act done intentionally and without just cause and excuse, was erroneous, as it was for the jury to determine and not for the Court whether such an act was committed when the defendant caused the plaintiff's arrest under the evidence in this case.

9. In an action for malicious prosecution, on the question of damages the Court properly told the jury they could allow for a reasonable attorney's fee paid by plaintiff in the case in which the prosecution was had.

10. In an action for malicious prosecution, punitive or exemplary damages may be awarded by the jury, but the right to such damages does not attach, as a conclusion of law, because the jury have found the issue of malice against the defendant, but the jury must find that the wrongful act was done from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or op- (421) pression, or in a manner which showed a reckless and wanton disregard of the plaintiff's rights.

11. In an action for malicious prosecution, the term "malice," in reference to the question of damages, means malice in the sense of personal ill-will, while in respect to the issue fixing responsibility it need not necessarily be personal ill-will, but may be said to exist where there has been a wrongful act knowingly and intentionally done plaintiff without just cause or excuse, and it may be inferred from the absence of probable cause.

ACTION by W. A. Stanford against A. F. Messick Grocery Company, heard by *Peebles, J.*, and a jury, at the February Term, 1906, of ROCKINGHAM.

There was evidence tending to show that in November, 1900, the plaintiff became indebted to the defendant in about $97.29 for groceries

sold and delivered to the plaintiff, and that such amount was still due and owing; that the transaction was conducted by R. E. Steele, who was at that time salesman for defendant company, and in the matter acted as its agent; that plaintiff having failed to pay, the defendant caused the arrest and trial of the plaintiff on a charge of embezzlement; that on the preliminary trial before a justice of the peace, in February, 1901, the plaintiff was bound over to Court, three magistrates sitting at the hearing; and at the following term of the Superior Court of Forsyth County a true bill was found by the grand jury against the plaintiff. At May Term, 1901, the plaintiff was acquitted in a trial of the cause before a petit jury, and the plaintiff then commenced the present action for malicious prosecution and malicious abuse of process.

The plaintiff claimed and offered evidence tending to show that there was an absolute sale of the goods and that the arrest was wrongful, malicious, without probable cause, etc., and because it appeared to be the only available method of forcing the collection of the claim (422) from the plaintiff, whom the defendant knew to be insolvent and otherwise protected by the homestead exemption laws of the State. There was evidence of the defendant tending to show that the goods were placed with the plaintiff on consignment and the plaintiff was guilty of embezzlement in wilfully failing to settle the claim or account for the proceeds of the sale of goods.

The following issues were submitted and responded to by the jury:

1. Did the defendant cause the arrest and prosecution of the plaintiff as alleged? Yes.

2. If so, was the arrest without probable cause? Yes.

3. If so, was the arrest malicious? Yes.

4. Did the defendant by its agent cause the plaintiff to be arrested and prosecuted for the unlawful purpose of forcing him to pay the debt due defendant by plaintiff, and not for the purpose of vindicating the law against embezzlement? Yes.

5. What amount, if any, is the plaintiff entitled to recover of the defendant? $2,000.

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

Lindsay Patterson and *C. O. McMichael* for the plaintiff.

Manly & Hendren and *L. M. Swink* for the defendant.

HOKE, J., after stating the case: In this suit, the plaintiff seeks to recover on two causes of action, to wit, malicious prosecution and malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice and without probable cause, but only its

regular execution is contemplated. There is malicious abuse of process where a party under process legally and properly issued employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect. *Wurmser v. Stone,* 1 Kan. App., cited in 1 Cooley on Torts, 3 Ed., 356; *Emery v. Ginnan,* 24 Ill. App., 65; *Lauzon* (423) *v. Charroux,* 18 R. I., 467.

For recovery on malicious prosecution, as stated in *R. R. v. Hardware Co., ante,* 54, there must be shown that an action or proceeding has been instituted, without probable cause, from malice, and that damage has been sustained, and that the proceeding has been terminated by the discharge or acquittal of the accused. Cooley, *supra,* 320; Jaggard on Torts, 349.

In actions for malicious abuse of process, there must be shown (1) an ulterior purpose, and (2) some act done in the use of the process not proper in the regular prosecution of the case. A wilful perversion of the process of the Court to effect some collateral end, and one not within the scope of the action when regularly and properly pursued. Cooley, *supra,* 354, 355. In this last action it is not necessary to show a want of probable cause, nor that the proceeding his terminated.

On the trial below the defendant in apt time excepted to the submission of the fourth issue, which was addressed to the second cause of action, as stated in the complaint, that for abuse of legal process. If it be conceded that this issue may arise on the pleadings, there is no testimony to support it as a separate and distinct cause of action. In any event, its submission is not required, for a full and complete determination of the rights of the parties litigant can be better had without it. Both the allegations and the evidence show that the plaintiff's entire grievance arises, if at all, from the criminal prosecution for embezzlement, in which the plaintiff was arrested and bound over to Court. It is nowhere alleged, certainly there is no evidence to show, that the defendant did or attempted to do any act in this criminal proceeding which was contrary to the orderly and regular prosecution of the case. While the complaint endeavors to set up two causes of action, as a matter of fact the testimony only discloses one—that for ma- (424) licious prosecution—and the allegations purporting to be a second cause of action amount to nothing more than the assertion of a bad motive prompting the first.

If, under the principles governing such actions, the defendant was justified in instituting the criminal prosecution, the plaintiff has no cause of action, either first or second. If he was not, then the plaintiff can recover his entire damages on the first, second, third and fifth issues, and the motive suggested in the fourth issue can be received when properly established, and relevant on the issue as to malice or on the

question of damages. As said in *Plummer v. Gheen,* 10 N. C., 66: "If a man prosecute another for real guilt, however malicious his motives may be, he is not liable in an action for malicious prosecution, nor is he liable if he prosecutes him for apparent guilt arising from circumstances which he himself believes."

The defendant by exceptions duly noted further objects to the ruling of the Court on the statements made by R. E. Steele, the agent who effected the sale, to A. F. Messick, manager of defendant company, as to the nature of the trade under which the goods were passed to the plaintiff (record, p. 39). These statements by Steele to Messick, when he returned from the plaintiff's place of business and just after effecting the deal, were admitted by the Court as corroborative of Steele, but rejected as substantive testimony. We think the ruling was erroneous, and that the evidence was competent for both purposes.

This is not a question simply of what were the terms of the trade, but whether the defendant, in taking out the prosecution, had probable cause for so doing and whether he acted in good faith. What the salesman told Messick of the trade is pertinent to that inquiry, and should be heard by the jury, and given such weight as they may think it deserves. *Swaim v. Stafford,* 26 N. C., 392. If it be suggested (425) that Steele was the defendant's agent, and that knowledge of the agent will be imputed to the principal, the reply is that such knowledge will be so imputed when the question is as to the fixing responsibility for a transaction done in the scope and course of the agency. *Fishblate v. Fidelity Co.,* 140 N. C., 589. But the principle does not apply here, where the question is not as to the terms of the trade, but as to the responsibility for instituting a criminal prosecution, dependent in part on what the defendant understood the trade to be, from information reasonably relied on by him. Furthermore, there is an exception to this rule of imputed knowledge when it would be against the interest of the agent to make the disclosure. If Steele sold the groceries to the plaintiff outright, when his instructions were to sell only on consignment, he would not likely make known such a violation of instructions, and the case would seem to fall under this recognized exception to the principle of imputed knowledge. Tiffany on Agency, 262, 263; *Allen v. R. R.,* 150 Mass., 200.

Again, the statement of the manager made to the justice of the peace at the time the warrant was procured, was excluded as substantive testimony, and this is contrary to our decisions. The actionable wrong charged against the defendant was in taking out the warrant and causing the plaintiff's arrest. This was the act complained of, and the declarations of the manager in taking out the warrant, explaining and characterizing the act, are admissible as part of the *res gestæ. Johnson v.*

Chambers, 32 N. C., 287; *Merrell v. Dudley,* 139 N. C., 59, where *Mr. Justice Brown,* delivering the opinion, said: "Declarations or acts accompanying any act or transaction in controversy and tending to explain or illustrate it are received in evidence as part of the *res gestæ.*"

The defendant also objects to a portion of the Judge's charge, as follows: "The fact that a magistrate binds a man over to (426) Court and a grand jury finds a true bill against him is ordinarily evidence of probable cause for the jury to consider; but that rule does not apply to a case of this sort." It is certainly the general rule, applicable to cases of this character, that when a committing magistrate has bound the party over or a grand jury has found a true bill against him, such action *prima facie* makes out a case of probable cause, and the jury should be directed to consider the evidence as affected by this principle. *Johnston v. Martin,* 7 N. C., 248; *Bostick v. Rutherford,* 11 N. C., 83; *Bell v. Pearcy,* 33 N. C., 233; 19 A. and E., 663, 664. We see no reason why the principle does not apply here.

His Honor, in response to a prayer by the defendant, himself instructed the jury further: "The fact that the justice bound Stanford over to Court, and the grand jury found a true bill against him, establishes, for the purpose of this action, *prima facie* that there was probable cause for the action of the Messick-Grocery Company in swearing out the warrant; and before the jury can answer the second issue 'Yes,' the plaintiff Stanford must overcome this *prima facie* case, and satisfy the jury by the greater weight of evidence that the defendant swore out the warrant without probable cause." This states the doctrine correctly, but is in direct conflict with the portion of the charge excepted to, which is erroneous. The objection, therefore, must be sustained.

The defendant further excepts to the charge of the Court on the third issue—that addressed to the question of malice—as follows: "If the evidence satisfies you by the greater weight thereof that they sold the goods straight-out to Stanford, and that they went there and had him arrested for the purpose of collecting that debt, then the Court charges you that it is your duty to answer the third issue 'Yes,' because that would be a wrongful act done intentionally and without just (427) cause or excuse." Malice within the meaning of this issue does not necessarily mean personal ill-will, and the Court was therefore correct in its intimation that a wrongful act knowingly and intentionally done plaintiff without just cause or excuse, will constitute malice; but whether such an act was committed when the defendant caused the plaintiff's arrest, under the circumstances presented by this evidence, is for the jury to determine, and not for the Court. *Johnson v. Chambers, supra; McGowan v. McGowan,* 122 N. C., 145.

On the question of damages the Court properly told the jury they

could allow for a reasonable attorney's fee, paid by the plaintiff in the case in which the prosecution was had. 1 Sedgwick, sec. 241. And it is also correct doctrine, as stated in the charge, that on a verdict for the plaintiff in malicious prosecution, punitive or exemplary damages may be awarded by the jury. *Kelly v. Traction Co.*, 132 N. C., 368. This right to punitive damages does not attach, however, as a conclusion of law, because the jury have found the issue of malice in such action against a defendant. The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. R. R.*, 94 N. C., 318, such damages are not to be allowed "unless there is an element of fraud, malice, gross negligence, insult or other cause of aggravation in the act which causes the injury." And again, in the concurring opinion in *Ammons v. R. R.*, 140 N. C., 200, it is said: "Such damages are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done wilfully or under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." Attention is also called to this concurring opinion as to what may be properly included in compensatory damages.

(428) The term "malice" here, in reference to the question of damages, unlike its meaning in the issue fixing responsibility, means actual malice in the sense of personal ill-will, and the jury should be instructed that if they find the issue fixing responsibility in favor of the plaintiff, they shall award him compensatory damages, and if they further find that the wrongful act was done from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed a reckless and wanton disregard of the plaintiff's rights, they may, in addition to compensatory, award punitive damages. *Holmes v. R. R., supra; Ammons v. R. R., supra,* concurring opinion; *Bowden v. Bailes,* 101 N. C., 612; *Kelly v. Traction Co., supra;* 1 Joyce Damages, sec. 442, citing numerous authorities; 19 A. and E., 704.

In some of the earlier cases there is decided intimation that in actions which more especially impute malice, in case of recovery by plaintiff, such as slander or malicious prosecution, the right to punitive damages arises necessarily from a verdict for plaintiff; but in those cases, the circumstances, as a rule, did not call for any careful examination of the question, and the Court was not, therefore, advertent to the difference in the significance of the term "malice" when used in respect to damages and when it is used in respect to the issue fixing responsibility. In this last, it need not necessarily be personal ill-will, but, as intimated by his Honor in the charge, it may be said to exist where there has been a wrongful act, knowingly and intentionally done plaintiff without just

cause or excuse, and it may be inferred in actions of this character from the absence of probable cause.

For the errors pointed out the defendant is entitled to a new trial, and it is so ordered.

New Trial.

Cited: *Winslow v. Hardwood Co.,* 147 N. C., 277; *Cox v. R. R.,* 149 N. C., 119; *Downing v. Stone,* 152 N. C., 527; *Warren v. Lumber* Co., 154 N. C., 38; *Hamilton v. Nance,* 159 N. C., 59; *Wilkinson v. Wilkinson, Ib.,* 271; *Wright v. Harris,* 160 N. C., 550, 551; *Roper v. Ins. Co.,* 161 N. C., 157; *Lumber Co. v. Atkinson,* 162 N. C., 305; *Brinkley v. Knight,* 163 N. C., 195; *Gardner v. Ins. Co., Ib.,* 379; *Humphries v. Edwards,* 164 N. C., 156.

(429)

KEEL v. CONSTRUCTION COMPANY.

(Filed 22 December, 1906.)

Building Contracts—Entire—Payable by Installments—Building Destroyed Before Completion—Rights of Parties—Unendorsed Notes as Collateral.

1. Where one contracts with the owner of a lot to furnish all the materials and build and construct a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of the owner, and the contractor, being given the opportunity, refuses to proceed further, he is liable to refund any money which may have been paid him on the contract, and also for damages for its non-performance.
2. If the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder as the particular portion specified is completed; and if the house is destroyed by accident, the employer would be bound to pay the instalment then due, but would not be responsible for any intermediate work and labor and materials.
3. Where the contract to build a completed house is not entire and indivisible, but only a contract to do a part of the work and furnish part of the material, the owner or some independent contractor, having undertaken, or being bound, to do some substantial portion of the work; if the structure is destroyed by fire or other inevitable accident, before completion, in such case the parties are relieved from further performance, and the contractor is ordinarily allowed to recover for what he has done, over and above the amount which may have been paid him.
4. Where a contract for building a house, to be completed by a certain date, provided for the payment of an instalment when the "walls have been erected to the second story," and the instalment was paid, and thereafter the building, before completion, was destroyed by fire without fault on the part of the contractor or owner, the owner is not entitled to recover this instalment, nor any part of it, nor is the contractor entitled to recover the value of the walls left standing.
5. Where a contract for building a house, to be completed by a specified date, provided for the execution by the owner of certain notes and mortgage to mature after the date specified for the completion of the

building, and the notes and mortgages were executed, but the building was accidentally destroyed by fire before its completion, the owner is entitled to have the notes and mortgages in the hands of a bank, without endorsement, as collateral for money advanced the contractor, delivered up and canceled.

(430)

ACTION by X. T. Keel against East Carolina Stone and Construction Company, heard by *Webb, J.*, and a jury, at the August Term, 1906, of WAYNE.

There was evidence tending to show that defendant contracted and agreed to furnish material and build and construct for plaintiff, on a lot owned by plaintiff, in Mount Olive, N. C., a three-story building, at a contract price of $5,950, according to dimensions and stipulations set forth in the contract; said building to be completed on or before 1 August, 1905.

That on 22 August, 1905, when the house was erected to a point where the roof was about half covered, this store-house was accidentally, and without fault on the part of plaintiff or defendant, destroyed by fire.

That plaintiff, described as party of the second part in the contract, agreed to pay for the building, as follows:

"The said party of the second part agrees to pay the said sum of $5,950, as follows: $950 when the walls of said building shall have been erected to the second story; $1,000 when said building shall have been covered; $1,000 on 1 August, 1906; $1,000 on 1 August, 1907; $1,000 on 1 August, 1908, and $1,000 on 1 August, 1909; said last four payments of $1,000 each to be evidenced by four notes, drawing interest from August, 1905, at the rate of 6 per cent per annum, secured by first mortgage on said land and premises hereinbefore referred to. And the said party of the first part hereby stipulates and guarantees that it

(431) will complete the erection as per contract, of said building, on or before 1 August, 1905."

That plaintiff executed and delivered the four notes for $1,000 each in March, 1905, in accordance with the terms of the contract; and when the walls of the building had been erected to the second story, plaintiff paid the defendant the $950 as per stipulation.

That these notes had been deposited by defendant company with the National Bank of Goldsboro as collateral for money advanced by the bank to defendant company, and so held by said bank without endorsement.

That the defendant company had failed and refused to go and complete the building; and the value to plaintiff of the walls left standing on the lot after the fire was $500.

On these facts admitted and established by the verdict of the jury, the Court entered judgment as follows:

"It is thereupon, on motion of counsel for the plaintiff, considered and adjudged by the Court, that the defendants, The East Carolina Stone and Construction Company and the National Bank of Goldsboro, cancel and deliver up the four notes of one thousand dollars each, executed by the said X. T. Keel to the said East Carolina Stone and Construction Company, and the mortgage securing the payment of the same, and that the plaintiff, X. T. Keel, recover of the defendant, The East Carolina Stone and Construction Company, the sum of four hundred and fifty dollars ($450) and the costs of this action, to be taxed by the Clerk.

"It is further considered, ordered and adjudged by the Court, that the restraining order herein be made perpetual."

Both plaintiff and defendant excepted, the defendant alone perfecting his appeal.

Aycock & Daniels and *M. T. Dickinson* for the plaintiff.
Dortch & Barham and *W. C. Munroe* for the defendant.

HOKE, J., after stating the case: When one contracts with the owner of a lot to furnish all the materials and build and construct (432) a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of the owner, and the contractor, being given the opportunity, refuses to proceed further: in such case, he is liable to refund any money which may have been paid him on the contract, and also for damages for its nonperformance. *Brewer v. Tysor,* 48 N. C., 181; *Lawing v. Rintles,* 97 N. C., 350; Beach's Modern Law of Contracts, sec. 232, citing *Thompkins v. Dudly,* 25 N. Y., 272.

And this principle will not be affected by the fact that the money is to be paid by instalments, if the price is entire for a completed building and these instalments are arbitrary and fixed without any regard to the value or any distinctive portion of the work done. *School Trustees v. Barrett,* 27 N. J. Law.

But if the contract is divisible and severable; if the price is not entire for a completed building, but is payable by instalments, these instalments being fixed with regard to the value of the work done, or as certain portions of same are finished: in that event, if the structure be destroyed by inevitable accident, "the builder is entitled to recover for the instalments which have been fully earned," but it seems that he has no claim for a proportional part of the next instalment which has been only partially earned. *Brewer v. Tysor,* 50 N. C., 173; Beach Modern Law, citing *Richardson v. Shaw,* 1 Mo. Ap., 234.

In this well-considered case, *Laws, J.,* delivering the opinion, says: "The true principle which controls such a case as this is clearly stated

in Addison on Contracts, 452: 'If the contract price of the building is to be paid by instalments on the completion of certain specified
(433) portions of the work, each instalment becomes a debt due to the builder as the particular portion specified is completed; and if the house is destroyed by accident, the employer would be bound to pay the instalment then due, but would not be responsible for any intermediate work and labor and materials.' "

It has been further held that where the contract to build a completed house is not entire and indivisible, but only a contract to do a part of the work and furnish part of the material, the owner, or some independent contractor, having undertaken, or being bound, to do some substantial portion of the work: if the structure is destroyed by fire or other inevitable accident, before completion, in such case the parties are relieved from further performance, and the contractor is ordinarily allowed to recover for what he has done, over and above the amount which may have been paid him. *Cook v. McCabe,* 53 Wis., 250; *Butterfield v. Byron,* 153 Mass., 517.

In the cases just cited and others of like import, by the nature of the agreement, both parties contracted with reference only to the one particular building, and evidently contemplated its continued existence. On its destruction, therefore, both sides are absolved from further obligation concerning it. The methods of adjustment in such circumstance are not pursued, because the modification of the general rule suggested by these cases does not apply to the one we are considering, and the cases are only referred to because they are mentioned, and to some extent relied on, in the argument in chief of the defendants' counsel.

In the contract before us the stipulations for payment by instalments are clearly made with reference to distinct portions of the work as it progressed; and the contract, therefore, is not entire, but divisible; and applying the principles above stated and pertinent to this inquiry, we hold that when the walls of the building had reached the second
(434) story, by the express terms of the instrument the $950 was due and owing. This much had been earned, and plaintiff had no right to recover it back, nor any part of it; and the judgment, therefore, of $450 entered against defendant, being predicated upon a right to recover back the payment, is erroneous and must be set aside.

Nothing is due the defendant, however, by reason of the verdict of the jury, to the effect that the walls, as they stood after the fire, were worth $500 to plaintiff. This is what the $950 was chiefly paid for; and being greater in value than the walls, nothing is due defendant on that account.

The $1,000 to be due when the building should be covered has not been paid and was never earned, and no question about it is involved in this suit.

The four notes for $1,000 each executed and outstanding, and now in the hands of the National Bank, were to be paid only after the building was completed. They were in no sense a payment, but by the express terms of the contract, and by the presumption of the law, they were only given in evidence of the obligation, and the mortgage, as security for these notes when they matured.

The amount represented and evidenced by these notes has never been earned and was never due by the contract, and the plaintiff is entitled to have them, and the mortgage given to secure them, delivered up and canceled.

True they are in the hands of the bank as collateral for money advanced to defendant; but they are held without endorsement and are subject to defenses and equities available against the payee. *Mayers v. McRimmon,* 140 N. C., 640.

The judgment, therefore, as to these notes and the mortgage is correct, and the same is affirmed.

Modified and affirmed.

Cited: Steamboat Co. v. Transportation Co., 166 N. C., 585.

(435)

HOLLAND v. RAILROAD.

(Filed 22 December, 1906.)

Railroad—Flagman—Contributory Negligence.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate from a rear-end collision on a siding, where the evidence shows that the intestate was employed by defendant as flagman, and that it was his duty, after his train had taken the siding, to lock the switch to the main track and stand near the switch and protect it and give the necessary signals to approaching trains so as to safeguard his own train, and that he did not perform this duty, and his negligence in this respect was the immediate and sole cause of the collision by which he lost his life, the Court did not err in instructing the jury, if they believed the evidence, to find for the defendant.

ACTION by M. H. Holland, administrator of H. L. Holland, against Seaboard Air Line Railway Company, heard by *Moore, J.,* and a jury, at the September Term, 1906, of MOORE.

From a judgment of nonsuit, the plaintiff appealed.

W. J. Adams and *Seawell & McIver* for the plaintiff.

U. L. Spence, J. D. Shaw and *Murray Allen* for the defendant.

WALKER, J. The plaintiff brought this action to recover damages for the alleged negligent killing of his intestate. The evidence introduced by him tended to show that, in October, 1902, a freight train known as

Extra 578, which was proceeding southward from Hamlet, took the siding at Rockingham, and a short time thereafter a passenger train, which was also proceeding southward at a fast rate of speed, ran upon the siding, collided with the caboose, or shanty car, at the end of the freight train, and killed the intestate, H. L. Holland.

The defendant's evidence tended to show that the intestate was
(436) employed by the defendant on Extra 578 as flagman, and it was his duty, as such, not only to set the switch to the main track and lock it, so that trains going south could pass on the main line by the switch in safety, but to stand near the switch and protect it from outside interference and give the necessary signals, until the expected trains had passed that point. That the said duty he wholly failed to perform, and his negligence, in this respect, was the immediate and sole cause of the accident.

The usual issues as to negligence, contributory negligence, the last clear chance and damages were submitted to the jury. At the close of the evidence, the Court intimated that it would charge the jury "that if they believed the evidence as to the manner in which the intestate came to his death, the presumption of negligence which the law raises from the fact that one is killed by the collision of trains is rebutted, and they should answer the first issue (as to negligence) 'No,'" and "if they believed the evidence relating to the alleged negligence of the plaintiff's intestate, they should answer the second issue (as to contributory negligence 'Yes.'" The Court also instructed the jury to answer the third issue (as to the last clear chance) "No."

There is no material difference between the case as now presented and the same case as it was when before us at a former term. *Holland v. R. R.*, 137 N. C., 368. But if there is any difference at all, it consists only in this, that at the former trial the plaintiff introduced the rules of the defendant company, showing what was the duty of the intestate with reference to the switch and this further difference, that there is in this record clear and undisputed proof that the intestate had full knowledge of Rule J., which required him, after his train had taken the siding and cleared the main track, to stand near the switch and give the sig-
(437) nals to approaching trains. It appears, therefore, from all of the testimony, that his duty was to lock the switch to the main track and then to stand by and see that the proper signals were given to trains moving on that track, so as to safeguard his own train. The evidence, if believed, shows that he did not perform this duty, and that in consequence of his failure to obey the rules, of which he had full knowledge, and the instructions of his superior, the conductor, to him when leaving Raleigh, the terrible disaster resulted by which he lost his life.

The very facts we have here, or rather those which the evidence, if

believed, tends to establish, are the same upon which this Court adjudged, in the former appeal, that the plaintiff could not recover, because his own negligence was the proximate cause of his death, and not the negligence of the defendant. We do not perceive any reason for reversing or modifying that conclusion, and especially should we not do so when the case for defendant is, if anything, stronger than it then appeared.

A party who loses in this Court cannot review its decision by a second appeal, as the proper and only way is by a petition to rehear. *Kramer v. R. R.*, 128 N. C., 269; *Pretzfelder v. Ins. Co.*, 123 N. C., 164; *Perry v. R. R.*, 129 N. C., 334; *Wright v. R. R.*, 128 N. C. 77; *Setzer v. Setzer*, 129 N. C., 297; *Jones v. R. R.*, 131 N. C., 135; *Green v. Green*, ante, 406. There may perhaps be an exception to this well-settled rule, but if so, this case is certainly not within it.

In the former appeal, we said: "All things considered, the question at last is, Was the situation a safe one, if the intestate had kept the position assigned to him by the defendant at or near the switch, so that he could prevent any interference with it and guard against any resulting danger? If so, his failure so to act was the proximate cause of his death, as it was the sole efficient cause. The company had provided a perfectly safe method for the management of its train at (438) that point, which if adopted would have saved the life of the intestate. As he alone disregarded it, and the engineer on No. 33 was not required to anticipate this negligence, his untimely death is referred by the law to his own fault in leaving his post of duty at a critical moment. If he did not leave the switch open, but it was changed by some one else after he left his place, or even by any accident, it could have been readjusted to the main track by him if he had been there, and No. 33 would have passed and not have taken the siding." *Holland v. R. R.*, 137 N. C., 373. And again, at page 374: "Plaintiff's witness, Conductor Simpson, testified that he instructed Holland that morning to change the switch and lock it to the main line when he headed in and, in his absence, to look out for the safety of the train. There was but one possible thing to do after locking the switch to the main line in order to further protect his train, which was on the siding, and that was to watch the switch and see that it was not changed by any one else so as to endanger his train. The conductor further stated that he instructed him to look after the switches in his absence. If he had done this the accident would not have occurred. There was only one inference to be drawn from the evidence, and that was against the plaintiff."

We can only add to what is there said, that the intestate was the sentinel appointed by the defendant to watch and guard the switch and forewarn incoming trains of any danger. He was the one man to

whose keeping had been committed the safety of his comrades in the company's service and of his employer's property, and he was more responsible for it than any one else. He failed in the performance of his duty at the very moment when his obedience to orders and his vigilance were most required to prevent the resulting catastrophe. His (439) negligence was ever present and the efficient and, indeed, dominant cause of his injury and death, reaching to the effect, and therefore proximate to it. To subject the defendant to a recovery in such a case does not seem to be equitable, and would certainly contravene established principles of law. Plaintiff's death was caused, not by the defendant's negligence, but by his own disobedience of instructions. *Whitson v. Wrenn,* 134 N. C., 86; *Hicks v. Mfg. Co.,* 138 N. C., 319; *Stewart v. Carpet Co.,* 138 N. C., 60; *Biles v. R. R.,* 139 N. C., 532.

No Error.

Cited: Gerock v. Tel. C., 147 N. C., 11; *Boney v. R. R.,* 155 N. C., 111; *Jackson v. Lumber Co.,* 158 N. C., 321.

CANNADAY v. RAILROAD.

(Filed 22 December, 1906.)

Contracts—Lex Loci Contractus—Exceptions to Doctrine—Relief Department —Acceptance of Benefits, Effect of—Comity.

1. Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.
2. The exceptions to this general doctrine are: (1) when the contract in question is contrary to good morals; (2) when the State of the forum, or its citizens, would be injured by its enforcement; (3) when the contract violates the positive legislation of the State of the forum, and (4) when it violates its public policy.
3. Where the plaintiff, an employee of the defendant, entered into a contract in South Carolina, pursuant to which he became a member of its Relief Department, by which he agreed that the acceptance by him of benefits for injuries sustained should operate as a release and satisfaction of all claims against defendant growing out of said injuries, and the contract of employment was made in South Carolina, and the plaintiff was injured in that State by defendant's negligence, and accepted and received benefits under the provisions of the contract in said State, and where the courts of South Carolina have interpreted the contract as an agreement to elect in event of injury either to accept the benefits and release the defendant or waive the benefits and sue on the cause of action, and that his election to receive the benefits was a release of his cause of action for negligence: *Held*, that this interpretation is binding upon this Court, and the plaintiff, having no cause of action in South Carolina, has none in this State.

CLARK, C. J., dissenting.

(440)

ACTION by James A. Cannaday against Atlantic Coast Line Railroad Company, heard by *Ferguson, J.*, and a jury, at the June Term, 1906, of GUILFORD.

This was an action for the recovery of damages for personal injury. The facts material to the decision of the appeal were as follows: The jury found upon issues submitted to them that the plaintiff was injured by the negligence of the defendant, and that he did not, by his own negligence, contribute thereto. By way of further defense, defendant alleged that prior to his employment, plaintiff entered into a contract pursuant to which he became a member of the Relief Department, an organization formed by the several companies constituting the Atlantic Coast Line Railroad Company for the purpose of establishing and managing a fund for the payment of definite amounts to the employes contributing thereto, entitling them when disabled by accident or sickness, or their families in case of death, to certain amounts, the basis of which was fixed in said contracts. The said contract is set out in full, and among other provisions, contains the following: "I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of said Relief Department, and of the guarantee by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their Relief Department, for damages arising (441) from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said Relief Department of all claims against said Relief Department, as well as against said company, and all other companies associated therewith as aforesaid, arising from or growing out of my death, said release having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department and of said company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said company." It was further alleged that after the injuries sustained, plaintiff received benefits pursuant to the said contract, evidence of which was set out in the record. Upon this defense, the following issues were submitted to and found by the jury:

"Was the plaintiff, at the time of his alleged injury, a member of the

Relief Department of the Atlantic Coast Line Railroad Company in South Carolina, and did he agree to be bound by the rules and regulations of said Relief Department? Ans. Yes."

"Did the plaintiff, after his injury, and before the bringing of this action, accept and receive benefits from said Relief Department for said injury? Ans. Yes."

It is admitted that the contract of employment was made in South Carolina, and that the contract, by which plaintiff became a member of the Relief Department, was also made in said State. That the
(442) service into which plaintiff entered was "as engineer to run an engine and train of cars from Florence in said State to Augusta in the State of Georgia." That the injury for which the action is brought occurred in the State of South Carolina, and that the acceptance of benefits under the provisions of the contract as found by the jury was in said State. There was judgment for plaintiff upon the verdict, and defendant appealed.

Z. V. Taylor and *E. J. Justice* for the plaintiff.
Rose & Son and *King & Kimball* for the defendant.

CONNOR, J., after stating the case: It is settled that "Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made." *Scudder v. Bank,* 19 U. S., 406. "The interpretation of a contract and the rights and obligations under it, of the parties thereto, are to be determined in accordance with the proper law of the contract. *Prima facie* the proper law of the contract is to be presumed to be the law of the country where it is made." Dicey Conft. Law, 563. *Bowen, L. J.,* in *Jacobs v. Credit Lyonnais,* 12 Q. B., 589, says: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention." 9 Cyc., 667.

The principle is illustrated in *Bridger v. R. R.,* 27 S. C., 456 (13 Am. St., 653). The action was for injuries alleged to have been sustained in North Carolina by the negligence of defendant. The defense of contributory negligence being pleaded, the question was whether, as held by the courts of this State, the age of the plaintiff precluded the defendant from relying upon it, and the decision of this question
(443) was made to depend upon the decisions of the courts in North Carolina. *Simpson, C. J.,* said: "The injury was inflicted there, and if the parties had remained in that State and brought action there,

they would have been compelled to stand or fall by the law there. And we cannot see, upon principle, how stepping over the line could give the plaintiff a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before, and, therefore, which he could not have enforced in the tribunals having jurisdiction of the matter at its origin. * * * In such case, the plaintiff having no cause of action in North Carolina, where the injury was inflicted, he could have none here."

The principle has been recognized and enforced by this Court in *Watson v. Orr,* 14 N. C., 661; *Anderson v. Doak,* 32 N. C., 295; *Williams v. Carr,* 80 N. C., 294; *Hancock v. Tel. Co.,* 137 N. C., 497; *Hall v. Tel. Co.,* 139 N. C., 369.

The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on "Contracts," in 9 Cyc., 674: "The general doctrine that a contract, valid when it is made, is valid also in the courts of any other country or State, when it is sought to be enforced, even though had it been in the latter country or State, it would be illegal and hence unenforcible, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the State of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the State of the forum, that is, is contrary to its Constitution or statutes, and (4) when the contract violates the public policy of the State of the forum. These exceptions are grounded on the principle that the rule of comity is not a right of any State or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and (444) from moral necessity to do justice in order that justice may be done in return." Note 49; *Gooch v. Faucett,* 122 N. C., 270 (39 L. R. A., 835).

We are thus brought to a consideration of the question whether the courts of South Carolina have interpreted the contract and passed upon the effect, upon his cause of action, of the election made by the plaintiff to accept benefits from the Relief Department by reason of his injuries. This inquiry invites an examination of two questions: First, does the contract, as interpreted by the courts of South Carolina, undertake to release the defendant in advance from all claim or demand for injury sustained by reason of its negligence? Or, second, is it an agreement to elect, in the event of such injury, either to accept the benefits provided by the contract and release the company, or waive the benefit and sue on the cause of action? If the first be the proper interpretation of the contract, the question would arise whether it is not within one of the ex-

ceptions to the general rule of comity as stated by Mr. Lawson. If the second is the correct view, no such question can arise. The answer, of course, is dependent not upon the interpretation which we would put upon it, but what interpretation the courts of South Carolina have put upon the contract.

The defendant relies upon *Johnson v. R. R.*, 55 S. C., 152 (44 L. R. A., 645). The plaintiff insists that, by reason of the course which that case took in the courts of South Carolina, the final result did not "become the law of the State, but merely of that case." This contention renders it necessary for us to notice the history of the case.

The action was brought by the plaintiff, an employee, for the purpose of recovering damages for injuries sustained by the alleged negligence of the defendant. In addition to denial of liability on the alleged
(445) cause of action, the defendant by way of special defense set up a contract in all respects as the one before us, alleging the receipt of benefits under it and release from all claim or demand for damages. The plaintiff demurred orally to the "second affirmative defense," assigning as grounds of demurrer that the contract set out therein "was contrary to law and against public policy, and a release thereunder cannot be pleaded as a defense to an action for damages caused by the defendant's negligence." The demurrer was overruled by *Judge Watts,* Circuit Judge, who said: "There is no question in my mind that a contract of this kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy, and when the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured. After he was injured, he was put to his election as to whether he would sue the company or go ahead and carry out the contract, and receive the benefits of that contract. It seems to me that the decision in the case of *Price v. Railroad Co.* would control in this case, and I think the plaintiff, having elected to receive the benefits under that contract, is now estopped from bringing his action against the railroad company." The basis of his Honor's judgment overruling the demurrer becomes material because of the subsequent course which the case took. The plaintiff appealed, stating five separate exceptions to the judgment. It is not necessary to set them out here. The Supreme Court of South Carolina consists of a Chief Justice and three Associates. To provide for the contingency arising when, upon appeal, the Justices were equally divided in opinion, it is declared by section 12, Article V, of the Constitution, that the concurrence of three of the Justices shall be necessary to a reversal of
(446) the judgment below. Provision is made for the decision in such

contingency when a constitutional question is involved, by which the Circuit Judges are called to the assistance of the Justices in the decision of such question. In *Johnson's case, supra,* the Justices were equally divided. *Mr. Justice Pope,* writing an opinion concurred in by *Mr. Justice Gary,* for reversal of the judgment. *Chief Justice McIver,* writing an opinion referred to as "dissenting," concurred in by *Mr. Justice Jones,* for affirming.

In this condition of the case it is held by a unanimous Court in *Florence v. Berry,* 62 S. C., 469, that when "a judgment is affirmed by a divided Court, such a judgment must be regarded as a judgment of the Supreme Court, and as such is binding authority in all subsequent cases, until it is overruled by competent authority." In view of the rule of comity, therefore, the interpretation and validity of the contract must be treated by us as settled by the courts of South Carolina. The principle announced by *Simpson, C. J.,* in *Bridger v. R. R., supra,* applies with peculiar force. The plaintiff had no cause of action in South Carolina, and therefore has none here. Merely crossing the State line cannot enlarge or give a cause of action which he did not have in the State when he came. Every fact and circumstance affecting the cause of action occurred in South Carolina.

This is conclusive of the appeal unless, as contended by the plaintiff's counsel, the form of the pleading presents the question whether the defendant is seeking to use, not as a shield, but as a weapon, a contract which violates the settled policy of this State, or is prohibited by our Employer's Liability Act. Revisal, sec. 2646. The plaintiff's view is that he has established by the verdict of the jury a cause of action for an injury sustained by reason of the defendant's negligence, upon which he would recover but for the affirmative defense, relied on by the defendant, which, being executor, this Court is asked to specifi- (447) cally enforce. That, in respect to the contract, the defendant is the actor demanding affirmative relief. We do not concur in this view. Whatever may have been the character of the contract prior to the execution of the release by the plaintiff, by that act the cause of action was released for all legal and practical purposes, and extinguished.

In the courts of South Carolina the defendant pleads release by way of affirmative defense, and not as a counterclaim or cross-action. It is as if it had pleaded payment or accord and satisfaction, by which it avers that the plaintiff had at the time of bringing the suit no cause of action. This was the status of the matter in South Carolina, and it is in no respect different here. Did the Court in South Carolina enforce the original contract, holding it not to be against public policy, or did it so interpret it that no release of a cause of action for negligence was affected by the contract, but that the release executed after the injury, in con-

sideration of benefits received, operated to extinguish the cause of action?

While there is apparently some divergence of view between the learned Justices who wrote opinions in *Johnson's case,* the prevailing opinion by the then *Chief Justice,* although called in the reports of the case "dissenting," clearly indicates that the decision, following the language used by *Judge Watts,* is put upon the interpretation of the contract. The *Chief Justice* says: "In the outset I desire to say what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point, that I do not suppose any one doubts that a contract, whereby a railroad corporation or any other common carrier undertakes to secure immunity from liability for damages resulting from the negligence of the carrier or any of
(448) its servants or agents, is contrary to public policy, and therefore void. But the question here is whether the contract or arrangements set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded, for, on the contrary, the very terms of the contract necessarily assumed that the defendant is liable, and the whole scope and effect of the contract is to fix the measure of such liability and the manner in which such liability shall be satisfied." The learned *Chief Justice* proceeds to quote from a case decided by the Supreme Court of Pennsylvania, "He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." *Johnson v. R. R.,* 163 Pa. St., 127. He then proceeds to analyze the terms of the contract, setting forth clearly and forcibly his interpretation of it.

We have no doubt that the decision is based upon two propositions: (1) That a contract made in advance to exempt a railroad company from liability for its negligence is contrary to public policy and void. It is so, independent of the constitutional provision in South Carolina, or our statute, which is in almost the same terms. *Harrill v. R. R.,* 135 N. C., 601. (2) That the contract as interpreted by the Court does not have that effect. The case was heard before the special tribunal provided by the Constitution of South Carolina upon the suggestion that a constitutional question was involved. By a *per curiam* opinion, the judgment was affirmed for the reason that no constitutional question was presented. This view relieves us from considering the other branch of the controversy.

It is conceded that the courts which have passed upon this form of contract have almost uniformly sustained it, upon the ground stated by *Judge McIver.*

In deciding this appeal, we do not express any opinion upon
(449) the question, except to say that we fully concur in the opinion

that a contract to exempt a railroad company from liability for negligence is void. We have uniformly and frequently so held. The question as to the interpretation of this contract, when, if ever, presented to this Court in a manner making it our duty to pass upon it, will be approached as an open question. We are informed that the question has been removed from the sphere of litigation by legislation in South Carolina. By the Act of Congress, the contract or acceptance of benefits under it is declared not to be a bar to an action for damages. It may not be improper to say that the contract does not commend itself to our judgment. In this case it appears that the plaintiff paid into the Relief Department $72 and received by way of benefits $68.

We must in obedience to the well-settled law of comity declare that the plaintiff, having no cause of action in South Carolina, has none in this forum. The judgment must be reversed, and judgment upon the verdict be entered for the defendant.

Reversed.

CLARK, C. J., dissenting: It is established by the verdict in this case that the defendant was guilty of negligence in allowing a collision of two trains in South Carolina, resulting in injuries to plaintiff causing damages to him to the amount of $1,800, and that he was not guilty of contributory negligence. There is no exception calling in question the correctness of the trial in these respects. The defendant relies upon a discharge or release by reason of benefits received from the "Atlantic Coast Line Relief Department."

When the action is upon contract made or a tort committed in another State, the laws of that State must be taken into consideration in passing upon the liability of the defendant. But when liability (450) is established without question, as in this case, the matter of a discharge, whether by payment, release or statute of limitations, is governed by the *lex fori,* the law of the place where the case is tried and where such defense is to be allowed or disallowed. If a contract made in North Carolina, on which the statute of limitations is three years, is sued on in New York, where the limitation upon that class of contracts is six years, the defense is governed by the latter limitation, and *vice versa,* when a suit is brought in this State on a cause of action accruing in New York. In the same way, if the plea of payment or release is one which cannot be sustained in good conscience or is against the public policy of the State where the case is tried, the courts thereof will not hold it a valid defense to defeat a valid liability which the defendant has incurred elsewhere.

The release here set up is by virtue of a transaction by which the plaintiff, who has paid in $72, has received back $68, and the defendant

is insisting that that is a release of a liability for $1,800 damages legally ascertained, which the plaintiff has sustained by the wrongful act of the defendant. Such a defense is not good in *foro conscientiæ,* and in that matter the courts here are to be governed by their own rules of equity. There has been no consideration for the release, and such being the case, the Judge properly entered judgment in favor of the plaintiff upon the verdict.

It is strenuously argued by the able and learned counsel for the plaintiff that the "Atlantic Coast Line Relief Department" is an ingeniously devised plan to cause the employees of that company, at their own expense and by means of deductions from their wages, to insure the railroad company from liability for injuries sustained in its service, notwithstanding the provisions of the Fellow-servant Act, now Revisal, 2646. It is not necessary to go into that matter, as it is apparent
(451) that there was no consideration for the release here set up. But the act in question affects a most meritorious class of our citizens, engaged in hazardous *quasi*-public service. They are deeply and vitally interested that judicial construction shall in nowise impair the just protection afforded them by that section, and especially by the last paragraph thereof: "Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section, shall be null and void."

Cited: Johnson v. Tel. Co., 144 N. C., 412; *Williamson v. Tel. Co.,* 151 N. C., 229; *Burrus v. Whitcover,* 158 N. C., 385; *Penn v. Tel. Co.,* 159 N. C., 314; *Fashion Co. v. Grant,* 165 N. C., 456; *Smith v. Express Co.,* 166 N. C., 158.

HICKORY v. RAILROAD.

(Filed 22 December, 1906.)

Nuisances—Injunctions—Freight Depot—Gates.

1. An injunction will be denied in advance of the creation of an alleged nuisance when the act complained of may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful, contingent or eventual merely.
2. A decree of the Superior Court enjoining defendant from enlarging its freight depot upon a finding by a jury that such enlargement will constitute a public nuisance, will be modified so as to permit defendant to remedy and guard against any possible danger to persons crossing its tracks by erecting suitable gates across the street and by providing a gateman.

CLARK, C. J., dissenting.

THIS is a petition by the defendant to rehear this case, reported in 141 N. C., 716.

W. B. Rodman for the petitioner.
Self & Whitener and *T. M. Hufham, contra.*

BROWN, J. This case is reported 141 N. C., 716. Upon careful consideration of the petition to rehear the same, we are of opinion that the decree of the Superior Court should be modified. The action was brought to enjoin the defendant from erecting an addition of (452) seventy feet to its freight warehouse on its property in the city of Hickory, upon the ground, as indicated by the pleadings and plaintiff's evidence, that it would create a public nuisance by obstructing the view along the railroad tracks and thereby make it dangerous for persons to cross defendant's tracks at Marshall Street. The following is the material issue submitted to the jury: "Will the enlargement of defendant's present freight depot by an extension on the eastern side thereof constitute a public nuisance? Answer: Yes."

When the fact of nuisance is established by the verdict of a jury, the ordinary judgment is that the defendant be required to abate it. It is not always that the "far-reaching arm of the chancellor"—the writ of injunction—will be extended even then. The general rule is that an injunction will be denied in advance of the creation of an alleged nuisance when the act complained of may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful, contingent or eventual merely. That is the universal law in all the courts in this country. See 21 A. and E. Encyc. Law (2d Ed.), 705, where the cases are collected from all the States. Mr. High also states the law to be without a discordant note, that when the injury complained of is not an existing nuisance *per se,* but may or may not become so according to circumstances, and when it is uncertain, "or productive of only possible injury," equity will not interfere. In support of that he cites thirty-odd cases, two being from this State. All the decisions in this Court support the rule referred to. *Simpson v. Justice,* 43 N. C., 115; *Barnes v. Calhoun,* 37 N. C., 199; *Wilder v. Strickland,* 55 N. C., 386; *Ellison v. Commissioners,* 58 N. C., 57; *Walton v. Mills,* 86 N. C., 280; *Dorsey v. Allen,* 85 N. C., 358. In the latter case *Chief Justice Smith* says: "While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to (453) render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noise, or otherwise, and justify the protecting arm of the law, yet there must be the *ascertained and not probable effects apprehended.* When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the Court will refrain from interfering."

In *Barnes v. Calhoun, supra,* an action to restrain the erection of a

mill, *Gaston, J.,* says: "But it (a court of equity) will only act in a case of necessity when the act sought to be prevented is not merely probable, but undoubted, and it will be particularly cautious thus to interfere when the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience."

Mr. High, in his work on Injunctions, also says: "When an injunction is asked to restrain the construction of works of such a nature that it is impossible for the Court to know until they are completed and in operation whether they will or will not constitute a nuisance, the writ will be refused in the first instance." Secs. 488 and 489, note 1.

It seems to us that Mr. Elliott has given us the true and just rule which should guide us in the disposition of this case, fair to plaintiff and defendant alike. He says: "Where a street is laid out across the right of way of a railway company at a point where the company has only one track, no question can justly arise as to the impairment of the company's franchise by such taking, for under such circumstances both the use as a highway and the use as a railroad can stand together, and do not interfere with each other." Elliott on Railroads, sec. 1104.

(454) The extension of defendant's warehouse and the safe use of Marshall Street can easily coexist. The defendant can readily construct gates across the street for the protection of persons crossing the tracks from injury by its trains. There is no evidence that the defendant will not do this, and it can be compelled to do so by this Court by order in this case. This Court can direct a mandatory injunction compelling defendant to establish such gates and provide such gatemen as are usual at much-frequented crossings, or it can direct that the defendant be enjoined from building the extension until it does erect such gates. It must be admitted that this will afford the most perfect relief, and that conditions would be much safer than they now are or ever have been since the street was opened.

We must take it as true that the record discloses the only purpose for which the suit is brought, viz., to lessen the danger to passers and traffic along Marshall Street. The modification of the decree affords the most perfect safety possible. It is a method of safety universal in this country. We have a direct authority in this State for such an order. *Hyatt v. Myers,* 71 N. C., 273. In that case the nuisance complained of was a steam-mill across the street from plaintiff's residence. The fact of an existing nuisance was established by a jury. The Court, notwithstanding the verdict, declined to enjoin the defendant, but directed him, *of its own motion,* to raise his smokestack twenty feet and to attach spark-arresters thereto, or otherwise to abate the nuisance. So, if defendant's freight station was already extended, and an existing nuisance and danger as alleged, and the fact so found, the defendant should be allowed

to abate the nuisance by establishing protecting gates. It cannot abate it now, because it does not exist.

In *Hyatt v. Myers,* 73 N. C., 233, *Chief Justice Pearson* states the law to be that, even after a verdict establishing nuisance, equity will not necessarily enjoin. The application of that remedy will (455) always depend upon circumstances, the chief of which is, "Can the trouble be otherwise remedied?" This case is cited and affirmed in *Brown v. R. R.,* 83 N. C., 130, by *Judge Dillard,* who holds in substance that equity will not enjoin, even after verdict establishing it, unless the nuisance is irreparable, or one "which cannot be otherwise relieved against." To the same effect is Story Eq., sec. 925; Adams Eq., 211; 3 Daniel Chancery, 1587. In *Simpson v. Justice,* 43 N. C., 120, *Chief Justice Pearson* says that the jurisdiction of courts of equity to interfere by injunction in cases of this kind should be exercised "sparingly and with great caution." "There is," says that eminent Judge, "an obvious difference between a thing which is a nuisance itself, and one which may or may not be a nuisance according to the manner in which it is used."

We, therefore, think it proper to direct a modification of the decree of the Superior Court so as to permit the defendant to remedy and guard against any possible danger to persons crossing its tracks at Marshall Street by erecting suitable gates or barriers on its right of way across said street, and to provide a gateman, as is usual and customary at all dangerous and much-frequented railroad crossings in cities and towns. Said structure shall be such as is reasonably sufficient to afford protection to persons using said crossing from injury by passing trains and to be maintained by the defendant.

Upon presenting its petition to the Superior Court and satisfying the Judge thereof that defendant has fully complied with the decree as modified and amended, the perpetual injunction enjoining defendant from extending and enlarging its freight depot shall be vacated.

As to the other contention of defendant relating to the title to certain land, we will add nothing to what is said in the opinion at the last term. We, generally, affirm the judgment subject to the (456) modification made.

Let the costs of this rehearing be equally divided between plaintiff and defendant.

Former Decree Modified.

CLARK, C. J., dissenting. This is a petition to rehear this case, which was finally decided 141 N. C., 716, by a unanimous Court. It has twice before been before the Court, 137 N. C., 189, and 138 N. C., 311.

When the depot was put up in Hickory in 1859, nearly half a century

ago, it was located in the woods. Now it is a growing, thriving town. The people there have not asked for the removal of the passenger station, nor in this action even that the freight depot now there should be removed; but they first asked the defendant for additional freight facilities. This not being granted, they applied to the Corporation Commission, who three years ago, in December, 1903, ordered additional freight warehouse room. Instead of putting this additional freight warehouse out in the edge of town, as is usual, where the many tracks and shifting requirements could be provided for, the defendant insisted on enlarging the freight warehouse in the center of the growing town, with the evident result of greater interference with the transit of people and traffic from one side of the town to the other by long strings of box-cars and the necessary shifting and moving thereof and the imminent danger to the lives and limbs of the citizens in traveling along their own streets, going across the tracks. Among instances of such results where the railroad has persisted in keeping its freight tracks within the populous part of the town is *Wilson v. R. R.*, 142 N. C., 346.

The passenger station is not so objectionable in the heart of the town, for those trains are very short (compared with the length of (457) freight trains), make short stops, and pay some attention to a schedule—and do not cut out and leave cars, and transfer them (for Hickory is a junction point with another railroad), as is necessary with freight trains which come at any hour, day or night, remain an unconscionable time, and are moved back and forward to the greatest danger of the lives and limbs of citizens passing from one side of the town to the other.

The defendant's counsel have argued this case as if the addition of seventy feet to the warehouse, with the additional obstruction to the view of those passing across the track, was the whole of the evil sought to be prevented. The Corporation Commission having three years ago ordered additional facilities (an order which the defendant must some day comply with in spite of all the delays incident to this protracted proceeding), if these additional facilities are given by making this addition of seventy feet to the freight station now in the heart of the town, the result will be a permanent and every year greater increase in the number of freight trains, standing for unlimited time, upon the tracks and sidetracks in the very center and heart of the town, moving and shifting, cutting out and putting in freight cars, severing one-half of the town from intercourse with the other, except at imminent and deadly peril of life and limb.

The affidavit for the injunction in this case alleges the above facts, and that if the proposed addition to the warehouse is not enjoined the persons using said streets crossing the tracks "will have no means of ascer-

taining when they can cross the tracks of the defendant over said streets, and will use the same in *constant menace of loss of both life and property,* and the situation so created will become a *veritable death-trap,* and that such building and platform will constitute a public nuisance of the worst kind," and if permitted to be erected and maintained will expose the plaintiff to numerous, repeated, and expensive actions for injuries to persons using said streets. The complaint reit- (458) erates this allegation, and avers that "the defendant operates a large number of local and through freight trains in said city, which trains are run at all hours of the day and night; that said trains are almost constantly and for long periods of time shifting and running backward and forward upon the tracks of defendant adjacent to said freight depot, and that persons about said passenger depot or engaged in loading or unloading freight are exposed to constant inconvenience and great peril by reason of the danger of their being run down by said trains to the injury of themselves and the destruction of their property; and the space between the defendant's tracks and its freight depot is so narrow, confined and inadequate that it is utterly impossible for shippers or receivers of freight to gain access to said freight depot without endangering themselves and their property," and that the above stated frequent shifting and moving of freight trains (which will not only continue, but be increased if the additional freight facilities ordered by the Corporation Commission are given by adding to the present freight warehouse in the heart of the city) are a constant menace to the lives of those going to the passenger depot or crossing the track, the long line of freight cars, besides the additional length of the warehouse, cutting off the view of approaching trains.

There was ample evidence to support the above state of facts, which would be almost a matter of common knowledge, upon proof of the location and attending circumstances, for the streets and railroad tracks cross upon the same grade.

The plaintiff offered proof of many tragedies that have occurred at that spot by reason of above matters, but was stopped by objection from the defendant.

The Judge charged the jury: "A nuisance like the one complained of is the maintenance of a condition which seriously interferes with and interrupts the use of a street or the streets of a town, (459) which are in general use and necessary for the convenience of the citizens and for the business in respect of travel or course of business either by obstructing the streets for an unreasonable proportion of the time, or by having it so that travelers along said street or streets, which cross the railroad at public crossings, cannot, by the exercise of reasonable, ordinary care, with safety pass over such crossings. But if the con-

dition merely gives inconvenience to the public, or causes some delay in their movement, which is incident to the operation of the railroad, this does not constitute a nuisance. If the jury shall find that the building the proposed extension on the east end of the freight warehouse of seventy feet will so change the condition in respect to Marshall Street crossing that it will not be reasonably safe for persons exercising reasonable care, that will be a nuisance, and the jury should answer the fourth issue 'Yes.'" The jury so found.

The defendant cannot complain of this charge. If the proposed addition to the warehouse at that spot will increase the danger to the citizens, by the retention and increase of the freight trains shifting or halted on the track as well as by the added obstruction of the view, the court of equity must restrain the commission of the threatened act.

Railroads are chartered primarily for the public benefit and convenience. The emoluments and enrichment of their owners are secondary in law, though, of course, the primary object with those who promote and operate these *quasi*-public corporations. It is now well settled that their rates and management are matters of public investigation, regulation and control. They must exercise the public franchises granted them to further and advance the public welfare. At last term, 141 N. C., 721, we intimated the opinion that when the defendant erected the additional freight facilities required by the order of the Corporation Com-
(460) mission at some more suitable and less dangerous locality, it should remove all their freight business to that point.

"Legislative authority to a railroad company to bring its tracks within municipal limits does not confer authority to maintain a nuisance." *R. R. v. Baptist Church,* 108 U. S., 317, which has been quoted and followed, *Thomason v. R. R.,* 142 N. C., 300. The right to operate its trains through Hickory does not give it the right to unnecessarily imperil the lives of citizens of the town by shifting and moving its freight trains at a frequented center when this can be done without loss at a more suitable point. *Sic utere tuo ut alienos non laedas.* The erection of gates is not suggested by either party, and will be only a less public nuisance than the present situation. They will obstruct the use of the streets more and more as population increases, and injuries will occur, especially at night, for they will not be always carefully guarded.

As to the other point presented in the rehearing, it is immaterial to the decision of this case and the injunction which is the object of it, whether the defendant owns 100 feet on each side of the track or 400 feet width at this point.

The proposed extension of the warehouse is up and down the track, and cannot be affected by that question in the least. If the defendant owned 400 feet it could not use it for other purposes than as at present.

While adhering to the correctness of the result reached on that point in the decision rendered more than two years ago, 137 N. C., 203, and twice reiterated since, it may be well to recall that the defendant itself took the same view, and, as stated 137 N. C., at p. 203, the record shows that "the defendant in open Court agreed that it did not claim any part of the land described in the deed and plats, except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by order of the Court." In so doing, (461) the defendant only agreed to what was its valid claim.

Cited: Beck v. R. R., 146 N. C., 457; *Cherry v. Williams*, 147 N. C., 457; *Little v. Lenoir*, 151 N. C., 418; *Crawford v. Marion*, 154 N. C., 76; *Berger v. Smith*, 160 N. C., 215.

DUCKWORTH v. MULL.

(Filed 22 December, 1906.)

Torts—Jurisdiction of Justice—"Property in Controversy."

1. In an action begun before a justice of the peace in which the plaintiff made demand in the sum of $50 for damages done to his property and premises by defendant in depositing the carcass of a dead horse near the lands of the plaintiff, whereby the comfort and enjoyment of his home were impaired and a nuisance committed to his premises, the Superior Court, on appeal, erred in dismissing the action for want of jurisdiction in the justice.
2. Art. IV, sec. 27, of the Constitution, and Revisal, sec. 1420, (enacted to carry out this provision), which provides that "justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract wherein the value of the property in controversy does not exceed $50," comprehend all actions *ex delicto*, the term "property in controversy" meaning the value of the injury complained of and involved in the litigation, and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice has jurisdiction concurrent with the Superior Court to hear and determine the matter.

WALKER and CONNOR, JJ., dissenting.

ACTION by Frank Duckworth against F. R. Mull, heard on appeal from a justice of the peace by *O. H. Allen, J.*, and a jury, at the June Term, 1906, of BURKE.

The plaintiff made demand in the sum of fifty dollars ($50) for damage done to his property and premises by defendant in depositing the carcass of a dead horse near the lands of the plaintiff, whereby the comfort and enjoyment of his home were impaired and a nuisance com-

(462) mitted to his premises by the filth and stench arising and flowing therefrom.

There was evidence on the part of the plaintiff tending to show that the defendant, on 22 June, 1904, had placed in a gully above his (plaintiff's) spring and premises, the carcass of a horse; that the point where the same was deposited was only some fifty yards above the head of a branch which ran within ten steps of plaintiff's spring, and that when it rained, the water would run down the gulley from the carcass from the head of the branch and on down past the spring.

There was evidence tending to show further that the plaintiff suffered great annoyance and discomfort from the stench arising from said carcass; that it could be noticed distinctly 300 yards below the premises and spring of the plaintiff, and in the field above his house; that his stock refused to drink in the branch at his watering-place; that the buzzards sat in the trees and around the spring, and that he was forced to get water at another place; that plaintiff, prior to the beginning of this action, went to defendant and asked him to cover up or remove the carcass, but defendant refused to do so.

At the close of plaintiff's testimony the defendant moved for judgment as of nonsuit under the Hinsdale act for want of jurisdiction in the justice of the peace before whom the same was begun, and of the Superior Court on appeal to hear and determine the same. Motion allowed, and plaintiff excepts. Judgment for defendant, to which judgment plaintiff excepted and appealed to the Supreme Court.

Avery & Ervin for the plaintiff.
Avery & Avery for the defendant.

HOKE, J. The Constitution of this State, Art. IV, sec. 27, ordains that justices of the peace shall have jurisdiction under such regu-
(463) lations as the General Assembly shall prescribe, of civil actions founded on contract wherein the sum demanded shall not exceed $200 and wherein the title to real estate shall not be in controversy; and provides further that the General Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed $50.

Carrying out the provisions of this section, the Legislature has enacted as follows:

Sec. 1419: "Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract except, (*a*) wherein the sum demanded, exclusive of interest, exceeds $200; (*b*) wherein the title to real estate is in controversy."

Sec. 1420: "Justices of the peace shall have concurrent jurisdiction

of civil actions not founded on contract wherein the value of the property in controversy does not exceed $50." Revisal 1905, secs. 1419, 1420.

By this statute, the Legislature has conferred on justices of the peace jurisdiction in terms certainly as broad as the Constitution permitted, and this jurisdiction, therefore, will depend on the true interpretation of the constitutional provision.

The question involved here being one of civil jurisdiction, only the clauses of the Constitution pertinent to that inquiry have been quoted. And the subject of contract having been dealt with in express terms, when the Constitution provided that jurisdiction could be conferred in "other civil actions," it was referring to actions of tort, and the question presented here is whether this clause authorizing that jurisdiction could be given in "other civil actions where the value of the property in controversy does not exceed fifty dollars," includes all torts or only a restricted class of torts.

On that question we think that the decisions of this Court, already made, lead necessarily to the conclusion that the clause (464) referred to comprehends, and was intended to comprehend, all actions *ex delicto;* that the term, "property in controversy," here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice, as provided by the statute, has jurisdiction concurrent with the Superior Court to hear and determine the matter.

Thus in *Malloy v. Fayetteville,* 122 N. C., 480, it was held:

(*a*) "The provision in sec. 27, Art. IV, of the Constitution, authorizing the General Assembly to give to justices of the peace 'jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars,' is not a restriction, even by implication, to forbid conferring jurisdiction where damage, and not property, is in controversy.

(*b*) "Section 888 of The Code authorizing action for 'damages' not exceeding fifty dollars to property, though the property be of greater value, does not contravene sec. 27 of Art. IV of the Constitution, and is authorized by sec. 12 of said article.

(*c*) "A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars for injury to personal property, though such property be of greater value than fifty dollars."

This was an action for negligent injury to personal property where the property, a horse and buggy, was shown to be worth more than one hundred dollars; but the injury thereto, the matter in litigation, was

alleged and proved to be less than fifty dollars, and the verdict and judgment were upheld.

And in the more recent case of *Watson v. Farmer,* 141 N. C., 452, approving *Malloy v. Fayetteville,* it was held:

"Courts of justices of the peace have jurisdiction to hear and
(465) determine actions for injury to personal property and to render judgments thereon, not exceeding fifty dollars, and the jurisdiction is not determined by the value of the property injured, but by the amount demanded in the warrant or complaint."

Justice Brown, in delivering the opinion, says "the jurisdiction of the justice is not to be measured by the value of the property, but by the amount demanded in the warrant or complaint."

In both of these opinions the value of the property injured is rejected as the test of jurisdiction, and the value of the injury, as defined and limited by the summons and complaint, is adopted.

And we are not impressed with the position taken, that this addition to a justice's jurisdiction should be confined to actions for claim and delivery of personal property.

While the proceedings of the Convention of 1875, this being the convention by which the section in question was established, are not very fully reported, we know that one of the purposes considered most desirable at that time was to enlarge the jurisdiction of justices of the peace; and no good reason suggests itself why such a purpose should be stopped short by adding only one additional cause of action to the jurisdiction already had by these officers; and we know that the first Legislature which met after this change in the organic law enacted the statute as it now appears in the Revisal, sec. 1420: "Justices of the peace shall have jurisdiction of civil actions not founded on contract wherein the value of the property does not exceed fifty dollars."

The simple, natural interpretation of the statute would make it apply to all "civil actions not founded on contract," and should have much weight as the first legislative interpretation of the meaning of the clause in question.

Again, it is urged that if the Convention of 1875 had intended
(466) to confer this extended jurisdiction in actions for tort, they would have used the terms, "in other actions where the amount demanded does not exceed fifty dollars," as they did in speaking of contract.

The answer is, that in contract the "sum demanded" would include every case of contract; whereas, in tort, these words would not have been sufficiently broad, inasmuch as they would have excluded actions for specific personal property, one of the most useful and common of the actions *ex delicto.* And it might be further answered that if the convention had intended to confine this jurisdiction to actions for claim and delivery,

they could easily have said so; and they no doubt would, for they were a body of men who knew their minds and knew how to express their meaning in apt and forceful language.

We are clearly of the opinion, as heretofore stated, that these words, "where the property in controversy does not exceed fifty dollars," mean, and were intended to mean, the value of the injury involved in the litigation.

In the business affairs and transactions of individuals and the construction of instruments which concern the devolution and transfer of property between them, this term "property" has usually received a more restricted construction. It has been so in the decisions of our own Court; but in constitutions and public statutes where the words permit, and the spirit and intent of the law require, the word "property" has frequently and more usually been accorded the broader significance which we have given it.

In the sections of our Constitution protecting life and property, the term is held to include vested rights of action.

As said in Cooley on Constitutional Limitations (7 Ed.), p. 577: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary (467) interference."

And in Black's Constitutional Law, p. 432, it is said: "A cause of action, accruing at common law or by a contract which is fixed and settled in a particular person, and continues in force, is a vested right within the protection of the constitutions. It is property, and it cannot lawfully be divested by legislative interference, or by taking away the legal means of making it effective, or by so hampering it with conditions or restrictions as to render it practically worthless." Also, *Angel v. R. R.*, 150 U. S., pp. 1-19.

And in *R. R. v. Dunn,* 52 Ill., 260, construing a statute giving to married women control over their separate property, the term "property" was held to include a right of action for personal injury. In delivering the opinion *Chief Justice Breese* said: "If, then, it can be established that the right of action for this injury is property, as it came to her from a source other than her husband, then it was her separate property and comes under the operation of the act." And the *Chief Justice* then proceeds: "Chancellor Kent, in his Commentaries, says another leading distinction in respect to goods and chattels is the distribution of them into things in possession and things in action. The latter are personal rights, not reduced to possession, but recoverable by suit at law. Money due on bond or other contract, damages due for breach of covenant, for the detention of chattels or for torts, are included under this general head or title of things in action. 2 Kent's Com. (Comstock's Ed.),

432, under the head of the nature and various kinds of 'personal property.' A right to sue for an injury is a right of action; it is a thing in action, and is property according to this authority."

There are decisions by the Supreme Courts of Michigan, Rhode Island and Connecticut to like effect in questions of similar import. *Dunlap v. R. R.*, 50 Mich., 470; *Cooney v. Lincoln*, 20 R. I., 183; *Hubbard* (468) *v. Brainard*, 35 Conn., 563.

There is a decision to the contrary in Wisconsin: *Gibson v. Gibson*, 43 Wis., 23. In that case, some weight was given to the wording of the particular statute. Apart from this we do not think this case is well considered, or that it is in accord with the weight of authority.

We are therefore of opinion, and so hold, that the Constitution has granted the right to confer jurisdiction to the extent therein specified in the case of all actions arising *ex delicto;* and the Legislature having given this jurisdiction to justices of the peace, there was error in dismissing the case, and the judgment is reversed.

Judgment reversed.

WALKER, J., dissenting: This is the first case, I believe, where a justice of the peace has been held to have jurisdiction of an action for the recovery of damages for a tort which did not consist in a direct injury to property. My own opinion is, and always has been, that it was never intended by the Constitution, Art. IV, sec. 27, to confer jurisdiction in actions not *ex contractu,* except for the recovery of specific property, or, at most, for the recovery of damages to property not exceeding the value of fifty dollars. Jurisdiction of the justice could only be vested by express provision of the Constitution, or by legislative grant given in pursuance of the provisions of the Constitution. The Constitution, Art. IV, sec. 27, provides that "The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed $200, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties wherein the punishment cannot exceed a fine of $50 or imprisonment for thirty days. And the General Assembly may give to (469) justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed $50." The Constitution does not in terms confer jurisdiction upon justices to try actions for damages arising from torts, and it limits the power of the General Assembly in conferring jurisdiction to those cases wherein the value of the property in controversy does not exceed $50. In *Malloy v. Fayetteville,* 122 N. C., 480, it was held that a justice of the peace has jurisdiction of an action for damages not exceeding $50 for injury

to personal property, though such property be of greater value than $50.; but this was held by a bare majority of the Court, and, with all respect, I submit, against the correct interpretation of the Constitution.

Unless sec. 27 of Art. IV is a restriction upon the legislative power to confer jurisdiction upon justices of the peace, then there is no restriction upon the legislative will in this direction, and jurisdiction may be conferred upon them in any amount and covering every variety of action.

Art. IV., sec. 12, which is cited in the opinion in *Malloy v. Fayetteville,* in support of the decision in the case, concludes with the sentence, "so far as the same may be done without conflict with other provisions of this Constitution." Any allotment of other jurisdiction than that mentioned in sec. 27 is certainly in conflict with that section. The enumeration of powers which may be exercised is always held to exclude the exercise of other powers not enumerated. When the Constitution says, "and the General Assembly may give to justices of the peace jurisdiction of other civil actions whenein the value of the property in controversy does not exceed $50," it is manifest that the meaning would not be added to it if it had said further, "it shall confer no further or other jurisdiction." If sec. 12, Art. IV authorizes an allotment of jurisdiction not mentioned in sec. 27, why would it not be competent for the Legislature to increase the jurisdiction in actions founded on contract to any amount it pleases beyond $200? Why would it not also be com- (470) petent for the Legislature to give to justices of the peace jurisdiction in criminal matters without the limitation of punishment? Section 27 does not expressly forbid the Legislature to confer jurisdiction beyond $200 in civil suits nor in criminal matters where the punishment exceeds a fine of $50 or imprisonment for thirty days. It simply says that justices shall have jurisdiction up to that limit, but certainly does not say that they shall not have jurisdiction beyond that limit.

It is true that there are a number of cases having their origin before justices of the peace which were brought to recover damages for injury to personal property and which came to this Court and were upheld before the case of *Malloy v. Fayetteville* was decided; but not in a single one of those cases was the question of the constitutional power to confer jurisdiction raised. It appears for the first time in *Malloy v. Fayetteville,* and the authority of that case is greatly weakened by the force of the two dissenting opinions. Even if the Legislature could confer the jurisdiction on a justice of the peace of an action for the recovery of damages for injury to personal property, it appears to me that it has not done so.

Section 1420 of the Revisal of 1905 provides: "Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed

$50." This section is in exact harmony with sec. 27 of Art. IV of the Constitution, and in express terms confers the jurisdiction which the Constitution permitted the Legislature to confer.

The section relied on in the opinion of the Court in *Malloy v. Fayetteville* is now sec. 1476 of the Revisal of 1905, and reads as follows: "All actions in a court of justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any in-
(471) jury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court." This section assumes the existence of the jurisdiction of the justice in such cases, and merely provides rules for the conduct of the trials, but it does not confer jurisdiction. It is significant that sec. 1420 appears in the Revisal under subdivision III, chap. 27, entitled "Civil Jurisdiction," while sec. 1476 appears under subdivision VII, chap. 27, entitled "Rules of Procedure." Section 1420, conferring the jurisdiction which the Constitution says the Legislature may confer, limits that jurisdiction to cases wherein the value of the property in controversy does not exceed $50. Section 1476 places no limitation upon the jurisdiction. If sec. 1476 does confer jurisdiction upon justices of the peace to hear and determine cases involving injury to personal property, to what amount is their jurisdiction limited? The Court in *Malloy v. Fayetteville* assumes that the amount is limited to $50; but why to $50? Section 1476 makes no limitation. It simply lays down the rule of procedure, which is certainly not the same thing as jurisdiction, and that rule of procedure is to be the same as provided in civil actions in the justice's court. Now there are two kinds of civil actions in the justice's court: one founded on contract, wherein the jurisdiction is limited to $200, and one founded on tort, wherein the jurisdiction is limited to $50. Which shall be the limitation here, and what did the Legislature mean? It seems clear to me that the Legislature, even if it had the power, has not conferred upon justices of the peace jurisdiction in matters of this sort. When the Constitution established the courts of justices of the peace, it fixed their jurisdiction, and when it conferred upon the Legislature the authority to add to that jurisdiction, it in express terms states in what particular it may add to it. But whether or
(472) not jurisdiction is conferred in cases of tort for injury to property, and is not confined to the recovery of specific property, an action, such as this one, is certainly one of the first impression. The Convention could not have intended to grant such jurisdiction in all cases of wrongs, whether to property, person or character, and without regard to their nature, by the mere use of the word "property," which has a well-defined meaning, when used in the Constitution in connection with the subject to which it relates.

In *Malloy v. Fayetteville,* it appears, at p. 483, that the present *Chief Justice,* who there spoke for the Court, evidently thought there was a clear distinction between the word "property," as used in the Constitution, and the word "damages," or the right to recover them, and he places the decision of the Court upon the ground that the right to recover "damages" as distinguished from "property" is conferred, and conferred only, by Art. IV, sec. 12, of the Constitution, which provides that the portion of power and jurisdiction which does not pertain to this Court may be allotted and distributed by the Legislature among the other courts created by that instrument or which may be established by law, in such manner as it may deem best, and that the Legislature has actually given the jurisdiction under this section by passing what is now sec. 1476 of the Revisal.

But it has been shown, it seems to me, that no such jurisdiction was conferred by that enactment (Revisal, sec. 1476) or intended to be conferred by the Constitution, Art. IV, sec. 12. But there is more to be said: When conferring jurisdiction of non-residents upon courts a sharp distinction has always been drawn between the word "property" and the term "subject-matter" of the action. The latter term signifies the nature of the cause of action and of the relief sought. It relates to the right to prosecute the particular suit and to obtain the relief demanded; while the word "property" is used in quite a different sense as denoting something tangible, or at least something which may be subjected (473) to the process of the Court, as in the case of attachment or garnishment. It is the *res* and not the mere right in the particular action to sue for damages. *Cooper v. Reynolds,* 77 U. S., 308; *Pennoyer v. Neff,* 95 U. S., 714; *Foltz v. R. R.,* 19 U. S. App., 581; *Hall v. Hall,* 12 W. Va., 15. When we refer to the constitutional protection over property or the right of a married woman to acquire and own property in her own right, as her separate estate, or to the subjects of taxation—and perhaps there are some other instances—we may very well say that the word "property" as there used should be considered a *nomen generalissimum* and should embrace within its meaning everything owned and possessed, whether tangible or intangible, for that is the manifest purpose. This meaning is given to the word in order to comply with the evident intent, as ascertained from the context, and the necessity arising out of the particular nature of the law being construed. Cases referring to such a use of the word are not, therefore, in point. It would seem that my view is supported by the case of *Smith v. Campbell,* 10 N. C., 590, where the Court gave a restricted meaning to the word "property" when construing a clause of the Constitution in respect to the jurisdiction of a justice of the peace. See also *Pippin v. Ellison,* 34 N. C., 61. When the word was used in the Constitution it was meant to refer to

the thing for the recovery of which the action is brought, and not to the right to bring the action to recover that thing. It is the value of the former, and not of the latter, that determines the jurisdiction, and it can make no difference whether the thing to be recovered is personal property in possession or a chose in action. If either is the thing sought to be recovered, or the value of it, if there has been a conversation, it is the "property in controversy." The division of property into real and
(474) personal and of the latter into property in possession and in action can have no material bearing on this case, and will tend, I think, more to obscure than to elucidate the real question involved. The framers of the Constitution evidently meant that the thing for the recovery of which, or of damages for its conversion, the suit is brought, should be considered as the property in controversy. This is the natural and, it seems to me, the only meaning they could have intended to express. If it is not, it logically follows from the decision in this case that a justice will have the power to try all kinds of torts, such as libel, slander, seduction and the many others known to the law. It cannot be that it was intended to confer such an extensive jurisdiction.

CONNOR, J., concurs in the dissenting opinion.

Cited: Neill v. Wilson, 146 N. C., 244; *Houser v. Bonsal,* 149 N. C., 53; *Worth v. Trust Co.,* 151 N. C., 196; *Williams v. R. R.,* 153 N. C., 363; *Wilson v. Ins. Co.,* 155 N. C., 175, 177.

SUTTON v. DAVIS.

(Filed 22 December, 1906.)

Vendor and Vendee—Specific Performance With Compensation for Defects—Commissioner's Deed—Escrow—Building Destroyed Before Delivery of Deed—Rights of Parties.

1. The doctrine of specific performance with compensation for defects, when the vendor cannot convey exactly what his contract calls for, is usually applied to cases where the defects urged as a ground for compensation existed when the contract was made, but when the circumstances required, it is extended to cases in which the defects arose afterwards, as when the property was destroyed by fire subsequently to the execution of the contract, its application resting in the sound legal discretion of the Court.
2. A deed, in the line of the vendor's title, which had been executed by commissioners appointed in judicial proceedings pursuant to the Court's order, but which had been lost or mislaid, did not constitute a defect in his title.
3. Where the plaintiff sold a house and lot to the defendant, the deed to be delivered to defendant's attorneys to be delivered to defendant

on payment of the latter's note for the purchase-price, and the deed was delivered in escrow and the note executed as agreed, and the defendant went into possession, made an addition to the building and had same insured and it was destroyed by fire before the note was paid or the deed was delivered: *Held*, that the defendant, maintaining his right to a conveyance of the lot, was not entitled to any reduction from the amount of the note.

4. Where there is a contract for the sale and conveyance of realty absolute and binding on the parties, equity, for most purposes, will consider the contract as specifically executed; the vendee will become the equitable owner of the lands and the vendor of the purchase-money. After the contract, the vendor is the trustee of the legal estate for the vendee.

(475)

ACTION of F. M. Sutton against D. S. Davis, heard by *Moore, J.*, and a jury, at the February Term, 1906, of UNION.

Plaintiff claimed and testified that in June, 1904, he sold to defendant a house and lot in Waxhaw, N. C., for $500, and defendant executed and delivered to plaintiff his sealed note for the purchase-price, as follows:

$500. WAXHAW, N. C., 27 July, 1904.

On or before 1 January, 1905, I promise to pay to the order of F. M. Sutton the sum of five hundred dollars, with interest at 6 per cent. from date. This note given for purchase-money for town lot and storehouse in Waxhaw, N. C.

Witness my hand and seal. D. S. DAVIS. (SEAL.)

That plaintiff had executed a deed for said lot to defendant under circumstances hereinafter set forth.

That the sale was for cash, but on defendant's request plaintiff consented that the money should be payable on 1 January, as indicated.

That when plaintiff made the offer to defendant, the defendant accepted same by letter, as follows:

WAXHAW, N. C., 13 July, 1904. (476)

MR. F. M. SUTTON, *Monroe, N. C.*

DEAR SIR:—In answer to your letter of July 12th, I will accept your offer and take the house and lot for $500, though it is a big price. Let me know when you will be ready to make the deed, so I will be ready to pay for same. Make the deed to D. S. Davis. If agreeable to you, I would prefer giving you my note for the amount until January 1st, and securing it by note we have at Savings, Loan and Trust Company at Monroe for $2,750, as the note will be due then. Of course, your note would draw interest from date, though either way will suit me. Just suit your convenience and let me know what day you will make the deed. If you cannot come out here, you can have the papers fixed up in Monroe

and turn them over to Messrs. Redwine & Stack. Transfer the insurance over to them and you can let me know whether you will want the money on my note signed by myself and brother, D. S. Davis.

Please send me an order to Broom & Garrison for the keys and give me a few days' notice if you want the money down. Your early reply will oblige me, as the improvements I will want will cost about $450, and I want to start at it right away. There is more to do than I first thought. Yours truly, T. L. DAVIS.

That pursuant to the directions contained in this letter, plaintiff executed and delivered a deed for the property to Redwine & Stack, and told Mr. Redwine to hold the deed till the money was paid. If they said the title was all right, defendant was to give plaintiff his note, which he did soon thereafter.

That no one had ever informed witness that there was any deed missing in the line of his title till the fire occurred.

Defendant answered, admitting the execution of the note in
(477) purchase of the lot; set up as a defense that as a part consideration of the trade, and as an inducement thereto, plaintiff represented that he had an unexpired fire policy on the property for $300, which would afford insurance to that amount till January 1st, when the money was to become due, and plaintiff was to hold this as a collateral; and in case of loss by fire, the amount realized from same was to go as a credit on the note.

The answer claimed this $300 as a credit, and offered to pay the $200 over and above such amount.

Defendant stated here that balance of contract was in letters, and admitted that the letter above set out was written by him for himself, and that he signed the name of T. L. Davis to it.

That it was understood between plaintiff and defendant that the deed was to be delivered whenever plaintiff could make defendant a good title, and defendant was to pay plaintiff then, and Redwine & Stack were to pass on the title.

The defect urged by defendant against the title was as follows: That there was one missing deed which had been executed and delivered to C. Brown & Sons, under whom plaintiff claimed by R. B. Redwine (of Redwine & Stack) and T. J. Jerome, as commissioners, who had made sale of the property under a decree of the Court. The sale had been confirmed, title ordered and deed executed. That same having been lost or mislaid, the commissioners, Jerome and Redwine, executed a substitute, which plaintiff had when suit was commenced; but this second deed had not been made at the time the fire occurred.

Plaintiff denied that he had made any statement about any insurance policy.

It was further shown that soon after the trade, defendant took possession of the property, and had ever since exercised ownership and control over it; that he had made an addition to the building; had same insured, and collected $500 insurance thereon when it was de- (478) stroyed by fire in November, 1904. The policy being on the entire building and covering both the original building and the addition.

Issues were submitted and responded to by the jury as follows:

1. Was the deed, dated 23 July, delivered to Redwine & Stack, attorneys for the defendant, by the plaintiff, to be held as an escrow and delivered to defendant upon the payment of the purchase-price, $500? Answer: Yes.

2. Was the building upon the lot described in the complaint destroyed by fire on the 25th day of November, 1904? Answer: Yes.

3. What was the value of the building on said lot on the 27th day of July, 1904? Answer: $400.

4. What was the value of said lot without said building? Answer: $100.

5. Was the plaintiff, at the commencement of this action, able to convey said lot in fee-simple? Answer: Yes.

6. Did the plaintiff represent to the defendant that the insurance policy would not expire before the first day of January, 1905, as alleged in the answer? Answer: No.

7. Did the plaintiff represent to the defendant that he, the plaintiff, would hold the unexpired insurance policy for the benefit of the defendant, as alleged in the answer? Answer: No.

8. Did the plaintiff represent to the defendant that if the house should be destroyed by fire before the maturity of the note, the amount of said policy, three hundred dollars, would be credited on the note sued on, and the defendant should be liable only for the balance of the note, as alleged in the answer? Answer: No.

9. Were the plaintiff's representations as to the insurance policy inducements to give the note and material parts of the consideration of the note sued on, as alleged in the answer? Answer: (479) No.

10. Was the fact that there was a storehouse on said lot a material inducement and a material part of the consideration of the note sued on, as alleged in the answer? Answer: Yes.

Plaintiff moved for new trial for errors, etc., which was refused, and plaintiff excepted.

Plaintiff then moved for judgment on the verdict for the amount of the note and interest. Refused, and plaintiff excepted.

On motion of defendant, there was judgment on the verdict for $100

and interest thereon from 27 July, date of note, and also interest on $400 to time of fire.

Plaintiff excepted and appealed.

Adams, Jerome & Armfield and *F. F. Griffin* for the plaintiff.
A. M. Stack for the defendant.

HOKE, J., after stating the case: The house, a substantial part of the subject-matter, having been destroyed by fire during the continuance of the contract, the plaintiff seeks to recover the full contract price; and the defendant, maintaining his right to a conveyance of the lot, seeks to establish a credit on his title to the extent of the loss.

It may be well to note that defendant here is not asking to be relieved of all contract obligation concerning the property, as in *Wells v. Calnan*, 107 Mass., 514, cited and relied on by defendant. But, on the facts established, he asks judgment that credit on his note be allowed for the loss; and on payment of the same, after such credit, that a good and proper deed be delivered for the lot "on which the destroyed building stood."

His defense, then, will rest on the theory described by Pomeroy as "partial specific performance with compensation," and the gen-
(480) eral principle is stated by that author in his work on Contracts at sec. 434, as follows:

"When the vendor's title proves to be defective in some particulars, or his estate is different from that which he agreed to convey, or is subject to incumbrances or outstanding rights in third persons, or the subject-matter—generally the land—is deficient in quantity, quality, or value, it is plain that the contract cannot be specifically performed, according to its exact terms, at the suit of either party. In such a case there are only three possible alternatives for a court of equity to pursue: either to refuse its remedy entirely, or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give and to pay the full price as agreed; or to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price, proportioned to the amount and value of the defect in title or deficiency in the subject-matter. In determining which of these alternatives to adopt, it is evident that, under all ordinary circumstances, the second one would be extremely unjust and inequitable; and yet it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration. The first alternative might often contravene the wishes and interests of both the parties, and cannot, therefore, be taken as the general or, at least, universal rule. Still, if the deficiency or defect is large and material, and

the purchaser is unwilling to accept a partial performance, this alternative must be adopted. The third is based upon equitable principles; it endeavors to preserve the rights of both the parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee, and sometimes, although under more and greater restrictions, in aid of the vendor. There are circumstances, however, under which even a vendee is not allowed to avail himself of its doctrine." (481)

The principle here stated has been usually applied to cases where the defects urged as a ground for compensation existed when the contract was made; but, when the circumstances required, it has also been extended to cases in which the defects arose afterwards.

This was so held in a case decided by the Supreme Court of Georgia, *Phinizy v. Guernsey,* 111 Ga., 346. In that well-considered opinion, *Cobb, J.,* for the Court, said:

"The text-books and cases sited show that the doctrine of specific performance with compensation for defects when the vendor cannot convey exactly what his contract calls for, is thoroughly established, and it is in rare cases where the Court will refuse such relief at the instance of the vendee. It is true that in nearly if not all of the cases the inability on the part of the vendor to convey what the contract called for arose from some fact which was in existence at the time the contract of sale was made, such as defects in the title to a part of the premises, deficiency in quantity or quality or value of the property which was the subject-matter of the contract, and the like. There does not seem, however, to be any good reason why the principle should not be applicable where the inability of the vendor to convey a part of that which his contract stipulated for arose, subsequently to the making of the contract, out of some transaction in which the vendee was not involved; and the fact that the vendor was himself without fault would not seem to be an obstacle which would prevent the application of the rule. Requiring a vendor to pay damages to his vendee for a failure to convey property which, subsequently to the execution of the contract of sale, was destroyed by fire, is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence, bargained away something which he did not own, but which he believed was his own. That he would be re- (482) quired to pay damages in the latter case no one will doubt; that he should be in the former case ought not, it would seem, to be questioned upon principle."

While this principle is well established, its application is not always permitted as a matter of absolute right, but like the general doctrine of specific performance itself, of which this is a part, its application rests in the sound legal discretion of the Court. As suggested in the extract

from Pomeroy, "there are circumstances under which even a vendee is not allowed to avail himself of its doctrine."

And in sec. 344, this author further says: "In general, the purchaser is entitled to compensation for a deficiency except where the language of the agreement cuts off the claim; but this rule is sometimes, from the circumstances of the case, departed from, and the vendee left to the alternative of abandoning the contract entirely or of having specific performance without abatement of the price."

The Court is clearly of opinion that the present case comes within the exeception here suggested, and that on the facts established by the verdict, taken in connection with the admissions of the parties in the pleadings and testimony, the plaintiff is entitled to judgment for the amount of the note and interest, and without the reduction claimed by defendant.

The facts disclose that the plaintiff is without fault or delay in the matter, having done all that he had agreed to do. He had executed and delivered the deed to Messrs. Redwine & Stack, the parties designated, to be delivered to defendant when he paid the purchase-price. He had the title at the date of the contract; he had it when the suit commenced, and has it now, and is ready and able to convey the lot to defendant when the purchase-price is paid.

Under the special facts and circumstances of this case, the sug-
(483) gested defect is not deserving of serious consideration. A deed, in the line of plaintiff's title, which had been executed by Court commissioners appointed in judicial proceedings, had been lost or mislaid. There is no doubt as to the fact that these judicial proceedings were in all respects regular. The sale had been confirmed and title ordered and made pursuant to the order. The commissioners were Messrs. Redwine and Jerome, Mr. Redwine being the attorney with whom the deed of plaintiff to defendant and title papers were left. There was nothing to be done except for Mr. Redwine to call in his associate in the matter, fill out a blank deed and sign same, and the alleged defect would have disappeared.

As heretofore stated, such a defect, under the circumstances, was not of the substance, and should not be allowed to have substantial effect on the rights of the parties, either plaintiff or defendant.

The plaintiff, then, has been without fault in respect to the title or delivery of the deed; and immediately after the contract the defendant entered into possession and control of the property as owner. He repaired and added to the building; has occupied and used it, and placed an insurance policy on it; and when the same was destroyed, he collected the amount of the policy, which he retains. He is here now maintaining that he has a right to the lot under the contract, and prior to the time

this contract was made there had never been anything required to secure a perfect title but the payment of the purchase-money—payable by himself.

It is undoubtedly the general rule "that when property is destroyed by fire, the loss will fall on him who is the owner at the time."

It is also a well recognized principle that where there is a contract for the sale and conveyance of realty absolute and binding on the parties, equity, for most purposes, will consider the contract as (484) specifically executed; the vendee will become the equitable owner of the lands and the vendor of the purchase-money. After the contract, the vendor is the trustee of the legal estate for the vendee.

Haughwout v. Murphy, 22 N. J. Eq., 531; *Brewer v. Herbert,* 30 Md., 301; *Wetzler v. Duffy,* 78 Wis., 170; 2 White & Tudor's Leading Cases in Equity, part II, pp. 1108, 1109; Bispham Equity (6 Ed.), sec. 364; Pomeroy Eq. Jur., sec. 1406, note 2.

Pursuing the principle in White & Tudor's Leading Cases, *supra,* it is said: "It was declared in like manner by *Duncan, J.,* in *Richter v. Selin,* that 'equity looks upon things agreed to be done, as actually performed.' Consequently, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase-money. So much is the vendee considered in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interval; because by the contract he is the owner of the premises, to every intent and purpose, in equity.

"It is accordingly well settled that if the premises are consumed by fire subsequently to the sale, or are swept away by a flood, or if they are injured by a tort feasor, the loss will fall on the purchaser, who can neither make the deterioration a ground for refusing to accept a conveyance nor rely on it as a defense to an action brought for the purchase-money."

The principle does not in strictness apply here, because the contract, while binding, was not absolute and complete. *Lombard v. Congregation,* 64 Ill., 477.

The deed, being in escrow, to be delivered on condition, no title passed till condition was performed. *Craddock v. Barnes,* 142 (485) N. C., 89. But the defendant, having taken possession of the property as owner, and having exercised and enjoyed all the authority and benefits of absolute ownership, the case is very nearly within the principle; and, on the entire facts and circumstances, heretofore stated, we hold that the doctrine of compensation does not obtain, and that

plaintiff should have judgment for the amount of the note and interest without reduction. Appellant will pay costs of appeal.

Judgment Modified.

Cited:. Whitlock v. Lumber Co., 145 N. C., 126; *Lancaster v. Ins. Co.*, 153 N. C., 290.

(486)

PEDRICK v. RAILROAD.

(Filed 22 December, 1906.)

Navigable Waters—Obstruction—Bridges—Public Nuisance—Right to Sue—Injunctions—Railroads — Charters — Construction — Crossing Rivers — Drawbridges—Control—State and Federal Government—Navigation—Evidence.

1. The obstruction or interference with navigation being a public nuisance, no private citizen may sue therefor, unless he suffers some damage which is not common to the public.
2. A citizen who alleges that he owns and operates a sawmill on the banks of a navigable river and procures logs to be sawed in his mill in rafts, coming down the river both above and below a proposed bridge, etc., and is, in that sense, an abutting owner, is entitled to maintain an action to enjoin the construction and maintenance of a railroad drawbridge across said river below his mill as an alleged public nuisance, but a citizen who owns and runs sail-boats on said river has no right to sue.
3. The courts in such cases will act with great caution in interfering at the suit of private citizens. The State is the proper party to complain of wrong done to its citizens by a public nuisance.
4. The control of its navigable waters is with the State, the authority of the General Government being only cumulative protection from an interference with commerce.
5. The Legislature has the power to authorize a railroad corporation to cross and, of course, to erect a bridge over a navigable stream.
6. In ascertaining whether the charter of a railroad authorizes the construction of a bridge over a navigable stream, being in derogation of a public right, the rule of strict construction will be invoked and the power will not be found unless expressly given.
7. The charter of a railroad authorized it to construct a road from Raleigh, in an easterly direction, to or near Greenville; thence on the south side of Tar River to some point "above or near the town of Washington," which was on the north side of the river: *Held*, that the railroad was authorized to cross the river on a bridge, not necessarily "above" the town of Washington.
8. The power to control the management of a drawbridge over a navigable river after its construction, by requiring the draw to be kept open at all proper times, the removal of rafts or debris and in all other respects, in which the public welfare, interest and safety is involved, is ample in both Federal and State governments.
9. A drawbridge over a navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction

to the navigation as to amount to a nuisance. To constitute nuisance, the obstruction must *materially* interrupt general navigation.

10. Where a railroad had authority by charter to construct a drawbridge over a navigable river, and the evidence was conflicting as to whether the proposed bridge would constitute a nuisance by reason of its location below a certain town instead of above said town, and it appears that about one-fourth of the work had been done before any application was made for an injunction, a judgment of the low Court denying a temporary injunction restraining the construction of the bridge will be affirmed.

ACTION by Leroy Pedrick and others against Raleigh and Pamlico Sound Railroad Company, pending in BEAUFORT, and heard by *McNeill, J.*, at Washington, N. C., on 25 October, 1906.

This action is brought by the plaintiffs, citizens of the town of Washington, for the purpose of enjoining defendant corporation from constructing and maintaining a bridge across the Pamlico River, (487) a navigable waterway, wholly within this State, at the said town, for that "said bridge will materially burden, impede and obstruct navigation over said river and will constitute a public nuisance by rendering it difficult to pass said bridge with sailing vessels and floating rafts, barges, and other crafts, which are constantly plying the waters of said stream in their commerce with the said town and counties bordering on the waters of Pamlico Sound." The plaintiff S. R. Fowle alleges that "he is the owner of a large sawmill situated on said river above the proposed bridge, and is engaged in the manufacture of lumber, and is compelled, in the prosecution of his business, to float his logs to his said mill on the waters of said river in rafts and to ship lumber from his said mill in barges. Plaintiffs Pedrick and Rose are the owners of sailing vessels and engaged in the occupation of running the same between the docks of the said town and parts of the said river below the proposed bridge and the counties bordering on Pamlico Sound. Plaintiffs allege that sail-boat navigation will be peculiarly obstructed by said bridge, because of the effect of adverse winds, in the presence of which sailing vessels are compelled to tack and take different courses, which cannot be done in the space of seventy feet, the width of the draw in said bridge. They further allege that barges and floating rafts will be practically impossible of navigation because of the manner in which they are drawn by tugs, using ropes of such length that they cannot be controlled, but are subject to be dashed against the bridge by side-winds, etc. They further allege that the charter of defendant corporation does not authorize the construction of said bridge at the proposed point. That the construction of said bridge above the docks of the town would fully accomplish the purpose of defendant's charter and but slightly affect the navigation above the town. They further allege that the (488)

charter only authorizes defendant to construct a bridge across Tar River, the mouth of which is at a point about three miles above the town of Washington.

The defendant admits that it has begun the construction and proposes to complete a railroad bridge across the river near Washington, at a point where said river is about one-half mile wide and at which there is but one channel of eight feet in depth and one hundred feet in width. That the said bridge is being constructed under the authority of the Legislature of this State and by virtue of authority of the Secretary of War and the Engineering Department of the Government of the United States. That prior to granting such authority, the said Secretary of War investigated and passed upon all matters pertaining to or affecting the navigation of the said river by vessels of every character. That said bridge is being constructed under the rules and regulations specified by the Secretary of War, and will be, when completed, with the draw across the channel of said river, in all respects a modern structure of the most approved construction, and will not interfere with, obstruct or retard navigation by vessels of the character navigating said river. A map showing the channel, piers and construction at the channel, is attached to the answer.

Defendant further avers that the aforesaid railroad running from the city of Raleigh to the town of Washington was not practicable of construction in any other place or in any other manner than that in which it has been laid out, located and is being constructed and that there was no other practicable way of entrance and crossing of the aforesaid river than that which has been adopted by the board of directors, authorized
(489) by the Legislature and approved by the Secretary of War, in the place and at the point where it now proposes to construct the aforesaid bridge. That it is admitted that the plaintiff S. R. Fowle is the owner of a sawmill situated on said river, but this defendant avers that his aforesaid sawmill is only one of many mills located above said bridge, and the construction of this bridge will not and has not in any manner affected the aforesaid plaintiff S. R. Fowle in any other way or manner than the general public using said river for navigation; and it is further averred that no sailing vessel can now utilize said channel under adverse winds without the aid of a steam or power craft, and they aver that when their proposed bridge is completed that, instead of a channel 100 feet in width and 8 feet in depth, there will be two channels 70 feet in width each, dredged to a depth of 9 feet for the use of such vessels, and it is denied that the construction of the aforesaid bridge will inconvenience, obstruct, or hinder navigation on said river by any manner of craft, and it is further denied that the plaintiffs or either of them have any peculiar or especial property or interest in the naviga-

tion of said river, or would be affected by the construction of said bridge to any greater extent than the general public by reason of the construction thereof, and that either of them would suffer any special irreparable damage thereby.

That in 1903 the Legislature of the State of North Carolina granted to this defendant power to locate, construct and operate a railroad for the transportation of passengers, freight, mail and express, from Raleigh in Wake County; thence in an easterly direction through Wilson County, running near the town of Wilson; thence through Pitt County, running to or near the town of Greenville; thence on the south side of Tar River to some point on or near, across said river in Pitt or Beaufort counties above or near the town of Washington; thence to or near the town of Washington or to some point in an easterly direction to tidewater in the eastern section of North Carolina, on or near the Pamlico River or Sound, as shall be determined by the said board of di- (490) rectors. That pursuant to the power in said charter granted, the defendant company proceeded to lay out, locate its line of railroad as in its charter authorized to do, and at said time located and determined upon the crossing of the aforesaid river at the point at which it now proposes to construct its said bridge; that thereafter, to-wit, after its aforesaid line has been run and located, and after its board of directors has determined upon a crossing of said river at the point designated, the Legislature of North Carolina further extended the rights, powers and privileges of the defendant company by Private Laws of North Carolina, Acts of 1905, ch. 5, ratified 2 February, 1905, to construct said road from the town of Greenville, thence in an easterly direction through Pitt County to or near some point on the south side of Tar River in Pitt or Beaufort counties; thence to or near the town of Washington or to some point in an easterly direction to tidewater in the eastern section of North Carolina, on or near the Pamlico River or Sound, as shall be determined by the board of directors. That undertaking to locate its aforesaid line of railroad, this defendant has made careful examination and has made accurate surveys, and to this end has expended a large amount of money in its attempt to locate its railroad, and that there is no other point at which the crossing of said river can be established consistent with the powers and rights and privileges granted by the aforesaid Legislature; and this defendant avers that the right to build the aforesaid bridge at the point at which it proposes to build the same and the adoption by its boards of directors of this point of crossing the aforesaid river, was in strict compliance and in accordance with the granted power and authority of the Legislature of the State of North Carolina and the general law of said State. That pursuant to the granted authority and power of the Legislature and the authority of the (491)

Secretary of War so obtained, this defendant began and is actively engaged in the construction of a railroad about 140 miles in length, and to this end has expended many hundred thousands of dollars, and is now expending many thousands of dollars each day for the completion of its aforesaid railroad. That it has fully constructed about twenty-five miles of railroad, and will have completed the construction of about forty miles more of railroad by 15 January, 1907, and is in the process of constructing the entire line of its railroad. That in its work aforesaid, in the process of completion, this defendant company has been and is acting in good faith, upon the assumption and belief and advice that its aforesaid charter authorized and empowered it to cross the river at Washington as it is proposing to do, and if it were now stopped in the construction of said bridge it would entail a loss upon this defendant company of many thousands of dollars, and each day's delay it may be forced to suffer to gratify the plaintiff and others would be an inestimable damage, and would seriously affect this defendant in carrying out its purposes and plans regarding the development of the eastern section of North Carolina and the completion of its line of railroad for the use and convenience and advantage of all the people of Eastern Carolina.

The defendant further averred that it was amply solvent and able to respond in damages for any injury which plaintiffs might sustain by reason of the construction of said bridge, etc.

The complaint is verified by plaintiff S. R. Fowle, and the answer by C. O. Haines, president.

Summons was issued 24 September, 1906. Pursuant to notice, a motion for an injunction to enjoin the construction of said bridge was heard before *McNeill, J.*, 15 October, 1906. Both parties filed a number of affidavits tending to support their several contentions. (492) Motion for injunction was denied, and plaintiffs appealed.

Shepherd & Shepherd for the plaintiffs.

L. I. Moore, Stephen C. Bragaw and *Aycock & Daniels* for the defendant.

CONNOR, J., after stating the case: This appeal was argued before us with marked ability and learning, counsel citing authority for the which he based his judgment refusing the injunction.

It will be convenient, in the discussion of the question presented, to support of their several positions. His Honor did not find the facts upon state the uncontroverted facts material to the decision. The town of Washington, conceded to be a prosperous commercial community, containing about 8,000 inhabitants, is located on the north side, we will assume, of Pamlico River, about thirty-six miles above its mouth and (for

this purpose about three miles below the conjunction of said river with Tar River. The said river from its mouth to and above said town is navigable. That considerable traffic has been and is now carried on by the people of said town, over said river, with people living above and below Beaufort and adjoining counties. That said traffic is carried on by means of sailing, steam and gas vessels of considerable tonnage; that said river flows by and past the entire length of said town; there are a large number of wharves, stores, warehouses, together with several sawmills to which logs are brought in rafts from above and below said town, and the lumber is carried to market on barges towed by tugs down said river. That these mills and wharves are located both above and below the county (or highway) bridge which crosses said river, abutting on one of the streets of said town, the larger number of said mills and wharves being below said county bridge. The county bridge has a draw of thirty-six feet.

The defendant's resident engineer makes an affidavit to which is attached a map showing the formation of the banks of the (493) river, width of the channel, location of bridge, distance, etc. We find no contradiction, in any material respect, of the statement made in this affidavit. After stating his opportunities for knowing the facts to which he testifies, he says:

"That from a point below the draw of the said bridge, a distance of 2,500 feet, the channel runs a practically straight course, about northwest by north coming up, and southeast by south going down. That the channel continues then in a straight line above the said draw for a distance of 1,300 feet. That any vessel coming up the said river has a direct approach to the said draw of 2,500 feet, and any vessel going down the said river has a direct approach to the said draw for a distance of 1,300 feet. That a direct approach to the draw in the county bridge, which crosses the said river from Bridge Street, in said town, going up the said river, is about 450 feet; and that coming down the said river a direct approach can be made to the said county bridge draw for a distance of about 950 feet. That above the town of Washington the channel becomes more winding and crooked, and there is no point on the river between the town of Washington and the point three and one-half miles up the said river where the channel continues a straight course for a longer distance than 2,400 feet. That affiant has had opportunities of experience and observation in the matter of the construction of bridges across navigable waters, and knows that the bridge now being built by the said company is modern in character and of approved design, and that the draw of the said bridge is of a character recognized by the experts as being safe, convenient and readily opened and closed, and such as is in common use in railroad bridges at this time. That from Willow

Point above, the course of the river is very winding, with sharp turns and short stretches of water, and the location of a bridge across the
(494) stream above Willow Point would, of necessity, more seriously interfere with the navigation of said river above Willow Point than can the bridge located as is now proposed be to navigation upon the river from Washington to points below. That during the month of September pilings were driven at the points at which will be placed the center pier and end piers of the draw of the said railroad bridge. That from the time of the driving of these pilings until this date there has been left open and clear for the passage of water craft something more than half of the total space that will be provided for the passage of such craft after the said draw is completed. That during this time, that is to say, from the early part of September, affiant has been daily either on the said river or on the shore thereof opposite the proposed draw, and has seen every day numbers of sailing vessels, steamers, gas-boats, tugs and barges, and tugs with rafts of logs in tow, pass through said space without delay, inconvenience or difficulty. That affiant has at times seen a tug with two barges in tow, the said barges lashed together, pass through the said space, and has, at other times, seen the tug with two barges, one behind the other, pass through the said space without difficulty. That during the period of time referred to, the wind has been variable; unusually heavy tides have prevailed, and a considerable portion of the time the weather has been what is commonly called stormy. That the construction of the said bridge, in accordance with the plans, will not have the effect of causing the channel of the river, either at the draw of the bridge or above or below the same, to fill up, but on the contrary, the tendency would be to avoid the result. The plan upon which said bridge is being constructed will leave a space in the channel of the said river not less than seventy feet wide, and another space of the same width, which will become a part of the channel. That the plan attached shows the general elevation of the draw-span of this railroad
(495) bridge the depth of the water on each side of the center pier and between it and the two end piers. That upon the plan is indicated the relative location of the center and end piers, the space left open for the passage of water craft and the depth of the water at mean low-water level. That this plan has been made after a thorough sounding and examination of the said river and the bottom thereof, and is correct. That the depth of the water between the center pier and the end pier, to the south, runs from ten feet on the southern edge to twelve feet next the center pier. That the depth of the water between the center pier and the north pier runs from twelve feet and six inches to thirteen feet; and this depth is practically maintained in the channel for a distance of about two hundred feet below the draw and for the same distance above."

The defendant's charter, Private Laws 1903, ch. 1, authorizes the company to construct a railroad from Raleigh in Wake County in an easterly direction * * * to or near the town of Greenville; thence on the south side of Tar River to some point on, near, across river in Pitt or Beaufort counties, above or near the town of Washington; thence to or near the town of Washington * * * as shall be determined by said board of directors." The charter was amended by the General Assembly, Private Laws 1905, ch. 5, permitting the road to be carried to Snow Hill, in Greene County; thence to Greenville; thence "to or near some point on the south side of Tar River in Pitt or Beaufort counties," etc.

Defendant alleges, and it is not denied, that prior to the amendment of its charter by the General Assembly of 1905, it "proceeded to lay out and locate its line of railroad, and determine upon crossing the said river at the point at which it now proposes to construct its bridge." That on the day the summons was issued in this action, the bridge was more than one-fourth completed. We omit any reference to the affidavit showing the progress of the work and present condition (496) of the bridge.

Before proceeding to discuss the question whether, and to what extent, the proposed bridge would impede, obstruct or interfere with navigation, we will dispose of the two preliminary questions raised by the pleadings and argued before us:

1. Are the plaintiffs or either of them entitled to sue, that is, have they alleged such special and peculiar damage, different in kind from the public generally, by reason of the construction and maintenance of the bridge, as under the settled principles of law give them a right to sue?

2. Does the charter of defendant road authorize it to construct a bridge over Pamlico River at any point, or is it restricted to the construction over Tar River?

The obstruction or interference with the navigation being a public nuisance, it is elementary learning that no private citizen may sue therefor, unless he suffers some damage which is not common to the public, or, to express it affirmatively, he may sue by showing that he sustained some special peculiar injury, different in kind from the public. *Manufacturing Co. v. R. R.*, 117 N. C., 579, where the authorities are cited in a well-considered opinion by *Mr. Justice Avery*. The question is discussed and the latest authorities cited in Joyce on Nuisances, 267-271. We have no difficulty in finding that none of the plaintiffs who sue, in respect to their citizenship of the town of Washington, are entitled to do so upon the averment in the complaint. Mr. Fowle avers that he is the owner of a sawmill on said river, located above the pro-

posed bridge, and that he procures the logs to be sawed at his mill in rafts coming over said river, both from above and below the proposed bridge; that he ships his lumber to market over said river in barges which must be towed by tug-boats down the river and through the draw in the bridge.

Plaintiffs Pedrick and Jones say that they own and run sail-
(497) boats on said river passing from the docks above the proposed bridge into Pamlico Sound, etc.

It is not clear, upon the authorities, whether the allegations bring these plaintiffs within the principle entitling a private citizen to sue in such cases. If we look beyond our own decisions, we find much conflict in the cases applying the rule. We incline to the opinion, without undertaking to discuss and reconcile them, that upon the allegations in the complaint, plaintiff Fowle is, upon the authority of *Manufacturing Co. v. R. R., supra,* entitled to maintain the action. *Baird v. R. R.,* 6 Blatchf. (C. C.), 276; *Hickok v. Hine,* 23 Ohio St., 523; Wood on Nuisances, 853.

The right of plaintiffs Pedrick and Jones is much more doubtful. We do not very clearly perceive how their right to use the right of navigation for the purpose of having their boats to pass up and down the river differs, in kind, from that of all other persons. Mr. Wood says: "It is not enough that he has sustained more damage than another; it must be of a different character, special and apart from that which the public, in general, sustains, and not such as is common to every person who exercises the right that is injured." Nuisances, 646. In *Clark v. R. R.,* 70 Wis., 593, *Lyon, J.,* says: "The complaint herein alleges that the plaintiff owns a steam yacht, upon which he desires to travel daily and carry passengers between Neenah and Appleton; that in his business of a manufacturer he is largely interested in transporting freight up and down the Fox River, past the point where defendant's bridge is located, and would transport such freight by river but for the bridge; but now boats, passengers and freight have to take a circuitous route by reason of the bridge. The complaint fails to state where the plaintiff's business is carried on, or that he owns any property
(498) affected by the alleged nuisance; or that he has ever made any attempt to pass the bridge; or that he has any riparian rights affected by it. The whole substance of the complaint is that he desires to navigate the Fox River, where the bridge stands, with his yacht, and to transport passengers up and down the river at that point, but cannot do so because of the bridge, and is compelled to take a longer route to reach desired points. If there is any element of special damage alleged in the complaint—damage not suffered by the whole public, who navigate or may desire to navigate Fox River between

the same points—we fail to discover it." *Manson v. R. R.*, 64 S. C., 120; *Swanson v. Boone Co.*, 42 Minn., 532.

We are of the opinion that the plaintiffs, other than Mr. Fowle, fail to show any right to sue. It is not very clear that he has such right, but, as he alleges that he owns and operates a mill on the banks of the river and is, in that sense, an abutting owner, we think, and, for the purpose of passing upon the other questions, hold that the action will lie.

It is held by some courts, and with reason, that a court of equity will entertain a bill to enjoin a proposed public nuisance by one who might not be able to maintain an action at law. "The strictness of the original rule has been greatly modified since the days of Lord Coke," Joyce on Nuisances, sec. 424; *Wiley v. Elwood,* 134 Ill., 281 (28 Am. Rep., 673; 9 L. R. A., 726). In such cases the reason upon which the principle is founded, to avoid a multiplicity of suits, does not apply. It is uniformly held, however, that the courts in such cases will act with great caution in interfering at the suit of private citizens. The State is the proper party to complain of wrong done to its citizens by a public nuisance.

In regard to the second question, it will be well to state, as the basis of this discussion, a few elementary principles, before proceeding to consider the peculiar language of the charter. The power to regulate the use of navigable waters in the State, subject to the power (499) in the National Government, is in the General Assembly. The law is thus stated by *Battle, J.*, in *S. v. Dibble,* 49 N. C., 108: "The Neuse River having been thus recognized as a navigable water, the defendants had the right, in common with all other citizens, to navigate it with their boats and, as an incident of such right, to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in this case is the General Assembly of the State." It is clearly within the power of the Legislature to authorize a railroad corporation to cross and, of course, erect a bridge over a navigable stream; both constitute, in this sense, a part of the system of public highways of the State. These propositions are not denied by the learned counsel for plaintiffs.

It is suggested that, by a proper construction of the charter, the defendant is restricted to the construction of a bridge across the Tar River, and that the eastern terminus of this river is at Willow Point, about three miles above the town of Washington. Defendant suggests that the point is not the terminus of Tar River, but that it continues, by that name, until it reaches and passes the town of Washington. It is conceded that the eastern terminus of the river is not fixed by any legislation. We do not deem it at all decisive of the right of defendant to cross the river "near" Washington to fix the exact terminus. It is evident from the language of the records and affidavits that, what-

ever may have been the understanding in the past, the town of Washington is now understood to be located on the Pamlico River. We note that the charter of the Washington Toll Bridge Company, granted 24 December, 1812, empowers the company "to build a bridge across Tar River, above the town of Washington, in Beaufort County, and near the said town, to commence at Bridge Street." *Toll Bridge Co. v. Commissioners,* 81 N. C., 461. It also appears from the record set out
(500) in that case that subsequent legislation referred to it as Pamlico River. The Century Dictionary refers to Tar River as "flowing into Pamlico Sound. It is called in its lower course, Pamlico River." In "North Carolina and its Resources," a work published by authority of the State Board of Agriculture (1896), p. 122, it is said of Tar River: "At Washington it expands into a broad estuary, navigable for sea-going vessels, and thence takes the name of Pamlico River." We note these descriptions of the river, not as showing that Washington is, as a matter of law or fact, on the Tar River, but as indicating that the exact terminus is not known, and that in construing the charter this fact should be kept in view.

It is well known that in our State other rivers have been called by more than one name in different localities. The purpose of the Legislature was to authorize the defendant to construct a road from Raleigh to Greenville, thence on the south side of Tar River to Washington, which is on the north side of the river, the exact status of which, in respect to its name, is not ascertained. No one doubts that the road was to cross "the river in Pitt or Beaufort counties above, or near, the town of Washington, as shall be determined by the board of directors." These facts are thus settled: it was to cross the river from the south to the north side, to some point "above or near the town of Washington." It is not seriously contended that the road *must* cross at Willow Point, or that to cross at such point is either desirable or practicable.

We fully concur with the position of the learned counsel for plaintiff in regard to the rule by which grants of power to corporations are to be construed. The authorities cited sustain them. "All public grants are strictly construed; nothing can be taken against the State by presumption or inference." *R. R. Tax,* 18 Wall., 206; *S. v. Freeport,* 43 Me.,
202. In ascertaining whether the charter of a railroad authorizes
(501) the construction of a bridge over a navigable stream, being in derogation of a public right, the rule of strict construction would be invoked, and the power would not be found unless expressly given. The construction of somewhat similar language was before the Supreme Court of Massachusetts, in *Fall River Co. v. R. R.,* 87 Mass., 221, where *Bigelow, C. J.,* said:

"We cannot doubt that where an unrestricted grant of power is made

to a corporation to construct a road between two points, it carries with it the right to cross navigable waters, if they interfere in a course or route which is otherwise reasonable and practicable, and if the road can be constructed without destruction of the public easement or seriously impairing its convenient enjoyment and use."

The power to cross the river is given by necessary implication. It would be to attribute to the Legislature either ignorance of the geography of the State or a purpose to trifle with an important subject to say that it did not know that to leave Greenville at a point on the south side of Tar River and go to Washington did not necessarily involve crossing some river "above or near Washington."

Having reached the conclusion that the defendant has, by its charter, the right to cross, that is, construct a suitable bridge over the river, the question arises, whether it is restricted to such crossing *above* Washington. To adopt this construction would be to eliminate the word "near." If the Legislature intended to fix the point of crossing definitely "above" Washington, it was unnecessary to use the word *"near."* As said by the Supreme Court of Massachusetts: "The first and most obvious suggestion is, that the Legislature did not intend to fix with absolute certainty and precision the point of departure for the new road, which the defendants were authorized to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that, owing to the nature (502) of the ground, or for some other sufficient reason, it was not deemed expedient or necessary to fix it with accuracy. It is also clear that in thus omitting to designate it, it was their intention to delegate the power of locating it definitely to the defendants or their agents, and to vest in them the exercise of the needful judgment and discretion to carry into effect the authority which they intended to grant." Farnham on Waters, 327 (a). Thus, we find in the defendant's charter, power given the board of directors to determine the point of crossing the river —of course, to be exercised within the limits of the grant—"above, near" the town of Washington. This is the usual form in which the termini of proposed railroads are fixed. It is necessarily so, because we know from observation that the exact termini of railroads are never fixed until after the charter is granted; hence, words similar to those found here are generally used, followed by the power to the directors to fix them by survey or otherwise. *Justice Bigelow,* in the case cited, says: "It follows, that unless the defendants have clearly exceeded the limits of this discretion, and have acted either in bad faith or in disregard of the just limits which by a reasonable construction of the words of the statute should be put on their power to fix the *terminus a quo,* they cannot be deemed to have invaded the plaintiffs' rights, or be held amenable to process,

restraining them from prosecuting their work and constructing their road, according to the plan. * * * They are authorized to commence at a given point, or near it. If they embrace the latter alternative, a wide range is necessarily left open to them. The word "near," as applied to space, can have no positive or precise meaning. It is a relative term, depending, for its signification, on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects." Wood, Nuisances, sec. 274.

We think this correctly states the rules of construction, and, (503) applying it to this case, we are of the opinion that it was within the limits of the power conferred upon the directors of the defendant, acting in good faith, and a due regard to the rights of the public, to locate the bridge below the town of Washington.

We are thus brought to a consideration of the question whether the location, in the light of the evidence before us and for the purpose of disposing of this appeal, is reasonably necessary to the accomplishment of the purpose for which the power is granted, and whether, in the light of such evidence, we can say that it is reasonably practicable to locate the bridge above the county bridge. We concur with the plaintiff in saying that if the location of the bridge below the town will create a nuisance, and if defendant reasonably can accomplish the same purpose by placing it above the town, the charter will be so interpreted as to confine it to such location. 16 A. and E., 1001 (1 Ed.).

In *Hicks v. Hines,* 23 Ohio St., 523, it is said: "Corporations or public officers are not authorized to obstruct the navigation of a river under a legislative grant of power, merely for the building of a bridge across the river, when the bridge can reasonably be constructed so as not to destroy the navigability of the river." In that case the Court found that the effect of the proposed bridge "would effectually destroy all navigation and practically destroy the navigability of the river above the bridge." The right to build a bridge was not denied, but the contest related to the *kind* of bridge that might lawfully be constructed. An injunction was sought only against the building of a bridge *"without a draw." Tilman v. Wolfe,* 27 Texas, 68, was an action for damages for obstructing a navigable stream. The jury found that the obstruction was a nuisance, and the Court held that the statute under which (504) plaintiffs in error constructed the bridge did not authorize them to do so.

We have held at this term, in *Thomason v. R. R.,* that power conferred upon a railroad company to construct and operate a railroad must be exercised with due regard to the rights of the public and of the owners of property abutting or near to the road. In *Met. Asylum Dist.*

v. Hill, 6 L. R. (1880-81), 193, the jury, upon an issue submitted, found that the erection of the hospital for the reception of smallpox patients would be a nuisance, endangering the health of the persons living near-by. It was ruled by the House of Lords that the language of the statute did not authorize the establishment and maintenance of the nuisance.

The power being in the Legislature to authorize the obstruction of a navigable stream by the erection of another highway, as a county bridge or a railroad bridge, the courts will not undertake to control the exercise of the power. The question whether the proposed bridge, if an obstruction, is necessary for the public convenience, is for the Legislature, but in interpreting statutes, by which it is claimed the power is conferred, the courts will apply the rule of strict construction and interpret them upon the theory that the Legislature did not intend to confer power to unreasonably or unnecessarily obstruct the highway or navigation. Farnham on Waters, sec. 1296.

For the purpose of deciding the controverted questions of fact, necessary to dispose of the motion for an injunction, in no manner affecting the rights of either the State or such persons as may be entitled to sue, to have these questions in some appropriate action decided by a jury, we are confined to the complaint and answer, together with the affidavits and exhibits filed. It is not seriously contended that the proposed bridge will obstruct, that is, altogether prevent, boats, barges or rafts passing up and down the river, or that in the mode of its construction, in respect to the draw and the caisson, upon which it rests, the most (505) approved methods have not been adopted. The objection is directed to the *location* of the bridge, and not to its kind or construction. It is alleged, and not contradicted, that it is being constructed in accordance with the plans and specifications of the War Department and its engineers. The power to compel the management of the bridge after its construction, by requiring the draw to be kept open at all proper times, the removal of rafts or débris, the dredging of the channel, if found to be by reason of the caisson, and in all other respects in which the public welfare, interest and safety is involved, is ample in both Federal and State governments. We are, therefore, to eliminate all other questions and consider the testimony only in regard to the location. We find, upon an examination of the authorities, a recognition of the principle that where two rights exist, public as well as private, they must be used and enjoyed in the light of the maxim *"Sic utere,"* etc. *People v. R. R.,* 15 Wend., 134. The rule laid down by Mr. Farnham, and which we think correct, is: "As commerce upon land has increased and become more important, its requirements have modified to some extent the old rule which prevented any interference whatever with navigation rights, *and each right modifies the other;* so that the obstruction to

the navigation will not be regarded as unreasonable and a nuisance, unless it is material and unnecessary in view of the requirements of the land traffic." 2 Waters, 1290. He further says: "If a bridge is necessary for the convenience of the public, and does not prevent the free use of the stream as a public highway, although causing some slight inconvenience to those who had been in the habit of navigating the stream by obliging them to take some additional precautions in passing it, it is not necessarily a nuisance. The fact that the channel is somewhat abridged, or that vessels are delayed to a slight degree, does not render the (506) bridge a nuisance." *Mr. Justice McLean* in *Works v. R. R.*, Fed. Cases, No. 18046, says: "A draw-bridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. The delay is submitted to in consideration of the benefits conferred." The discussion of the Judge in this case is enlightening and apposite to the one before us. "To constitute nuisance, the obstruction must *materially* interrupt general navigation." *S. v. Wilson,* 42 Me., 9; *Woodman v. Pittman,* 79 Me., 456. In *Attorney-General v. R. R.,* 27 N. J. Eq., 1 (page 27), it is said: "The rule of law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves reasonable space for the passage of vessels, it is not indictable; and another rule is, that the bridge must appear plainly to be a nuisance before it can be so decreed, since a court of equity proceeding by bill, like a criminal court trying an indictment, must give the defendant the benefit of all reasonable doubts." *Williams v. Beardsley,* 2 Carter (Ind.), 591.

We have examined with care the affidavits filed in the case. Eliminating the complaint and answer, we find an irreconcilable conflict of *opinion* in the affidavits, while there is but little of fact. Seventeen persons who either own or operate sail, steam or gas vessels and boats on said river, express the opinion that the proposed bridge will seriously impede, impair and obstruct navigation. Twenty-one persons who say that they are in the same position to form opinion, are equally explicit and positive in expressing the opinion that the proposed bridge will not materially burden, impede or obstruct navigation upon the said river, nor will it seriously interfere with or tend to diminish or discourage commerce upon the said river. Each of the affiants gives the reasons upon which their opinions are formed. It is impracticable for us to (507) discuss them in detail; we are not sufficiently familiar with the questions involved to do so intelligently. We take, merely as illustrating the divergence of opinion, the affidavit of Mr. Bell, who says that he is sixty-two years of age and has been for many years engaged in navigating the river. His opportunity is evidently good for forming

an opinion. He says that the bridge will seriously obstruct navigation, giving his reasons therefor. Captain Springer, on the other hand, says that for twenty-five years he has navigated the river. He says that in his opinion no such result will follow. Both appear, from their affidavits, to be intelligent, honest men. They are a fair sample of the other affiants. A large number of citizens engaged in all kinds of occupations and professions express divergent opinions. If we were controlled in our judgment by numbers, the defendant would have the advantage.

Recurring to the parties to the action, we note that the complaint used as an affidavit is not verified by Mr. Pedrick or Mr. Jones. The affidavit of Mr. Haines is very full and explicit; he has large opportunities for knowing the conditions, and his opinions are entitled to much weight. Mr. Packard, an intelligent and evidently well-informed man and resident engineer of defendant, says that he has unusual opportunities for observing the character and class of commerce carried on upon the river. That he has made careful sounding examinations and surveys for the purpose of ascertaining the depth, width, character and course of the channel for a distance both above and below the town of Washington. He gives the result of his work as stated herein. He says that during the month of September pilings were driven at the points at which the center pier and end piers of the draw will be located. That from the time of the driving of the pilings to that of making the affidavit there has been left open something more than half of the total space that will be provided for the passage of boats when the bridge is com- (508) pleted; that during this time he has been daily either on the river or the shore opposite the proposed draw, and has seen every day numbers of sailing vessels, steamers, gas boats, tugs and barges and tugs with rafts of logs pass through said space without delay, hindrance or difficulty. That during said time the wind has been variable, usually heavy tides have prevailed, and for a considerable portion of the time the weather has been what is commonly called stormy. Captain Mohan says that he is engaged in navigating the river, transporting lumber and general freight to and from Washington and Philadelphia and other northern points. That his "barge is a vessel of 432 tons, 183 feet and 7 inches on keel and about 190 feet and 10 inches beam and about 12 feet deep," and one of the largest which "comes into these waters." That barges can be navigated through the draw in the proposed bridge without difficulty, and that the bridge will not impede, burden or obstruct navigation. He gives the width of draws and manner of construction of bridges over a number of navigable rivers between Washington and Philadelphia, showing that the draw in the bridge in controversy corresponds with many others. He says: "Affiant does not know of any draw-bridge across any river in North Carolina that is more easy of

access and less difficult to pass through, or that constitutes less of an obstruction to navigation than will the draw-bridge now being constructed by defendant."

In the light of this conflict of opinion and in view of the fact that courts of equity are cautious in interfering with a public improvement upon an allegation of apprehended injury, we would hesitate to enjoin the further construction of this bridge. *Judge McLean* in *Works v. Junction Co., supra,* a controversy much like this, says that where
(509) the evidence is equally balanced "the preventive and extraordinary remedy invoked ought not to be given."

Several witnesses express the opinion that it would be practicable for defendant to locate its bridge above the county bridge. The testimony in this respect in conflicting.

In *Barnes v. Calhoun,* 37 N. C., 199, plaintiff sought to enjoin the construction of a mill for that it would create a public nuisance, sobbing lands and injuring the health of the people. The testimony was conflicting. *Judge Gaston* said: "Upon the whole, we confess that the strong leaning of our opinion is with those who think that the apprehensions of the plaintiff are not without foundation. But we do not, on that account, feel ourselves authorized to grant the extraordinary remedy which he asks of us. We entertain no doubt of the right of this Court thus to act in cases of undoubted and irreparable mischief, and we hold that it may thus act upon the application of individuals, not only in the case of a private nuisance, but where the individuals suffer special injury in the case of a public nuisance also. *Spencer v. R. R.,* 8 Simons, 193. But it will only act in a case of necessity, where the evil sought to be prevented is not merely probable, but undoubted. And it will be particularly cautious thus to interfere, where the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." He emphasized the right of the plaintiff to sue at law for damages, and, if necessary, upon a verdict establishing the nuisance, apply for equitable relief.

In *Attorney-General v. Lea,* 38 N. C., 301, *Judge Nash,* citing *Attorney-General v. Blount,* 11 N. C., 384, says that the Court will enjoin a public nuisance *"in a plain case."* (Italics his). In this case an injunction to enjoin the erection of a public mill was dismissed. In *Simpson v. Justice,* 43 N. C., 115, plaintiff sought to enjoin a private nuisance.

Pearson, J., says that the fact of nuisance must be established by
(510) an action at law or *"by strong and unanswerable proof."* (Italics his.) The same principle controlled the Court in *Wilder v. Strickland,* 55 N. C., 389, *Nash, C. J.,* saying that if the erection of the mill should result in a nuisance, the courts of law would be open to the complainants. *Hyatt v. Myers,* 73 N. C., 232; *Dorsey v. Allen,* 85 N.

C., 358; *Reyburn v. Sawyer,* 135 N. C., 328. When we look into other jurisdictions we find the same rule uniformly adhered to. In *Eaton v. R. R.,* 24 N. J. Eq., 49, which was a bill to enjoin the construction of a bridge over a navigable water, the Chancellor said: "The work which is sought to be enjoined is a public enterprise of much importance to the people of the State, who, through their Legislature, have authorized its construction. I find no evidence of bad faith on the part of defendant, nor even any imputation of it. This Court is always reluctant to stay the progress of such enterprises, and will only do so in a case clearly calling for its intervention." He further says that if the defendants have done any wrong or unauthorized act "they may be called to answer for it in a court of law. They receive no license or immunity by the refusal of this Court to interfere with them on this application."

There is another view of the case pressed upon our attention. It appears that the defendant made contracts for the construction of the bridge and expended large amounts of money in the preparation for its placing; that for several months it was at work thereon. That pilings were driven, the foundation of the structure made and, as one witness said, about one-fourth of the work done before any application was made for an injunction. It is said in reply to this that plaintiffs had made application to the Attorney-General to institute suit, and were awaiting action by him. While the delay in bringing the action is not controlling in our minds, we cannot disregard the facts in the record. It is manifest that the question of the location of the bridge has been (511) discussed by the citizens of Washington and the defendant for some time, and that there is a division of public opinion in regard to it. The reports of Captain Johnson of the engineer corps show this. The surveys were being made and many and most unmistakable steps were taken showing that defendant had selected the location for the construction of this bridge. The observations of the Chancellor in *Eaton v. R. R., supra,* in this aspect of the case, are in point. It may be proper to say that we do not concur in the view pressed by defendant, that the decision of the Secretary of War permitting the location of the bridge is conclusive. The control of its navigable waters is with the State, the authority of the General Government being only cumulative protection from an interference with commerce. *R. R. v. Ohio,* 165 U. S., 365.

Upon a careful review of the evidence and authorities, we concur with his Honor, and his judgment must be

Affirmed.

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

Cited: Tise v. Whitaker Co., 144 N. C., 512; *McManus v. R. R.,* 150 N. C., 658, 661, 666; *Moore v. Meroney,* 154 N. C., 162; *Whitehurst v. R. R.,* 156 N. C., 50.

(512)

HAIRSTON v. LEATHER COMPANY.

(Filed 22 December, 1906.)

Railroads—Automatic Couplers—Negligence—Continuing Negligence—Contributory Negligence—Assumption of Risks—Fellow-servant Act—Recklessness—Scope of Employment—Disobedience of Orders—Issues.

1. In an action for injuries received in coupling cars without automatic couplers by an employee of a large manufacturing company which in connection therewith and as part of the same owns twelve to fourteen miles of railroad track on which it operates with its own crew, engine and cars belonging to it, and the cars of other roads, the Court was correct in charging the jury that the failure of the defendant to equip its cars with automatic couplers was negligence, and that if such failure was the proximate cause of plaintiff's injuries, they would answer the issue as to negligence "Yes."
2. The jury, under the charge, having found the issue of negligence against defendant, under the principles established in the *Greenlee* and *Troxler cases*, both the defenses of assumption of risk, which ordinarily includes the negligence of a fellow-employee, and that of contributory negligence, are closed to defendant, unless, perhaps, the negligent conduct of the injured employee should amount to resklessness.
3. The Fellow-servant Act, Rev., sec. 2646, applies to the railroad of defendant company and shuts off the defense of injury by negligence of a fellow-servant and bars all defense by reason of assumption of risk unless the "apparent danger was so great that its assumption amounted to reckless indifference to probable consequences."
4. Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessnss, was whether plaintiff was injured in the course of his service and employment, and the Court properly submitted a separate issue as to this matter.

ACTION by Luther Hairston against the United States Leather Company, heard by *O. H. Allen, J.*, and a jury, at the September Term, 1906, of BUNCOMBE.

There was allegation and evidence on the part of plaintiff tend-
(513) ing to show that defendant, a corporation engaged in the business of manufacturing leather and extracting tannic acid, in aid of and as a part of its enterprise, had constructed and was using 12 to 14 miles of railroad track, standard gauge, in and around its plant at Old Fort, N. C., and in operating this road had its own crew, engines, cars, etc.; and also used and shifted the railroad cars of other roads on which wood required for its purposes was brought to its plant. This wood was brought from various localities in railroad cars, and these cars were placed by the railroad on its sidetrack, where the engines and crew of defendant company would move them onto the tracks of defendant, where they were unloaded and the wood stacked between these tracks of de-

fendant company, from which point the railroad crew afterwards and as required would load the wood onto its own cars and haul same to points accessible and convenient to the chipper-house, where the machines of defendant company cut the wood up. Where the tracks permitted, by reason of being on an incline, the shifting of cars was sometimes done by hand, and especially was this true in pushing the cars from the chipper-house track into the chipper-house yard and up to the machines. That the cars of defendant were smaller than the railroad cars, being something like 18 feet in length, and not so high, and were without automatic couplers, the old style link and pin being used for the purpose. That plaintiff was an employee of defendant company, whose duties called on him to work at the chipper machines, and in the course and scope of his duties he was called on frequently to move these cars and stop them and couple and uncouple same; and on the occasion referred to, to wit, 2 May, 1904, in the course of his duty he was on a car which he had started and was letting it roll down towards another car to which it was to be coupled. While plaintiff was so engaged, and as he was about to couple the car he was on to another, the pin which had been prepared failed to drop properly so as to effect the coupling, but fell to the (514) ground between the cars. That plaintiff, remaining on the car, got down on his all-fours and was reaching down to pick up the pin, when a co-employee on the third car allowed same to roll down against the car he was on, jolting plaintiff's hand between the draw-heads, where it was mashed and severely injured. That this employee, one Will Caldwell, could have seen how plaintiff was engaged at the time, there being no obstruction, and plaintiff being in full view.

Plaintiff claimed that on these facts, if established, defendant was guilty of actionable negligence: (1) In not providing the cars with coupling devices, as required by law. (2) In negligently causing the violent collision between the cars as above set forth, while plaintiff was in plain view of those in control of the car which ran into the one plaintiff was on.

Admitting that the cars were without automatic couplers, defendant denied that there was any negligence on its own part, and claimed that it was no part of plaintiff's duties either to couple or uncouple cars, but that his duty was to work at the chipper machines, and alleged contributory negligence on part of plaintiff. Further, that plaintiff had assumed the risk of the injury which occurred to him, and that he was injured by the negligence of a fellow-servant in charge of the rear car, etc.

Defendant offered testimony to sustain his positions, and tendered issues as follows:

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

2. Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison?

3. Did the plaintiff contribute to his injury by his own negli-
(515) gence?

4. Was the plaintiff injured by the negligence of a fellow-servant?

5. Did the plaintiff assume the risk of an injury when he undertook to couple the cars outside of his regular duty?

6. Is the plaintiff entitled to recover damages; and if so, what sum?

The Court submitted the following issues, which were responded to by the jury as follows:

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

2. Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison? Answer: No.

3. Is the plaintiff entitled to recover damages; and if so, what sum? Answer: $1,000.

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

Locke Craig for the plaintiff.

Merrimon & Merrimon for the defendant.

HOKE, J., after stating the case: In the cases of *Greenlee* and *Troxler,* both being actions to recover for injuries inflicted on employees by the negligent failure of railroad companies to furnish their cars with automatic couplers, the principle was announced that such a failure would amount to continuing negligence on the part of the companies which would shut off the defense of contributory negligence and assumption of risk.

In *Greenlee's case,* reported in 122 N. C., 977, it was held:

(*a*) "The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se,* continuing up
(516) to the time of an injury received by an employee in coupling the cars by hand, for which the company is liable whether such employee contributed to such injury by his own negligence or not.

(*b*) "The former decisions of this Court touching upon the duties of railroads to provide modern appliances by coupling cars otherwise than by hand and foreshadowing the early holding that the failure to do so would be negligence *per se,* and the act of Congress (27 U. S. Statutes

at Large, p. 531) requiring self-couplers to be placed on all cars by 1 January, 1898, and the general adoption by railroads of such self-couplers, made it the duty of defendant to adopt such devices, and its failure to do so, whereby an employee was injured was negligence *per se.*

(*c*) "The fact that an employee remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employee if injured while coupling its cars by hand, the doctrine of 'assumption of risk' having no application where the law requires the use of new appliances to secure the safety of employees and the employee, being either ignorant of the law's requirement or expecting daily compliance with it, continues in the service with the old appliances."

In *Troxler's case,* reported in 124 N. C., 189, it was held:

(1) "Reason, justice and humanity, principles of the common law, irrespective of Congressional enactment and Interstate Commerce Commission regulation, require the employer to furnish to the employee safe modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb; and the failure to do so, upon injury ensuing to the employee, is culpable, continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow-servant, such failure being the *causa causans.*

(2) "It is negligence *per se* in any railroad company to cause one of its employees to risk his life and limb in making couplings (517) which can be made automatically without risk."

In *Hicks v. Manufacturing Co.,* 138 N. C., 331, it was said that both of these cases were approved; and further, that the principle therein announced would be further applied in cases of like peril and circumstance; and we think it should be applied here.

The defendant company, being a large industrial plant, in connection therewith, and as part of same, has constructed and owns, in and around its plant at Old Fort, N. C., 12 to 14 miles of railroad track, standard gauge, on which it operates with its own crew, engines and cars, and also the railroad cars of other companies carrying to that point the material required for its purpose. It is an enterprise of unusual extent and proportions, no doubt doing more hauling than many of the logging roads, which have been held as railroads under our decisions, and more shifting and coupling and uncoupling of cars than would be done on the same or much greater quantity of mileage in the operation of a regular railroad.

The track being situated on a level bottom in and around its plant, there would seem to be no difficulty in the procurement and use of these coupling devices, and at comparatively small cost, by means of which

these cars could be coupled automatically and without risk; and the Judge below was correct in charging the jury that the failure on the part of the company to equip its cars with automatic couplers was negligence, and that if such failure was the proximate cause of plaintiff's injury they would answer the first issue "Yes."

The jury, under the charge, having found this issue against the defendant under the principles established in the *Greenlee* and *Troxler* cases, both the defenses of assumption of risk, which ordinarily includes the negligence of a fellow-employee, and that of contributory
(518) negligence, are closed to defendant, and any issues addressed to these questions become immaterial and irrelevant unless, perhaps, the negligent conduct of the injured employee should amount to recklessness.

Again, we have held at the present term, in *Bird v. Leather Co.*, that the act known as the Fellow-servant Act, being Revisal, sec. 2646, applies to the railroad of defendant company, citing *Hemphill v. Lumber Co.*, 141 N. C., 487.

This statute, among other things, enacts that any employee of a railroad who is injured in the course of his service or employment by the negligence of a fellow-servant or by reason of any defect in the machinery, ways or appliance of the company, shall be entitled to maintain an action, and that any contract of an employer, express or implied, to waive the benefit of this section shall be void.

This statute, in express terms, shuts off the defense of injury by negligence of a fellow-servant, which was formerly open to defendant. And in *Coley's case,* 129 N. C., 407, it was held that in cases where same applied, it barred all defenses by reason of assumption of risk unless the "apparent danger was so great that its assumption amounted to reckless indifference to probable consequences." There was no recklessness here, nor was there any evidence tending to establish it. On the contrary, the plaintiff appears to have been doing as well as could be done with the appliance given him; and he testified that if he had gotten down on the ground and under the car to pick up the pin, his injury, in all probability, would have been much more serious.

These two defenses, then, being withdrawn from defendant, both under the decisions in *Greenlee* and *Troxler* and by the construction put upon the statute in *Coley's case, supra,* the numerous exceptions addressed to these questions become immaterial, and the only defense open to defendant on the facts presented was whether plaintiff was injured in
(519) the course of his service and employment.

The principles held to be controlling in this case, both in the decisions and by the statute, apply only for the protection of employees who are wrongfully injured in the course of their employment.

If this plaintiff went out of the line of his service and employment, and, in disobedience to the orders of his superior, officiously undertook to couple and uncouple cars, when it was no part of his duty to do so: in that event, both of these defenses would be open to defendant, and a different rule of responsibility would attach.

The evidence was conflicting on this question: that of the plaintiff tending to show that plaintiff, at the time of the injury, was acting in the course of his employment on the part of defendant, that plaintiff was acting out of the line of his duty, in disobedience to the express orders of his foreman.

The Court very properly submitted a separate issue as to this matter, and under a charge as favorable as defendant could expect, or had any right to ask, the jury have decided the question in favor of plaintiff; and this being true, under the principles discussed, and on the testimony, the plaintiff has a clear right of action.

There is nothing here said which conflicts in any way with *Elmore v. R. R.*, 132 N. C., 865. In that case, the Court, in sustaining a recovery had by plaintiff in the Court below, where a defendant had negligently failed to keep its cars supplied with automatic couplers which would work, held that the charge of the trial Judge was sufficiently favorable to defendant, the same being as follows:

"If plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that by reason of his position he acted foolishly and without prudence with reference to the (520) character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler."

As said by the Court, this is sufficiently favorable to the defendant, for it is the rule which applies in ordinary cases of contributory negligence and assumption of risk. *Hinshaw v. R. R.*, 118 N. C., 1047. But in cases like the present, involving the principles established by the cases of *Greenlee* and *Troxler* and *Coley's case,* where same applies, the correct rule is held to be as indicated in this opinion.

There is no error, and the judgment below is affirmed.

No Error.

Cited: Dermid v. R. R., 148 N. C., 193; *Blackburn v. Lumber Co.,* 152 N. C., 363; *Twiddy v. Lumber Co.,* 154 N. C., 240.

BANK v. HOLLINGSWORTH.

(Filed 22 December, 1906).

Corporations, Contracts of—Pleadings—Issues—Purchaser for Value—Fraud —Evidence—Tranfer of Corporate Assets—Collateral Agreement—Assignment for Benefit of Creditors.

1. While a corporation may contract under an assumed and fictitious name and be bound on the contract, the president or other managing officer, without any authority whatever, cannot bind the corporation by endorsing, in his own name, or the name of some firm of which he may be a member, a note payable to himself for which the corporation received no benefit or consideration.
2. Where this Court, on the former appeal, construed the pleadings as raising certain issues, and the parties went to trial on the pleadings, it is too late on this appeal to raise the question that such issues are not presented by the pleadings.
3. One who is not a creditor of a corporation is not in a position to complain of the fact that all its debts were not paid.
4. The exceptions to the charge of the Court on the issues directed to the question whether the defendant R. was a purchaser for value and without notice of D.'s fraudulent purpose in making certain transfers, are without merit, there being no evidence that R. had notice of facts sufficient to put him on inquiry.
5. Where the president of a corporation who owned all of its stock transferred the same and its assets to defendant in payment of a debt due defendant, the latter's collateral agreement in regard to the disposition of certain notes which they held and to pay the outstanding debts of the corporation did not make the transfer an assignment for the benefit of creditors within the operation of Laws 1893, chapter 433.

HOKE, J., dissenting.

(521) ACTION by National Union Bank of Maryland against J. B. Hollingsworth and others, heard by *W. R. Allen, J.*, and a jury, at the March Term, 1906, of the Superior Court of BUNCOMBE. From a judgment for the defendant the plaintiff appealed.

Julius C. Martin and *Charles A. Webb* for the plaintiff.
Locke Craig and *Moore & Rollins* for the defendant.

CONNOR, J. This cause was before us at the December Term, 1903, and is reported in 135 N. C., 556. The facts are there fully set forth, in the statement of the case, and we find no reason, in disposing of this appeal, for restating them, but refer to the case as reported. After discussing the several phases of the controversy, as presented and argued before us, we concluded by saying: "The cause should be remanded and a new trial had upon the issues of fraud raised by the pleadings and the claim of the defendant Robertson, that, in any event, he is a purchaser

for value and without notice. The burden of proof upon the first issue will be upon the plaintiff and as to the second upon the defendant." His Honor in accordance with this decision submitted the issues indicated and, in addition thereto, submitted the third issue: "Did the defendant, the J. E. Dickerson Company, endorse the notes in controversy in the name of J. E. Dickerson & Co.?" His Honor instructed the (522) jury, in deference to what he construed to be the opinion of this Court, to answer the issue in the negative.

The plaintiff's fifteenth exception is directed to this ruling. It was alleged that the defendant corporation had, through J. E. Dickerson & Co., as agents, contracted the debts sued on, had received the benefit of the money advanced on the notes, and was therefore liable for them.

We do not think the question raised by the third issue was left open, and his Honor may have refused to submit the issue. It will be observed that neither J. E. Dickerson or J. E. Dickerson & Co. had any connection with these notes, save by way of endorsement. There is no evidence that the J. E. Dickerson & Co. had any connection whatever with them. We expressed our opinion in the first appeal upon this phase of the case, as follows: "This note was never payable to the corporation, was not executed in consideration of any debt due the corporation, was never endorsed by any officer of the corporation, in his official capacity, and it is difficult to perceive how it could have become liable *upon the cause of action* set forth in the complaint, that is, the promissory note of Hollingsworth." We adhere to that view.

The learned counsel contends that there was abundant evidence to go to the jury to prove that J. E. Dickerson was acting as agent of the corporation when he endorsed Hollingsworth's note given in renewal of notes payable to J. E. Dickerson & Co., in the name of J. E. Dickerson & Co. While it is true, as contended by counsel, that a corporation may contract under an assumed and fictitious name and be bound on the contract, we know of no authority by which the president or other managing officer of a corporation, without any authority whatever, can bind the corporation by endorsing, in his own name, or the name of some firm of which he may be a member, a note payable to himself for which the corporation received no benefit or consideration. There is no (523) suggestion that either J. E. Dickerson undertook, or any officer of the bank understood or supposed that he was undertaking, to bind the corporation by endorsing the words "J. E. Dickerson & Co." upon the back of a note payable to J. E. Dickerson & Co. We find no *scintilla* of evidence tending to establish any liability against the corporation *upon the endorsement*, which is the cause of action. If the corporation received property from J. E. Dickerson or J. E. Dickerson & Co., in fraud of his or their creditors, the right *to follow the property* in the

possession of the corporation, or the hands of a purchaser with notice, is conceded. The exception cannot be sustained.

The plaintiff's tenth exception is pointed to the submission of the fifth and ninth issues, directed to the question whether Robertson was a purchaser for value without notice of the fraud of Dickerson. The exception is based upon the contention that the issues are not raised by the answer. We construed the pleadings as raising the question, and directed the submission of the issues as stated. Possibly there is some confusion in respect to the real matters in controversy in this case, growing out of the fact that the complaint is drawn upon the theory that the defendant Robertson, as partner of Watkins, Cottrell & Co., was personally indebted to the plaintiff bank. The affidavit upon which the attachment was issued states that Robertson, being a non-resident, is indebted and has property in this State. The attachment is levied upon the property assigned to him by J. E. Dickerson & Co., in the hands of J. E. Rankin, receiver, and the shares of stock in said company, "which belong to and are the property of the said W. S. Robertson." In the first trial the Court directed the jury to answer the issue that Robertson was not indebted to the bank, and rendered judgment accordingly, and this was, upon plaintiff's appeal, affirmed by this Court.
(524) 134 N. C., 582. Thereafter all parties, and the Court, treated the action as a bill to follow the property, upon the theory that Dickerson had dealt with it in fraud of his creditors. The pleadings should, upon the decision of this Court, have been amended so as to present the real controversy. The parties, however, went to trial upon the pleadings, and it is too late now to raise the question that they do not present the questions upon the decision of which their rights depend. If necessary to do so, we would not hesitate to direct appropriate amendments made in this Court.

Exceptions fourteen and seventeen are directed to the instruction that if the jury believed the evidence, they should find that all of the debts of the corporation had been paid. It is conceded that if his Honor's ruling upon the third issue was correct, these exceptions cannot be sustained. The defendant Robertson expressly undertook to, and says, without contradiction, that he did pay all of the debts of the corporation; and no one, other than plaintiff, which, as we have endeavored to show, is not a creditor, is complaining. We do not perceive how the plaintiff is in a position to complain of the time the debts were paid. Exceptions sixteen, eighteen and nineteen point to the charge of his Honor on the fifth and ninth issues directed to the inquiry whether Robertson was a purchaser for value without notice of Dickerson's fraudulent purpose in making the transfers. The plaintiff introduced Robertson's deposition. He testified that neither he nor the firm of Watkins, Cottrell & Co. had any connec-

tion with or knowledge of the Hollingsworth or Jones notes until after the property was transferred to him. The evidence upon this question is clear and positive. In answer to direct questions, he says: "I never dreamed of that; was as much surprised to hear of them as anyone else. I didn't know anything in the world about them—never heard of them before suits were commenced." This testimony was uncontradicted. It is claimed, however, that Robertson had notice of facts (525) sufficient to put him upon inquiry. We have carefully examined the testimony and are unable to find that he had knowledge of any facts in the slightest degree indicating that Dickerson owed any debts, except to his firm. There is no controversy in respect to the validity or amount of this indebtedness. As will be seen by reference to the statement of facts in the former appeal, 135 N. C., 566, two of the partners of Watkins, Cottrell & Co. died, and it became necessary to close up their business. Mr. Robertson, together with the executors, went to Asheville in May, and it was at that time that the first arrangement was made. The Bank of Asheville was then in business, and there is no suggestion that it was insolvent or at least that it was supposed to be so. Hearing that the bank had failed in September and that Dickerson was in trouble, Robertson again visited Asheville, and at that time the final assignment was made in payment of the debt. He swears that he did not at that time know that Dickerson was indebted to any one but himself. It was but natural that the failure of the bank, in which Dickerson was a director, should have made it prudent for Mr. Robertson to visit Asheville, but it was not, in our opinion, any evidence that he was indebted to the bank, and as we have seen, he swears positively that he did not know and had no intimation of that fact.

Without undertaking to discuss the evidence in full upon that point, we refer to the statement of facts heretofore made. His Honor clearly charged the jury in regard to the burden of proof and the manner in which they were to consider Robertson's testimony, introduced by the plaintiff. We find no error in the instruction given. To the suggestion that the transfer made to Robertson in September was an assignment for the benefit of creditors coming within the provisions of the Act of 1893, ch. 453, it is sufficient to say that the real consideration (526) of the assignment was in payment of the debt due Robertson. The collateral agreement in regard to the disposition of the notes which they held and the agreement on the part of Robertson to pay the outstanding debts of the Dickerson Company does not, in our opinion, bring it within the operation of the statute. While there were other exceptions in the record, they are not noticed in the brief, and we take them to have been abandoned. Those which were in the brief fully presented the real matters in controversy.

Upon a careful consideration of the entire record we are of the opinion that his Honor's instructions were correct and that his judgment is in accordance with the former opinion of this Court. There is

No Error.

HOKE, J., dissenting: I think the record and case on appeal show that there was evidence for the consideration of the jury of facts and circumstances which should have put the defendant Robertson on inquiry, and which would have led to knowledge of the fraud established by the verdict against Dickerson and Dickerson & Co.; and the jury should have been allowed to determine the question of the *bona fides* of Robertson's purchase in that aspect of the testimony.

In my opinion, therefore, there was error on the part of the trial Judge in charging the jury that if they believed the evidence they would answer the issue, addressed to that question, in favor of the defendant. As there is no question of law or legal inference seriously involved, however, I do not consider it necessary or desirable to discuss the case more at length.

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(527)

LEDFORD v. EMERSON.

(Filed 22 December, 1906).

Imprisonment for Debt—Fraud—Execution Against Person—Constitutional Law—Habeas Corpus—Supplementary Proceedings—Similar Proceedings Pending—Surrender by Sureties.

1. Where the plaintiff alleged that the defendant collected the proceeds of the sale of certain options, in which they were equal partners, and that his share of the net profits amounted to $4,400, and he further alleged that the defendant had been guilty of fraudulent conduct, and the plaintiff took judgment for the amount due as his share of the profits upon an issue which found that the defendant was "indebted" to him in that amount "by reason of the matters alleged in the complaint," an execution against the person should not have been issued upon the judgment, in the absence of any special finding of fraud by the jury.
2. Under Art. I, sec. 16, of the Constitution, which provides that "there shall be no imprisonment for debt in this State, except in cases of fraud," there can be no imprisonment to enforce the payment of a debt under final process, unless it has been found upon an allegation duly made in the complaint and a corresponding issue submitted to a jury that there has been fraud, and a judgment has been entered in conformity therewith.
3. Where the defendant was not originally liable to arrest and had been discharged upon *habeas corpus*, he cannot be held upon a surrender by his sureties.
4. Where the defendant was ordered to appear before the Clerk to be examined in a supplementary proceeding, when the Clerk was properly informed that a similar proceeding was then pending before the Judge, he should have refused to proceed, and failing so to do, the Judge had the power to order that he desist from further action.

LEDFORD *v.* EMERSON.

ACTION by John P. Ledford against A. S. Emerson, pending in CHEROKEE.

This is a petition for a *habeas corpus* by the defendant, in which he asks to be discharged from an arrest made by the (528) Sheriff under an execution against his person issued in the above-entitled case, heard by *W. R. Allen, J.*, at chambers, on 6 August, 1906, and he was discharged.

It is alleged that the parties were equal partners in a transaction by which in 1900 and 1901 they secured options for the purchase of certain land situated in the State of Georgia, which defendant took in his own name for their joint use and benefit and which were renewed from time to time. The defendant sold the options for $10,000 in 1903, concealed the real amount of the proceeds of the sale and paid the plaintiff only $250, falsely stating to him at the time that the said sum represented his share of the proceeds, and upon the faith of that statement the plaintiff accepted the $250 and gave his receipt for the same in full satisfaction of his share. A much larger amount was due, and this action was brought to recover the balance. The plaintiff filed an affidavit alleging the above facts, and obtained an order of arrest under which the defendant was taken in custody. He moved to vacate the order, and his motion was allowed by *Neal, J.*, 28 October, 1905. An appeal was taken to this Court by the plaintiff, and at Fall Term, 1905, the ruling was reversed and the case remanded, 140 N. C., at page 288, to which we refer for greater certainty. The case was before us on a prior appeal, 138 N. C., 502, and again before us at the last term, 141 N. C., 596, but not upon matters specially germane to the questions now involved.

The issue submitted to the jury and the answer thereto were as follows: "In what amount, if any, is the defendant indebted to the plaintiff by reason of the matters alleged in the complaint? Ans.: $4,225, with interest from 1 May, 1903." The Court adjudged simply that the plaintiff recover of the defendant the said sum and his costs, to be taxed by the Clerk. The execution on this judgment against the property of the defendant having been returned unsatisfied, the Clerk, (529) without any order from the Court, issued an execution against the person of the defendant under which he was arrested and afterwards discharged by *Judge Allen* as above stated. From the order discharging him, the plaintiff appealed.

E. B. Norvell, Busbee & Busbee, and *Axley & Axley* for the plaintiff.

Thomas A. Jones, Dillard & Bell, J. C. Martin and *Ben Posey* for the defendant.

WALKER, J., after stating the case: The plaintiff alleges that the de-

fendant collected the proceeds of the sale of the options, which amounted to $10,000, and that his share was one-half or $5,000, from which was to be deducted the sum of $600 due by the plaintiff on the settlement, leaving $4,400 the clear balance coming to the plaintiff as his share of the profits. So far the complaint shows only an indebtedness by the defendant to the plaintiff arising out of contract. But he further alleges that while he consented that the options might be taken in the defendant's name, upon the assurance of the latter that it would facilitate the sale of the land and would not affect the stipulation as to the equal division of the profits, yet he now believes that all this was done with the intent to cheat and defraud him, and that the sale of the options by the defendant without the knowledge of the plaintiff and without disclosing the fact to him was made with a like intent, and further that the false representation by which he procured the receipt for $250 was also fraudulent and made in furtherance of the original and continuing intent to deprive the plaintiff of his just and equitable share of the profits, the plaintiff being at the time the defendant got the receipt an illiterate man. The plaintiff took a judgment for the amount due him as his share of
(530) the profits and interest from 1 May, 1903, the time they were received by the defendant, upon an issue which finds that the defendant is "indebted" to him in that amount, "by reason of the matters alleged in the complaint."

We have already held (140 N. C., 288) that the defendant could be arrested under an ancillary order and committed unless he should give an undertaking conditioned, as provided by the statute, to render himself amenable to the process of the Court during the pendency of the action and to such as may be issued to enforce the judgment. But this is quite a different thing from imprisoning him under final process until he pays the debt or otherwise discharges himself from custody. The only provisions of the law relating to arrest and bail which can have any possible bearing on this case are substantially as follows: A defendant may be arrested where, as factor, agent, broker or fiduciary, he receives money or property and embezzles or fraudulently misapplies it, or where he is guilty of fraud in contracting the debt or incurring the obligation for which he has been sued, or when the action is brought to recover damages for fraud or deceit. Revisal, sec. 727. It is provided that an execution against the person of the judgment debtor shall not be issued, unless an order of arrest has been served, as provided by law, or unless the complaint contains a statement of facts showing one or more of the causes of arrest enumerated in the statute, "whether such statement of facts be necessary to the cause of action or not." Revisal, sec. 625.

The Constitution provides that "there shall be no imprisonment for debt in this State, except in cases of fraud." Art. I, sec. 16. This, we

think, clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. Whether the fraud to which that section refers is one that is committed in (531) contracting the debt, or extends to one that is collateral to it, such as the fraudulent concealment or disposition of property to evade the payment of the debt, is a question we need not now consider, though discussed by counsel. Whatever may be the nature of the fraud, it must be alleged and proved as any other issuable fact, and it is safer and better that when it is found by the jury to exist, it should be recited in the judgment, with a proper order or direction as to the issuing of executions to enforce it. The defendant is entitled in any event to have a finding by the jury upon this important allegation, before there can be any judgment that will warrant the issuing of an execution against his person.

In regard to this question, we adopt the view taken by the Court in *Davis v. Robinson,* 10 California, 411, where *Field, J.* (since a Justice of the United States Supreme Court), said: "There is no doubt as to the correctness of the position that the execution must be warranted by the judgment. It rests upon and must follow the judgment; if it exceeds the judgment, it has no validity. To authorize, therefore, an arrest on execution, the fraud must be stated in the judgment, for the writ issues, in the language of the statute, in the 'enforcement' of the 'judgment.' Nor do we entertain any doubt that the question of fraud must be submitted to the jury, except so far as may be necessary to authorize the arrest pending the action. To justify execution against the person, which may be followed by imprisonment, an issue must be framed, and be determined like issues of fact raised upon the pleadings. Fraud is an offense involving moral turpitude, and is followed by imprisonment not merely as a means of enforcing payment, but also as a punishment, and it would indeed be strange if on a mere question of indebtedness the right to a trial by jury should be held sacred and inviolate, and yet such trial be denied upon a question involving a possible loss of character and (532) liberty. We should hesitate long before we held that this latter question could be tried upon affidavits where the accuser is also a witness, where the affidavits are not present, and no cross-examination of witnesses is allowed. We are aware of decisions in other States holding a different view, but we do not find sufficient reasons advanced in them to induce us to deny what we cannot but regard as the clear right of the party accused." And again: "The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in

the judgment." It is also said: "By requiring the charges to be stated in the complaint the rights of the defendant will be fully guarded. He can then meet the charges, and have a fair opportunity of defending himself by a trial before a jury." There was no appropriate issue submitted in this case upon the alleged fraudulent conduct of the defendant, and we cannot hold that the general issue submitted embraced the matters relating to it. As soon as the money was paid by the purchaser of the options to the defendant, he immediately became indebted to the plaintiff for the amount of his share, and his subsequent conduct did not add one penny to that indebtedness, nor did it in law increase, in the slightest degree, the obligation to pay it. The debt has continued the same to this time, notwithstanding any of the alleged dishonest acts and practices of the defendant. So that when the jury found that he was indebted to the plaintiff "by reason of the matters alleged in the complaint," they referred, or at least must be presumed to have referred, of course, to those matters only which were necessary to constitute a cause of action for the recovery of the debt, and they were the transactions between the parties prior to the payment of the money to and the receipt of the money
(533) by the defendant for the plaintiff's use. This was fully sufficient to raise the implied promise to pay to the plaintiff his part of the proceeds, if there was not already an express one to do so. The allegations of fraud were therefore extrinsic to the cause of action, and it should not be supposed that the jury, under an issue so framed, passed upon the alleged fraud; and they not having made any special finding of fraud, a personal execution should not have issued upon the judgment. *Claflin v. Underwood,* 75 N. C., 485; *Preiss v. Cohen,* 117 N. C., 54.

There should be a separate and distinct issue submitted to the jury as to any fraud alleged, unless the cause of action is of such a nature that the questions of debt and fraud can be tried in one issue, so as to have a clear and intelligible finding as to each of them. Such a case will rarely, if ever, be presented, but we do not at the present undertake to say that an issue in that form would not be proper. It is better practice, though, to have the fraud found as a fact, under an issue by itself, or separate from that as to the debt. We think the *dictum* in *Peebles v. Foote,* 83 N. C., 102, that if there is an allegation of fraud in the complaint and a judgment for the debt, it will authorize an execution against the person if the complaint is duly verified, without any finding of fraud, and judgment thereon, was virtually disapproved in *Stewart v. Bryan,* 121 N. C., at p. 50, where *Furches, J.,* for the Court, says: "It will not do to carry the doctrine of *Peebles v. Foote* under section 447 of The Code, as amended by the Act of 1891, to the extent contended for in the argument of plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the

defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution." That case seems to sustain the view we have taken herein, that the Constitution requires that there shall be no imprisonment for the enforcement of a debt, unless where the fraud (534) has been adjudged upon an issue properly submitted to the jury. It was there held that a mere allegation of fraud, in a verified complaint, was not sufficient, where the judgment was simply for a debt. The cases cited by the plaintiff's counsel are not in point. *Kinney v. Laughenour,* 97 N. C., 325, did not involve a question of fraud, but a different cause of action, for which an arrest could be made. An order of arrest had been served before judgment, and the jury found the necessary facts to authorize an execution against the person to issue upon the judgment. *Pasour v. Lineberger,* 90 N. C., 159, and *Wingo v. Hooper,* 98 N. C., 482, merely decide that, at that time, the defendant was not entitled to a jury trial upon the questions of fact raised by the affidavits upon which the orders of arrest issued, and that the denial of a motion to vacate, if not reversed, is *res judicata.*

The constitutional right of trial by jury shields the defendant from arrest under an execution against his person unless, in actions of debt, an issue of fraud has been found against him and a judgment entered in conformity therewith. We so hold, and must refuse to follow *Patton v. Gash,* 99 N. C., 280, if in conflict with our views, or any expressions to the contrary, if there are such, in prior cases. If this right of trial by jury exists where his property, however small its value may be, is involved, with much greater reason is it guaranteed where the liberty of the citizen is imperiled. The provision of the Revisal, sec. 735, does not bear on the case, as it applies only to an issue, so called, which is raised by a denial of the facts stated in the affidavit, upon which the order of arrest is based and which is ancillary to the principal cause of action. In such a case the defendant *may* demand a jury trial, but where an issue of fraud is raised by the pleadings, the plaintiff must take the burden and he must establish the fact of fraud before he can be entitled to an execution against the person of the defendant. (535)

We conclude this branch of the case with the language of *Pearson, C. J.,* in *Claflin v. Underwood,* 75 N. C., 486: "We concur with his Honor in the conclusion that the defendant could not lawfully be arrested and imprisoned under a writ of *capias ad satisfaciendum,* for the reason that the issue of fraud had not been tried. By the Constitution no person can be imprisoned for debt except in cases of fraud. No case of fraud had been proved against the petitioner." We also refer to *Merritt v. Wilcox,* 52 Cal., 238, and *Payne v. Elliott,* 54 Cal., 339, where the subject is discussed and the conclusion we have reached is fully vindicated.

As our opinion is against the plaintiff in this appeal, it is not imperative that we should decide the question, whether an appeal is the proper remedy for the review of the Judge's decision upon the *habeas corpus* or whether the matter should have been brought before us by a *certiorari*. The question was not much pressed upon our attention, and we advert to it merely for the purpose of suggesting that a careful amendment of the statute relating to proceedings in *habeas corpus* with a view of affording a speedy and effective method of reviewing such proceedings in this Court would tend often to promote justice by simplifying the remedy and facilitating its use. It should, of course, be done cautiously so as not to defeat the object of the law in other respects, or to delay its administration in the courts. For the purpose of reaching the merits of the case and deciding upon them, we may at least treat this proceeding as in the nature of a motion in the cause to recall the execution and to discharge the defendant, the denial of which motion would be reviewable by appeal. Such a motion was made and entertained in *Houston v. Walsh,* 79 N. C., 36, and the procedure recommended as an appropriate one. The plaintiff surely has no reason to object to this view be-
(536) ing taken of the matter, as it is done for his benefit and so that he may be heard, if his appeal was improper.

It would seem that *habeas corpus* will lie where it appears from the judgment roll that the Court had no jurisdiction to issue an execution against the person. 17 Cyc., 1520; 21 Cyc., 324; *Claflin v. Underwood,* 75 N. C., 485; *Houston v. Walsh,* 79 N. C., at p. 41. The statute forbids the use of the writ only where the person applying for it has been committed or is detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or of an execution issued thereon. Revisal, sec. 1822. We see, therefore, that it must be a competent court and it must have had jurisdiction to proceed against the person committed.

This disposes of the plaintiff's appeal in this case adversely to his contention.

No Error.

PLAINTIFF'S APPEAL.

WALKER, J. After the defendant had been discharged upon *habeas corpus* by *Judge Allen,* his sureties surrendered him and he sued out another writ before the same Judge and was again discharged. It may be doubtful if the sureties could surrender their principal after he had once been discharged upon the ground that he was not amenable to arrest and imprisonment under an execution issued against him in the same cause. But however this may be, our ruling in the other appeal is decisive of this one. If the defendant was not originally liable to arrest, he surely cannot be held even upon a surrender of him by his sureties.

No Error.

PLAINTIFF'S APPEAL.

WALKER, J. The defendant was ordered to appear before the Clerk and be examined in a supplementary proceeding. He moved to dismiss the proceeding, as another of a like kind and instituted for the same purpose before the Judge was then pending on appeal to this (537) Court. The Clerk refused to dismiss, and the defendant excepted and prayed an appeal, which was also refused. He then obtained an order from *Judge Allen* to the Clerk requiring him to certify the record to the Superior Court in order that the matter might be reviewed by him as upon appeal, and to stay all action until it could be heard. The record was accordingly certified and the case came on to be heard by *Judge Allen,* who was of the opinion that the plea of former proceeding for the same cause pending and undetermined was a valid objection to the examination of the defendant, as full relief could be had in that proceeding. The Judge held that the ruling of the Clerk was erroneous, and ordered that the proceeding be dismissed. The plaintiff excepted, and appealed to this Court. We do not understand why this decision was not correct. If it was not, then it follows that the defendant might be vexed by any number of proceedings of the same kind, when one would fully and completely answer the purpose of the plaintiff. This is not a question as to the competency of testimony or the qualification of a witness, but it involves the right of the Clerk to proceed at all, under the circumstances. The cases relied on by the plaintiff's counsel are not in point. In *Bruce v. Crabtree,* 116 N. C., 528, which is more like this case than any other cited, the appeal was taken not by the defendant Crabtree, but by the witness Hartsfield, who had no interest in the cause. It is true the Judge who delivered the opinion said that the order of the Clerk was interlocutory and not appealable, it not being like a final judgment, citing *Clement v. Foster,* 99 N. C., 255, which it will be found does not sustain the view expressed by him. There the plaintiff moved for judgment upon the answer, which he alleged was insufficient. The motion was refused, and he appealed. It was properly held that the appeal was premature, because he should have noted his exception and appealed from the final judgment in the case. But there is no final (538) judgment in this proceeding, and no stage of it at which an appeal can be taken, in order to preserve and protect the defendant's rights, unless it is that at which this appeal was taken. When the Clerk was properly informed that a similar proceeding was then pending before the Judge, he should have refused to proceed, and failing so to do, the Judge had the power to order that he desist from further action. If the course suggested by the plaintiff should be pursued, great wrong and oppression might result to the defendant. The other cases cited are equally inapplicable. This case is governed by *Bank v. Burns,* 107 N. C., 465,

in which an appeal was held to lie to the Judge under circumstances similar to those which appear in this case, and both cases are distinguishable from *Turner v. Holden,* 109 N. C., 182, as in that case there was a defect in the process which could be remedied easily by amendment, while in this case and in that of *Bank v. Burns,* "the objection affects the very existence of the proceedings," as said by *Merrimon, C. J.,* in the latter case. We think *Judge Allen* proceeded regularly, and his ruling meets with our concurrence. It is unnecessary to notice the defendant's second ground of objection to the proceeding which he assigned before the Clerk and afterwards before the Judge.

No Error.

DEFENDANT'S APPEAL.

WALKER, J. When *Judge Allen* dismissed the proceeding then pending before the Clerk, he required the defendant to give an undertaking in the sum of $1,000 to appear at a time designated, for the purpose of being examined, should his order dismissing the proceeding be reversed, the said undertaking to take the place of the one on file, which was ordered to be canceled. If there was danger of the defendant leaving the State,

(539) and it appeared that he had property which he had unjustly refused to apply to the satisfaction of the judgment, the Judge had the power to require him to give security for his appearance, and this is all he did. Revisal, sec. 671. What effect our decision in the plaintiff's appeal from the order dismissing the supplementary proceeding will have upon the undertaking, as security to the plaintiff, we need not now determine.

No Error.

Cited: Copeland v. Fowler, 151 N. C., 356; *S. v. Webb,* 155 N. C., 430; *Howie v. Spittle,* 156 N. C., 182; *S. v. Dunn,* 159 N. C., 472; *Turlington v. Aman,* 163 N. C., 559; *Michael v. Leach,* 166 N. C., 225.

HILL v. RAILROAD.

(Filed 22 December, 1906.)

Corporations—Stockholders—Meetings—Notice—Irregularities—Resolutions—Ratification—Waiver—Laches—Presumptions—Railroads—Leases — Time —Covenants—Breach—Forfeiture—Stare Decisis—Ultra Vires Acts.

1. It is essential to the validity of the acts of the stockholders of a corporation that they should be assembled in their representative capacity, as they are not permitted to discharge any of their duties unless thus organized into a deliberative meeting, though they may all have severally and individually given their consent to any proposed corporate action.

2. Notice to each of the members of a corporation of the time and place of holding a meeting of the stockholders is absolutely essential to its validity, unless the stockholders are present in person or by proxy, or

unless the time and place are definitely fixed by the statute or by the charter or by usage.

3. Where a railroad company resolved to lease its road at a special meeting of the stockholders, of which one of the stockholders had no notice, but at a subsequent annual or stated meeting a resolution was introduced, at his instance, instructing the proper officers to take legal action to set aside the lease and recover the property, and such resolution was defeated: *Held*, that this was a ratification of the lease so far as any irregularity in calling or the manner of holding (540) or conducting the former meeting is concerned.

4. In the absence of proof to the contrary, it will be assumed that an annual or stated meeting of the stockholders of a corporation was held in accordance with the requirements of the charter.

5. Where, after a lease of the property of a railroad company had been authorized at a special meeting, of which the plaintiff had no notice, a regular annual meeting was duly held, of which the plaintiff had due notice and at which the president reported the material facts relating to the lease, and his report was received and adopted, this was a distinct approval of the lease by the clearest implication and without objection.

6. Where a stockholder of a corporation, with knowledge of the execution of the lease of all its property, maintained silence and inaction for more than a year, during which time the lessee had expended large sums of money in execution of his part of the contract and extensive dealings in the stock have taken place, this was a waiver of any right which he originally had to object to irregularities in the execution of the lease.

7. Where a resolution authorizing the lease of corporate property required the deposit of the sum of $100,000, *or* United States bonds, or bonds of the State of North Carolina, or other marketable securities acceptable to the directors and having a market value of not less than said sum, as security for the payment of the rentals, etc., while the lease itself provides that there shall be a deposit of $100,000 *in* United States bonds, or bonds of the State of North Carolina, or other marketable securities, etc.: *Held*, that the provision as contained in the resolution means that the lessee shall deposit either $100,000 in money, bonds or other marketable securities having a current value of not less than that sum, and not that the deposit should consist of bonds or securities having a par value of $100,000, and the substitution of the word "in" for the word "or," which was in the resolution, was merely accidental.

8. Where a resolution for the lease of corporate property provided for the deposit of securities for the payment of rentals with the State Treasurer, but the deposit was made with a trust company as authorized by the terms of the lease, and the change was called to the attention of the stockholders by the president at an annual meeting held a few months after a resolution had been passed directing a full inquiry to be made by a committee into the matter of the deposit, and particularly as to when and where it had been made, after which no further objection was made as to the deposit: *Held*, that the stockholders are presumed to have had knowledge of the contents of the lease, and any objection to the lease because the deposit was not made with the State Treasurer, or because it was not sufficient (541) in amount, was waived.

9. Where a lease of railroad property provided that the "lessee doth covenant with the lessor that it will not within any time during the continuance of said term fix or establish a rate or local freight at a higher average rate than the average tariff rate for local freight as established by the lessor at the time of the execution of the lease," but no clause of for-

feiture was annexed: *Held*, that the failure to comply with the covenant does not work a forfeiture of the lease, but simply gives to the lessor a cause of action on the covenant for its breach.

10. Where the term of a lease of property of a railroad company extends beyond the time fixed by its charter for the corporate existence of the lessor, such a lease is valid for the period of the corporate life of the lessor, and will extend beyond that period if the charter is renewed, and the lessor's corporate existence is thereby extended, and by this process it may endure for the full term.
11. The charter of the defendant company conferring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company, by the former decisions of this Court, to execute a valid lease of its property and franchises to another railroad company.
12. The doctrine of *stare decisis* is applicable to this case and means that this Court should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination.
13. A former adjudication of this Court in construing a statute or the organic law should stand when it has been recognized for years; and in such a case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts, and also a rule of property, and it should not be disturbed even though the conclusion reached may not be satisfactory to the Court at the time the same matter is again presented.
14. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself.
15. Where an alleged illegal transaction has been fully consummated and large expenditures have been made, the benefit of which have been received by the corporation and an objecting stockholder, and the rights of third parties have intervened, so that the *status quo* cannot be restored, and the cancellation of the contract upon the ground of its being *ultra vires* would defeat justice or work a legal wrong, a court of equity will interfere, if at all, only at the instance of the State.

CLARK, C. J., dissenting.

ACTION by W. F. Hill and others against the Atlantic and (542) North Carolina Railroad Company and another, heard by *Long, J.*, at the February Term, 1906, of CRAVEN.

This suit was brought by the plaintiffs to annul the lease of the Atlantic and North Carolina Railroad Company to the Howland Improvement Company, now the Atlantic and North Carolina Company, one of the defendants. The action was commenced in the name of W. F. Hill in behalf of himself and all other stockholders of the Atlantic and North Carolina Railroad Company. C. E. Foy and the Board of Commissioners of Craven County afterwards came in and by leave of the Court were associated with W. F. Hill as plaintiffs. The lease was attacked upon the following grounds:

First. The meeting of the stockholders called by the then president of the company, and at which the resolution was passed which authorized the execution of the lease, was irregularly called, due notice of the meet-

ing not having been given as required by the charter and the meeting not having been held at the place designated in the call. The facts relating to this objection are as follows: The by-laws of the company provide that the president shall have the power to call occasional meetings of the stockholders at such time and place as he may think proper, first giving twenty days' notice thereof in two or more newspapers published in New Bern. The president issued a call for an occasional or special meeting of stockholders to be held in New Bern on the first day of September, 1904, for the purpose of considering a proposition to lease the property and so forth of the company. The notice of or call for said meeting was published in but one newspaper, the *New Bern Journal,* it being at that time the only one published in said city. No personal notice of the meeting was ever given to any of the plaintiffs. Some of the stockholders assembled in New Bern at the time appointed in the no- (543) tice and organized by electing a chairman and secretary. A report was made by the proxy committee through its chairman, Henry R. Bryan, and the meeting was then adjourned to reassemble at Morehead City the same day at 3 o'clock P. M. The stockholders accordingly reassembled at Morehead City and passed the resolution directing the lease to be executed. The plaintiff W. F. Hill was not represented at said meeting, either in person or by proxy. He was at the time the owner of one share of the stock of the company. The Board of Commissioners of Craven was represented and voted the stock owned by the county in favor of the resolution authorizing the lease to be made. C. E. Foy was present and formally protested against making the lease, and his protest was entered on the minutes. The lease was not read to the stockholders. The by-laws further provided that "No contract for the assignment, sale or transfer of any corporate right, franchise or privilege of the company shall be made till the question of sale or transfer shall have been submitted to a vote of the stockholders and such sale or transfer approved by a majority of private stockholders in the State." At the regular annual meeting of the stockholders of the Atlantic and North Carolina Railroad Company held on 20 September, 1905, a resolution was introduced at the instance of W. F. Hill, one of the plaintiffs, instructing the president and directors of the lessor company to institute an action against the Atlantic and North Carolina Company, the lessee company, to cancel the lease made originally to the Howland Improvement Company and to recover possession of all the property, rights and franchises therein described. This resolution, on motion, was laid upon the table. The same resolution was introduced at a regular meeting of the directors on 28 September, 1905, at the request of W. F. Hill, and was also laid upon the table. There was a regular annual meeting of the stockholders of the lesser company on 22 September, 1904, which was (544)

held as provided by the company's charter, and of which all the plaintiffs had due notice. The plaintiffs, other than W. F. Hill, were represented at the meeting and participated in the proceedings. No steps were taken by any one to set aside the lease, which had then been made, nor was its validity questioned in any way. The president of the company, James A. Bryan, submitted his annual report and in it referred to the fact that the stockholders of the company, by a very large majority vote, had authorized a lease of its property and franchise to the Howland Improvement Company, "of which R. S. Howland is the progressive and enterprising president," and that an inventory of the property so leased was then being taken, and that Charles Dewey had been appointed to act with the expert of the lessee company to examine and report upon the condition and value of the road-bed, warehouses and other property of the lessor company, their report to form the basis of the agreement for the actual transfer of the property from the lessor to the lessee. The president then proceeds to say: "In leasing your property to the Howland Improvement Company, while there was, and was to be expected, some opposition to it, the impression is becoming general that your act was a wise one, and will result in the near future in the developing and upbuilding of the entire section along its line, a condition much needed and long hoped for, but until now having little prospect of realization." The provisions of the lease relating to the rental are then set forth, giving the increasing amounts for the successive periods during the entire term. No objection was made to the report, but, on the contrary, it was received and approved by the stockholders and ordered to be recorded in the minutes. The lease provides as follows: "The said lessor for itself, its successors and assigns, does covenant and agree to and with the lessee, its successors and assigns, that the said lessor (545) and its stockholders and directors will not do anything or take any action as such stockholders and directors that may or can interfere, in any way whatsoever, with the free use and operation and convenience of said railroad and other property so hired, let, farmed out and delivered to the said lessee according to the terms and intent of these presents."

Second. The lessee has not made the deposit of bonds required to be made before the lease should become effective, and, therefore, nothing has passed to the lessee. The resolution adopted at the meeting of 1 September, 1904, empowered the officers and directors to cause the lease to be executed and to look after the details of the transaction. The directors afterwards formally ratified and approved the lease as submitted at the said meeting of the stockholders and by resolution directed the property, rights and franchises of the lessor company to be turned over to the Howland Improvement Company upon the latter making the deposit re-

quired by the lease and complying with the conditions precedent mentioned in the lease. The provision of the lease in regard to the deposit is as follows. "To secure the prompt and faithful payment of said rents and sums as above stipulated to be paid, and of all taxes payable on the demised railroad and property as herein provided, and the faithful performance of the covenants entered into herein by the lessee as herein set forth, the lessee does covenant to and with the lessor, its successors and assigns, that it will deposit and keep on deposit with the Treasurer of the State of North Carolina, or any such bank or banks or other depository as may be approved by the directors of the lessor from year to year, and all the time during the continuance of said lease, the sum of one hundred thousand dollars in United States bonds, or bonds of the State of North Carolina, or other marketable securities acceptable to the directors of the lessor, and having a market value of not less than said sum." At the meeting of 1 September, 1904, "the matter of permitting the (546) Governor of the State to look after the making of the deposit required of the lessee was informally discussed" and on 3 September, 1904, the Governor deposited a certified check for $100,000 (which was furnished by R. S. Howland for the lessee) in the Bank of Wayne, and received a certificate of deposit therefor from said bank in his own name as Governor of the State. On 6 September, 1904, the president of the Atlantic and North Carolina Railroad Company and the presidents respectively of the Howland Improvement Company and the Wachovia Loan and Trust Company agreed that eighty of the North Carolina construction 6 per cent. coupon bonds, each of the denomination of $1,000, be deposited with the said Loan and Trust Company for the purposes set forth in the lease. The eighty bonds were purchased with money furnished by R. S. Howland, a part of which was the deposit in the Bank of Wayne, the certificate of deposit which was transferred to the seller being considered as so much cash paid on the purchase-money. The bonds were deposited with the Loan and Trust Company on 13 September, 1904, and were accepted by the latter upon the trust just stated, and are still held by said company. At the time of the deposit and at the time of the trial of this case the said bonds were worth $105,600. At a meeting of the directors of the lessor company held 11 July, 1905, an inquiry was directed to be made by the president, under the advice of the general counsel, into the matter of the deposit required by the lease, it being $100,000. At a meeting of the stockholders of the lessor company held 28 September, 1905, the president, J. W. Grainger, read his report, which was adopted. In it the following statement was made in regard to the deposit: "For the faithful payment of all rents, taxes and other obligations assumed by the Howland Improvement Company, lessees of your road, they are under contract in the lease to deposit a sum

(547) amounting to one hundred thousand dollars in United States bonds, or bonds of the State of North Carolina, or other securities acceptable to the directors of your company. This deposit has been made by the lessee in 6 per cent, coupon bonds of the State of North Carolina, maturing 1 April, 1919, placed in the Wachovia Loan and Trust Company of Winston-Salem, N. C."

Third. That the lessee has violated the contract on its part by increasing freight charges beyond what they were when the lease was executed. The lease contains the following clause: "The lessee doth covenant to and with the lessor, its successors and assigns, that it will not at any time during the continuance of said term fix or establish rates on freight, called local freight, at a higher average price or rate from station to station than the average rate for local freight tariff as lawfully fixed and established by the lessor at the time of the execution of this lease." The lessee did increase the local tariff rates over what they were at the time the lease was made on divers articles mentioned in the case, such as green lumber, cotton, flour and coal, but on dried lumber and certain other articles named they have been decreased.

Fourth. That the lessor company has no power to make the lease, and it is therefore void as being *ultra vires*. The facts which relate to this contention, and which appear in the case, may be thus stated: It is provided by the lessor's charter, sec. 17: "That the said company shall have the exclusive right of conveying or transporting persons, goods, merchandise and produce over the said railroad to be by them constructed, at such charges as may be fixed by a majority of the directors." Sec. 18: "Be it further enacted, that the said company may, when they see proper, farm out the right of transportation over said railroad, subject to the rules above mentioned, and the said company and every person who may have received from them the right of transportation of
(548) goods, wares and produce on said railroad, shall be deemed a common carrier as respects all goods, wares and merchandise entrusted to them for transportation." The company was incorporated on 27 December, 1852, for the term of ninety-nine years. The contract of lease is dated 1 September, 1904, and it is provided therein that the lease shall commence on that day and continue thereafter for the full term of ninety-one years and four months. It demises the franchise and all the rights, privileges and property of the lessor, and the formal transfer of the same took place on 3 September, 1904. The capital stock of the lessee company is limited to one million dollars, to be divided into ten thousand shares of the par value of $100 each, and 1,765 shares of the par value of $176,500 had been issued when the lease was made. Since the execution of the lease, and prior to the commencement of this action, 1,323 shares of the capital stock of the lessor company have been trans-

ferred on its stock book to new parties, and said transfers were based upon sales for value. Mr. Roberts, Mr. Joseph G. Brown, and Mr. Duncan testified that the stock of the lessor company had sold before the lease was made at from 20 to 30 cents on the dollar, while since, it had sold as high as from 60 to 70; while Mr. C. E. Foy testified that before the date of the lease the stock had sold at 47 to 50 and after that date it had sold as low as 50; that he bought some in May, 1904, at 50, and that after that date it had sold as low as 50, and he had bought some at that price. Dr. Hughes testified that he had owned some of the stock for two years before the date of the lease, and had offered to sell it at from 25 to 30, but had not sold it until two or three months before said date, when it brought 47. Mr. C. E. Foy stated that some of the stock sold just before or just after the McBee receivership at prices ranging from 47 to 53½ cents on the dollar. The statement of all these witnesses were found to be correct, and are to be taken and considered (549) as facts in the case. It also appears that dividends have been declared by the lessor company and paid out of funds received from the lessee under the lease, the payment in 1906 having been made directly by the lessee company, and that all the plaintiffs and the other stockholders, except the plaintiff W. F. Hill, received the dividends for the years 1905 and 1906 paid to them respectively without any objection on account of the fact that they had been paid out of the rent or other funds received under the lease. The plaintiff Hill kept his dividend-check for six weeks without objection. The lessee from 1 September, 1904, to the date of bringing this suit, has expended for betterments on the road and equipment between $100,000 and $200,000.

The plaintiff C. E. Foy testified that he suggested the bringing of this suit to the plaintiff Hill, and agreed to save him harmless.

We have not set forth in detail the terms of the lease, as we do not consider it necessary to do so. It may properly be stated, though, that among other things not deemed material, it provides for the expenditure of $250,000 by the lessee within three years from the date of the lease for the permanent betterment of the road-bed, the equipment of the road and the improvement of terminal facilities; for the insurance of the property and its preservation in good condition; for the indemnification of the lessor against any loss or damage by reason of a violation by the lessee of any of its duties or obligations or by reason of any tort committed by it for which the lessor in law could be held liable to the injured party; for the continued corporate existence of the lessor company; the expenses of maintaining it and of providing a proper inspection of the company's property from time to time to be paid by the lessee, the amount, though, not to exceed the sum of $1,200. It is further provided that if the corporate life of the lessor is ended by the expiration of

(550) the term fixed by its charter, before the term of the lease will expire, the lease shall in that case come to an end when the charter expires by its own limitation, but if it is prolonged, then the lease shall continue so long as the charter does, but not beyond the time fixed in the lease.

At the trial below it was agreed by the parties that a jury should be waived and the Judge should find the facts and state his conclusions of law thereon, and render judgment accordingly.

We have made the foregoing statement of what we regard as the material facts from the findings as they appear in the record. The Judge concluded, as to the objection founded upon irregularities in calling and holding the corporate meetings, that all the parties concerned had acted in good faith and that those defects, if they are such, had been either waived or the lease ratified, so far as they are concerned, by the subsequent proceedings and transactions. As to the deposit of the bonds, he ruled that there had been a substantial compliance with the stipulation in the lease and that the default, in this respect, if there had been any, had also been waived. The objection that there had been an increase in the charges for freight was not regarded by him as a cause for forfeiture, but rather, if well grounded, as entitling the lessor to an action on the covenant. The last reason urged by the plaintiffs, namely, that the lease is *ultra vires,* was rejected by him, as the question which it raises had been settled by former adjudications of this Court which, under the doctrine of *stare decisis,* should not be disturbed.

The Court thereupon adjudged that the defendants go hence without day and recover of the plaintiffs their costs to be taxed, and the plaintiffs appealed after having duly excepted to the several rulings of the Court and to its final judgment.

(551) *W. W. Clark, O. H. Guion,* and *L. I. Moore* for the plaintiffs.

A. D. Ward, Aycock & Daniels, R. D. Gilmer, P. M. Pearsall for the defendant.

Busbee & Busbee for private stockholders.

WALKER, J., after stating the facts: The plaintiffs seek in this action to set aside the lease made by the Atlantic and North Carolina Railroad Company to the Howland Improvement Company, which has been succeeded by the Atlantic and North Carolina Company, which latter company is now fully vested with all of its rights and interests under the said lease. It is asserted that the lease is void upon several grounds: 1. Because the meeting of the railroad company, at which authority was given to execute the lease, was not called according to the provisions of its charter, in that the requisite notice of the time and place of holding the meeting was not given and that the meeting was not held at the

place designated in the call. 2. That the lease has never taken effect, as the deposit of bonds provided for in the resolution of the stockholders of the railroad company has never been made, this being a condition precedent, the performance of which was required by the express terms of the resolution before there could be any valid execution of the lease. 3. The lessee has violated its contract by increasing the local charges for the transportation of freight above the tariff rates existing at the time the lease, if valid, was executed. 4. That the railroad company had no authority, under its charter or the general law, to lease its franchise and other property, and the proceedings by which it attempted to do so were *ultra vires,* and the lease is, therefore, null and void.

It is unquestionably true that no function of a corporation can legally be exercised except by and through its agents and representatives, either its directors when they are clothed with power for that purpose, or the stockholders who are the constituent members of the corporate body. It is, therefore, essential to the validity of their acts that (552) they should be assembled in their representative capacity, as they are not permitted to discharge any of their duties unless thus organized into a deliberative meeting, though they may all have severally and individually given their assent to any proposed corporate action. *Duke v. Markham,* 105 N. C., 131. This rule of law is in accordance with a plain dictate of reason and justice. The corporation is entitled to the opinion and judgment of each of its members or of each of its directors or of its other governing body, upon any and all measures taken in the transaction of its business affairs, and for the same reason is each stockholder, whose interests may be vitally affected, entitled to be present and to a reasonable hearing, and especially where anything is to be done likely to prejudice or impair his rights. This principle of the common law, expressed in one of its favorite maxims, is applicable not only to judicial tribunals which pass in judgment upon individual rights, but to corporate bodies as well. Therefore has it always been conceded, as a just and indisputable rule in the law of corporations, that notice to each of the members of a corporation of the time and place of holding a meeting of the stockholders is absolutely essential to its validity, unless the stockholders are present in person or by proxy or unless the time and place are definitely fixed by statute or by the charter or, as it is said, by usage. Clark on Corporations, p. 464 (184); Morawetz on Priv. Corp. (2 Ed.), sec. 479. The majority can act for the corporation, of which they constitute a part, only at a meeting which has been regularly called, and the law permitting a majority thus to act and decide for the corporation against the will of the minority, when there is no restriction in the charter or the general law, presupposes that there has been discussion and deliberation in which all had the right and the

opportunity to participate. Failure, therefore, to notify even one
(553) of the members, either personally or in the manner provided by the charter, is fatal to the proceedings and transactions of the meeting. *Ibid.*

We will assume, for the purpose of deciding this case, that the publication of notice in one newspaper, there being only one then published in New Bern, was insufficient as a legal notice under the charter, and that Hill had no notice of the meeting; and if this is so, and it were all that appeared in this case, we should be compelled to hold that the meeting was not regularly held and its action in regard to the lease was void as to the protesting stockholder who was absent. But this is not all. No stockholder, who was not present, has complained of what was done at the meeting in New Bern and the adjourned meeting at Morehead, but the plaintiff Hill. Foy was there and the Board of Commissioners of Craven County was duly represented. The meeting at which it was resolved to make the lease was held on 1 September, 1904, first at New Bern, and then by adjournment at Morehead City in the afternoon of the same day. Hill was not present either in person or by representation. His co-plaintiffs were, and the stock-vote of the Commissioners of Craven County was cast in favor of the lease. It is true that Foy protested against making the lease and threatened to institute legal proceedings to annul it, but he was there and participated in the meeting, and this fact dispensed with notice to him. He and the Commissioners are therefore not in a position to complain of a want of notice. Thompson on Corp., secs. 712 and 6184; Clark Corp., p. 464.

How is it with Hill? So far we have assumed that he was not bound by the proceedings; but a subsequent annual or stated meeting of the corporation was held on 20 September, 1905. In the meantime no action had been taken by Foy in execution of his threat to sue, or to make good his protest against the action of the stockholders, although more than a year had elapsed since the lease had been executed. At the meet-
(554) ing of 20 September, 1905, a resolution was introduced by Foy, at the instance of Hill (as the finding of the Judge and the evidence show), instructing the proper officers to take such legal action as was necessary to set aside the lease and recover the company's franchise and other property from the lessee, and identically the same resolution was introduced, in the same way, at the meeting of the directors, after the adjournment of the stockholders' meeting on the same day. Both resolutions were, on motion, laid upon the table, or, in other words, defeated.

The defendants contend that this was a waiver of any irregularity in calling the meeting of 1 September, 1904, or a ratification of what then was done in regard to the lease, so that any defect in the proceedings was cured and the lease fully validated in respect to the objection that there

was no notice of the first meeting, or that it was adjourned from New Bern to Morehead, if that was irregular; and so we think. *Wells v. Gates*, 18 *Barbour*, 558; *Hotel Co. v. Marsh*, 63 N. H., 230; *Stokes v. Detrick*, 75 Md., 256.

The plaintiff's counsel seems, in his brief, to concede that this would be true, provided it appeared affirmatively that at the annual meeting the requisite majority had voted to table the resolution.

It cannot well be argued that the refusal of the stockholders at that meeting to adopt the resolution of Hill, introduced by Foy, was not a distinct approval and affirmance by them of the action taken at the first meeting. *Zabriskie v. R. R.*, 64 U. S. (23 How.), 381. It is hardly necessary to discuss, or to cite cases for the purpose of sustaining, so plain a proposition; but how stands the law with reference to the question presented by the contention of counsel? An examination of the authorities discloses that there is little or no disagreement as to the presumption of regularity with respect to an annual or stated meeting.

It is settled that in the absence of proof to the contrary, it will be (555) assumed that such a meeting was held in accordance with the requirements of the charter. "If a stockholder' meeting," says Mr. Clark, "is irregularly called or conducted, the irregularity may generally be waived by the stockholders. They may ratify acts of the majority which are not binding because of irregularities, and thereby render them binding. Every reasonable intendment is to be made in favor of the regularity of stockholders' meetings, and the burden is upon one who claims that they were invalid to show the circumstances rendering them so. In the absence of evidence to the contrary, their legality will be presumed. 'The maxim of law in such cases is, *Omnia rite acta presumuntur.*' Thus it has been held that, in the absence of evidence to the contrary, it will be presumed that due notice was given to all stockholders. So it will be presumed that a quorum of members was present, unless the contrary clearly appears." Clark on Corp., p. 471. This presumption is indulged as to an annual meeting held under the provisions of the charter. With reference even to the case of a special meeting, where notice was required to be given, the very question we now have under consideration was presented in the case of *Insurance Co. v. Sortwell*, 90 Mass. (8 Allen), 223, in which the Court says: "The other objection to the legality of the meeting is, that a quorum of members of the company, according to the requisition of the by-laws, was not present at the time the act was accepted. It is true that the record does not show affirmatively that fifteen members of the company were present at the meeting. Nor is it necessary that it should. The contrary does not appear. It is sufficient that the record shows that the meeting was duly called, and proper notice of it seasonably given. The law will assume, in the ab-

sence of evidence, that a proper number were present to transact the business for which the meeting was called. Illegality will not be pre-
(556) sumed, but the contrary. The maxim of law in such cases is, *'Omnia rite acta presumuntur.' Sargent v. Webster,* 13 Met., 504." See, also, Thompson on Corporations, sec. 3926, *et seq.*

The charter appoints the time for holding the general meetings (fourth Thursday in September), and, as we understand, there is no point made because of any omission to give notice of the annual meeting held 28 September, 1905. But even in regard to that and to all other matters, the law presumes regularity and the performance of all conditions essential to the validity of the proceedings, in the absence of any showing that there was a failure in some material respect to observe the directions of the charter. The unequivocal act of tabling the resolution of the plaintiff Hill, we must hold to be a clear ratification of the lease binding upon the company and all of its stockholders, so far as any irregularity in the calling or manner of holding or conducting the former meeting is concerned. We have not yet referred to the fact that "a regular annual meeting was duly held as provided by the charter on 22 September, 1904, of which the plaintiffs had due notice" (Finding No. 28), and at which Mr. Bryan, the president of the company, reported the material facts relating to the lease. His report was received by the meeting, and adopted. (Finding No. 38.) This was a distinct and emphatic approval of the lease by the clearest implication, and without any objection from a single stockholder. Thompson on Corporations, sec. 3928; *Zabriskie v. R. R., supra.*

But we also think that the silence and inaction of the plaintiff Hill from 1 September, 1904, to 28 September, 1905, was a waiver of any right he originally had to object to irregularities of which he now complains. He has forfeited by his conduct any right he had in the beginning.

It is a general rule of law, as well as of good morals and fair
(557) dealing, that if a party is silent when he should speak or supine when he should act, he will not afterwards be permitted to either speak when he should be silent or to act when he has failed to do so at the first proper and opportune moment. The acquiescence of one who might have taken advantage of an error obviates its effect, *"Consensus tollit errorem."* Upon this maxim of the law depends the important doctrine of waiver, that is, the passing by of a thing. "Silence always implies consent," says another cardinal maxim of the law. *"Qui tacet consentire videtur."* "Where, however," as we are told by Mr. Broom, "an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule, observed as well by courts of equity as of common law, that he should come in the first instance to avail himself of

it, and not allow the other party to proceed to incur expense. 'It is not reasonable afterwards to allow the party to complain of that irregularity of which if he had availed himself in the first instance all that expense would have been rendered unnecessary'; and, therefore, if a party, after any such irregularity has taken place, consents (expressly or impliedly) to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known." Broom's Legal Maxims (8 Ed.), p. 137. What he clearly means is that a party must not only threaten or declare his purpose to do a certain thing if his objection is ignored, but he must follow up his protest by appropriate action; otherwise, he will be deemed to have abandoned his original intention and to have condoned the imputed wrong. This rule, though applied usually to matters of pleading and procedure, is yet equally applicable to all cases where the question of laches is involved, and is generally favored in a court of equity. The doctrine is well stated in Thompson on Corporations, sec. 4534, where it is substantially said that while a court of equity will interpose at the suit of a single stockholder to (558) enjoin acts done by the officers of a corporation irregularly or in excess of their powers, which are injurious to his rights, or acts *ultra vires* (Thompson on Corp., sec. 4520), yet if he has stood by until the transaction to which he objects has become executed, he will not afterwards be heard to complain and this is so although the party who may have dealt with the corporation in the particular case knew of the irregularity of the proceedings or the invalidity of the transaction. When the act is done in good faith for the benefit of the company, although not done as it should have been, the stockholder must dissent within a reasonable time or his assent will be presumed and he will be estopped from gainsaying the validity of the transaction by his silence, when he ought to speak and act, it being such a neglect of duty that he is not entitled to the consideration of a court of justice; and especially is this principle enforced when the objectionable act may be followed by a large expenditure of money, in which case the stockholder should not only enter his protest seasonably, but follow up the same by active and preventive means, for it is obviously against good conscience that one who has the power to prevent the alleged injurious proceeding should stand by and see work prosecuted and money expended that may result to his benefit, and afterwards raise his objection thereto. He may not thus wait unreasonably and pocket the gain of the venture if successful, and then, if so minded, fall back upon his protest as a saving of his legal remedy. Such a course of conduct is the full equivalent of bad faith, and the doors of the Court are shut against him because he cannot enter it, as he should, with clean hands and a clear conscience. His neglect to act, and not mere-

ly to speak, at the proper time, bars his right to remedial justice as effectually as his neglect to protest would have done. *Watts' Appeal,* 78 Pa. St., 370. "The stockholder of a corporation who seeks to prevent
(559) the consummation of an illegal corporate act, or to avoid it, should be *swift* to make known his desires and assert his rights through the tribunals appointed for that purpose." *Thompson v. Lambert,* 44 Iowa, 247. It is his duty to act, and with reasonable promptness. *Zabriskie v. R. R., supra.* If he has refrained from this obvious course of action until the matter is fully consummated or, as in this case, until the lease transaction has proceeded to completion, instead of invoking the restraining power of the Court at the proper time, it would be exceedingly unjust to listen to his appeal when he has thus come too late and after costly improvements have been made, large sums expended in execution by the lessee of its part of the contract and extensive dealings in the stock of the company have taken place—all, perhaps, in reliance upon his long-continued silence and inaction as evidence of his acquiescence in the existing situation and upon the reasonable supposition that his threat to sue was merely an idle one or that upon mature consideration he had changed his mind. *Clegg v. Edmondson,* 8 De Gex M. & G., 787; *Ashurst's Appeal,* 60 Pa. St., 290; *R. R. v. R. R.,* 3 De Gex M. & G., 341; *B. C. Co. v. Lloyd,* 18 Ves., 514; *Rogers v. Cruger,* 7 Johnson, 611; *Bradley v. Ballard,* 55 Ill., 413; *Wood v. C. W. Co.,* 44 Fed. Rep., 146; *Stokes v. Detrick, supra; Lyceum v. Ellis,* 8 N. Y., Supp., 866. The doctrine, therefore, is so firmly established as to be placed beyond the reach of cavil; and it is a very clear and salutary rule in the law of agency adopted for our guidance, that when the principal, with the knowledge of all the facts, acquiesces expressly or impliedly by his silence in the voidable acts of his agent, done under an assumed authority or in disregard of prescribed methods, he cannot be heard afterwards to impeach them, under the pretense that they were done without authority, or even contrary to instructions. *Bank v. Reed,* 1 W. & So., 101. This is
(560) tantamount either to a waiver or ratification, and is based upon the idea of laches.

The maxim of the law, that every ratification relates back and is equivalent to a prior command (*Omnis ratihabitio retrotrahitur et mandato priori equiparatur*), is as much predicable of corporate as it is of individual ratification, that is, of the corporation and stockholder alike, and with the same force and conclusiveness in the case of each of them, and the precedent authority is equally to be presumed as to each in the absence of dissent from the unauthorized act. In either case, if the principal neglects promptly to disavow the act of his agent or his trustee, by which the latter has transcended his authority, he thereby makes the act his own, and will no longer be heard to question its validity. *Kelsey*

v. Bank, 69 Pa. St., 426; *Pub. Co. v. Hitson,* 80 Texas, 216; *Sheldon v. Eickemeyer,* 90 N. Y., 614. An express assent, it is said, is not essential on the part of the stockholder or the corporation in order to operate as an equitable estoppel and defeat the right afterwards to disaffirm or repudiate the alleged irregular act. It may be inferred from the failure, not only to promptly condemn the unauthorized, although not illegal act, but to seek judicial redress for the wrong or a preventive remedy to stay the hands of the offending agent. If this doctrine of equitable estoppel applies to the transaction of corporate or associate bodies as well as to persons acting in a natural capacity and there never was any doubt that it does—then no case can call more strongly for its application than the one now before us.

The previous conduct and present attitude of the plaintiffs are not calculated to produce a favorable impression upon a Court administering equity. That they have been tardy in coming forward with their grievance and very slow in vindicating their supposed right in the only practical way it could be done, cannot be doubted, and objections now come from them with bad grace, who have for so long a time slept (561) upon their rights. They must make a better showing of wrongs which they have suffered, and also of reasonable and timely efforts to obtain relief against them, before a court of equity will interfere in their behalf to set aside an executed contract, and especially as it is well-nigh impossible to place the parties in *statu quo. Dimpfell v. R. R.,* 110 U. S., 210; *M. H. Co. v. Phalen,* 128 Pa. St., 110; *Gordon v. Preston,* 1 Watts, 385; *B. C. Co. v. Lloyd, supra.* The plaintiffs come at this late day for a redress of their alleged grievances and ask for equitable relief to cancel the lease, while they should have appeared and commenced their opposition much sooner, when they could have done so with more show of reason and justice. The laws assist those who are vigilant, and not those who sleep over their rights, is a fundamental rule in equity which is not only eminently just, but is necessary to the protection of those who are more watchful and careful of their interests and who otherwise may be made to suffer innocently if the law should favor one guilty of such laches. We have discussed this branch of the case fully, as our decision upon the first objection urged by the plaintiffs will have an important bearing upon most of the other grounds of opposition to the lease and will make the task of deciding them much less difficult.

Before proceeding further, we cannot do better than direct attention to the steady and unvarying current of judicial thought upon this subject, as indicated in the decisions of some of the courts whose opinions are entitled to the highest respect, and who have had similar questions under consideration. "If he (the complainant) wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient

promptness to enable the Court to do justice to him without doing injustice to others." *Rabe v. Dunlap,* 51 N. J. Eq., 48. "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing (562) in, an arrangement which is *ultra vires* of the company to which they belong, watching the result: if it be favorable and profitable to themselves, to abide by it and insist on its validity, but if it prove unfavorable and disastrous, then to institute proceedings to set it aside." *Gregory v. Patchett,* 33 Beav., 595. In *Kent v. Mining Co.,* 78 N. Y. 159, it was said: "Acts of a corporation which are not *per se illegal* or *malum prohibitum,* but which are *ultra vires,* affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected in a reliance on those acts. It is not needed that there be an express assent upon the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of the commital of it, this will be deemed an acquiescence in it; and if innocent third persons have been led thereby to put themselves in a position where harm would come to them if the act were held invalid, the stockholders are estopped from questioning it. An unconscionable arrangement will not be disturbed where there has been a ratification of it, with knowledge of all its bearings, after time has been had for consideration." Mr. Noyes says: "Acquiescence for an extended period during which time the interests of third parties have intervened, may itself constitute laches and prevent a stockholder from attacking a consolidation even on the ground of fraud." Intercorp. Rel., 49. All these authorities and others of equal force and directness were cited and approved by this Court in *Spencer v. R. R.,* 137 N. C., 107, to the carefully prepared opinion by *Mr. Justice Connor* in which case we refer for a clear and conclusive vindication of the principles both by reason and precedent. "It is not to be understood that courts will refuse to protect the rights of a single stockholder if (563) invaded by the majority, however large, or refuse relief against aggressions of consolidated capital, however powerful," says the Court in that case. But the injured party must move in due time to assert his right, and before the transaction has been fully consummated and the interests of third persons have become involved. We there quoted with approval the following passage from *Pender v. Pittman,* 84 N. C., 372: "This equity ought to be promptly asserted, and not deferred until by a sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done and restore matters to their former condition. An injunction against carrying out a contract of sale made under a power contained in a mortgage will not be.

granted when the relief to which the plaintiff considers himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened." We will have occasion again to refer to *Spencer v. R. R.*, when we reach another important and, perhaps, the leading question raised in this case.

The next objection made by the plaintiffs is that the deposit of bonds was not made as required by the resolution of the stockholders, and that this was a condition precedent to the effective execution of the lease, and not having been complied with, the lease is void. Fulfilment of this stipulation is made, by the express terms of the resolution of 1 September, 1904, a condition precedent to its validity, and we will so treat it, so far as the resolution is concerned. In respect to this provision there is some slight difference in the phraseology of the resolution and that of the lease itself. The resolution requires the deposit of the sum of $100,000, *or* United States bonds, or bonds of the State of North Carolina, or other marketable securities acceptable to the directors of the company, and having a market value of not less than said sum, as security for the payment of the rentals, interest and charges and the performance of the conditions of the lease," while the lease (564) itself provides that there shall be a deposit of $100,000 *in* United States bonds, or bonds of the State of North Carolina, or other marketable securities, etc. (pursuing thereafter the language of the resolution), with this further provision: "which said deposit and security, or any equivalent for it which may be substituted therefor, may be applied" (as in the lease specified). In the resolution it is provided that the deposit shall be made and kept with the Treasurer of the State, and in the lease that it shall be kept with the Treasurer or in any such bank or banks or other depository as may be approved by the directors of the lessor company. The resolution makes this deposit a condition precedent, while in the lease the provision as to the deposit takes the form of a covenant, for it says: "And to secure the prompt and faithful payment of the said rents and the sums as above stipulated to be paid and of all taxes, and the faithful performance of the covenants made herein by the lessee, the said lessee does hereby covenant to deposit and keep on deposit with the State Treasurer," etc. We are clearly of the opinion that the provision as contained in the resolution was intended to mean, and its wording so implies, that the lessee should deposit either $100,000 in money or bonds or other marketable securities having a current value of not less than that sum, and not that the deposit should consist of bonds or other like securities having a par value of $100,000. The idea was to have $100,000 on deposit to secure the performance of the stipulations of the lease, and that it should, at all times, be kept equal to that amount, whether it be in so many dollars or in bonds or other securities of not

less value than that number of dollars. The words, "and having a market value of not less than that sum," refer to their immediate antecedents, "the bonds or other securities," and not to the $100,000 as having the value of that sum, or, in other words, as being equal to its (565) own value, which would be a solecism. This is the clear import of the language employed in the resolution, and as thus construed there was a substantial compliance with the requirements of the resolution in this respect. We think that the substitution in the lease of the word "in" for the word "or," which is in the resolution, was merely accidental, and that it was not the purpose to change the substance of the provision as found in the resolution. Besides, if the language of the lease is construed by itself, it is evident the same meaning was intended as that we give to the provision in the resolution. The change in the lease from the phraseology of the resolution, and especially the use of the expression, "which said deposit and security or any equivalent for it which may be substituted therefor," it seems to us plainly evinces the intention to have been to require so many dollars to be deposited or securities of an equivalent market value, without any special regard to their par value.

The same reasoning also applies to this ground of complaint as that we applied to the first objection of the plaintiffs to the lease, namely, the want of sufficient notice of the stockholders' meeting. The fact that the deposit had been made with the Wachovia Loan and Trust Company was called to the attention of the stockholders by the president of the company at the annual meeting held on 28 September, 1905. If the change of the depository from the State Treasury to the Loan and Trust Company was not authorized and did not meet with the approval of the stockholders, they were put on inquiry by the report of the change in the depository, and no complaint was made, although that was the time to speak and to raise objections. A resolution was passed at the meeting held on 11 July, 1905, directing a full inquiry to be made by a committee into the matter of the deposit, and particularly as to when and where it had been made, and this inquiry was required to be conducted un- (566) der the advice and guidance of the general counsel of the company. The stockholders must be held to have had knowledge of everything such an inquiry would have disclosed, and it appears from the subsequent report of the president that they did have such knowledge. We could hardly hold that they did not have knowledge of the contents of the lease (which varied from the resolution and authorized the change in the depository) when it was provided that it should be executed by the directors; they accepted and approved the form of the lease; it was so executed, and then an inquiry was ordered to be made into the matter of the deposit. If they did not have full knowledge of the contents of

the lease, they should have had it. Much less evidence than we have here has been held sufficient to fix a party with notice. *Bunting v. Ricks,* 22 N. C., 130; *Blackwood v. Jones,* 57 N. C., 54; *May v. Hanks,* 62 N. C., 310; *Ijames v. Gaither,* 93 N. C., 358; *Hulbert v. Douglas,* 94 N. C., 122; *Bryan v. Hodges,* 107 N. C., 492. Those cases decide that the law will presume knowledge by the stockholders from their laches in not informing themselves, as they were called upon to do so by being put on their guard, if they did not in fact have knowledge, which we think it appears they did have, when the finding of facts by the Court upon this point are properly considered. But acquiescence to be inferred from long delay, more than a year, coupled with their silence and the failure to object at the seasonable moment, as effectually deprives the plaintiffs of this ground of objection as it did of the other. In a case strikingly similar to ours in respect to the deposit, the Court said that the facts showed that the corporation had notice of the place of deposit under circumstances not as strong as those in this case, its attention having been called sharply to the fact by a letter from its treasurer requiring remittances to be sent during his absence to another than the appointed depository, and that it acquiesced in the change of the depository by reporting to the stockholders that its funds were in (567) the hands of the new depository. "The conduct," says the Court, "of the corporation constituted a ratification of the act of the treasurer (if his act it was) in selecting the place of deposit, and absolved him from liability in that regard." *R. R. v. Dixon,* 114 N. Y., 80. It is true the Court finds that at the time of the execution of the lease no deposit had been made with any one, and that the change of the depository was not made by the directors, but by agreement between the president of the lessor company and the president of the lessee company, though the matter of permitting the Governor of the State to look after the making of the deposit was discussed informally at the meeting of the directors on 1 September, 1904, and he caused to be purchased the eighty bonds which were subsequently deposited with the Loan and Trust Company, they being worth $105,600, and that in changing the place of deposit the officers, and all others participating, acted in perfect good faith, nothing to the contrary having been alleged or proved. If all this was irregular and unwarranted, the Court was right in deciding, upon the authorities we have already cited, that it, as well as the other alleged omissions and defects in the proceedings and transactions, had been fully waived and the lease in respect to them had been ratified by the subsequent conduct of the stockholders, including the plaintiffs.

As to the objection now urged, that there has been an increase in the local freight charges in violation of the terms of the lease, it is sufficient to say that the stipulation not to raise the rates is in the form of

a covenant without a clause of forfeiture annexed to it, as there is in the case of the deposit. If the lessee fails to make and keep that good, the lessor has the right to reënter and determine the lease; but not so if the freight charges are increased. It seems, and we will hereafter (568) show, that in the latter case the parties did not intend that a failure to comply with the covenant should work a forfeiture of the lease, but simply that it should give to the lessor a cause of action on the covenant for its breach. The law leans against any construction of a stipulation in a contract which will involve a forfeiture, and will construe it to be a covenant rather than a condition subsequent. "As conditions subsequent tend to destroy estates, they are not favored in law, and if it is reasonably doubtful whether a provision in a conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter." 1 Cyc., 1050. And this would be so even if the lessor has any other remedy by which to get redress or by which to enforce a compliance with the stipulation. The fact that this provision is in the form of a covenant and that it is not mentioned in the clause of forfeiture and reëntry, would seem to indicate clearly that its violation was not intended by the parties to be good cause for terminating the lease. But the lessor company has not attempted to reënter for a breach, even if it has the right to do so, which we need not therefore decide.

If the covenant has been broken and there is a continued infraction of it, we do not mean to say that a court of equity could not afford relief by a mandatory injunction or other appropriate equitable remedy and compel strict observance of the stipulation, though in the form of a covenant, if sufficient ground is shown for its interference, and especially if from the peculiar nature of the covenant the breach cannot be compensated in damages recoverable at law, or if the legal remedy would for any other reason be inadequate.

The learned counsel for the plaintiffs contended that the term of the lease would extend beyond the time fixed by its charter for the corporate existence of the lessor company. It has been settled by the authorities that such a lease is certainly valid for the period of the corporate (569) life of the lessor, and will extend beyond that period if the charter is renewed and the lessor's corporate existence is thereby extended, and by this process it may endure for the full term; and provision is made in this lease to meet just such a contingency. 23 A. and E. (2 Ed.), 781; Noyes Intercorporate Rel., sec. 201; 5 Thompson Corp., sec. 5896; 3 Cook Corp., p. 2594; Baldwin R. R. Law, p. 458; *Gere v. R. R.*, 19 Abb. N. C. (N. Y.), 193; *R. R. v. R. R.*, 51 Fed., 309 (*s. c.*, 163 U. S., 592); Wood on L. & T., sec. 61, p. 144; *Brown v. Schleier*, 118 Fed. Rep., 981. And this accords perfectly with the reason of the thing and the justice of the case.

We are not now referring to the right or the power of the lessor company to make the lease under its charter or the general law applicable to such cases; but assuming for the present that the power exists, the correctness of which assumption we will consider hereafter, we decide only at this stage of the case that the lease is in all other respects valid.

This brings the discussion to the principal question raised by the plaintiffs, and upon which, we take it, they mainly rely for success, and that is whether this lease is *ultra vires* or beyond the power of the lessor to make. This is an exceedingly important matter, but the difficulty of deciding it is greatly lessened by the former decisions of this Court. If it were an open question, we might be confronted by a very serious problem which would require the gravest consideration; but we do not think that such a situation is presented. The right to discuss the question has been foreclosed by adjudications which we, under established principles, are not at liberty to disregard, if we were inclined to do so. We must consider the former decisions of this Court as authoritative and conclusive upon us.

By referring to the charter of the North Carolina Railroad Company, Laws 1849, ch. 82, we find that by sections 18 and 19 (570) the right to transport passengers and freight and the power to "farm out" the right of transportation were given to that corporation in the same language used in sections 17 and 18 of the charter of the lessor company in this case. The corresponding sections in the two charters are copies of each other. The North Carolina Railroad Company, in September, 1871, leased its road and all its rights and franchises to the Richmond and Danville Railroad Company, a foreign corporation, for thirty years, with the right to change the gauge of the track. An action was brought by the State to test the validity of this lease and to enjoin the change of the gauge, the plaintiff alleging that the lease was executed without any authority of law and that the change of gauge would be injurious to the State and its citizens. This Court, after a careful consideration of the question at issue, decided that the power to "farm out," which was given by the charter, fully authorized the making of the lease and that it was lawful and valid. The Court also decided that under the general law and the charter, the lessor company had the right to change the gauge of its road, which right passed to the lessee by the lease. There was a dissenting opinion, and, too, a very able one, as were all of the opinions of the eminent Judge who wrote it, but this does not affect the authority of the decision as a judicial precedent or take it out of the rule of *stare decisis,* but really emphasizes the fact that the case was well considered. *S. v. R. R.,* 72 N. C., 634. This is not all. The Legislature by the Act of 1874-5, ch. 159, prohibited any railroad company in the State, except those having a narrow gauge, from increas-

ing the gauge of their tracks under heavy penalties. The Richmond and Danville Railroad Company, defendant in the former case, and certain of its officers, caused the gauge of the track of the North Carolina
(571) Railroad Company to be widened from four feet eight inches to five feet, and thereupon the said company and its officers were indicted for violating the Act of 1874-5. The Court decided upon the special verdict that the defendants were not guilty, and the decision was placed upon the ground that the North Carolina Railroad Company had leased its franchise, privileges and property to the Richmond and Danville Railroad Company, which included the right or privilege of changing the gauge of the road, and that the lease was valid in every particular, and was not *ultra vires,* as contended by the State through its Attorney-General. *S. v. R. R.,* 73 N. C., 527. It expressly affirmed its former decision in *S. v. R. R., supra,* in the strongest and most emphatic language. It held that the charter of the North Carolina Railroad Company was a contract which could not be violated by the State in the form of legislation or otherwise, and secondly, that the lease between the North Carolina Railroad Company and the Richmond and Danville Railroad Company was inviolable upon well-settled principles of law. Referring to the former decision of the Court involving practically and substantially the same question, the Court, by *Mr. Justice Rodman* (who clearly assented to the view of the Court as stated in the former opinion), said: "It must be assumed in considering this case, that the matters decided in the case of the State against the same company, which is now a defendant, are the settled law of this State, and admit of no question. Two things were decided in that case: 1. That the lease of its road, etc., by the North Carolina Railroad Company to the Richmond and Danville Railroad Company was lawful and valid. 2. That the lessee, by virtue of the lease, had up to the passage of the Act of 1874-5 a right to change the gauge of the North Carolina Railroad." 73 N. C., at p. 529. The Court then observes that the State owned a large
(572) majority of the shares of stock in the North Carolina Railroad Company, at the time the lease was made, and had supreme control over every act and contract of the company, and the lease could not have been made without its express consent. It also referred to the fact that the lessor company had covenanted in the lease not to interfere by its servants or agents with the free use and convenient operation of the railroad, and for these additional reasons it could not be heard to question the validity of the lease or to molest the lessee in the use of the road or in changing the gauge. These considerations apply with equal force to this case, as similar provisions to those mentioned are to be found in the charter of the Atlantic and North Carolina Railroad Company and the lease it made to the Howland Improvement Company. Indeed, the

charter of the Atlantic and North Carolina Railroad Company seems to be substantially a copy of the charter of the North Carolina Railroad Company, and the lease made by it to the Howland Improvement Company is, in all particulars pertinent to the matters presented in this case, substantially like that of the North Carolina Railroad Company to the Richmond and Danville Railroad Company. It is utterly impossible to escape the conclusion that the question of *ultra vires,* now raised in behalf of the plaintiffs, has been decisively answered by this Court, against their present contention, more than thirty-four years ago, in *S. v. R. R.,* 72 N. C., 634, and afterwards upon reconsideration of the whole matter and review of that decision, it was solemnly adjudicated by the Court in *S. v. R. R.,* 73 N. C., 527, that such a lease purporting to have been made under a power given in words identical with those used in the charter of the Atlantic and North Carolina Railroad Company, was not only authorized by those words and valid in that respect, but was not *ultra vires.* It is therefore entirely too late, under the circumstances and in view of these precedents, for the plaintiffs to again raise the ques- (573) tion as to the true meaning of the words "to farm out" or to question the validity of the lease upon the ground that it is *ultra vires.* We will not attempt to discuss the question ourselves as if it were *res nova,* for it is not, and every consideration of public policy and good faith requires that we should accept the interpretation given to those words by this Court, and also its decision as to the power of the railroad company to make the lease, as a finality, and we therefore hold that the lease is not *ultra vires,* because it has been so decided and is not open for readjudication.

It is said, though, that we are not bound by those decisions. Why not? The doctrine of *stare decisis,* commonly called the doctrine of precedents, has been firmly established in the law and is applicable to this case, if to any. It means that we should adhere to decided cases and settled principles and not disturb matters which have been established by judicial determination. The precedent thus made should serve as a rule for future guidance in deciding analogous cases, and it should especially be controlling, as we will hereafter see, if, as in this case, persons in their business relations and in making their contracts have acted upon the faith of its correctness and in reliance upon its continuance as a rule of law, so that rights have become vested which will be seriously impaired if the rule thus established is reversed. This is not only a sensible but a just principle, and a contrary rule would manifestly be inequitable. Let us give solemn heed to the impressive language of *Lord Kenyon,* when laying an injunction upon the Judges to abide by former decisions: "I cannot legislate," said he, "but by my industry I can discover what my predecessors have done, and I will tread in their footsteps." These

words which fell from the lips of a great Judge cannot be too often carefully weighed by us, when situated as we now are and as he was at
(574) the time he uttered them. A law-writer, who has given special study to the question, says that similar principles govern the courts in ascertaining the legislative will, and construing statutes and fundamental laws, to those which control their action in announcing the doctrines of the common law, as applicable to the causes which come before them for adjudication (Wells on *Res Judicata,* 554, sec. 604), and it was said, too, while discussing the doctrine of *stare decisis.* Again, in this connection, he says: "The community to be affected by it (a former decision) have acted upon it in a vast number of judicial relations; rights of property which have grown up under it have changed hands and passed through numerous ramifications, until it has become imperative to regard it as a rule of property, which no power can disturb. What our present opinion may be, as to the merits of the decision in that case, is now of no consequence whatever. In construing statutes, and the Constitution, the rule is almost universal to adhere to the doctrine of *stare decisis.* This is an adjudicated question, and the subject of its correctness is to us a sealed book." *Ibid., sec.* 605. The same author, quoting from Mr. Fearne, says: "If rules and maxims of law were to ebb and flow with the tastes of the Judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by or dependent at all upon the former determinations in cases of a like nature, I should like to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase." *Ibid.,* sec. 599. And we add, what person would enter into a contract based upon the meaning of a statute once construed, without first taking a fresh opinion from the Court? "Where a judicial interpretation has once been put upon a clause, expressed in a vague
(575) manner by the Legislature, and difficult to be understood, that ought of itself be a sufficient authority for adopting the same construction. *Buller, J.,* said: 'We find one solemn determination of this doubtful expression in the statute, and as that construction has since prevailed, there is no reason why we should now put another construction on the act on account of any supposed change of convenience.' This rule of construction will hold good, even if the Court be of opinion that the practical construction is erroneous; so that if the latter be *res integra* the Court would adopt a different construction. Judicial use and practice will have weight, and where continued for a long time will be sustained though carried beyond the fair purport of the statute." 2 Lewis' Sutherland on Stat. Const. (2 Ed.), sec. 475. *Lord Cairns* said: "I think that with regard to statutes it is desirable not so much that the

principle of the decision should be capable at all times of justification as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty." *Comrs. v. Harrison,* L. R., 7, H. L., 9. "Under the application of the doctrine contained in the maxim (*stare decisis et non quieta movere*), where a series of decisions, or even a single decision, of a court of last resort has been accepted as the proper interpretation of the law and has been acted upon and become a rule of property, the courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one." 26 A. and E. (2 Ed.), p. 161. We have repeatedly said that the weightiest reasons make it the duty of the Court to adhere to its decisions. *Weisel v. Cobb,* 122 N. C., 67.

But there is another well-grounded principle that enters into this case and should have a place in this discussion. It is clearly stated by *Lord Mansfield:* "When solemn determinations acquiesced under, have settled precise cases and become a rule of property, they ought for (576) the sake of certainty to be observed as if they had originally formed a part of the text of the statute." *Wyndham v. Chetwood,* 1 Burrow, 419. We adopted that rule in *Long v. Walker,* 105 N. C., 109, where it was held that a former adjudication of the Court in construing a statute or the organic law should stand, when it has been recognized for years, and in such a case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts and also a rule of property, and that it should not be disturbed even though the conclusion reached may not be satisfactory to the Court at the time the same matter is again presented. To the same effect are *Grantham v. Kennedy,* 91 N. C., 151, and *Kirby v. Boyette,* 118 N. C., 244, in which case the Court applying the doctrine of *stare decisis* and referring to a principle which had been established by a decision of the Court for thirty years, said: "Can this Court, consistently with its constitutional obligation to adhere to decisions which may have become a rule of property, alter or modify the principle upon which the people of the State have been invited to invest their money for so long a period? The proposition upon which the contention of the petition to rehear is based is unsound in law and cannot be acted upon without grave danger to the rights acquired under a well-founded confidence in the stability of judicial decisions. The theory is that if a court, in the elucidation of the questions involved in any given controversy, finds it necessary to crystallize the law upon the subject into a clean-cut rule, which will prove a guide to the profession, such rule may be abrogated after it has been acted on for over thirty years, because the case in hand might have been decided by stating the principle governing the particular case, instead of

the broader one founded upon the reason of the thing, but decisive also of other cases as well as that at bar. To lend our sanction to such (577) a view of the law would be to imperil the security of many principles upon which titles have been acquired under the advice of the most competent counsel. A due regard for vested rights necessarily constrains a court to reject such a theory as little short of revolutionary."

In *Young v. Jackson,* 92 N. C., at p. 148, this Court said: "The case cited was decided in 1875. It has been treated as a proper construction of the statute in question, and, as thus construed, it has been acted upon, no doubt, in many cases. To disturb it would unsettle titles and give rise to much confusion and injustice. We cannot think of doing so." "After the meaning of a statute," it is said in a work of high authority, "has been settled by judicial construction, the construction becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment, and contract obligations entered into or vested rights acquired while the former decision was in force cannot be impaired." 26 A. and E., 179. See, also, *Douglas v. Pike County,* 101 U. S., 677. "A change in judicial construction in respect to a statute should be given the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment—that is to say, its operation must be prospective, not retrospective." *Lewis v. Symmes,* 61 Ohio St., 471.

In considering the effect of overruling a decision upon existing contracts, the Court in *Falconer v. Simmons,* 51 W. Va., 177, said: "An overruled decision is regarded as not law, as never having been law, but the law as given in a later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception: that where there is a statute, and a decision giving it a cer- (578) tain construction, and there is a contract valid under such construction, the latter decision does not retroact so as to invalidate such contract."

This Court in *S. v. Bell,* 136 N. C., 677, gave practical effect to the rule that the reversal of a precedent should not be allowed to work an injustice, by requiring that the case then under consideration should be tried anew, not according to the principle as then decided to be the correct one, but according to the former adjudication, simply because the party is presumed to have acted in reliance upon it. Was that not the only fair and proper caurse to pursue, and would any other have commended itself to our sense of right? The opposite ruling would have met with strong condemnation, as being contrary to the plainest principles

of justice. Speaking of a like case, *Lord Kenyon* said: "It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years." *Rex v. Younger,* 5 Dumf. & E. (Term Rep.), at p. 450. Of the same purport as the cases just cited is *Township v. State,* 150 Ind., 168, where the Court says: "Courts will not so apply a change made in the construction of the law as it was held to be in the overruled case as to invade what are considered vested rights, or, in other words, while, as a general rule, the law as expounded by the last decision operates both prospectively and retrospectively, still, courts are required to and do confine it in its operation so as not to impair vested rights, such as property rights or those resting on contracts express or implied." There are many decisions by the Supreme Court of the United States to the same effect. The doctrine is clearly stated in *Louisiana v. Pillsbury,* 105 U. S., 295 (quoting from *Douglas v. County of Pike, supra*), as follows: "The true rule is to give a change of judicial construc- (579) tion in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself." And again, it is briefly put thus: "A change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment." *Anderson v. Santa Anna,* 116 U. S., 356. The rule, in a somewhat modified form, is clearly and strongly stated in *Olcott v. Supervisors,* 16 Wall., 678, thus: "This Court has always ruled that if a contract, when made, was valid under the Constitution and laws of a State as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or judiciary will be regarded by this Court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule." Cases from that Court may be cited almost without number, so frequently and consistently has the rule been announced. *Gelpcke v. DuBuque,* 1 Wall., 175; *Pine Grove v. Talcott,* 19 Wall., 68; *Ins. Co. v. Debolt,* 16 How., 416; *Taylor v. Ypsilanti,* 105 U. S., 74; *Boyd v. Alabama,* 94 U. S., 645; *Chicago v. Sheldon,* 9 Wall., 50. An excellent statement of the doctrine of *stare decisis* will be found in Black's Interp. of Laws, 375, *et seq.,* where it is substantially said that

an authoritative judicial construction put upon a statute has the force of law by becoming, as it were, a part of the statute itself. The
(580) importance of this rule arises out of the fact that the declared meaning is at once accepted as correct by those whose rights or whose business conduct may be affected by it, and many transactions may depend for their validity upon the permanence of the interpretation thus given to the words in question. "The Court almost always, in deciding any question, creates a moral power above itself; and when its decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case." *Bates v. Relyea,* 23 Wend., 336. "We hold the doctrine to be sound and firmly established, that rights to property and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the State, and which were valid contracts under the statute as thus interpreted when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same Court overruling the former decisions; that as to such contracts or investments, it will be held that the decisions which were in force when the contracts were made had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions cannot retroact so as to impair rights acquired in good faith under a statute as construed by the former decisions." *Farrior v. Mortgage Co.,* 92 Ala., 176. This rule is one made by the law at the call of justice, and in obedience to the plain dictate of common sense, to protect a contract made on the faith of an exposition of the terms of a statute, in the former decision, and which should, as to that contract at least, remain unimpaired so that no detriment will come to parties who have thus dealt with each other in the honest belief that the same construction will be placed upon a statute, under which they have contracted and which is expressed in iden-
(581) tically the same language. It is not unreasonable that they should be so influenced in their conduct and not by the opposite belief that the court of last resort in the State will so vacillate in its decisions as to give two radically different constructions to the same words. A court would stultify itself if it should hold that parties should have acted upon any such belief.

The people are supposed to have confidence in their highest court, at least to the extent of ascribing to it the virtue or consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights, because he has simply acted upon the supposition that what the Court has so solemnly determined will again be its decision upon the same state of facts, or that at least, if it does change its mind, his rights and interests will be thoroughly

safeguarded. If courts proceeded upon any different theory in the decision of causes, the people would be left in a state of uncertainty as to what the law is, and could not adjust their business affairs to any fixed and settled principles, which would, of course, produce most mischievous, if not disastrous, consequences. A court, therefore, is not always at liberty to inquire, in passing upon a case before it, what is the law, for investigation should sometimes stop when it has been ascertained what has already been decided on the subject. Wells *Res. Jud., Ib.*, sec. 598. In *Los Angeles v. Water Co.*, 177 U. S., 575, the Court sums up the clear result of all the authorities, citing many cases, as follows: "At the time of the contract of 1868 and of the passage of the ratifying Act of 1870 it was established by the decision of the highest court of the State that the Constitution of the State permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the Legislature. This law was part of the contract of 1868, as confirmed by the Act of 1870, and could not be affected by (582) subsequent decisions."

There is still another principle, in some respects like the one just discussed, that we should consider in this connection. It is thus stated in *Bradley v. Ballard*, 55 Ill., 419: "While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporations in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice." A full discussion of the doctrine will there be found, with the citation of many cases to sustain it. *Thompson v. Lambert*, 44 Iowa, 239; *Sheldon v. Eickemeyer*, 90 N. Y., 607; *Stokes v. Detrick*, 75 Md., 256; Thompson on Corporations, sec. 4534; Noyes Intercorp. Rel., sec. 196. And the doctrine of laches also applies to acts alleged to be *ultra vires*. The illegality of corporate acts must be promptly exposed, and relief will be denied the corporators who wait until the evil has been done and the interest of innocent third parties has become involved. *Zabriskie v. R. R.*, 23 How. (64 U. S.), 381. The objection of a stockholder to the lease of a railway company alleged to be invalid, comes with bad grace after he has received the profits of the completed transaction. He will not be permitted in this way both to approve and disapprove the act of the corporation. *Dimpfell v. R. R.*, 110 U. S., 210. The general principle deducible from the authorities is that if the alleged illegal transaction has been fully consummated and large expenditures of money have been made, the benefit of which has been received by the corporation and the objecting stockholder, and the rights of third par-

ties have intervened, so that the *status quo* cannot be restored, and the cancellation of the contract upon the ground of its being *ultra*
(583) *vires* would defeat justice or work a legal wrong, a court of equity will interfere, if at all, only at the instance of the State. Thompson on Corp., sec. 8438, and secs. 8318 to 8323.

R. R. v. R. R., 145 U. S., 393, is directly in point and "on all fours" with this case. If anything, the plaintiffs in this case can have less ground on which to stand and demand relief than did the plaintiff in that case. The difference, if any, between the two cases is in favor of the present defendants. There the plaintiff company leased its road to the defendant in perpetuity, which leasing the Court held to be invalid. The lessor brought the suit to cancel the lease as being *ultra vires,* but the Court refused to entertain its bill upon the ground that the contract had been fully executed, and further held that both the corporation and its stockholders were barred by laches, and in this connection it says: "When the parties are *in pari delicto,* and the contract has been fully executed on the part of the plaintiff, by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches." It would seem impossible to distinguish the two cases in this respect. See, also, *Hardwood v. R. R.,* 17 Wall., 78; *Rabe v. Dunlap,* 51 N. J. Eq., 40. This Court has recently given its assent to the same principle, as one not only just in itself, but as peculiarly fit to be applied to such cases, when parties have waited, especially
(584) when they had full knowledge of the facts and, as the very nature of the transaction shows, when new rights and interests necessarily have arisen, before they invoked the aid of the Court. It was there held that when a stockholder fails for two years to bring an action to annul a consideration of two corporations alleged to be *ultra vires,* and in the meantime the agreement has been fully executed and third parties have acquired interests in the consolidated company, a court of equity will not grant the relief demanded, namely, that the transaction be set aside. *Spencer v. R. R.,* 137 N. C., 107.

These principles clearly apply to this case, for the Court has found as facts that the lease was made and all the dealings between the parties were conducted in good faith and with an honest purpose, and that there has been a transfer of a large number of the lessor's shares of stock and

other transactions which involve the interests of third parties; that the plaintiffs Foy and the Board of Commissioners have accepted and appropriated to their own use the dividends paid to them, which were so paid from money received from the lessee, under the terms of the lease; that large expenditures have been made by the latter, and that the plaintiff Hill kept his dividend check for six weeks without objection. These and many other facts found by the Court and already stated, show how grossly inequitable it would be to listen with favor to the plaintiff's appeal for relief.

While we have discussed the case in some of its aspects upon the plaintiff's assumption that the lease is void, it must not by any means be inferred that we assent to that proposition, because we do not think they can at this late day be heard to say that it is *ultra vires,* this Court having said most positively and unequivocally that it is not. We must accept that decision as a final and conclusive exposition of the words of the charter under which the lessor claimed the right to lease its franchise and property. It is not, therefore, *ultra vires,* because this (585) Court has said that it is not, and that is quite sufficient for our guidance, and as irrevocably fixes the meaning of the words of the charter as if they had been so unmistakably interpreted by the Legislature, and that very meaning had been written into the charter by it and the power to lease had thereby been expressly given without leaving any room for construction. The authorities applicable to this view of the case have been copiously cited.

Before closing this opinion we must direct attention to the exact analogy, nay, the precise sameness, word for word, between the charter of the lessor in this case and that of the North Carolina Railroad Company, which was construed in *S. v. R. R.,* 72 N. C., 634, and *S. v. R. R.,* 73 N. C., 527. The one is manifestly a literal copy of the other. Upon what rule of construction can it be argued that where there is an intent to express the same idea and evidently to confer the same power, we should give to the words employed by the Legislature two different and opposite interpretations, and thus defeat that purpose? Identity of language necessarily implies identity of meaning, and every principle of logic and fair construction requires us so to decide. The two clauses were inserted in the charters of the respective companies whose railways constitute, with the Western North Carolina Railroad, one continuous State line from the mountains to the seashore, now under the control of the Corporation Commission, which body can compel proper connections and traffic arrangements for the convenience of the public. Two of these charters were granted at the same session of the General Assembly (1854-5) and the other a few years prior thereto (1849), and they were framed necessarily with a common intent and therefore expressed in

identical words. We have not been endowed with faculties so sub-
(586) tle and so acute as to be able to distinguish between things not merely similar, but exactly the same.

In *Logan v. R. R.*, 116 N. C., 945, *Mr. Justice Avery,* speaking for the Court, says: "The question of the authority of the lessor company 'to farm out' its franchise and property to the lessee is no longer an open one. *S. v. R. R.*, 72 N. C., 634. This was said in 1895, just twenty-three years after the decision in the principal case. In *Harden v. R. R.*, 129 N. C., at p. 356, decided in 1901, *Mr. Justice Clark,* while expressing a possible doubt as to the correctness of the original construction of the charter of the North Carolina Railroad Company, yet said for the Court that it was not "a new question" (*res integra*), and therefore not open for reconsideration. Numerous other cases, decided both before and after that time, have in the same way recognized the construction of the words of the charter to which we have so often referred, as a settled one. There are findings of fact in this case to the effect that the executive department of the government has accepted this Court's former construction of the words "to farm out" as the correct one and acted upon it by taking part in making a lease of the North Carolina Railroad Company to the Richmond and Danville Railroad Company, first in 1872 and again in 1895, and also in leasing the franchise and property of the Atlantic and North Carolina Railroad Company to one Best in 1881, two Governors of the State having actually participated in making the leases of the Atlantic and North Carolina Railroad Company, and the State holding the majority of the stock in each of the lessor companies, and having, therefore, the power to control their action, through its proxy and the directors appointed in its behalf.

The fact that the intention to make a lease must have been known to the public for some time prior to its final execution, as the notice of the meeting, while not conforming strictly to the requirement of the by-laws, must have been seen and read by many, and was actually known
(587) to two of the plaintiffs, and the additional facts that no other stockholder resorted to any legal measures to prevent its execution, and that the State, holding a majority of the shares of stock and a controlling interest in the corporation, approved and voted for the lease, through its proxy or other representative, and its directors afterwards ratified it, and that through its Governor it helped to carry out one at least of its important provisions, furnishes plenary proof that the public generally acquiesced in the construction which this Court had placed upon the words used in the charter, as the State in its corporate and sovereign capacity, in attending meetings by proxy and receiving dividends from the North Carolina Railroad Company and in other ways, had done for many years. Under such accumulated circumstances show-

ing an acceptance of this Court's interpretation of those words, should it now be open to challenge by the plaintiffs? We clearly think not. It also appears that in 1897 a bill was introduced in the House of Representatives for the purpose of annulling the lease of the North Carolina Railroad Company to the Southern Railway Company, the successor of the Richmond and Danville Railroad Company, and that during the debate upon that bill several members assailed the lease of 1895 upon the ground that it was *ultra vires*, and that about the same time the then Governor of the State threatened to attack the lease, and that in 1897 a suit was brought in the Superior Court of Craven County to enjoin the leasing of the franchise and property of the Atlantic and North Carolina Railroad to another company, and that a restraining order was continued to the hearing by the Judge of that Court upon the ground that such a leasing would be *ultra vires*, notwithstanding the decisions of this Court in *S. v. R. R.*, 72 N. C., 634, and 73 N. C., 527. It is stated that the bill failed to pass in the House, and as the Legislature took no action to prevent the making of the lease of the North Carolina Railroad (588) to the Richmond and Danville Railroad Company or the Southern Railway Company, and has never attempted to have the same annulled, it would seem that the legislative department is committed to the validity of the lease. The Governor's threat, made in 1897, should have no influence in this case, in any view, but it may also be said of it that it was contrary to the well-defined policy of the executive department, both before and after his incumbency.

As to the ruling of the Judge of the Superior Court, it can add nothing to the case in favor of the plaintiffs, he not having appellate jurisdiction, and besides, his ruling was seemingly erroneous upon a well-settled principle which requires the lower courts to respect and observe the decisions of this Court until they are overruled or reversed.

We have discussed these matters because the facts are in the case and to exclude the inference that we had overlooked them, but we consider them as manifestly irrelevant and as being entitled to no weight in forming our conclusion, except the facts found by the Judge, which tend to show that executive and legislative sanction was given to the construction of the charters which this Court adopted years ago.

As by virtue of the authority vested by the law in us, we require respect for submission to our decisions, we should not do less than render the same degree of respect to them ourselves, and not overrule them, even if we should differ from our predecessors, who were as able as we to decide wisely, impartially and correctly, unless the injury is so great as to imperatively demand such action, and provided that in doing so we do not commit a greater wrong and inflict greater injury than we would by adopting the opposite course. If we have overruled cases in the past,

it was because we found that no appreciable harm would be done in those particular instances. We have unanimously overruled a case at (589) this term, and reinstated a former precedent, precisely for the reason that no rights had accrued under the overruled case and no injury would therefore result, but on the contrary, to let it stand and thereby set aside the former precedent, which it had itself overruled, would have greatly impaired if not utterly destroyed rights which had been acquired upon the faith of the correctness and stability of the first decision.

No principle of the law has been more carefully preserved and cherished than the one embodied in the ancient maxim of *stare decisis,* which has been found to be essential, under an enlightened public policy, to prevent wrong and to execute simple justice. The people yield submission to the law, as expounded by the courts, because they have respect for their judgments and confidence in their integrity of purpose; but if by a shifting and vacillating course of decision the law becomes unsettled, and inevitable disaster and oppression follow the uncertainty thus created, they will forfeit that respect and confidence which Judges should so much desire and which is so important to the proper administration of the law and to the welfare of the State. The people may then well say to us: "Keep (not) the word of promise to our ear and break it to our hope." Better it will be to be guided by that salutary and conservative maxim of the common law, which our predecessors so much revered and have admonished us to follow, and which an eminent author has said "furnishes indubitable evidence of the law-abidingness of the English-speaking people, a feature which is indelibly stamped upon every aspect of their civil and political life."

The defendant's counsel contended that a plaintiff must have a case of substantial merit when he applies to a court of equity for relief, and that no such case is presented in this record. We have refrained from discussing that phase of the case at length, though there is much to be said in regard to it. How the plaintiffs have been prejudiced in (590) any way as stockholders, we have been unable to see, as the market price of the stock has advanced from $30 to $70 per share since the lease was made, their property has been enhanced in value by improvements and betterments and the lessor company has apparently a brighter prospect than it ever had before, as under the former management it was in a languishing condition. But notwithstanding the plaintiffs have not as yet been substantially damaged in the least, we have considered their case upon its legal merits, and as if they had been, or upon the assumption that whether substantially damaged or not, they may as stockholders attack the validity of the lease, and further as if they had really brought this suit in good faith to right what they conceive to be a wrong.

His Honor, *Judge Long,* though himself expressing a doubt as to the correctness of the former rulings of this Court, deemed it his duty, as he declared, to follow the settled rule of the law and not to disturb the construction of words more than once solemnly adjudicated. After a most careful and intelligent statement of the facts and an able and forceful presentation of the law of the case, his Honor held that the lease is valid and that the plaintiffs are not entitled to the relief they demand, and, having so found, he adjudged that the action be dismissed at the cost of the plaintiffs. In the findings of fact, in the opinion of the Court as to the law and as to its duty in the premises, and in the judgment rendered, we fully concur.

Before concluding we must advert to another matter which it seems to us affects the integrity and authority of this Court. It is always a matter for regret when any questions are brought into discussion which have no proper place in a judicial opinion of any kind, and especially where those questions not only do not relate to the law of the case, but are entirely foreign thereto, and, while of public importance, are only political in their nature and fit subjects for debate on the (591) hustings or in the legislative hall, and not in this forum. We must decline to enter upon the consideration of any such matters, but confine ourselves to the facts stated in the record and the law arising thereon, as we are enjoined to do and as the good example of our predecessors, if nothing else, should lead us to do. If we unsettle the foundations of the law by substituting our own individual opinion of what is right, often biased and prejudiced, for the safer, wiser and more temperate rule of the law, we will surely bring discredit upon our decisions and justly merit, as we will certainly receive, the condemnation of the people.

We find no error in the rulings of the Court.

Affirmed.

BROWN, J., concurring: I concur fully in the able and exhaustive opinion of *Mr. Justice Walker,* who speaks for the Court in this case. As to whether the lease of the Atlantic and North Carolina Railroad was wise or not is not for this Court to say. Suffice it that it was made by the administration of Governor Aycock, an able and patriotic son of our State, after long and patient consideration and supported by a well-defined and pronounced public sentiment, so much so that the succeeding General Assembly refused to take any steps to disturb it. The State and other stockholders are now in receipt of a large revenue from it—something they never received before. I shall not discuss the wisdom or folly of government ownership of railroads, State or National. Those who wish to be informed as to the wretched failure of this State in managing and owning railroad property will do well to read the able

article of the Hon. Thomas B. Womack on the subject in the December number, 1906, of *World's Work*. The reader will also be enlightened as to the enormous losses of the States of Missouri and Pennsylvania
(592) when engaged in similar business, by reading the instructive article of Mr. C. M. Keys in the same number of that magazine.

CLARK, C. J., dissenting: Passing by the patent objections (1) that the so-called lease was made at a meeting irregularly called, due notice thereof not having been given as required by the charter, and held at a place not designated in the call; (2) that the deposit of bonds required by the lease to be made before the lease should become effective has not been made as stipulated, and (3) that freight rates have already been increased in violation of the express provision that this should not be done, which was an indispensable agreement without which the lease would not have been made, we will come at once to the fatal defect, that the company was without any power whatever in its charter to lease out its property and franchises and thus wholly abdicate the discharge of those duties in consideration of the undertaking to render which its charter and franchises were granted. All authorities concur, and even the defendant admits that the lease could not be legally made unless in the charter, or by special act of the Legislature, the power to lease was expressly conferred. "The lease by a railroad company of all its road, rolling-stock and franchises for which no authority is given in its charter, is *ultra vires* and void," says the highest court of the Union. *Thomas v. R. R.*, 101 U. S., 71; *R. R. v. R. R.*, 118 U. S., 290; *Transportation Co. v. Pullman*, 139 U. S., 49.

The attempted lease is all the more objectionable in this case, because not only is there no such power in the charter, or in any statute, but the State being the owner of a great majority of the stock, the control of this great work, held in trust for all the people, and for future generations, should not pass to the hands of a non-resident syndicate to be operated for their profit and emolument and in furtherance of their own
(593) policies of aggrandizement, and to the destruction of the last hope of the accomplishment of the great public policy of a system of State Internal Improvements so wisely laid out and planned by our fathers and paid for out of a constricted public treasury, without consulting the people of the State represented in their Legislature, when the General Assembly was to assemble within less than four months. There should have been a halt made before the control of a great piece of public property, built out of the taxes of the people, was handed over to strangers, and put beyond further operation in the public interest, until at least the people whose property it was could have been consulted. The haste of the lessee to accomplish this transfer without consulting

the real owners of the property and their Legislature—the only body which had power to confer a right to lease it—must be noted. Why was not the opportunity given the General Assembly to express the public wish as to this disposition of so large a part of the State's property? Why was not time allowed at least to give due notice of the meeting as required by the charter, and why was not the meeting held at the place named in the call? Why were not the bonds stipulated to be deposited so deposited before the lessee took possession of the State's property, and why has the stipulation against an increase of rates, without which the contract would not have been made, been so soon ignored and disregarded? All these indicia of haste would be potent in considering the validity of a transaction in which private parties engaged; why should they not be considered and weighed when they concern the transfer forever from the people of the State, without consulting their representatives in the General Assembly, of the control of so great and valuable a property, and which is on the point in the near future of becoming immensely more valuable with our increasing wealth and population, and the retention of the control of which would, by the State's regulation of its rates and charges, be so important a factor and check (594) upon the rates charged by the other railroads of the State which have passed into the control of other non-resident syndicates?

Section 18 of the charter provides as follows: "The said company may, when they see proper, *farm out* the right of transportation over said railroad, subject to the rules above mentioned, and the said company and every person who may have received from them the right of transportation of goods, wares and produce on said railroad shall be deemed a common carrier as respects all goods, wares and merchandise entrusted to them for transportation."

It must be apparent to any one who reads that paragraph of the charter that it did not authorize the company to make any lease of all its rights, properties and franchises; yet that is the sole reliance of the defendant in its search for legislative power conferred to make the lease. The meaning of these words cannot be more clearly stated than by *Bynum, J.*, 72 N. C., at p. 648, who, after stating that not a single decision in this State or elsewhere had ever maintained such a construction—and it may be added than not one here or elsewhere has done so since—adds: "A right of transportation *over* a road is one thing, and the road itself with its engines, shops and property is certainly another, and these can no more be confounded than rent can be with the land out of which it issues. One is a right of passage over the *corpus*, the other is the *corpus* itself. A lease of the road would carry the right of transportation as an incident, but the right of transportation would not carry the road, for if so, every wagoner at a toll-gate who buys a ticket over a

turnpike for a year or a term of years thereby acquires a lease of the road and its management. Nothing is more common than for all roads, with connecting lines, to farm out the right of transportation over their lines, and in this day of close connections and rapid transit the
(595) practise is indispensable to successful business. We every day see this right farmed out to express companies and by one company for the cars and freight of another and for special purposes. At many of our depots we see freight cars painted and marked the 'Yellow Line,' the 'Green Line,' the 'Blue Line.' What does it all mean? These cars belong to vast incorporated companies of these names which are doing nearly all the fast transportation of the United States; yet they do not, as I am informed, own a mile of road. Their business is to furnish cars and freight which they agree to deliver. In order to do so, they hire or farm from the railroad companies the right of transportation over their lines at stipulated rates and speed. One company furnishes the road and motive power and farms out the right of transportation to the other company, which supplies the rolling-stock and delivers the freight." *Judge Bynum* then proceeds and conclusively shows the origin and use for 200 years of the term "farm out the right of transportation" and how it came to be inserted in railroad charters, and that its signification has always been as above stated, and has never at any time been understood as conferring the right to sell or lease the railroad property and franchises. He then truthfully added: "No authority or decision is cited to sustain this lease, and we may fairly conclude that the judgment here is without a precedent."

The foregoing is quoted from the dissenting opinion of *Mr. Justice Bynum* in *S. v. R. R.*, 72 N. C., 640. That dissent was well received by the profession at the time and, the writer believes, has since been generally deemed by it as the true statement of the law, like *Judge Iredell's* famous dissent in *Chisholm v. Georgia,* 2 U. S., 419; and *Justice Brown's* dissent in Income Tax Case, *Reagan v. Trust Co.,* 154 U. S., 362. The opinion of the Court was supported, as *Judge Bynum* said, by not
(596) a single citation then, and no opinion has been since rendered that sustains it. On the contrary, on every occasion in which it has since been referred to, this Court has either markedly refrained from endorsing it or has intimated against its correctness.

The able and learned counsel in this case did not argue that this isolated decision was correct, nor is the opinion of the Court herein based on its correctness. The defense rest their case upon the doctrine *stare decisis*—and though "decisis" is in the plural, the defendant's counsel presented but that single case. When a decision is wrong this Court has overruled it, though it has been again and again repeated, notably *Hoke v. Henderson,* 15 N. C., 1; *Watson v. Watson,* 56 N. C., 400, and

there are many others. Certainly when there is only one decision, and that is clearly wrong upon its face, is supported by no precedent, before or since, and is opposed to the public policy of the State, it would be singular if the courts were compelled to repeat the error instead of correcting it. Nor can the doctrine that the decision has "become a rule of property" be invoked. Railroad leases are not a matter of everyday dealing. This is the first time since the case in the 72 N. C. that the construction of such a clause has been presented to the Court. The clause construed is not even a provision of a general law, but is merely a clause in a private act, and now a similar clause in another private act is before us. If the former construction was wrong, now at the first opportunity it should be corrected. The former decision after it was made was conclusive between the parties thereto and as to that charter. It would not have been conclusive even between the same parties in a second lease, especially after the doubt cast upon it, and for this reason when a second lease was proposed it was signed at midnight to avoid an injunction from a State court and the lessee obtained in the Federal District Court a validating decision, which is not put upon the correctness of the decision in 72 N. C., 634. The Judge (*Simonton*), a good (597) lawyer, was careful to put his ruling upon the sole ground that the Supreme Court of the State had so held. *R. R. v. R. R.*, 81 Fed., 595.

A construction by the Court of one private statute does not establish a rule of property as to rights claimed under another private statute, although the language of the two may be similar, or even identical. *Williamson v. Berry*, 8 How. (U. S.), 495; *Hatch v. Burroughs*, 1 Woods, 439; *Barber v. R. R.*, 166 U. S., 43; *Wood v. Brady*, 150 U. S., 18. The charters of both the North Carolina Railroad and of the Atlantic and North Carolina Railroad have been held to be private statutes. *Hughes v. Commissioners*, 107 N. C., 598; *Durham v. R. R.*, 108 N. C., 399; *Logan v. R. R.*, 116 N. C., 940.

Besides what is above said, this lease should not be held valid because of an erroneous decision, between other parties, construing a clause in another and different private act, and which decision has never since been held correct, for many reasons among them:

(1) When *S. v. R. R.*, 72 N. C., 634, was decided it received the vote of but three Judges out of five, and the lower Court (*Albertson*) had held against its validity. It has been argued that the lease having been made by the executive department, charged with operating the property, the courts should not intervene. It is clear that this is a mistaken view, for to the legislative, not to the executive department, belonged the function of permitting the property to be leased, and the trust confided to the State directors by the statute was to operate the State's property, not to

lease it and pass its control away from the State into alien hands, as was well said by *Bynum, J.*, in 72 N. C.

(2) The decision in the 72 N. C., 634, was not only called in question by the division of the Judges, and the inherent error apparent on
(598) inspection, but it has never been held to be correct since, not even (as we have seen) in the opinion in the Federal Court, 81 Fed., 595, which sustained the second lease of the North Carolina Railroad, not because the decision in 72 N. C., 634, was correct, but simply because it had been made in a case to which that railroad had been a party. In the following cases only has it been referred to in this Court since, and in not one of them with approval: In *S. v. R. R.*, 73 N. C., 529, *Rodman, J.*, who had not sat in *S. v. R. R.*, 72 N. C., 634, because interested as a stockholder in the North Carolina Railroad, referred to the said decision in the 72 as *res judicata* (which it was as between the parties), and held that the State could not forbid the lessee to change the gauge. He placed his opinion in the 73 N. C. on the ground that the Legislature could not forbid the change of gauge upon the since wholly discredited and overthrown doctrine that the State could not in any respect regulate the management of the railroad, neither its rates of fare and freight nor the location of its station-houses nor any other detail of its economic management. *Bynum, J.*, again dissented, and time has vindicated his judgment. Indeed, *Pearson, C. J.*, had long previously, in *State v. Matthews*, 48 N. C., 459, held the true doctrine that the Legislature, notwithstanding the charter, could "afterwards regulate the speed at which the cars shall run" and control railroads in other respects, adding "the sovereign being presumed to reserve to itself the right of regulation of all such matters in the absence of an express contract to the contrary."

S. v. R. R., 72 N. C., 634, was first mentioned again in 116 N. C., 945, where this Court merely said that the validity of the lease was *"res judicata"* between the parties, but no intimation was given that it had been correctly so held. In 120 N. C., 624, the General Assembly addressed an inquiry to the Supreme Court, in whose reply, through *Chief Justice Faircloth*, it is said: "Without expressing any in-
(599) timation either way upon the question whether the power to lease its road is vested in the North Carolina Railroad Company by its charter," etc. The inquiry was upon a clause in a pending bill by which it was sought to validate the new lease of the North Carolina Railroad. The Court refused to say that the decision in 72 N. C. was correct, and the bill did not pass.

S. v. R. R., 72 N. C., 634, was next mentioned in *Harden v. R. R.*, 129 N. C., 358; where the Court, referring to the second lease of the North Carolina Railroad, said: "*If* the lease is valid because made subsequent

to the decision of a dividend Court in *S. v. R. R.*, 72 N. C., 634," etc., and also said, p. 356: "If it were a new question the Court might possibly hold with *Judge Bynum.*" The Court thus recognized that as to the North Carolina Railroad the matter was *res judicata,* but refused to approve the decision. The next and last reference was made by *Mr. Justice Connor* in *Land Co. v. Hotel,* 132 N. C., 533, where he says: "*Bynum, J.,* in his very able dissenting opinion in *S. v. R. R.*, 72 N. C., 645, says 'No railroad scheme was ever devised by more of the wisdom and patriotism of the State. It was intended to be in fact what it was in name, the *North Carolina Railroad,* which, when completed from the Atlantic to the Tennessee line, would radiate a uniform system of lateral roads connecting all parts of the State in a common brotherhood by an easy and convenient intercommunication of trade and travel.'" *Judge Connor* further says (p. 534): "It is difficult to believe that the policy of the State for nearly a century was to be reversed and the prospective seaport was to be hampered by the grant of the absolute ownership of the entire water-front thereof, separate and distinct from the ownership of the abutting lands; that the State was to part with this property which it held in trust for all of its citizens. Nothing save a clear declaration of such purpose would justify such conclusion." This (600) was found so "difficult to believe" that *Judge Connor,* speaking for us, held that we did not believe it. Certainly, then, we cannot believe, without "a clear declaration of such purpose," that the State intended to grant away the control, not merely of a water-front, but of the line of railroad which she had built to that port and "held in trust for all its citizens."

Thus we see that the solitary case invoked to wrest this property from the State was not only, as *Judge Bynum* said, "without authority or decision cited to sustain it and without a precedent," but it has received no support since from any decision in any other court, and always, when referred to since in this Court, it has either been cited only as being *res judicata* of that particular lease or a strong intimation of its doubtful character was recorded. This, as well as the other circumstances calculated to discredit its authority, were well known to the defendant, and it took this lease little more than ninety days before the Legislature would meet, which could alone confer the power to lease, according to the decisions of the United States Supreme Court and all other precedents, and now asks us to hold such lease valid because of that one entirely unsupported decision. The lessee knew it had been questioned and doubted. It took with notice that it was not an "approved precedent."

(3) The citation of the lease of the North Carolina Railroad Company is peculiarly unfortunate. The history of the means by which that first lease was procured is not in this record, but there was nothing

in its negotiation which could recommend it as a precedent. The company now operating it as lessee reports to the Corporation Commission that it made, for the year ending 30 June, 1906, over $1,000,000 net profits after paying the rental, all operating expenses of all kinds, including maintenance of equipment and of roadways, damages,
(601) salaries, taxes and charges of all kinds. Thus the people of the State have paid the rent and taxes for the lessee and all expenses of every kind, and we are presenting the lessees in addition yearly a net profit of over $1,000,000. The Corporation Commission Reports are as official as those of this Court or of the State Treasury, and may properly be referred to. With this annual loss of over $1,000,000 to the people of the State from the decision of a divided Court, which decision has not since been approved, we might well refuse to approve it now, when another piece of the State's property is about to pass from its control and the sole authority invoked is that decision. This leasehold of the North Carolina Railroad, which cost the lessee nothing, and on which the people are paying the rent and all expenses, besides making the lessee an annual present of over $1,000,000, is said to be counted in its mortgage as worth $12,000,000—a princely gift. In truth, on a 4 per cent. basis, the lease is worth $25,000,000, and this value will increase unless rates of transportation are largely reduced.

If the lease is *ultra vires* there could be no ratification of it. If the words conferring the right "to farm out transportation *over* the road" could not confer on the company the right to lease the road itself and all its property and franchises, certainly the receipt of rent from an illegal lease could not confer the power to lease which the Legislature has not given.

In *R. R. v. R. R.,* 130 U. S., 22, *Miller, J.,* said, quoting *R. R., v. Riche,* L. R., 7 House of Lords, 653: "A contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." This is cited and approved in *Transportation Co. v. Pullman,* 139 U. S., 55. In the
(602) same case and in *Thomas v. R. R.,* 101 U. S., 83, is a full collection of authorities from the highest courts in this country and in England, all holding that "a railorad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy."

Repeated reference has been made in opinions of this Court to the wise and patriotic system of railroads which our fathers planned and built. Seventy years ago they began with an efficient system of State regulation of railroads by the only practical plan of State ownership. Now when all the world has turned to that system, by either taking over the sole ownership or a controlling interest—save only this country and England, in both of which the tide is setting in the same direction—we have before us the question of the validity of transferring to alien hands the last piece of the State's once magnificent patrimony.

It may be well to recall the method by which that patrimony has piece by piece disappeared, as shown in our statutes and judicial reports and by common knowledge:

As long as the Wilmington and Weldon Railroad Company received a bare support from a sparse population and an impoverished country it was undisturbed, but as soon as it gave unmistakable signs of becoming profitable a syndicate, by insisting that the State could not properly manage the road because it had not till then been profitable, procured the passage of an act by which the State exchanged its shares in that road for the same face value of its bonds. As those bonds were (603) then quoted around 35, and there is good reason to believe that the stock has since been watered more than 25-fold—*Douglas, J.*, in *Corporation Commission v. R. R.*, 137 N. C., 25—the syndicate is now receiving dividends on more than $70 from the public for every $1 invested in acquiring from the State this valuable property. Next the North Carolina Railroad gave signs of becoming valuable, and then the present Northern syndicate made it a leasehold property, now worth over $25,000,000, from which they receive an annual profit of over $1,000,000, as we have seen next came the Raleigh and Gaston and Raleigh and Augusta Railroads, whose State stock was acquired by the process of being exchanged for depreciated State bonds, and their stock has been watered 6-fold; then the Western North Carolina Railroad was sold for a beggarly sum and bonded and stocked (as the Railroad Commission Reports of that day showed) for $74,550 per mile, on which the public are to pay dividends and interest. And now the last fragment of the State's great system, the Benjamin of our hopes, is to pass into alien hands. It lingered last only because it was the last to show signs of coming profitableness.

In *R. R. v. Wellman*, 143 U. S., 339, the Supreme Court of the United States held that if a Legislature fixed rates that would permit a railroad company to earn 4 per cent. net on the true value of its property, after purging its expense account by legal investigation from exorbitant salaries and illegal disbursements, the courts could not interfere. As the State now parts with the control of its last railroad on the ground that

it has not hitherto been profitable, it is well to recall that the same pleas were made by syndicates who were anxious to relieve the State of the burden of the other State railroads now so profitable, and that if (604) they had not been hearkened to, the people of this State would now be paying no taxes of any kind whatever, or would be receiving reduction in freights and fares of the amount of all their taxes. Illinois and New Jersey are both free from payment of any or a large part of their State taxes by reason of those States acting wisely as to its ownership of railroads.

By the report of the Corporation Commission for the present year, it appears that (using round numbers) the State taxes are $2,500,000, county taxes aggregate $2,500,000, town taxes $1,500,000, school taxes $1,500,000—a total of $8,000,000 of taxes. During the same time the receipts of railroads within this State from intrastate freight and passengers and its pro rata, according to mileage, from through traffic, was (counting on the same rate of increase since 30 June) over $23,000,000. Their expenses, by their own showing, unpurged as suggested in the above decision in the 143 U. S., was $17,000,000, leaving $10,000,000 net profits, most of which has been carried out of the State to our impoverishment. Not all of this has been earned, it is true, on the railroads whose controlling interest was once owned by the State which could have thus retained an efficient control. These figures are pertinent, and should well make us pause before we hold valid this passing o ver to alien hands of the State's last property upon the authority of a single decision, erroneous on its face, without precedent when delivered by a divided Court, and which has not been since approved, not even in this case, nor has it been followed till now.

We were told on the argument that the lease should be favored, if the law was doubtful, because State management was bad and free passes had been illegally issued. These arguments would have been more in place in an argument before the General Assembly upon an application for authority to lease, but if it was admissible for counsel to pre- (605) sent it, it is not improper to say that the publicity possible under State ownership enabled the discovery to be made of this handful of illegal passes issued by the Atlantic and North Carolina Railroad Company. What would have been the discovery if the same calcium-light of publicity had been turned upon the syndicate-owned railroads? Would it have been better? In *S. v. R. R.*, 122 N. C., 1069, *Douglas, J.*, states that the number of free passes in this State were then over 100,000.

As to the management of the railroads under private ownership, it has been more profitable certainly, but profitable to whom? Not to the public, who pay into the treasuries of the syndicates over ten million dollars in excess of all expenses and some seven million five hundred thousand dollars after paying their taxes and rentals, and after al-

lowing 4 per cent. net profit on the $70,000,000, at which they list the true value of their properties. Is there any cause in this to increase the number of privately owned railroads at a loss to the State of her last remaining railroad?

But finally, we were told by their counsel that these corporations are at least better managed than when in the State's hands. Are the daily reports of wrecks, deaths of passengers and employees, missed connections and delayed freights fewer than when the State owned the railroads and public opinion exerted a direct pressure upon officials? Are the salaries of the higher officials less, or the pay of the working force greater, or their hours shorter than when the officials in charge of the railroads knew that the public eye was upon them and the public could command their faithful discharge of duty.

When the divided Court in 73 N. C. denied the right of the Legislature to regulate the gauge, *Judge Bynum* asserted that the State did have that power, and with prophetic vision foretold that the gauge would be changed back and that there would be the same gauge throughout the Union. It has come to pass. He also said this, 72 N. C. (606) at p. 654, which comes more and more clear to the sight of all men as the years unfold before us: "The rapid multiplication of these bodies, their resources and far-reaching ambition, their ubiquity and vast combinations, all moved and directed by concentrated power and talent, constitute them a distinct and almost independent and overshadowing power in our governments, and in fact the great social and political problem of the age. Whether they shall control the government or government shall control them, are questions that are forcing themselves upon public attention and fast assuming practical importance. They should and will be maintained in the exercise of all their essential and legitimate powers as necessary and useful institutions of modern civilization. But if in addition to the dangerous power of transferring all their property and franchises to anybody and anywhere, it should also be held that their corporate powers are such contracts as put them beyond the reach of all legislative check or control in the interest of society, then the problem will have been solved. The government, in my opinion, will have abdicated its sovereignty, heretofore supposed to be inalienable, and society will be left without protection to *chartered irresponsibility.*"

Cited: Hill v. Brown, 144 N. C., 120; *Chappell v. White,* 146 N. C., 577; *Mason v. Cotton Co.,* 148 N. C., 510, 517; *S. v. Fulton,* 149 N. C., 487; *Water Co. v. Trustees,* 151 N. C., 176; *Power Co. v. Nav. Co.,* 152 N. C., 492; *Wilson v. Taylor,* 154 N. C., 218; *Jones v. Williams,* 155 N. C., 190; *Earnhardt v. R. R.,* 157 N. C., 366; *Acker v. Pridgen,* 158 N. C., 340; *Penn v. Tel. Co.,* 159 N. C., 313; *Owens v. Wright,* 161 N. C., 134, 135; *Weston v. Lumber Co.,* 162 N. C., 201.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1907

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(607) STATE v. THOMAS HUNTER.

(Filed 19 February, 1907.)

Indictment—Sufficiency of Evidence—Discretion of Trial Judge—Mistrial—Continuance—Corroborative Evidence—Bloodhounds.

1. Evidence that defendant made a peculiar footprint, which was identified in soft ground in the morning following the burning of a house, being plain and distinct and leading off from the place, and that defendant's shoes fitted the tracks, and that he denied burning the house before he was accused, was sufficient to go to the jury.
2. Evidence that a bloodhound, well trained to track human beings and nothing else, and often used for the purpose, was put upon the tracks of the defendant and followed them until the defendant was "treed," is sufficient to go to the jury as corroborative.
3. It is in the discretion of the trial Judge to grant or refuse a mistrial and continuance, and his action is not reviewable.

CRIMINAL ACTION, tried before *Neal, J.*, and a jury, Fall Term, 1906, of GATES. Relevant evidence is stated in the opinion of the Court.

Attorney-General and *W. M. Bond* for the State.
L. L. Smith and *Aydlett & Ehringhaus* for defendant.

CLARK, C. J. Indictment for feloniously burning a storehouse (608) in the night-time. There was evidence that the ground behind the storehouse was soft and had been freshly plowed, and witness testified that next morning the prisoner's tracks were found there, leading off from the storehouse; that he had known prisoner all his life, and that the prisoner made a peculiar track; that having had white swelling when a boy, the prisoner's left leg was two or three inches shorter than the other; that this made him walk on his left toes, the heel of that foot not touching the ground unless that foot went very deep into the ground;

that he knew prisoner's track well, and that these were his tracks; that no one else in that neighborhood made such tracks; that these tracks were plain and distinct; that they led up behind the gin-house so that the person making them was screened from the dwelling-house, and led again off to the road which went to the prisoner's house. Another witness testified that he carried his bloodhound there the afternoon succeeding the fire; that the tracks were peculiar (and such as were described by first witness); that his dog is a clear-blooded English bloodhound, well trained to track human beings; he had often used him for that purpose, and that the dog will track nothing else; that he put the dog on these tracks; that the dog followed them through the field and across the road, when he seemed to catch the scent of something in the air, whereupon he broke off through the woods, and when witness got up with the dog he had treed prisoner up a dogwood tree. That the prisoner said to witness, "What does this mean? I didn't do it." That they took off prisoner's shoes, and they fitted the tracks exactly.

There was evidence for prisoner and by him and evidence that his character was bad; but it is unnecessary to state prisoner's evidence, as the jury found for the State, and the exceptions are (1) the admission of any evidence of the conduct of the dog; (2) the refusal of a mistrial and a continuance that the prisoner might obtain other (609) evidence; (3) the refusal to charge that there was no evidence to go to the jury; (4) that though the Court gave the prisoner's prayer that "the acts and doings of the dog are not evidence upon which you can rely as substantive evidence upon which you can convict the prisoner," the Court added, "but are circumstances in corroboration of the State's testimony as to tracks. *S. v. Moore,* 129 N. C., 498."

There was no error. 1. The conduct of the dog was competent evidence. Underhill Cr. Ev., p. 438, n. 5; 1 Wigmore Ev., sec. 177 (2); *Hodges v. State,* 98 Ala., 10; *Simpson v. State,* 111 Ala., 6; *Pedigo v. Commonwealth,* 103 Ky., 41; *S. v. Hall,* 3 Ohio N. P., 125. In the present case the requirement of other proof of the tracks being those of the prisoner, as stated in *S. v. Moore,* 129 N. C., 502, was complied with. It is common knowledge that trained bloodhounds can follow the scent of a human track under such circumstances as here stated. The sense of smell in such animals is abnormally acute and their conduct is at least sufficient as corroborative evidence to be submitted to a jury. Such animals are used by the State to track escaping convicts, and this has never been deemed illegal. Within the range of their intelligence the conduct of animals has always been deemed worthy of consideration. Among many instances Lord Campbell in his life of Sir Thomas More (2 Lord Chancellors, 37) quotes that of the beggar-woman's little dog, which having been bought by his wife of a thief, the Lord Chancellor allowed the beg-

gar-woman to prove her property by the dog's recognition of her. Then there is the classical incident of Ulysses, on his return from his memorable wanderings, being recognized by his dog Argos (who died from joy), though his family and his followers knew him not. There is the more modern incident of Aubry's dog of Montargis, who procured the (610) confession of his master's murderer by his recognition of him. And there are many other incidents that can be readily recalled. A trial is a search after truth, and the law rejects no evidence, however humble, which in common knowledge may be a guide to a successful search. The evidence will always be submitted to the jury unless too remote to be of any probable assistance.

2. The refusal of a mistrial and continuance after the evidence was all in rested in the sound discretion of his Honor, and is not reviewable.

3. His Honor properly refused to withdraw the case from the jury. Independent of the corroborative evidence from the trailing by the dog, the evidence as to the identity of the tracks was before the jury. Underhill Cr. Ev., sec. 374; *S. v. Graham,* 74 N. C., 649; *S. v. Reitz,* 83 N. C., 636; *S. v. Daniels,* 134 N. C., 655. There was also the remark of the prisoner, when found up the tree, denying the crime, though he had not been charged with it.

4. The amendment of the prayer by adding that the trailing of the dog, though not substantive evidence, was corroborative, was in accord with what was said in *S. v. Moore,* 129 N. C., 498.

No Error.

Cited: S. v. Spivey, 151 N. C., 679; *S. v. Norman,* 153 N. C., 593; *S. v. Taylor,* 159 N. C., 467; *S. v. Thompson,* 161 N. C., 242; *S. v. Burney,* 162 N. C., 614; *S. v. English,* 164 N. C., 506; *S. v. Andrews,* 166 N. C., 351.

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(611)

STATE v. W. C. DAVIS et al.

(Filed 19 February, 1907.)

Indictment—Public Roads—Bridges—Land-owner Need Not Keep in Repair When Afterwards Made.

When the public road is made after the land-owner has cut his ditches for draining, he is not required to keep the bridges in repair that are subsequently placed over them.

THIS was an indictment against the defendants, tried before his Honor, *McNeill, J.,* and a jury, at Fall Term, 1906, of HYDE, upon a bill

charging them with refusing and neglecting to keep up certain bridges in the said county. Upon the following special verdict the Court adjudged that the defendants were not guilty, and the State appealed.

SPECIAL VERDICT.—The jury being duly sworn and impaneled in this cause, for their verdict find the following to be the facts, to-wit:

That prior to and at the time of the laying out of the road and establishing same by the Commissioners of Hyde County, Q. M. Davis, the father of the defendants, W. C. Davis, C. W. Davis, Olivia Mann, and George Davis, owned the tract of land over which the road was laid out and established, and had the same drained by ditches which were necessary for the proper drainage thereof. That Q. M. Davis is dead, and the defendants, other than W. D. Mann, who has intermarried with Olivia Davis, are the heirs of Q. M. Davis and own and hold the said tract of land, which is a farm, as heirs of Q. M. Davis. That in 1857 the Commissioners of Hyde County, upon petition of Q. M. Davis and others, laid out and established the public road set out in the bill of indictment over the ditch and across the said tract of farm land. That at the time of establishing the said road the ditches were used and (612) necessary for the drainage of the said farm, and no ditches alleged in the bill of indictment have been cut across the road since the establishment thereof by the defendants or those under whom they claim. That the owners of the road since its establishment have maintained and kept the bridges until the last one or two years.

That at the time of and before the establishment of said road the said ditches were as they now are, and said road was laid out across ditches which at that time and in same manner now drain said farm of defendants. That said ditches do not drain the public road, and are not necessary to the drainage thereof. That the defendants have failed and neglected to keep said bridges across the said ditches in repair, and same were, at the time this action was commenced, unsafe for public travel. That the overseer of said road gave due notice for ten days to defendants to repair said bridges, and they refused more than ten days, and still refuse, to repair same.

If upon the foregoing facts the Court shall be of opinion as a matter of law that the defendants are guilty, the jury find them guilty; if upon said facts the Court be of opinion that as a matter of law on the said facts the defendants are not guilty, the jury find them not guilty.

No ditches are referred to in this verdict except such as may have been cut before the road was laid out.

Upon the foregoing verdict the Court is of opinion that defendants are not guilty, and so adjudges. The Solicitor for the State excepts to the foregoing judgment and appeals to the Supreme Court.

Attorney-General and *W. M. Bond* for the State.
Aydlett & Ehringhaus for defendants.

BROWN, J. It appears that defendant constructed certain (613) ditches through his land for the purpose of draining it; that some time afterward a public road was established across defendant's land and bridges placed by the authorities across the ditches.

We know of no law which charges an owner of land with the duty of keeping bridges in repair when the road is established after he constructs his ditches. Section 2697 of the Revisal does not cover this case, but only cases where the owner of the land constructs a ditch across a public road then in existence. *Nobles v. Langley,* 66 N. C., 287, relied on by the State, is no authority, for the reason that in that case the public road was established before the ditch was dug across it.

Affirmed.

STATE v. G. F. SIMMONS.

(Filed 12 March, 1907.)

Indictment—Concealed Weapons—Exceptions—Ignorance—Good Faith—Advice—Intention—Juries—Facts—Charge—Error—Jurors Polled—Intimation of Opinion.

1. In order to come within the exception of the statute (Revisal 1905, sec. 3708) prohibiting the carrying of concealed weapons, the defendant, otherwise having the authority, must have been in the actual performance of his duties at the time.
2. A person acting in ignorance of the law in good faith and upon advice of the Clerk of the Court or of an attorney, but in violation of the statute prohibiting the carrying of concealed weapons, is not excused.
3. The intention of the defendant to conceal a weapon on his person is immaterial, if from his own testimony it appears that he necessarily knew that he was carrying it concealed.
4. Juries should not only find the facts, but they should draw their own conclusions therefrom uninfluenced by the acts or language of the Court; and the language of a charge, "if you believe the evidence, the defendant is guilty, and you will return a verdict of guilty," is improper, though, standing alone, not reversible error.
5. It is error for the Court below, when informed by the jury in answer to his question, that some of them believed the defendant guilty and some not guilty, to poll the jury, ascertain from each that he believed the evidence, and then again instruct them, "if they believed the evidence, to return a verdict of guilty," it being an intimation of opinion upon the facts and calculated to prevent an impartial consideration of the case.

(614)

INDICTMENT for carrying a concealed weapon, tried before *Jones, J.,* and a jury, November Term, 1906, of LENOIR. From verdict and judgment, defendant appealed.

The defendant was indicted for carrying a concealed weapon, to-wit, a pistol. He attempted to justify upon the ground that he was Bird and Game Warden and entitled by Revisal, sec. 1868, to exercise all the power and authority of a constable at the common law and under the statutes of this State. He was not on duty when the pistol was found on his person. The weapon was in his possession on the night in question. He dropped it from his pocket into the mud, picked it up, stepped upon the sidewalk of South Street in Kinston and wiped it with his handkerchief. After cleaning it, he dropped it into his pocket. The pistol was first in his hand and then in his pocket, sometimes in view and sometimes not in view. The above is taken from the defendant's own testimony. He proposed to show by the Clerk of the Court that the latter advised him, when he took the oath of office, that he, being a constable, had a right to carry the pistol, and that he carried it under that belief and he also proposed to testify that "he did not intend to conceal the pistol." All this testimony was excluded, and the defendant excepted.

The evidence of the State tended to show that the defendant carried the pistol on his person and that a part of the time it (615) was concealed.

The Court charged the jury as follows: "If you believe the evidence, the defendant is guilty, and you will return a verdict of guilty." The jury retired and after being out a few minutes came into court, whereupon the Judge inquired of them what was their trouble in reaching a verdict, and they replied that some of them thought the defendant guilty and others thought him not guilty. The Court then inquired of each juror if he believed the evidence, and each juror replied that he did believe the evidence as given on the stand; whereupon the Court told the jury again: "If you believe the evidence, return a verdict of guilty." The defendant excepted to each of the instructions. There was a verdict of guilty and judgment entered thereon. Defendant appealed.

Attorney-General for the State.
Loftin & Varser and *M. H. Allen* for defendant.

WALKER, J., after stating the case: The fact that the defendant was game warden at the time he was found with the pistol in his pocket did not excuse him for carrying it concealed. Even if he was invested with the power and authority of a constable for all purposes, and not only to the extent that was necessary for the efficient discharge of his official duties as game warden, it appears that he was not then in the actual performance of those duties. He does not, therefore, come within the exception of the statute. Revisal, sec. 3708; *S. v. Hayne,* 88 N. C., 625; *S. v. Boone,* 132 N. C., 1107.

The advice of the Clerk of the Court, that the defendant had, as con-

stable, the right to carry a pistol, is equally ineffectual as a defense to this indictment. "Ignorance of the law excuses no man." If he would take advice as to the criminality of a contemplated act, he must (616) be sure that it is correct, for otherwise he will be as guilty, if he does the act, as if he had not taken it. *S. v. Boyett,* 32 N. C., 336; *S. v. Dickens,* 2 N. C., 406. Even the advice of an attorney learned in the law has been held to be insufficient to protect his client against a criminal prosecution for illegally voting at an election. *S. v. Downs,* 116 N. C., 1064. The rule is of general application in cases of this kind. We find it thus stated in 12 Cyc., at p. 155: "It is no defense for the accused to show that he believed in good faith that the law which he violated was unconstitutional. Nor will it avail him that he acted in good faith, under the advice of counsel; or that he is a foreigner, and that the act with which he is charged is not a crime in his country," citing numerous cases to support the text. There are, of course, some exceptions to the rule.

Defendant offered to testify that he did not intend to carry the weapon concealed. The criminal intent in this and in like offenses created by statute is the intent to do the forbidden act. *S. v. McDonald,* 133 N. C., 684. The statute provides that the possession of a deadly weapon, if carried about the person, shall be *prima facie* evidence of concealment, if the accused is at the time off his premises. It is not necessary to a conviction that the State should show an intention to use the weapon for any unlawful purpose, for it is the intent to conceal and not the intent to use it in any particular way that renders the act of carrying it criminal. *S. v. Dixon,* 114 N. C., 850; *S. v. Reams,* 121 N. C., 556; *S. v. Brown,* 125 N. C., 704. In this case, the defendant himself testified that he had the pistol in his pocket a part of the time, and that it was then concealed or hidden from view. It necessarily follows, if this be true, that he knew that it was thus concealed. He has shown no valid excuse for carrying it in his pocket "out of sight," and the presumption (617) of the statute, instead of being rebutted by the proof, as it should have been if he confidently expected an acquittal, was greatly strengthened, if not made conclusive. Upon his own statement, if found by the jury to be true, it would seem clear that the specific intent, which he proposed to prove, was, under the circumstances, altogether immaterial. He must be presumed to have intended to do that which he knowingly did. Knowledge that he was carrying the weapon concealed is equivalent, under the statute, to the criminal intent to conceal which is required by the law to exist, there being no lawful excuse for carrying it. *S. v. Woodfin,* 87 N. C., 526; *S. v. Lilly,* 116 N. C., 1049; *S. v. Erwin,* 91 N. C., 545; Broom's Legal Maxims (8 Ed.), p. 306, *et seq.* If the object of the defendant was to prove that he carried the pistol in his

pocket, not for the purpose of concealing it and thus violating the law, but because he believed that he had the right as an officer to carry it, the testimony was equally immaterial, for he had no such right, and the mere fact that he thought so is of no avail. Such a construction of the statute as would justify him on that ground would defeat its very purpose. As said in *S. v. Lilly, supra,* the gist of the offense is the manner of carrying the weapon. Evidence of the intent, such as that offered by the defendant, may be competent and relevant in some cases, but not in one of this character. Our case is governed by *S. v. Dixon,* 114 N. C., 850; *S. v. Pigford,* 117 N. C., 748; *S. v. Brown,* 125 N. C., 704.

We have often intimated that a general instruction to the jury in the form of the one given by the Court is objectionable. *S. v. Barrett,* 123 N. C., 753; *Sossaman v. Cruse,* 133 N. C., 470; *S. v. Green,* 134 N. C., 658; *S. v. Garland,* 138 N. C., 675. Speaking of a charge identical in language with the one given in this case, *Justice Henderson,* in *Bank v. Pugh,* 8 N. C., at p. 206, said: "The nature of the rejection (of the bond) is an inference of fact, to be drawn from the evidence (618) which the Judge has, improperly, drawn for himself and the jury both, leaving to the latter only to say whether the witness swore truly or not. The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of *fact* resulting therefrom. It would repel the interference of juries, as far as the law will warrant, in all questions of law and, in like manner, the interference of the Judge in matters of fact." And in *Merrell v. Dudley,* 139 N. C., at p. 59, *Justice Hoke* thus refers to the subject: "The language is inexact, and this form of expression should be eschewed by the Judges in charging juries. This Court has heretofore called attention to it in a number of cases." We do not say that such an instruction, standing alone, will constitute reversible error, as that will depend upon the nature and circumstances of the particular case in which it is given and upon the strength of the probability that it prejudiced the complaining party. If it should clearly appear to have done so, we might deem it proper to order a new trial, but we take occasion again to express the hope that the strong and impressive words of *Judge Henderson,* which we have more than once quoted with approval, will be heeded, and that what we ourselves have said will have the effect of changing the form of expression and of conforming instructions more closely to the requirement of the statute. Revisal, sec. 535. As we reverse the judgment on another ground, we need not further discuss this exception, as it is sufficiently considered, for the purposes of this case, in what we have already said.

When the jury returned to court, after having been out for a few minutes, the Judge inquired of them as to their trouble in reaching a verdict, and they replied that some of them thought the defendant guilty and

others thought he was not guilty; whereupon the Judge polled the jury, asking each juror if he believed the evidence, when each replied
(619) that he did believe the evidence as given on the stand. This was not according to regular procedure or the approved precedents in such cases, if it was not a direct violation of the Act of 1796. "No Judge in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." Revisal, sec. 535. Besides being in effect an intimation of opinion as to what the verdict should be, the inquiry of the Judge and the manner of making it were calculated to deprive the jury of that freedom of thought and action which is so essential to an impartial consideration of the case and a proper discharge of their duty. *Nash v. Morton,* 48 N. C., 3; *S. v. Shule,* 32 N. C., 153; *S. v. Whit,* 50 N. C., at pp. 227 and 228. The evidence, may, in the opinion of the Court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt without any suggestion from the Court, direct or indirect, as to what that finding should be. *S. v. Lilly,* 116 N. C., 1049. The presumption of innocence and the doctrine of reasonable doubt require that method to be pursued, and it is clearly enjoined by the statute we have cited, the restraining words of which define clearly the respective functions of Court and jury in the trial of causes.

There must be another trial because of this error in the remarks of the Court to the jury.

New Trial.

Cited: Metal Co. v. R. R., 145 N. C., 297; *S. v. Godwin, Ib.,* 463; *S. v. R. R., Ib.,* 572; *S. v. R. R.,* 149 N. C., 473; *S. v. R. R., Ib.,* 512; *S. v. Parker,* 152 N. C., 792; *Westfelt v. Adams,* 159 N C., 424; *Holt v. Wellons,* 163 N. C., 131.

(620)

STATE v. BETSY ROBINSON.

(Filed 3 April, 1907.)

Married Women—Executory Contract—Indictment—Refusal to Work Crops—Motion for New Trial Continued to Next Subsequent Term—Sickness of Judge—Motion Made Then—Appeal Lost—Relief—Merits Decided to Avoid Further Useless Prosecution.

1. A married woman, without the written consent of her husband, cannot make a valid executory contract, unless it falls within the exceptions of the Revisal, sec. 2094; and where there is no evidence of such assent

she cannot be held criminally liable for wilfully refusing to work certain crops on lands "rented" by her, under the Revisal, sec. 3367.

2. When owing to the illness of the trial Judge the cause could not proceed to judgment, and when, without default or laches on the part of the defendant, she had her motion continued and moved for a new trial upon exceptions reserved at the next term, when judgment was pronounced against her, from which she appealed, the appeal was lost under Revisal, sec. 534; but a new trial will be granted, as the loss resulted from an act of God, which she could not foresee, and the consequences of which she could not avoid.

3. In an appeal from a conviction in criminal cases it is not only proper, but the duty of the Supreme Court, when a new trial is granted, to decide upon the legal merits of the case, if it appears that the State cannot ultimately succeed in the prosecution.

CLARK, C. J., concurring in result.

CRIMINAL ACTION, tried before *Councill, J.*, and a jury, at October Term, 1905, of SAMPSON.

The defendant was indicted under Revisal, sec. 3367, for wilfully refusing to work certain crops on land "rented" to her by the prosecutor, and for wilfully abandoning the same before paying advances made by her landlord. She was at the time she entered into the contract of renting in 1905 and still is a married woman and lived on the land. Her husband's place of business was in Harnett County (621) but he came home every Saturday night and spent Sunday with his family. On a certain day in June, the prosecutor ordered her to work the crop the next Friday, as it was in bad condition, but she refused to do so, as he testified, but she stated that her children were sick and she could not leave them for two weeks, and she told the prosecutor that she would work the crop on the next Monday. He began working the crop on Saturday and on Monday the defendant was in the field and, with others she had employed, was working the crop, when the prosecutor forbade her to work any longer and ordered her to leave the land and not to go on it again. She worked again on Tuesday, when he had her arrested. There was evidence that the defendant managed the business on the farm rented to her by the prosecutor. The defendant requested the Court to charge the jury that there was no evidence of defendant's guilt, and they should acquit her. The jury returned a verdict of guilty. The presiding Judge was too sick to pronounce judgment, adjourned Court and continued the motion for judgment. At the next term judgment of imprisonment for thirty days was pronounced by another Judge after refusing to grant a new trial, on motion of the defendant, who excepted and appealed.

Attorney-General for the State.

J. D. Kerr and *F. R. Cooper* for defendant.

WALKER, J., after stating the case: The defendant cannot be criminally liable under Revisal, sec. 3367, unless the contract with the prosecutor by which she rented and agreed to cultivate the land was valid and binding upon her. This was decided in *S. v. Howard,* 88 N. C., 650, as to an infant, whose contracts are merely voidable, and the principle is applicable with greater force to a married woman, whose
(622) contracts, as a general rule, are void. In *Howard's case, Justice Ashe,* for the Court, says: "The case then results in this, that the State seeks by this indictment to hold the defendant amenable to the criminal law for the violation of a void contract. With all due respect to the opinion of those who entertain such a proposition, we must say that it seems to us preposterous." See, also, Bishop on Statutory Crimes (1873), sec. 131; *S. v. Plaisted,* 43 N. H., 413; *Jones v. State,* 31 Texas Cr. Appeals, 252; 2 McLain's Cr. Law, sec. 846.

Was the contract of the defendant void? Her general executory contracts, not authorized by the statute, have been held to be void. Mordecai's Law Lectures, pp. 328, 329, and 358. It is also settled that the husband is entitled to the society and to the services of his wife, and consequently to the fruits of her industry. She cannot contract to render those services to another without his consent. Those rights were given to the husband, it is said, because of the obligation imposed by the law upon him to provide for her support and that of their offspring, and the right continues unimpaired so long as the legal duty continues to exist. *Syme v. Riddle,* 88 N. C., 463; *Baker v. Jordan,* 73 N. C., 145; *Hairston v. Glenn,* 120 N. C., 341; *Kee v. Vasser,* 37 N. C., 553; *McKinnon v. McDonald,* 57 N. C., 1; *Cunningham v. Cunningham,* 121 N. C., 413. There was no evidence that the husband assented to the contract. Nor do we think there is any evidence in this case to show that the contract falls within any of the classes mentioned in the Revisal, sec. 2094, as contended by the Assistant Attorney-General in his able and well-considered argument, so as to take the case out of the general rule that her executory contracts are void. *Baker v. Garris,* 108 N. C., 218. On the contrary, such facts as we have in this case have been held not to bring the contract of the married
(623) woman within the operation of that section. *Sanderlin v. Sanderlin,* 122 N. C., 1; *Clark v. Hay,* 98 N. C., 421. It comes to this, that in no view is the alleged contract of the defendant binding upon her, and upon the principle already stated she cannot be held responsible criminally for its breach. The evidence, therefore, discloses that she was not guilty of any offense under the law, and the Court should therefore have given the instruction requested by the defendant's counsel. In the view we take of the case, it can make no difference whether the defendant was a tenant or a cropper.

Without intending to discuss the subject or to reëxamine the reasons upon which the many decisions of this Court are based with a view of testing their soundness, it may simply be remarked that if we should hold a married woman to be bound by a contract for her services entered into, not only without the consent but against the will of her husband, it might prove disastrous to the marital relation and be productive of a long train of most evil consequences. There should be a clear expression of the policy of the State upon this important question, if there is to be a change, and it will best come from the law-making body.

What we have said about the wife's earnings and the validity of her contracts relates to her general right to contract, rather than to her power to dispose of her property, real or personal. The Legislature has seen fit not to change the law as it has repeatedly been declared to be, although its attention has more than once been called to the matter, and although there have been many sessions of that honorable body since the law was first so declared. We took occasion recently in *Ball v. Paquin,* 140 N. C., 83, to again direct attention to the subject, but an examination of the public statutes will show that there was no responsive legislation at the last session. It would, therefore, seem to be of the opinion that the Constitution and the statute have been properly interpreted, and that it is wise and expedient to let the law re- (624) main as it has been settled by the numerous decisions. We are not at all disposed to question the correctness of this conclusion, as the people, by their Constitution, have appointed the Legislature, and not this Court, to declare and formulate the public policy of the State. We decide what the law is, and not what it should be. We can construe, but not legislate.

We cannot overlook the fact that the motion for a new trial, upon the exception reserved, was not made during the term of the Court at which the case was tried. This is expressly required to be done by the statute, Revisal, sec. 554, and it has been held that it cannot be made after the term has expired. *Turner v. Davis,* 132 N. C., 187. But it appears in this case that the Judge who presided at the trial was taken ill and could not proceed with the business of the Court. He could not even pronounce the judgment against the defendant. The motion for a new trial could be made at any time before this was done. No laches can be imputed to the defendant. Shall she lose her right to enter her motion for a new trial and to have it heard and considered where there has been no default on her part, but she was prevented from taking the proper steps for that purpose solely by the act of God, which is so treated by the law as to affect no one injuriously? The answer to this question should clearly be in the negative. What, then, is her remedy? We must ascertain from analogous cases. When an

appeal had been duly taken, and the Judge had lost his notes, so that the case could not be stated, a new trial has always been ordered, unless the appellant had been negligent. *S. v. Powers,* 10 N. C., 376; *Isler v. Haddock,* 72 N. C., 119; *Sanders v. Norris,* 82 N. C., 243; *S. v. Randall,* 88 N. C., 611; *Commissioners v. Steamboat Co.,* 98 N. C., 163; *Burton v. Green,* 94 N. C., 215; *Owens v. Paxton,* 106 N. C., 480; and especially *McGowan v. Harris,* 120 N. C., 139, where the authori-
(625) ties are collected. Formerly and prior to the enactment of the present provision of the law (Revisal, sec. 591), the rule was held to apply to a case where the Judge had died or his term had expired. So where the plaintiff was prevented from issuing an execution by the act of the County Court in erroneously refusing his application for one, and that Court was afterwards abolished before its error could be corrected by the mandate of this Court, to which an appeal had been taken, it was held that he should not be prejudiced by the error and the subsequent act of the law in abolishing the Court from which the execution would have issued. *Isler v. Brown,* 66 N. C., 556. See, also, *Pell v. Linnell,* L. R., 3, C. P., 441; *Rex. v. Edwards,* 4 Taunton, 309.

In *Regina v. Justices,* 15 Q. B. (69 E. C. L.), 88, the notice of appeal was not served in time by reason of the respondent's death, and the Court held that the condition of giving notice, annexed to the right of appeal, having been imposed by the law, and performance of it having become impossible by the act of God, the appellant was excused from such performance, and accordingly ordered the appeal to be heard as if the notice had been duly given. And substantially the same ruling was made in *Newton v. Boodle,* 3 C. B. (54 E. C. L.), 795. There the appellant lost the benefit of a bill of exceptions tendered to the ruling of a Judge at *nisi prius,* or at the assizes, by the death of the Judge and without any default of his own, and the Court permitted him to move for a new trial, notwithstanding the proper time had elapsed, so that he might be restored to the position he would have occupied if the bill of exceptions had not become abortive by the death of *Chief Justice Tindal* of the Court of Common Pleas, before it could be sealed and perfected by that Judge who had presided at the trial. The remedy was an adequate and an appropriate one under the practice of the Court at that time. Under our procedure, the remedy must be found
(626) in merely ordering a new trial. We need not decide that the case should be treated as if the motion had been made, because it would have been made if the defendant's opportunity for making it had not been lost accidentally and by no fault on his part, or because, further, the Solicitor has agreed with the defendant's counsel upon a case on appeal and has thereby consented that it may be so treated, for even if we should so decide there would appear to be error which neces-

sitates another trial. We simply grant a new trial because the defendant has lost her appeal by an act of God, which she could not foresee and the consequences of which she could not avoid. As said by *Taylor, C. J.*, in *S. v. Powers, supra,* "under the circumstances, there is no other mode by which the justice of the case can be attained."

Our opinion on the merits has been expressed, thinking that it might end the prosecution unless the facts as now presented are materially changed, which does not now seem to be probable. Where a case must go back for another trial, it is not only proper, but it may be fairly regarded as a duty of the Court to decide upon the legal merits, if it appears that the State cannot ultimately succeed in the prosecution or the plaintiff in the litigation. It prevents the useless expenditure of time and the unnecessary accumulation of costs, and there are other and perhaps weightier reasons for taking such a course.

Why order a new trial unless there was error, and how can we know whether there was error or not unless we examine into the merits of the case?

New Trial.

CLARK, C. J., concurring in result: The defendant has lost her right of appeal by no fault of her own, but in consequence of the illness of the Judge, who was taken ill and could not proceed to judgment. The succeeding Judge could neither impose judgment (627) nor "settle a case on appeal," as he had no personal knowledge of the incidents of the trial. The only remedy is in ordering a new trial. Indeed, the Judge might well have instructed the jury that there was no evidence that the defendant voluntarily abandoned the work.

This renders it *obiter* to discuss the merits of the case. It is true that *Syme v. Riddle,* 88 N. C., 463, and some cases following it, have held (not without question, however) that a husband is entitled to the earnings of his wife; but in my judgment that decision is opposed to the entire thought and civilization of the day and ought not to be held now as authority. It was based upon the preconceived opinion of Judges who rested their decision upon the barbarous doctrine of the common law under which a woman upon marriage became *non sui juris,* and her husband took her property and her earnings as fully as a master became entitled to the property and earnings of his slave. The decision in *Syme v. Riddle* is directly opposed to the language of the Constitution, Art. X, sec. 6: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become *in any manner entitled,* shall be and remain the sole and separate estate and property of such female." This guarantees her control of her property of all kinds,

whether acquired before or after marriage, and it can make no difference whether it is income from her property or earnings from her labor. Of the two, the wife's right to control the latter is stronger of natural right. There can be no force in the argument used in *Syme v. Riddle,* that her earnings are needed for the support of the family, and therefore her husband should have them, for there is no guarantee that he will so apply them; indeed, there is much less certainty thereof than that the wife and mother will use her earnings for the benefit of her children. Besides, by the same token, as it devolves especially
(628) upon the husband to support his wife and children, there is a stronger reason that he shall not dispose of his earnings without his wife's concurrence than that she shall be constrained not to receive and use her own earnings without the husband's consent. By unanimous decision of the Court of Appeals in England in the *Clitheroe case* (*Reg. v. Jackson*), Q. B. D. (1891), 697, it was held that the husband could not enforce the unwilling companionship of the wife. The law now recognizes the equality of rights of both parties to the marital relation, and no longer asserts the inferiority or subjection of the woman. But argument ought to be out of the question in view of the language of the Constitution. In *Syme v. Riddle,* 88 N. C., 463, and that class of cases, the Court overlooked the fact that there is no statute with us giving the wife's earnings to the husband, and that the Constitution had entirely abrogated the common-law doctrine as to the subjective status of the wife.

In England the Court of Chauncery by judicial legislation, pure and simple, originated the status of the wife's separate property, and created the doctrine, by judicial enactment, of "charging in equity," which has since been completely repealed and effaced by the more progressive action of Parliament. In 1870 Parliament enacted that a married woman was entitled to her earnings, for the above action of the courts had applied only to the wealthier classes, to married women owning property, which the Court of Chancery could reach and control. In 1882 Parliament enacted in substance the provision of the North Carolina Constitution, that a married woman's property of every description, whether acquired before or after marriage, shall be in her sole control, and went further by dispensing with any necessity of the husband's assent to conveyances of the wife's property (which is the only restriction upon her freedom of control required by our Constitution), and gave the wife absolute freedom of contract. The Judges of England being, as
(629) sometimes is the case with courts, unable or unwilling to recognize the completeness of a change made by an enactment of the law-making power, held, notwithstanding the broad terms of the Act of 1882, that if a married woman possessed no property at the time she

made a contract, her subsequently acquired property could not be subjected to execution. In 1893 Parliament swept away this refinement, and ever since in England a married woman's property rights and her right to contract are the same as her husband's. The same is true of New York (from whose Constitution the married woman's clause in our Constitution is copied), and in most other States. 1 A. & E. (2 Ed.) 522. The above summary of the changes in the English law is taken from the *Century of Law Reform,* 358-370; *Dicey's Law and Opinion in England,* 373, 395. Professor Dicey in summing up these statutory changes says that they made simple and plain and more complete the changes which the Court of Chancery by ingenious and successive tentative decisions had made in favor of the daughters of the wealthy, and that Parliament applied the benefits of "the change to the daughters of the poor as well as in favor of the daughters of the rich," which the courts had done.

It would seem, indeed, that the wife here had a right to her earnings; the Constitution so says, and there is certainly no statute upon our books to the contrary. As the husband went home every Saturday and spent Sunday with his wife, and there is no evidence that he raised any objection to her working the crop, the jury would doubtless have found upon proper instructions that the defendant's contract for work was to aid in the support of herself and family. They could hardly have supposed in reason that it was for any other purpose. This being so, she had a legal right to agree that the product of her labor should go to the payment for provisions furnished her, being necessaries for herself and family. The Constitution requires the assent of the husband only to "conveyances" by her, not to sales of personalty, as her (630) crop when gathered. *Vann v. Edwards,* 135 N. C., 661. As Professor Dicey said of the Parliament of England we may say of our Constitution, that it was not intended that the rich woman should control the income (as well as principal) of her property, while leaving the petty earnings of the poor woman, from her needle or otherwise, to the control of the husband, to be squandered in drink or otherwise at his will. The emancipation was to all women alike, and it matters not in what manner the income is derived, whether from earnings or property, and whether they become entitled thereto before or after marriage.

In *Christopher v. Norvell,* 201 U. S., 216, it is held that a married woman owning stock in a national bank is subject to a personal judgment, like every one else, for an assessment on the stock, notwithstanding that under the laws of the State a married woman cannot enter into a contract, because since the laws of the State do not incapacitate her to own such stock, she assumes the liability incident to its ownership. For the same reason, since the laws of this State do not inca-

pacitate a married woman to work a crop as tenant or on shares, she is liable to the criminal law, to the same extent as any one else, for receiving advances on such crop and afterwards abandoning the work. Her liability for such conduct arises under the statute, and not by virtue of her contract. *Christopher v. Norvell, supra.*

There has been as to married women some approximation to the Constitution in late legislation. Laws 1901, ch. 617, now Rev., 2016; *Finger v. Hunter,* 130 N. C., 529; and this Court has often recommended more effective legislation to conform to the Constitution, *Bank v. Howell,* 118 N. C., 273; *Ball v. Paquin,* 140 N. C., 96. In view of the present great confusion in the law as shown in the table in *Vann v. Edwards,* 128 N. C., 431-435, such legislation is badly needed.

(631) There is a very important question, which, however, like the above, it is not necessary to decide, as there is really no case before us, since a new trial has been ordered on the ground that there is no valid judgment and hence no appeal presenting the merits. It is well, however, to note the question, that it may not be thought that it was tacitly approved. This indictment is under Revisal, 3367, which provides that if any tenant or cropper shall procure advances from a landlord to enable him to make a crop on the land rented to him, and then wilfully abandon the same without good cause and without paying for such advances, he is guilty of a misdemeanor and liable to fine and imprisonment. This and the almost identical provisions of section 3366 apply only to certain counties named therein. As such conduct is merely a breach of contract, and there is no crime if the advances are repaid, a grave question arises whether these sections are not in violation of the provision in the State Constitution (Art. I, sec. 16) forbidding "imprisonment for debt, except in cases of fraud," and also whether they do not conflict with the Thirteenth Amendment to the Constitution of the United States against "involuntary servitude, except as a punishment whereof the party shall have been (*i. e.,* previously) duly convicted." If the service is enforced unless the debt is paid, is it not "involuntary servitude?" *Clyatt v. U. S.,* 197 U. S., 207; *Robertson v. Baldwin,* 165 U. S., 275.

This statute is doubtless a very convenient one for landlords in the counties named. But if upon full consideration it shall prove to be unenforcible it may result in great loss to them. While in most cases its operation may prove a convenience to the tenant in aiding him to get supplies, and not a hardship, it is capable of great abuse. It is at least wise to call attention to the matter, that it may not be supposed that the Court has passed upon the enforcibility of these sections.

Cited: Jones v. Layne, 144 N. C., 606; *S. v. Wilkes,* 149 N. C., 453; *S. v. Williams,* 150 N. C., 804.

(632)

STATE v. W. LEE HANNER.

(Filed 24 April, 1907.)

Special Verdict—Facts—Findings—Sufficiency.

The findings of a special verdict on an indictment for selling liquor without a license must be sufficient for the Court, as a matter of law, to determine the innocence or guilt of the defendant; when the verdict leaves open the inference of innocence or guilt as one of fact, it is defective, and a new trial will be ordered.

CLARK, C. J., concurring.

INDICTMENT for selling liquor without a license, heard before his Honor, *Moore, J.*, and a jury, at the February Term, 1907, of DAVIDSON.

The defendant was indicted in the Court below for selling liquor without a license. The jury returned a special verdict in which they found that the defendant did not have a license to sell liquor. They further find that the testimony of the witnesses is true. James Eastep testified that he applied to the defendant for the purchase of a gallon of whiskey and was told by him that he could let him have a gallon for two dollars, express charges prepaid. The witness paid defendant two dollars, who gave him a receipt, as follows: "Dock Eastep. One gal., $2.00. Paid. W. L. H." When the defendant gave the receipt he said: "If the whiskey don't come, come back up here and I will make it good. Sometimes it gets misplaced." He further said that the witness would get the whiskey the next morning at the express office, as it would be there by that time. The witness went to the express office in Lexington the next morning and got the one gallon of whiskey. The defendant, when he sold the whiskey, told the witness that it was then in Danville, Va., and was old man Alex Bailey's whiskey, and that witness knew what it was. He also said that he was agent of Bailey or Bailey Company in Danville; that he would (633) send the order to Danville and, if the order was accepted, the liquor would be sent direct to the witness at Lexington, and that if it did not come "he would make it good or (the witness) would get his money back." The defendant did not go with him to the express office to get the whiskey; it came in the name of the witness and was delivered to him by the express agent at Lexington. It was tagged, and on the tag was written "Dock Eastep, Lexington, N. C." The witness is called Dock Eastep, and may have given that name to the defendant when the liquor was ordered. There was nothing said about the defendant selling the witness any whiskey, but he told him that he was the agent for another concern, and that he would send the order in to them as agent. The tag was on the jug when the witness got it at the

express office. D. E. Hepler testified that the defendant told him he represented Alex Bailey, and that the liquor concern was located in Danville, Va., and he was its representative. The card on his office door reads: "Bailey Distilling Company, Danville, Va."

Upon the special verdict the Court was of the opinion that the defendant was guilty, and the jury so found. From the judgment upon the verdict, the defendant appealed.

Assistant Attorney-General Clement for the State.

Walser & Walser, S. E. Williams and *John A. Barringer* for defendant.

WALKER, J., after stating the case: A special verdict must include all the essential elements of the offense charged, or there can be no conviction, and it follows that if the findings are not responsive to the allegations of the indictment they will not sustain a judgment. The jury must find the facts, and not merely state the evidence which may tend to prove them. There can be no aider of the verdict by intendment, or reference to extrinsic facts appearing in the record, and (634) this is so even though the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the constituent facts not distinctly found. Clementson on Special Verdicts, 291, *et seq.*

It is said by *Ruffin, C. J.*, for the Court, in *S. v. Watts,* 32 N. C., 369: "It is common learning that a verdict is defective which finds only the evidence; since the Court cannot draw inferences of fact, but only apply the law to facts agreed or found. To authorize judgment for the State, therefore, on the verdict, it ought to have contained direct findings of the necessary facts." Hawkins Pleas of the Crown, bk. 2, ch. 47, sec. 9, states the rule to be that the Court in adjudging upon a special verdict is confined to the facts expressly found, and cannot supply the want thereof, as to any material part, by any argument or implication from what is expressly found. It was accordingly adjudged in *Rex v. Plummer, Kel.,* 111, and other cases he cites, that where the jury failed to find an essential fact, the Court could not take it as established from the other evidential circumstances of the fact which were expressly found, though they were as full to the purpose as they could well be that the omitted fact existed. So in *S. v. Blue,* 84 N. C., 807, it is said: "In judging upon a special verdict the Court is confined to the facts expressly found, and cannot supply the want thereof, as to any material part, by an argument or implication from what is expressly found. And when the facts are of an equivocal character, which may mean one thing or another, the Court cannot determine as a question of law the

guilt or innocence of the defendant. A special verdict is in itself a verdict of guilty or not guilty as the facts found in it do or do not constitute in law the offense charged. There is nothing to do but to write a judgment thereon for or against the accused. Therefore, in finding a special verdict the facts should be stated fully and explicitly, (635) and the omission of any fact necessary to constitute the offense is fatal," citing 2 Hawkins P. C., 622. The authorities are all to the effect that the jury must state the essential facts, and not leave it to the Court to supply them or any of them or to draw inferences from evidence set forth in the verdict, which must contain the ultimate facts that constitute the offense, and not those merely which may tend, though never so strongly, to show the defendant's guilt. *S. v. Curtis,* 71 N. C., 56; *S. v. Lowry,* 74 N. C., 121; *S. v. Bray,* 89 N. C., 480; *S. v. Oakley,* 103 N. C., 408; *S. v. Crump,* 104 N. C., 763; *S. v. Finlayson,* 113 N. C., 628. In *S. v. Custer,* 65 N. C., 339, *Justice Rodman* tersely states the principle: "In (passing upon) a special verdict, we are not at liberty to infer anything not directly found."

The jury in this case have stated in their verdict certain facts and circumstances, related by the defendant to the witness, which may tend or not to establish his guilt. But after all, they are but evidence and not the facts themselves upon which the law can adjudge guilt or innocence. The facts recited tend just as much to show that the liquor was sold, in good faith, to be shipped from Danville, as they do to prove that the defendant's method of selling was a subterfuge and a mere cover by which to conceal a violation of the law, or to evade its provisions, in order to escape its penalty, and certainly it tends to prove the former fact just as fully as it does the one that the defendant sold the liquor in Lexington, by himself delivering the jug at the express office for the defendant, who was to call and get it. What the defendant said to the witness, James Eastep, was mere evidence, and not the facts themselves, which the jury should have found before the Court could proceed to judgment. This is the fatal defect in the verdict. We would assume a jurisdiction not possessed by us and be guessing at the true and crucial fact of guilt, if we should direct a conviction (636) upon the present verdict. There is hardly sufficient evidence stated from which to infer that the defendant placed the whiskey in the express office, or had it done, instead of having it shipped from Danville, Va., unless we are permitted, as we are not, to substitute mere conjecture for that certain and reliable proof of a fact which the law requires to establish it.

As said by *Shepherd,* C. J., in *S. v. Finlayson,* 113 N. C., 628: "Evidently a very important question concerning interstate commerce was intended to be presented, but we cannot consider it upon this verdict."

Judging from the nature of the findings, the course of the argument here and the briefs of counsel, it was supposed below, we could infer, that the verdict was equivalent to a finding that the whiskey was actually and in good faith sold for shipment from Danville, Va., and the question was whether the transaction was so far interstate traffic as to protect the defendant from prosecution under our law against the unlawful sale of liquors, and also whether the act of Congress, sometimes called the Wilson Act, applied to the case. But this matter we cannot consider, as it is not at all presented in the record, owing to the imperfection of the verdict in the respect we have indicated.

Where a special verdict is so defective that the Court cannot pronounce judgment upon it, the rule is to order a new trial. *S. v. Wallace,* 25 N. C., 195; *S. v. Curtis,* 71 N. C., 56; *S. v. Blue,* 84 N. C., 809; *S. v. Brittain,* 89 N. C., 481. "If the verdict does not sufficiently ascertain the fact, a *venire facias de novo* ought to issue." 2 Hawkins P. C., p. 622, and note 2. It is of course within the power of the trial Court to direct the jury to retire and further deliberate for the purpose of remedying any defects in the verdict. Clementson Special Ver-
(637) dicts, p. 293; *S. v. Arthur,* 21 Iowa, 322.

Our conclusion is that there has been no sufficient verdict rendered for the Court to determine, as matter of law, the guilt or innocence of the defendant, and the case stands, therefore, as if there had been a mistrial. *S. v. Curtis, supra.* It follows that there was error in entering judgment as upon a conviction, for which there must be another trial.

New Trial.

CLARK, C. J., concurring: In a special verdict the Court is not at liberty to infer anything not found. *S. v. Custer,* 65 N. C., 339. The facts found are that the defendants sold a gallon of whiskey and received $2 therefor; that he *said* he would send the order to Danville, Va., and have the whiskey sent out by express, and the purchaser did get the whiskey at the express office next morning. But there is no evidence that he did in fact send the order to Danville, nor that this particular whiskey came by express from Danville addressed to Eastep. The tag on the jug bore Eastep's name, but nothing to indicate that it had come by express from Danville or elsewhere for him. Neither the express agent nor his books were in evidence, and the defendant availed himself of his privilege of not going on the stand, and neither proved the sending of the order nor the shipment of whiskey in pursuance thereof. The jury did not find that these things were done, and the Judge could not draw that inference. If authorized to draw any inference, he might possibly have inferred that the whiskey was already in the ex-

press office, or elsewhere in Lexington, and that the gallon jug was merely tagged with defendant's name ready for Eastep next morning. We do not know how this was. If the whiskey was in fact ordered by defendant from Danville, and was in fact shipped thence in a gallon jug by express addressed to Eastep, no witness went upon (638) the stand to testify to those facts, and the jury has not so found the facts.

If these facts had been found, the question would have been presented whether our statute, making the place of actual delivery to the purchaser the place of sale, would apply to this case. *S. v. Patterson,* 134 N. C., 612; *Delamater v. South Dakota,* 205 U. S., 93. But in the absence of such facts we cannot discuss an abstract proposition of law without facts on which to base the proposition. But it may be noted that even if those facts had been found, there would still arise other questions. The size of the package has been held material. *Austin v. Tennessee,* 135 U. S., 100; *Cook v. Marshall County,* 196 U. S., 261, in which last case *Justice Brewer* says: "It may be shown that the intent of the party concerned was not to select the usual and ordinary mode of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the State law." The State has sole power to regulate or prohibit the sale of liquor. *Barbier v. Connally,* 113 U. S., 31. Was the shipment of one gallon of whiskey by express in a single jug from Danville, Va., to Lexington, N. C., a usual and legitimate act of interstate commerce, or was it merely an attempt to evade a law which the people of this State have enacted under their right of local self-government? If the transaction was merely "a cover for fraudulent dealing, it is no defense to a prosecution under the State law," says the United States Supreme Court, *supra,* and this view should be submitted to the jury in all similar cases, that they may find (639) how the fact is. In Calvert Regulation of Commerce, 127, the following are among the rules on this point deduced from the decisions of the United States Supreme Court:

"4. The size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States is a material consideration.

"5. The motive which actuates the particular method of shipment may be determined from several circumstances: (*a*) The trifling value of each parcel. (*b*) The absence of an address on each package. (*c*)

The fact that many parcels, for the purpose of the shipment, are aggregated."

The State will not allow its police regulations to be violated under cover of fraudulent shipments from another State, nor will the Federal courts, as the highest Federal Court has said, permit "the interstate commerce clause to be invoked as a cover" for defying or evading the State law. Calvert Regulation of Commerce, 124. Indeed, it is immaterial whether the defendant took orders for liquor to be shipped from a point outside or inside the State, for his act being in violation of the State law which regulates the liquor traffic, neither he nor the carrier is protected by the interstate commerce clause of the Federal Constitution. *Delamater v. South Dakota,* 205 U. S., 93.

If in this case the whiskey had in fact been shipped from Danville, Va. (though it is not so found), but was already, at the time of the purchase, in the express office, or elsewhere in this State, and was thereafter tagged with purchaser's name, the defendant was guilty, under the Wilson Act. *Brewing Co., v. Crenshaw,* 198 U. S., 17; *In re Rahrer,* 140 U. S., 545. If whiskey is manufactured in this
(640) State and sent into another in order to be reshipped in retail quantities to consumers here in violation of our police regulation of the sale of liquor on orders taken by the distiller's agent, it is not the subject of interstate commerce. *Crigler v. Commonwealth,* 27 Ky. Law.

In view of the enormous business notoriously done in the shipment of liquor into this State by express in jugs, the fact should be found whether such shipment is a *bona fide* exercise of interstate commerce or whether it is an attempt merely to evade the State's regulation of the traffic in intoxicating liquor in the exercise of the police power.

Cited: Vinegar Co. v. Haun, 149 N. C., 356; *S. v. McCloud,* 151 N. C., 731; *S. v. Colonial Club,* 154 N. C., 185; *S. v. Fisher,* 162 N. C., 566.

STATE v. MACK MCGHEE.

Hayden Clement, Assistant Attorney-General, for State.
Walser & Walser and *J. A. Barringer* for defendant.

WALKER, J. The facts in this case are substantially like those in *S. v. Hanner, supra,* and as the two cases present the same question, they were argued together. The decision in *S. v. Hanner* must therefore, govern in this case.

New Trial.

(641)

STATE v. ANNIE TURNER.

(Filed 30 April, 1907.)

Indictment—Removal of Causes—Discretion—Evidence—Judge's Charge—Omission—Motive—Supreme Court—Newly Discovered Evidence.

1. The action of the Superior Court Judge in refusing to remove a cause to another county for trial is not reviewable under the Revisal, sec. 427.
2. Under an indictment as accessory before the fact it is competent for counsel to ask the witness, "What seemed to be and what was the relation between the principal and the defendant?" such being a matter of common observation, and not calling for expert testimony.
3. It is not necessary to prove motive for the commission of crime, though when circumstantial evidence is relied on to prove the commission of the offense it is competent for the State to show motive.
4. In a trial under an indictment, the omission of the trial Judge to charge upon any particular phase of the evidence is not reviewable in the absence of a prayer for special instruction thereto, and such is true when he fails to charge upon the view of there being no evidence of motive to commit the crime alleged.
5. In criminal cases the Supreme Court has no power under the Constitution nor at common law to entertain a motion for a new trial on the ground of newly discovered evidence.

CONNOR, J., dissenting; WALKER, J., concurring in dissenting opinion.

CRIMINAL ACTION, tried before *Moore, J.*, and a jury at the December Special Term, 1906, of ALAMANCE. Pertinent facts are stated in the opinion of the Court.

Assistant Attorney-General for the State.
Jacob A. Long for defendant.

CLARK, C. J. The prisoner was convicted and sentenced to the State's Prison as accessory before the fact to Henry Walker, (642) who had been convicted of burglary with assault with intent to murder L. Banks Holt at Graham.

The first exception is to the refusal of the motion to remove the cause to another county for trial. Rev., 427, provides that the Judge shall not remove any cause, whether civil or criminal, unless he "shall be satisfied that the ends of justice demand it." His action is not reviewable. *S. v. Smarr,* 121 N. C., 672.

The second exception is to the admission of the question, "What seemed and what was the relation between Henry Walker and the prisoner?" It was competent to show that these relations were friendly and intimate, and being a matter of common observation and experience, it was not a matter requiring that the witness should be an expert in order to express his opinion. It was a fact based on observation, as much so as the state of the weather, whether the temperature was cold or

warm, whether a person was angry, is insane, and similar matters. This is because no better evidence can be had than the observation of eye-witnesses, and the jury must draw their conclusion from the evidence. 1 Elliott Ev., sec. 671, prop. 4; *Blake v. State,* 73 N. Y., 586; *McKee v. Nelson,* 4 Cowen, 355. The opinion of witnesses in such matters is the result of many observations, which cannot be detailed to the jury. 1 Elliott Ev., 547.

The third and fourth exceptions are that the Court did not charge the jury that there was no evidence tending to show that the prisoner had any motive to commit the crime. The Judge was not asked to so charge. *Patterson v. Mills,* 121 N. C., 258, and cases there cited. Besides, it was not necessary to prove motive for the commission of crime—*S. v. Adams,* 136 N. C., 617; *S. v. Wilcox,* 132 N. C., 1143—
though when circumstantial evidence is relied on to prove the
(643) commission of the offense it is competent for the State to show
motive. *S. v. Green,* 92 N. C., 779; *S. v. Adams,* 138 N. C., 697. Furthermore, there were in fact circumstances in this case from which the jury might have inferred motive. The able charge of the Court was fully as favorable to the prisoner as she had any right to ask.

The prisoner files a motion here for a new trial for newly-discovered evidence, on the ground that Henry Walker, who was one of the witnesses against the prisoner, on the scaffold retracted his evidence. As he at the same time withdrew his confession of his own guilt made after his conviction and denied all knowledge of the crime of which he had been convicted upon evidence which was conclusive to the jury that convicted him, to the trial Judge and to the Governor, such hearsay retraction as to the prisoner should not carry more weight with the Court than his sworn statement at the trial and cross-examination, especially in view of the evidence of other witnesses that the prisoner took the key out of the door, by use of which Walker entered the house, and that the key was found in the lock on the outside of the door after the shooting; that Mr. Holt had refused to sign the petition for her husband's pardon, and her attempt to flee when arrested, even if we could consider the motion. But this Court has uniformly held that under the Constitution it has no power to entertain such motions in criminal cases, and has no desire to assume a function which can be more efficiently performed by the Executive. The authorities and the reasons governing us are too recently set forth in *S. v. Lilliston,* 141 N. C., 863-869, to require their repetition here. The jury did not act solely upon the testimony of Walker, for it acquitted the co-defendant of the prisoner, who was also implicated by his testimony.

At common law there was no appeal in any criminal case, the
(644) sole remedy being by application to the Home Office, which is

equivalent to the application to the Governor here. To this day, this is still the law in England. Our Constitution has changed this only to allow an appeal for error of law below, "on any matter of law or legal inference." The organic law did not change the common law further so as to give criminals an appeal upon the facts, and did not allow us to review them upon affidavits as to facts not submitted to the jury. We have no right, as this Court has always held, to assume a power which the Constitution has left, as at common law, with the Executive Department. It is unnecessary for us to review the facts.

This Court is created by the Constitution, and has no powers not therein stated. If "inherent right" is invoked, it cannot go beyond that possessed by the courts at common law.

No Error.

CONNOR, J., dissenting: I am aware that it is becoming in a Judge, who has once expressed his dissent from the decision of a question, to acquiesce and regard the decision as settling the law. I should not depart from this course in the present case but for my deep conviction that, by following what, with the utmost deference, I think an erroneous precedent, we are depriving a person charged with a grave crime of an opportunity to have her cause submitted to a jury with the light thrown upon the accusation, to which she is entitled.

The defendant was convicted of a most atricious crime upon the testimony, principally, of a self-confessed burglar and, but for an accidental failure to accomplish his purpose, a murderer, under sentence of death. While there is in the record some testimony the truth of which cannot be questioned, but, being admitted, standing alone, is barely sufficient to raise a suspicion of guilt, the only direct, (645) positive testimony against the defendant comes from Henry Walker. Without undertaking to point out the ear-marks of falsehood and the improbability of truth in his testimony, or the peculiar circumstances under which it was given, it may be conceded that it constituted evidence fit to be submitted to the jury and, of course, if believed, justified conviction. Nor can it be denied that if she is guilty her punishment is but reasonable and just.

This Court, in a number of cases, the last being *S. v. Lilliston,* 141 N. C., 857, has held that while, in a civil action, it has the power to grant a new trial for newly-discovered evidence, it has no such power in a criminal case. The cases in which the motion has been made were reviewed in *Lilliston's case.* I confess that, after examining them, I am unable to see or to understand wherein the distinction is found wihch permits and, upon this record, would make it our duty to grant this defendant a new trial if she had been cast in a civil action, involving the

title to a tract of land or personal property of an insignificant value, denies the power to do so when she stands convicted of a crime followed by a sentence of imprisonment at hard labor for life. It is not claimed that any statute confers the power in one case and withholds it in the other. The Constitution confers the jurisdiction to hear and determine civil and criminal appeals in exactly the same terms. I am impressed with the fact that in almost every case in which the motion has been denied for want of power the Court has thought proper to say that there is no merit in the case made out by the affidavits, and that, upon the showing made, the motion would not be granted in a civil case. I cannot but think that the learned Judges felt that it was well to strengthen the position by the last reason. I say this with all possible respect. *S. v. Jones,* 69 N. C., 16, was a petition to re-
(646) hear; the question which we have here was not presented. *Justice Reade,* while denying the petition, said that, upon considering the defense set up, it was apparent that it could not have availed the defendant.

In *Starnes' case,* 97 N. C., 424, usually relied upon to sustain the denial of power, the facts as disclosed are that at February Term, 1886, the motion was denied upon the authority of *Jones' case, supra.* At the next term of the Superior Court of Union County, when the prisoner was called to the bar for sentence, as the law then required, he made the motion in that Court, filing affidavits to sustain it. The Judge found, among other facts, that the newly-discovered testimony was "cumulative merely," and for *that reason,* "in deference to the adjudication of the Supreme Court," denied the motion, and the prisoner appealed. *Smith, C. J.,* says: "Without stopping to inquire whether, at this late stage in the proceeding, and after an unsuccessful appeal to the Supreme Court upon alleged errors, in law such an application can be entertained in the Superior Court, to whose jurisdiction the cause has been remitted, we proceed, as did the Judge who assumed the right to act upon the application, to consider the case upon its merits, as if made in due and apt time and to a court having jurisdiction." The learned *Chief Justice,* not willing to send the prisoner to his death upon the mere denial of power to grant relief, proceeds to carefully analyze the affidavits and rest his judgment upon the elementary proposition that a new trial will not be granted for newly-discovered evidence which is "cumulative merely." He concludes his opinion with a strong commendation of "the zeal, ability and persevering energy" of counsel assigned by the Court without fee. Their zeal was rewarded by a pardon for their client upon the ground that the newly-discovered evi-
dence disproved his guilt. This case falls far short of "closing
(647) the question." *S. v. Rowe,* 98 N. C., 629, is decided upon the

authority of *Jones'* and *Starnes' cases,* as is *S. v. Edwards,* 126 N. C., 1051. *Council's case,* 129 N. C., 511, was a petition to rehear. Prisoner was convicted of a capital felony and sentenced to death. This Court in a *"Per Curiam* opinion" affirmed the judgment. *Douglas, J.,* ordered the petition docketed. While it was dismissed because it was held that the Court had no power to grant it, the merits of the petition were discussed, the learned Justice saying: "Though the petition to rehear must be dismissed, we have discussed the objection, as has sometimes been done where an appeal is dismissed." *Douglas, J.,* dissented, saying: "Knowing that rehearings are constantly granted in civil cases, and finding no distinction between civil and criminal actions, either in the statute or the rules of the Court, I am unwilling to say, even by implication, that property is more valuable than life and liberty or entitled to a greater degree of protection." I take the liberty of appropriating and making my own the foregoing language, expressing, as it does, my convictions. *S. v. Register,* 133 N. C., 746, is disposed of by a simple reference to those cited. Not until *Lilliston's case, supra,* is any discussion to be found of the question or other reason given than that it is so decided. In that case an exceedingly well-considered and interesting written argument was filed, tracing the history of the judicial system of the State from its foundation, showing from the language of the statutes what power and jurisdiction was conferred upon the courts, Superior and Supreme. In that case the defendant's motion was met with an uncontradicted affidavit, showing that he knew, prior to the trial, of the evidence upon which he relied. This, of course, made it the duty of the Court to decline the motion, and while the question was somewhat discussed and the power denied, the *Chief Justice* gave this as an additional reason for denying the motion. The case before us is absolutely free from such complications. (648) Walker was convicted of burglary and sentenced to be hanged. He made statements implicating the defendant and another woman as accessories before the fact. He was respited for the purpose of enabling the State to have his testimony upon their trial. His testimony, if true, made both women guilty. There was positive, direct, and, except by Walker, uncontradicted testimony, contradicting his evidence. Much of it was from disinterested witnesses and went to the vital question in the case in regard to which he was not corroborated. While I do not wish to discuss the testimony, it is but proper to say that I do not understand it after reading it carefully twice, as set out in the opinion. I do not find any testimony, except Walker's, other than an inference that she took the key out of the door; nor do I understand Mr. Holt's testimony to be that he refused to sign the petition for her husband's pardon. On the contrary, he says that he told her that if the Judge and

jury would sign it, he would do so. This incident makes an entirely different impression on my mind from that drawn in the opinion. It not only shows the kindly feeling existing between Mr. Holt and the defendant, but explains her trip to Burlington the night of the shooting. Her husband had been convicted of an assault and sentenced to the roads. This fact is not claimed to have any connection with the shooting of Mr. Holt—he had nothing to do with it. Nor do I see anything in her conduct referred to "as an attempt to flee" inconsistent with innocence. It is impossible to analyze the testimony, and I only make this reference to it to say that if I understood it as stated in the opinion I should promptly refuse her motion without regard to the question of power.

The jury acquitted the other woman, Fannie McCain, and convicted the defendant. It is not proper for me to comment upon this (649) fact and I have no inclination to do so. The defendant, a colored woman, evidently without friends or influence, has been imprisoned since her conviction. The motion for a new trial is based upon the affidavit of the Sheriff who executed Walker. He says: "That affiant heard the said Henry Walker, as he stood upon the scaffold with the rope around his neck and his feet and hands confined, just before he was hanged, and when asked by affiant if he desired to say anything before his execution, say with great earnestness and with repeated statements that Annie Turner and Fannie McCain had nothing to do with the shooting of Mr. L. Banks Holt or with entering the house—that neither of them knew anything about it whatever; that he had sworn that they had tried to persuade him to shoot Mr. Holt because he thought that it would prolong his life, and that all that he had said about them was false in every particular. He further denied that he had shot Mr. Holt and that he knew anything about it one way or the other." Three other persons filed affidavits corroborating that of the Sheriff. Here we have a case in which every condition required by the courts for granting a new trial for newly-discovered testimony is met. The newly-discovered evidence is material, would probably result in a different verdict, is not cumulative merely, and could by no possibility have been known to defendant until January 8, 1907, after the adjournment of the Court at which she was tried. The newly-discovered evidence comes with, what is declared by the law, as much solemnity as if made under oath. It is a dying declaration. While it is not my purpose to discuss the merits of the defendant's case, I am impressed with what is said by counsel in *Pegram v. King,* 9 N. C., 605; "The simple statement of the case shows there must be relief somewhere." In that case (9 N. C., 295), on a motion to dismiss a bill to set aside a judgment and grant a new trial because the principal wit-

ness "upon his death-bed" said that the evidence which he had (650) given upon the trial was untrue, the Court said: "It resembles those cases where the principal witness on a trial at law has been afterwards convicted of perjury in his evidence in that case. In such cases relief should be granted in some way or other." When the cause came on for hearing, upon argument by Gaston for and Ruffin against granting relief, *Taylor, C. J.*, said: "And in a court of equity if new evidence is discovered which could not possibly be made use of in the first trial the Court will interfere. No evidence could have been given of the dying declarations of Jenks, wrung from him in an agony of remorse when he had no motive to misrepresent." It is true that the witness Walker, as a part of his dying declaration, denied his own guilt. This would, however, go to the value to be attached to his declaration regarding the innocence of the defendant. It is said that for a miscarriage of justice, such as indicated here, the defendant can apply to the Governor for pardon. I think that, so long as the cause is pending in the courts, there should be, and is, power in the judicial department to secure a fair, impartial trial. It is not pardon, but justice that the defendant asks. She insists that she is not guilty and that her conviction has been accomplished by the perjury of the principal witness, and that she is entitled to be tried in the light of his confession made on the gallows. To the suggestion that her relief is in executive clemency, I find no more conclusive answer than is given by *Douglas, J.*, in *Council's case, supra:* "The argument that in criminal cases the pardoning power of the Governor fulfils the purpose of a rehearing, is purely *ab inconveniento* and, to my mind, does not meet the ends of justice. Pardon is an act of mercy, and so far from establishing the innocence of any one, presupposes his guilt. The Governor may restore him to his liberty, but not his character. What a defendant asks in a re-
hearing is that he may have a fair trial, and yet, no matter how (651) clearly his innocence may appear, nor how great the error we ourselves may have committed, we can give him no relief." In a case like this, the Governor can be asked to pardon only because he believes the party not guilty. A new trial only gives the defendant an opportunity to have another jury, with the additional light, pass upon the question of his guilt. If this defendant is guilty of the crime charged, there is nothing in the case appealing to executive clemency. If she is not guilty, she does not need it. I fully concur in the wisdom of the principle that new trials in either civil or criminal cases should for newly-discovered evidence be granted with the utmost caution and only in a clear case. Under our rule no argument will be heard upon the motion. It is not probable, and I hope not possible, that another case appealing so strongly to the Court for a re-examination of the rule denying relief will come to us. That the motion is renewed after the re-

peated denial of power indicates that the profession, usually so ready to acquiesce in the decisions of the Court, does not give its assent to the conclusion reached upon this question. As for myself, "having fully stated what, in my opinion, is the correct principle of law, as it should have been declared, henceforth this decision shall be the law with me." *Walker, J.*, in *Hoggard v. Jordan,* 140 N. C., 619.

WALKER, J., concurs in the dissenting opinion.

Cited: *S. v. Walker,* 145 N. C., 566; *S. v. Stratford,* 149 N. C., 484; *S. v. Arthur,* 151 N. C., 656; *S. v. Grainger,* 157 N. C., 633; *S. v. Ice Co.,* 166 N. C., 404.

(652)

STATE v. WILL BANKS.

(Filed 30 April, 1907.)

Indictment—Murder—Degrees of Murder—Statute—Malice—Premeditation.

1. Evidence is sufficient for a conviction of murder in the first degree under the statute as wilful, deliberate and premeditated, which tends to show: That defendant had threatened to kill deceased in upholding his son in not paying him some money; thereafter they disputed about the amount owed, and defendant threatened the deceased with a pistol; deceased was with his son and the defendant followed the son, struck at him; deceased caught him around the neck and the defendant fired upon him several times; then defendant cursed and said he would kill him, and fired again; deceased offered no resistance, and had a gun under his left arm; deceased was fired upon twice, and between the first and second firing walked away from the defendant some twenty steps, and was followed and again fired upon.
2. Revisal, sec. 3631, does not give a new definition of murder, but classifies its different kinds as they existed at common law, theretofore included in one and the same degree; to constitute malice required by the statute to make out a case of murder in the first degree, it is unnecessary to show personal ill-will or grudge between the parties, and it is sufficiently shown when there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstances.
3. No particular time is necessary to constitute premeditation and deliberation for the conviction of murder in the first degree under the statute, and if the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial.

INDICTMENT for the murder of one Frank McMillan, tried before his Honor, *Ward, J.*, and a jury, at May Term, 1906, of ASHE.

There was verdict of guilty of murder in the first degree, and from sentence thereon defendant appealed to the Supreme Court.

(653) *Asssitant Attorney-General* for the State.
R. A. Doughton for the defendant.

HOKE, J. We have given the record and the exceptions noted our most careful consideration, and we find no error which entitles the prisoner to a new trial.

The objections urged upon our attention by counsel are that the Judge declined to charge as requested:

First. That there was no evidence of a deliberate and premeditated murder, and, therefore, a verdict of murder in the first degree should not be rendered.

Second. That to constitute murder in the first degree, there must exist, on the part of the slayer toward the deceased, expressed malice; and that in order to convict defendant of murder in the first degree in this case, the jury must be satisfied beyond a reasonable doubt that he slew deceased with particular or express malice, and that he did so with premeditation and deliberation.

Third. That in the charge, as given, the Court did not properly instruct the jury as to what constitutes deliberation and premeditation, in that he did not tell them that if the purpose to kill was formed simultaneously with the act of killing, the homicide would not be murder in the first degree.

We are of opinion that none of these objections can be sustained.

There was evidence tending to show that the son of deceased owed the prisoner a small sum of money, and there was a dispute between them as to the amount; that a few days before the homicide, the prisoner was heard to say that the deceased, Frank, upheld his son, Onney, in not paying him the money, and that he was going to have the money or shoot the deceased. On the occasion of the homicide there is no substantial difference in the account given by the witnesses. Three eye-witnesses to the occurrence testified, in substance, as fol- (654) lows:

Jesse Reeves: "Banks left church first. McMillan and I went on home together. We overtook Banks and Onney McMillan and Robert McMillan. Then we all went on together. Banks said that Onney owed him $1.50, and Onney disputed the amount; and Onney put his hand in his pocket, and Banks said: 'Hold on! durn you, don't bring out anything,' and pulled his pistol out. McMillan and the boy were going on. Banks had his pistol out, and told the boy not to dispute his word. He leaned up against the deceased and said: 'Do you see this?' Banks then went on and overtook Onney. It was twenty steps to the forks of the road. Banks ran up and told Onney he was going to have his money or beat hell out of him, and struck at him, and deceased then threw his arm around Banks' neck, and Banks fired, and deceased went up against a fence, and Banks kept walking up, snapping, and changed the barrels with his right hand, and I saw him hit deceased with the

pistol. Deceased fell. Banks, after the first two shots, and while deceased was going away, fired at him three or four times. Banks snapped three or four times right over the deceased after the firing, and then changed the butt of the pistol and hit deceased in the face. Deceased walked ten steps between the time of the first and second fire."

Nettie Parsons: "Banks ran around deceased and shot him in the back. When the last shot was fired deceased had his back turned to Banks, and Banks followed him up and fired at him as deceased was going from him. Deceased had his back to Banks all the time he kept shooting."

Robert McMillan: "After we left the church Banks said to Onney, 'I want to see you,' and Onney stopped. Banks had a Barlow knife, and shook it at Onney and said if Onney did not pay him he would whip him. The deceased came up and said he meant for the boy
(655) to pay the debt. Then they got to disputing about how much was owing Banks. Banks got his pistol out and showed it to the deceased and asked him if he saw it, and deceased said he saw it; and Onney went on in front and Banks followed him, and told Onney he was going to have his money if he had to knock hell out of him. Banks struck at Onney, and deceased caught Banks around the neck and turned, and Banks shot six times. He shot all the shots and got back and said, 'Damn, he would kill him,' and fired again. Deceased was doing nothing, except asked us not to let him kill him. Deceased had a gun under his left arm, but did not change the position of the gun."

On cross-examination, this witness further stated:

"Just before the two last shots were fired, Banks stepped back two or three feet and shot him in the back, and said he was going to kill him."

The deceased was struck four or five times, two of the shots having been fired in his back, one of these coming out at the nipple. He died in a few minutes, and not many steps from the place of the first assault.

While there was no expert testimony as to which of the wounds caused the death, at the time it occurred, there was evidence to the effect that the shots from the front entered the bowels—a kind of wound which, as a rule, does not cause a quick death. And there is every probability that the shots which caused the death at the time it occurred were those which entered the back—most likely the one going through the body and coming out at the nipple.

Without further comment, we think the mere statement of this testimony affords ample evidence that the killing was wilful, deliberate and premeditated, and the prayer of the prisoner addressed to the question was properly refused.

And we are of opinion, also, that the second prayer for in-
(656) structions on the part of the prisoner was properly declined:

"That to convict of murder in the first degree there should be proof beproof beyond a reasonable doubt that there existed particular or express malice on the part of the prisoner toward the deceased?"

As we interpret this prayer, it means, and was intended to mean, that to constitute malice, required by the statute to make out a case of murder in the first degree, the unlawful killing must be from personal ill-will or grudge between the parties. And this position, we think, is clearly erroneous. There has been no change wrought in this respect by the statute dividing the crime of murder into two degrees, Revisal, sec. 3631, as to the element of malice which must exist to make out the crime.

Both before and since the statute, murder is the unlawful killing of another with malice aforethought. See Clark's Crim. Law, p. 187. This malice may arise from personal ill-will or grudge, but it may also be said to exist whenever there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstances. The statute does not undertake to give any new definition of murder, but classifies the different kinds of murder as they existed at common law, and which were, before the statute, all included in one and the same degree.

Thus, all murder done by means of poison, lying in wait, etc., or by any other kind of wilful, deliberate or premeditated killing, or murder done in the effort to perpetrate a felony, shall be murder in the first degree, and punished with death. All other kinds of murder shall be deemed murder in the second degree, and punished by imprisonment in the State's Prison.

But the constituent definition of murder remains as it was, and in neither degree is it necessarily required that the unlawful killing should be from personal ill-will or grudge. *S. v. Wilcox,* 118 N. C., 1131; *S. v. Finley,* 118 N. C., 1161. (657)

Nor can the exception made to the charge as given be sustained: "That the Court failed to tell the jury that if the purpose to kill was formed simultaneously with the killing, the homicide would not be murder in the first degree."

The position is sound, and the case cited, *S. v. Foster,* 130 N. C., 666, and other decisions, are apt to support it.

But, assuming that the exception is open to defendant without a prayer for instructions to that effect, we think the defendant has had the benefit of the principle contended for, in the full and comprehensive charge of the Court. After explaining the nature of the crime, and reading the statute dividing the crime of murder into two degrees, the Judge, among other things, speaking of this feature of the offense, said:

"In order to constitute murder in the first degree, the killing must not only be done with malice aforethought, expressed or implied, but it must be done with wilful premeditation and deliberation, and all this must be shown beyond a reasonable doubt.

"Without wilful premeditation and deliberation being thus shown, it cannot be murder in the first degree.

"The word 'wilful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. The meaning of the word 'premeditation' is a prior determination to do the act in question. It is not essential that this intention should exist for any considerable period of time before it is carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried out. An act is done deliberately when done in cold blood and after a fixed design to do the act.

"No particular time is necessary to constitute premeditation and (658) deliberation, and if the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial."

And further:

"If you find from the evidence, beyond a reasonable doubt, that the prisoner, Will Banks, after wilful premeditation and deliberation and with malice aforethought, fired a pistol at Frank McMillan, and killed him, then it would be your duty to return a verdict of guilty of murder in the first degree.

"If you find from the evidence, beyond a reasonable doubt, that the prisoner, Will Banks, with malice aforethought, intentionally fired a pistol at the deceased, Frank McMillan, and killed him; and you fail to find beyond a reasonable doubt that the killing was done with premeditation and deliberation, then it is your duty to return a verdict of guilty of murder in the second degree."

In this charge, as to murder in the first degree, the Court excludes all idea of a killing simultaneous with the conception of the homicidal purpose, and directs the jury, in effect, that before they can convict of the higher crime, the killing must be from a fixed determination previously formed after weighing the matter.

The charge, we think, gives the prisoner the full benefit of the principle contended for by him, and is fully sustained by authority. *S. v. Dowden,* 118 N. C., 1145-1153; *S. v. Thomas,* 118 N. C., 1113-1121; *S. v. Spivey,* 132 N. C., 989; *S. v. Exum,* 138 N. C., 618.

There is no error, and the judgment below is affirmed.

Affirmed.

Cited: *S. v. Jones,* 145 N. C., 470; *S. v. Roberson,* 150 N. C., 842; *S. v. Spivey,* 151 N. C., 685; *S. v. Baldwin,* 152 N. C., 828; *S. v. Mayhew,* 155 N. C., 480; *S. v. Murphy,* 157 N. C., 617; *S. v. Shelton,* 164 N. C., 517; *S. v. McKenzie,* 166 N. C., 294.

(659)

STATE v. HAMPTON KENDALL and JOHN VICKERS.

(Filed 14 May, 1907.)

Indictment—Murder—Judge's Charge—Evidence—Conspiracy—Harmless Error—Exceptions and Objections.

1. The validity of a trial cannot be successfully objected to upon the ground that one of the jurors, in the sound legal discretion of the Court, was permitted to ask a competent question of a witness who was then upon the stand giving testimony.
2. It is not error in the Court below, upon a trial under an indictment for murder, to refuse to instruct, "If the jury find that the deceased was slain by one of the prisoners, and are not satisfied beyond a reasonable doubt as to which one, the issue should be answered, 'Not guilty,'" when there is evidence that one of them may have been present aiding and abetting the other and that the killing may have been done in furtherance of a conspiracy between them.
3. Upon the trial under an indictment for murder, evidence is sufficient to go to the jury on the question of conspiracy which tends to show the association between the parties, the full knowledge of the defendants of the habits and belongings of the deceased, as having ready money; a conversation of one of the defendants in the presence of the other, with a third person, that he would give such person five dollars to get the deceased out in the woods, which was acted upon, the other defendant saying the deceased "said something he was going to make him take back"; that defendants soon followed deceased and witness into the woods, and coming upon them from a different direction, one of the defendants asked the deceased "what he was doing there," and upon reply, "what was that to him," called deceased a vile name; one of the defendants had a pistol; the witness turned her back and ran off and soon heard a pistol shot; afterwards the deceased was found dead from the effects of a bullet hole which alone would have caused death and with his pockets turned wrong side out.
4. When upon the trial under an indictment for murder there is an absence of any evidence tending to establish the crime of manslaughter, and the defendant has been convicted of murder, a mistake in the charge of the Court as to manslaughter is harmless error, and the verdict of the jury will not be disturbed on that account.

INDICTMENT for the murder of one Lawrence Nelson, tried before his Honor, *Peebles, J.,* and a jury, at February Term, (660) 1907, of CALDWELL.

There was testimony on the part of the State tending to show that deceased, Lawrence Nelson, disappeared from the knowledge and observation of his associates and neighbors in Lenoir, N. C., where he then worked, on 25 September, 1906; and that on 11 December following his dead body was found in the woods, three and one-half miles northeast

of the town of Lenoir; that the body had a bullet-hole which entered from the back of the neck; and Dr. Kent, the expert examined, testified that the ball entered from behind, and at the point would have caused his death if deceased had been alive when the wound was received. The body, when found, gave evidence of having been dead for a considerable time, and the left-hand hip-pocket had been turned wrong side out; and it was shown that he was in the habit of carrying his money in that pocket. It was proved that Nelson and the two prisoners had boarded together at the same house, Kendall and deceased staying in the same room; and it was shown that the three were together for several hours the morning of the day he disappeared; that deceased was a man who had ready money, and that the fact was known to both the prisoners; and that on the occasion of the homicide, as claimed by the State, Nelson had shown some money—two twenty-dollar gold pieces and some silver and greenbacks and none was found on his person when the body was found, as stated.

Onah Grier, a witness for the State, testified, among other things, as follows:

"I saw Kendall and Vickers at the depot that day, too—never saw them before. They were on the yard at the depot. I did not talk with them. Mag Lewis was with them; talked with them. Kendall gave her $5 to get Nelson out in the woods. Vickers said Nelson said something he was going to make him take back. Money Kendall (661) gave Mag was greenback. Nelson and another boy were standing at the railroad about fifty yards from depot, and Kendall showed us where they were, and we went up to them. Nelson said 'Hello, sweetheart,' to Mag. We went with them up the railroad, and then to a negro restaurant. Nelson and the other man—I don't know who he was—went to the edge of Freedman. Mag and I bought corned beef, crackers, chipped beef and peanuts at the restaurant. We turned to the left from there, crossed a creek on a foot-log, went on another path and turned into an old road. Stopped outside of road, and Mag built a fire and roasted some peanuts. The time was about 5:30 o'clock in the evening. We went back into the road, and the other boy came to us and we all went back to the fire. Nelson cut some pine bushes for us to sit on. We ate peanuts and talked around the fire. We saw Kendall and Vickers coming a different way from the one we came. Kendall asked Nelson what he was doing there, and Nelson asked him what it was to him. Vickers called Nelson a son of a bitch. Vickers had a pistol, and I said to Mag, 'Let's run,' and we ran. The other man who was with Nelson ran. I heard a pistol fire about one hundred yards away. It was about dusk. I never saw the man who ran first any more that night, nor any of the others. We ran down a little hill; don't know

what direction. We rambled around all night until four o'clock next morning, then went into a house and asked for something to eat, but did not get it, and then went to a negro restaurant and bought something to eat. * * * We all talked together at the fire. Nelson showed us some money. There were two twenty-dollar gold pieces, some greenbacks and some silver. There were two keys in his purse also. Don't know what he did with the money after showing it to us. He gave me fifty cents. I never saw him after that. Next saw Kendall and Vickers at the magistrate's trial." (662)

Defendants denied having anything to do with the killing or knowing anything about it. Denied any acquaintance with Onah Grier and any and all facts testified to by her which tended to inculpate them, and offered evidence tending to prove an *alibi*.

There was a verdict of murder in the second degree, and from sentence on the verdict the defendants excepted and appealed.

Assistant Attorney-General Clement and *W. C. Newland* for the State.
Lawrence Wakefield, R. Z. Linney, Mark Squires and *Jones & Whisnant* for the defendants.

HOKE, J., after stating the case: The verdict shows, necessarily, that the jury have rejected the evidence of the prisoners in denial of their guilt and tending to establish an *alibi*, and have accepted the testimony of the State; and this being true, defendants may well feel that they have been mercifully dealt with by the verdict and that every reasonable doubt arising on this testimony has been resolved in their favor.

It is objected to the validity of the trial that one of the jurors was permitted to ask a question of a witness who was then upon the stand giving his testimony. There is no reason that occurs to us why this should not be allowed in the sound legal discretion of the Court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases. This course has always been followed without objection, so far as the writer has observed, in the conduct of trials in our Superior Courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does, ask a very pertinent and helpful question in furtherance of the (663) investigation. Authority is also in favor of the Court's action in permitting the question. *Schaffer v. R. R.*, 128 Mo., 65.

The prisoners further except because the Court refused to give their prayers for instruction that, "If the jury find that the deceased was slain by one of the prisoners, and are not satisfied beyond a reasonable doubt as to which one, their verdict should be, 'Not guilty.'" This

prayer is defective in that it entirely ignores the view, and the evidence which tends to support it, that one may have been present aiding and abetting the other, and that the killing may have been done in furtherance of a conspiracy between them. This limitation on the position stated in the above prayer is suggested in *S. v. Finley,* 118 N. C., 1162, the authority relied upon by the prisoners to sustain them in their exception. The prayer, with the proper modification arising from the testimony, was correctly and fairly given by his Honor in a portion of the general charge, as follows:

"If the State has satisfied you beyond a reasonable doubt that Lawrence Nelson was unlawfully killed on 25 September, 1906, then it is your duty to go one step further to ascertain whether or not the defendants, or either of them, did the killing. If the evidence satisfies you beyond a reasonable doubt that he was killed by one or the other of the defendants, both being present, and you are not satisfied beyond a reasonable doubt which one killed him, then it would be your duty to acquit them both, unless the evidence satisfies you beyond a reasonable doubt that they were there together aiding and abetting or encouraging each other, or that they formed a conspiracy and got Mag Lewis to entice him out there in the woods, and went out there in pursuance of that conspiracy, and one killed him in the presence of the other."

(664) It is further objected in this connection, that there was no evidence tending to establish a conspiracy, but a reference to the testimony contained in the record affords ample evidence of a common purpose—that one was present aiding and abetting the other, and further discussion of this objection is not required. Objection is further made that the Judge below gave an incorrect charge in the question of manslaughter, as follows:

"Whenever it is admitted or established to the satisfaction of a jury and beyond a reasonable doubt that one man kills another with a deadly weapon, the law presumes that the killing was done with malice and places the burden on the defendant to satisfy the jury beyond a reasonable doubt by the greater weight of the evidence that he killed the deceased under circumstances that would mitigate the crime to manslaughter or excuse it altogether." The error assigned being that matter in mitigation is not required to be proved beyond a reasonable doubt. The position of counsel is correct in this. This Court has repeatedly held that facts and circumstances of this character need only to be proved to the satisfaction of the jury. *S. v. Clark,* 134 N. C., 698; *S. v. Byrd,* 121 N. C., 684. But the mistake, which was, no doubt, an inadvertence on the part of the trial Judge, does not constitute reversible error, for the reason that it was made in presenting the question of manslaughter, and in no aspect of the testimony is there any feature of manslaughter in the case.

It is a principle very generally accepted that on a charge of murder, if there is any evidence to be considered by the jury which tends to reduce the crime to manslaughter, the prisoner, by proper motion, is entitled to have this aspect of the case presented under a correct charge; and if the charge given on this question be incorrect, such a mistake will constitute reversible error, even though the prisoner should be convicted of a graver crime, for it cannot be then known whether, if the case had been presented to the jury under a correct charge, they (665) might not have rendered their verdict for the lighter offense. But where there is an entire absence of any evidence tending to establish the crime of manslaughter, and the prisoner has been convicted of murder, a mistake in the charge of the Court as to manslaughter is considered harmless error, and for such error the verdict and judgment will not be disturbed. *S. v. White, supra; S. v. Capps,* 134 N. C., 622; *S. v. Utley,* 132 N. C., 1022; *S. v. Foster,* 130 N. C., 666. And so it is here. There is abundant evidence from which the prisoners might have been convicted of murder in the first degree. There are phases of the evidence which justify the verdict as rendered. But assuming that one of the prisoners fired the fatal shot while the other was present, aiding and abetting—and this view the jury have adopted under a correct charge—there is no evidence which tends to reduce the killing to manslaughter or to make out, in their favor, a case of excusable homicide. There is no evidence tending to show that deceased was killed in the anger aroused by a sudden combat into which the prisoners had unexpectedly entered; none which tends to rebut the malice implied by the law when one has been intentionally killed with a deadly weapon. *S. v. Chavis,* 80 N. C., 353; *S. v. Peter Johnson,* 48 N. C., 266. The other exceptions are without merit, and the judgment below is affirmed.

No Error.

Cited: *S. v. Dove,* 156 N. C., 657; *S. v. Greer,* 162 N. C., 652.

(666)

STATE v. C. F. MALLARD.

(Filed 14 May, 1907.)

Indictment—Trespass—Railroads—Right of Way—Appeal—Advice of Counsel.

Payment of the appraisement into Court is a condition precedent to a right of entry for construction purposes by a railroad; upon the trial under an indictment (Revisal, sec. 3688) for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad, pending an appeal by the

railroad company (Revisal, sec. 2587), when the company has not paid into Court the sum appraised by the commissioners. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent.

THE defendant was tried at November Term, 1906, of DUPLIN before his Honor, *Jones, J.*, and a jury, for a violation of section 3688 of the Revisal, upon appeal from a justice of the peace, and was convicted. From the judgment rendered, defendant appealed.

Assistant Attorney-General Clement for the State.
Rountree & Carr for defendant.

BROWN, J. This case is similar to *S. v. Wells,* 142 N. C., 595, the offense having been committed at the same time. In fact, Wells was working under this defendant, and for the same company, at the time of the alleged trespass. In *Wells' case* the Judge found the facts by consent, and as they were held to be insufficient to support the judgment, a new trial was directed.

This case was tried before a jury, and comes up upon assignments of error to his Honor's rulings. In was held in *Wells' case* the Judge found the facts by consent, and as they had no authority to proceed to construct its road upon the lands of others until the amount of the appraisement had been paid in Court.

(667) The defendant's own evidence shows that he was assistant superintendent of the logging department and had charge of the building of the railroad; that, acting under orders from his superior, he and his force had entered on Carter's land and were constructing their road thereon against the protests of the owner. It is not pretended that such entry was for the purpose of marking out and surveying the route. It is not pretended that, pending the appeal in the condemnation proceeding, the appraisement money had been paid into Court, and the defendant fails to state in his evidence that he was informed or believed that it had been paid. At the same time he states that he knew the land was Carter's property, and that on the profile map furnished by the company Carter's name was put down as the owner. The defendant offers no evidence, except that in entering and constructing the road he obeyed the order of his superior officer.

The defendant offers to prove that his superior officer, Parsley, was advised by counsel learned in the law to proceed to construct the road, notwithstanding the money had not been paid. There may be cases where, under certain circumstances, such advice might be evidence of the *bona fides* of an entry; but here the facts are all before the Court, and, giving the defendant credit for all he offered to prove, the entry can

neither be justified nor excused. *S. v. Durham,* 121 N. C., 546; *S. v. Bryson,* 81 N. C., 595; *S. v. Crawley,* 103 N. C., 353; *S. v. Fisher,* 109 N. C., 817.

Payment of the appraisement into Court is a condition precedent before a right of entry can be acquired for construction purposes. Rev., 2587. This is a reasonable protection to the land-owner, and without compliance with the statute the company cannot justify its entry, notwithstanding the advice of counsel. To hold that the orders of the officers, although based on such advice, would justify or excuse such entry, nothing else appearing, would destroy the protection the statute gives to the land-owner and lay open his lands to unwar- (668) ranted seizure by every so-called railroad and logging corporation (whether solvent or insolvent) that desired to cross his lands and had been able to secure the right of eminent domain as a common carrier and public servant.

Assuming that strictures of the Solicitor in his argument to the jury upon the high-handed conduct of the logging company were unduly severe, which we by no means concede, yet the defendant was not prejudiced thereby. His Honor might well have instructed the jury that upon all the evidence, if believed, including that of defendant himself, they should find him guilty.

Affirmed.

WALKER, J., concurs in result.

STATE v. F. B. BRITTAIN.

(Filed 14 May, 1907.)

Indictment—Legislative Enactments—Constitutional Limitations—Jurors—Practice—Mayor's Court—Appeal.

1. The method by which jurors are to be selected and summoned not being prescribed by the Constitution, and no limitation therein upon the power of the General Assembly to regulate it, an exception to the validity of section 10, chapter 158, of the Private Laws of 1895, because the jurors were not drawn out of the box, but were summoned by the marshal as directed by the act, cannot be sustained in a criminal action charging defendant with selling liquor in violation of section 9 of said act.
2. The defendant's rights, guaranteed by the Constitution under an indictment for violating the provisions of chapter 158 of the Private Laws of 1895, are preserved to him when an unrestricted appeal from the Mayor of the town is given him by the act and the trial in the Superior Court is *de novo;* alleged errors in the Mayor's Court may be disregarded on appeal to the Supreme Court.

STATE *v.* BRITTAIN.

THIS was a criminal action charging defendant with selling
(669) liquor after 11 o'clock P. M., under sec. 9, ch. 158, of the Private Laws of 1895, begun before the Mayor of Morganton and carried on appeal by the defendant to the Superior Court of BURKE, where the case was tried at March Term, 1907, before his Honor, *Guion, J.*, and from the judgment rendered, defendant appealed to the Supreme Court.

Assistant Attorney-General and *Avery & Erwin* for the State.
S. J. Ervin for the defendant.

BROWN, J. The constitutionality of Private Laws, ch. 158, creating the mayoralty of Morganton a special court, with full jurisdiction to try and punish offenses of the character of that with which the defendant is charged, has been affirmed by this Court in *S. v. Powell,* 97 N. C., 417. The defendant demanded a jury trial before the Mayor under section 10 of the act, and excepts because the jurors were not drawn out of the box, but were summoned by the marshal as directed by the act, section 10. The exception cannot be sustained. What is meant by the terms jury and grand jury, as used in the Constitution, is fully defined in the learned opinion of *Mr. Justice Shepherd* in *S. v. Barker,* 107 N. C., 914, but the method by which the jurors are to be selected and summoned is nowhere prescribed by our Constitution, and we find no limitation therein upon the power of the General Assembly to regulate it. The sheriffs almost daily select and summons talis jurors and special veniremen, and in certain contingencies the Judge may appoint a person to select and summons jurors. *Boyer v. Teague,* 106 N. C., 576. We notice this exception to the regularity of the proceeding before the Mayor only because it was strongly urged, and not that it is necessary in our opinion to consider it. This defendant's rights, guaranteed
(670) by the Constitution, are fully protected when the right of unrestricted appeal is given him by the statute. *S. v. Lytle,* 138 N. C., 742. Inasmuch as the trial in the Superior Court is *de novo,* the alleged errors committed in the Mayor's Court may, therefore, be disregarded. *S. v. Koonce,* 108 N. C., 752. To the proceedings in the Superior Court no exception is taken, except one, which is disposed of by what we have said.

No Error.

Cited: *S. v. Shine,* 149 N. C., 482.

(671)

STATE v. JOHN LONG.

(Filed 14 May, 1907.)

Indictment—Bigamy—Statutes—Constitutional Law—Judge's Charge—Practice—Evidence—Presumption—Marriage in Another State—Bill of Indictment—Seven Years' Absence.

1. Revisal, sec. 3361, is constitutional under the State and Federal constitutions. When a man having a lawful wife admits a second marriage in another State, the bigamous marriage is exploited by his living openly and avowedly in this State with his wife by the second marriage, and the offense may be dealt with, tried, determined and punished in the county where the offender may be apprehended or be in custody.
2. Revisal, sec. 3361, does not by its language make it necessary for the indictment to state the dates of the marriages in a charge of the felonious offense of bigamy, and section 3255 thereof provides that no judgment upon any indictment for a felony or misdemeanor shall be stayed or reversed for omitting to state the time at which the offense was committed, where time is not of the essence of the offense.
3. Under an indictment for bigamy, Revisal, 3361, it is unnecessary to state where the second marriage took place.
4. Under Revisal, sec. 3361, it is not necessary that the offense of bigamy should be committed in the county where the bill is found, to confer jurisdiction, and the proper remedy, where permissible, is by plea in abatement.
5. When it appears under an indictment for bigamy (Revisal, 3361) that the offense was committed outside of this State, jurisdiction of the courts of this State is ousted; but the presumption is in favor of jurisdiction, and the burden of proof is on the defendant. He must prove that the offense had not in fact been committed in the county where the bill was found, and a motion to quash or in arrest will not be granted. Revisal, 3255.
6. If the defendant desires fuller information upon which to prepare his defense than is required to be charged in the indictment for bigamy, Revisal, sec. 3361, he should ask for a bill of particulars. Revisal, 3244.
7. A certificate on the back of the bill of indictment not appearing to have been signed by the foreman of the grand jury is not ground for a motion to quash or in arrest of judgment, under Revisal, sec. 3254, unless it is shown that, in fact, the "witnesses marked X" had not been "sworn and examined."
8. The proviso of Revisal, 3361, as to divorce and seven years' absence are matters of defense, which the defendant must prove to withdraw himself from the operation of the statute.

INDICTMENT for bigamy, tried before his Honor, *Guion, J.*, and a jury, at April Term, 1907, of RUTHERFORD.

The defendant's counsel moved to quash the bill of indictment upon the grounds:

1. That the bill is defective in that it failed to charge the date of either of the alleged marriages.

2. That the bill is defective, because it fails to allege where and when the second marriage took place.

3. That the bill is defective, as it failed to allege that the former wife had not been divorced, or that she had not been out of the State and knowledge of the defendant for seven years.

4. That the bill is defective, because the foreman of the grand jury did not sign the instrument on the back of the bill, underneath the words "Those marked X sworn and sent."

5. That there was no evidence upon which to base a verdict of
(672) guilty.

The motion was disallowed, and defendant appealed.

Hayden Clement, Assistant Attorney-General, for State.
D. F. Morrow for defendant.

CLARK, C. J. Indictment for bigamy. The marriage to the lawful wife was proven by her. Rev., 1636. The defendant filed a written statement at the trial, as follows: "I admit the second marriage, and that it was solemnized in the State of South Carolina, under the laws of that State, to Dovie Owens." The evidence was uncontradicted that the defendant returned here and lived for four weeks with Dovie Owens in Rutherford County, as man and wife, stating that she was his wife, and openly claiming her as such. There was no evidence for the defendant.

The Court properly refused to instruct the jury, as prayed, that upon the whole evidence the defendant was not guilty. The prayer was doubtless based upon a misconception of *S. v. Cutshall,* 110 N. C., 538. In that case it was held in a very able opinion by *Judge Avery,* with full citation of authorities, that under our statute (Rev. 3361), though the second marriage is solemnized in another State, the defendant will be adjudged guilty of bigamy here if he shall thereafter cohabit with such person within this State, citing *S. v. Fitzgerald,* 75 Mo., 571, and other cases. While the second marriage elsewhere commences the bigamy, the subsequent living here in the bigamous relation gives force and validity to our statute, which confers jurisdiction, though the second marriage "has taken place" in another State. Bigamy, like marriage, is a status, and not merely the wedding ceremony. Our statute is a necessity. Without it the offense of bigamy could be perpetrated with impunity, to the scandal of all good citizens, by a man simply marrying an-
(673) other woman, in one State during his wife's life, and living with her in another.

The statute (Rev., 3361) provides: "If any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, every such offender * * * shall

be guilty of a felony, and any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended or be in custody." There is nothing in the State or Federal Constitution which disables the Legislature from enforcing this statute, when, though the second marriage took place elsewhere, the bigamous marriage is exploited by avowedly and openly living in ratification of it in this State.

The defendant moved to quash, and also in arrest of judgment, because (by reason of failure to fill up certain blanks in the indictment) the indictment—

(1) Did not charge the date of either marriage. It is sufficient to follow the words of the statute, and the date of marriages is not required to be charged. Rev., 3361. Besides, Rev., 3255, provides: "No judgment upon any indictment for felony or misdemeanor shall be stayed or reversed * * * for omitting to state the time at which the offense was committed, where time is not of the essence of the offense." *S. v. Burton,* 138 N. C., 578; *S. v. Arnold,* 107 N. C., 864; *S. v. Peters, ib.,* 883.

(2) Because the indictment does not allege where the second marriage took place. The statute (Rev. 3361) provides that it is immaterial whether it took place in "North Carolina or elsewhere" and *S. v. Cutshall,* 110 N. C., 548, upholds the validity of the statute, as above stated, if there is subsequent bigamous cohabitation here.

(3) Because it is not charged that the offense was committed in Rutherford County and in this State. The finding and return (674) of the bill by the grand jury of any county is sufficient *prima facie* to confer jurisdiction. The bill must charge the constituent elements of the offense, but need not set out time and place when not an element thereof. It is not always necessary, either in England or in this State, that the offense should in fact have been committed in the county where the bill is found. If the defendant wishes to urge that the offense was committed in another county, his remedy is not by a motion to quash, or in arrest, but by a plea in abatement (equivalent to a motion to remove in a civil action). *Connor, J.,* in *S. v. Burton,* 138 N. C., 578; *S. v. Holder,* 133 N. C., 711; *S. v. Carter, Furches, J.,* 126 N. C., 1012; *S. v. Lytle,* 117 N. C., 801.

If the defendant wishes to rely upon the fact that the offense was committed outside the State, he cannot move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. *Hoke, J., S. v. Barrington,* 141 N. C., 820; *Connor, J., S. v. Burton,* 138 N. C., 578 (in which neither time nor place were proven); *S. v. Blackley,* 138 N. C., 622; *S. v. Mitchell,* 83 N. C., 674. When it appears, whether in the evidence for the State or defendant, that the offense was committed out

of the State, jurisdiction is ousted. *S. v. Buchanan,* 130 N. C., 660. But the presumption is in favor of jurisdiction, and the burden is on the defendant. *S. v. Barrington, supra.*

Furthermore, Rev., 3255, forbids quashing or arrest of judgment "for want of a proper and perfect venue" when the offense charged is one of which the Court had jurisdiction, as here, of bigamy. In *S. v. Williamson,* 81 N. C., 540, the indictment did not charge that the offense was committed in the county, and *Smith, C. J.*, said that "the want of such averment of a proper and perfect venue is not fatal to a bill of
(675) indictment," and sustained the refusal of a motion in arrest. Even in indictments for murder it is "not necessary to prove that it was committed in the county." *S. v. Outerbridge,* 82 N. C., 617, and Rev., 3255, prohibits quashing, or arresting judgment, for failing to aver "any matter unnecessary to be proved."

Formerly failure to allege and prove the locality, appropriate to the forum, was fatal, because essential to the jurisdiction, both in civil and criminal actions. Now this has been wisely reversed by statute. Jurisdiction of the locality of the transaction is presumed if the Court has general jurisdiction of such subject-matter. A party in a civil action must move to remove (Rev., 425), else the trial will proceed where the action is brought; and likewise in a criminal action the defendant must plead in abatement (which is equivalent to a motion to remove, *S. v. Lewis,* 142 N. C., 636), if he thinks the trial should be in another county; and in both civil and criminal actions, if he relies upon defect of jurisdiction because the transaction occurred in another State, he must prove it as a defense under the general issue.

Not only the above is true, but as to this particular offense the statute (Rev., 3361) expressly gives jurisdiction in any county "where the offender shall be apprehended, or be in custody." Hence, it is not necessary either to allege or prove that the offense was committed in that county. This provision obtains in England by statute as to many offenses, and we have recently held as to Rev., 3233, that our Legislature has the same plenary power. *S. v. Lewis,* 142 N. C., 626. The same provision that a prosecution may be begun in any county of the State was enacted in the "Johnston" Act, Laws 1770, ch. 1, sec. 4 (25 *State Records,* 519b). If the offense occurred out of the State, that is a matter, as we have seen, to be proven in defense.

If the defendant had wished fuller information in regard to
(676) matters not named in the statute as ingredients of the offense, and therefore not required to be charged (*S. v. Covington,* 125 N. C., 642), so as to prepare his defense, such as the times and places of the marriages, he should have asked for a bill of particulars, as is now provided by Rev., 3244. *S. v. Brady,* 107 N. C., 826; *S. v. Gates,*

ib., 832; *S. v. Dunn,* 109 N. C., 840; *S. v. Bryant,* 111 N. C., 693; *S. v. Shade,* 115 N. C., 758; *Townsend v. Williams,* 117 N. C., 337; *S. v. Pickett,* 118 N. C., 1231; *Gold Brick case,* 129 N. C., 657; *S. v. Van Pelt,* 136 N. C., 639 and 669. A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense, but the statute (Rev. 3361) does not make the time or place of either marriage an element of the offense, but, on the contrary, expressly makes the place of the second marriage immaterial, and confers jurisdiction in the county where the offender is "apprehended or in custody." There was, however, in fact the fullest proof of bigamy, by cohabitation after the second marriage in Rutherford County.

(4) The defendant further contends that the bill was defective because it does not appear that the foreman signed the certificate on the back of the bill that the "witnesses marked X" had been "sworn and examined." It was recently held in *S. v. Sultan,* 142 N. C., 572-3, that this informality was cured by Rev., 3254, citing the numerous authorities to that effect and overruling *S. v. McBroom,* 127 N. C., 528, the only case to the contrary.

(5) The defendant further objected to the bill that it did not negative divorce and seven years' absence. But these were matters in the proviso to Rev., 3361, and need not be negatived in the indictment. They are matters of defense which the defendant must prove to withdraw himself from the operation of the statute. *S. v. Goulden,* 134 N. C., 746, citing *S. v. Norman,* 13 N. C., 222, and numer- (677) ous other cases here and elsewhere, among the latter *Lord Denman, C. J.,* in *Murray v. Reg.,* 7 Q. B., 706.

There could not be less merit in any case. The defendant's written admission of the *"second* marriage" necessarily admits also the first, which was also proven by his deserted wife herself, and the evidence of the open and shameless cohabitation in Rutherford County, with the second wife, was plenary and without contradiction. The defendant cannot complain of any severity in his sentence.

No Error.

WALKER, J., concurs in result.

Cited: *S. v. R. R.,* 145 N. C., 575; *S. v. Ray,* 151 N. C., 714, 716.

STATE v. KING and COOPER.

(Filed 27 May, 1907.)

Indictment—Solicitor's Fee—Statutes.

1. The fees of the Solicitors are matters entirely of statutory regulation; under Revisal, sec. 2768, when default was made by one indicted for a misdemeanor and judgment *nisi* entered against him and his surety,

thereafter made absolute, and at a still subsequent term the surety produced the defendant, and the penalty of the appearance bond was remitted by the Court, upon payment of costs, the Solicitor is not entitled to a fee upon the *sci. fa.*

2. Under Revisal, sec. 2768, providing that the "Solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts, respectively, and as a compensation for their services shall receive a sum to be fixed by the Court, not more than five per centum of the amount collected," etc., the Solicitor is not entitled to a fee upon a judgment *nisi* of four dollars, or any other amount, when at a subsequent term the defendant is produced by his surety, the Court suspends the judgment upon payment of the costs of the *sci. fa.*, and remits the penalty upon the appearance bond.

3. Under the Revisal, sec. 3220, the Solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the Court in the exercise of his discretionary power.

(*S. v. Whisnant*, 5 N. C., 287, holding that in a proceeding by *scire facias*, where the costs are taxed, the Solicitor is entitled to a fee of four dollars, discussed and distinguished.)

(678)

APPEAL from an order retaxing bill of costs, heard before *O. H. Allen, J.*, November Term, 1906, of BUNCOMBE.

Defendant Bob King, having been held for a misdemeanor, defendant A. L. Cooper became surety for his appearance before the Superior Court of Buncombe County. At January Term, 1906, defendant Bob King having made default, judgment *nisi* was duly entered against him and his surety; and at August Term, to-wit, 11 August, 1906, judgment absolute was entered against defendant and his surety for the penalty of the bond and the costs. At November Term, 1906, the surety having procured the presence of defendant Bob King, said defendant then plead guilty on the indictment, and judgment was suspended on the payment of the costs of the principal case, to-wit, the indictment, and the costs of the *sci. fa.*, the penalty of the appearance bond being remitted.

In taxing the bill of costs of the *sci. fa.*, against defendants, the Clerk included a tax fee of $4 each as fees for the Solicitor. On the hearing of the motion to retax, the Court made some modifications of the bill as taxed by the Clerk, and, with other changes, disallowed the fees taxed on the *sci. fa.* for the Solicitor, and this officer excepted and appealed, claiming:

First. That the fees were properly taxed.

Second. That if they were disallowed, he was in any event en-
(679) titled to a commission on the judgment absolute which had been entered on the bond at August Term, 1906.

George A. Shuford for plaintiff.
Frank Carter, contra.

HOKE, J., after stating the facts: The fees due the Solicitors of the State are a matter entirely of statutory regulation, and on the questions presented by the present appeal are governed by Revisal 1905, sec. 2768. This section provides:

"First. The Solicitors shall, in addition to the general compensation allowed them by the State, receive the following fees, and no other, namely:

"For every conviction upon an indictment which they may prosecute for a capital crime, twenty dollars.

"For perjury, forgery, counterfeiting, passing or attempting to pass or sell any forged or counterfeited paper or evidence of debt maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; stealing, concealing, destroying, or obliterating any will; maliciously burning or attempting to burn houses or bridges; misdemeanors of accessories after the fact to felonies; in each of the above cases, ten dollars.

"For larceny, receiving stolen goods, embezzlement, frauds, maims, deceits and escapes, five dollars.

"For all other offenses, four dollars."

Then follows, in the same section, a clause as to prosecution of penalties and forfeited recognizances, as follows:

"The Solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts, respectively, and as compensation for their services shall receive a sum to be fixed by the Court, not more than five per centum of the amount collected upon such penalty or forfeited recog- (680) nizance."

There is nothing in this section which permits or suggests the construction that the Solicitor is entitled to a fee of four dollars on a penalty of forfeited recognizance. It is argued that a right to such a fee may exist under and by virtue of the words, "For all other offenses, four dollars," the argument being that the term "offense" is broad enough to include default in failing to make appearance as required by the bail bond. This might be true as a matter of general definition, but such an interpretation is not permissible here. If the section were at all ambiguous, a proper application of the maxim, *"Noscitur a sociis,"* would forbid it. The statute is giving a general and inclusive statement of the various offenses which a Solicitor is called on to prosecute, and after specifying a long list of these offenses, in which other amounts are allowed, concludes with the sentence in question, "For all other offenses, four dollars," meaning, undoubtedly, criminal offenses, the kind about

which it was treating. But no application of the maxim is required or permitted, for the reason that on a perusal of the entire section the meaning is too plain for construction; for all of the clauses specifying fees for these offenses are, by correct interpretation, referred to the opening one: "For every conviction upon an indictment which they may prosecute," these fees are allowed. Here, in explicit terms, the fees are confined to prosecutions in which there has been a conviction on indictment. While the facts are not exactly similar, the construction we have adopted is, we think, established by the decision of the Court in *S. v. Dunn,* 95 N. C., 698, where a prosecutor who had been adjudged to pay the costs in a criminal case was held not liable for a fee to the Solicitor, the Court saying that such fees are only due when there has been a "conviction on an indictment." The very fact that in a subse-
(681) quent clause of the same section there is a separate provision as to fees in prosecutions by the Solicitor for penalties and forfeited recognizances, supports and emphasizes the conclusion that fees for this service were not and were not intended to be included in the former portions of the law. Nor can the Solicitor in the present case be allowed the commission on the penalty as contended for . Here, too, the language of the statute is explicit: "As compensation for their services they shall receive a sum to be fixed by the Court, not more than five per cent. on the amount collected."

It is suggested for the appellant that the judgment absolute entered according to *sci. fa.,* at August Term, 1906, conferred on the Solicitor a vested right on the commission, and the Judge had no power, by subsequent action, to deprive him of this amount. But the position cannot be sustained. "Not more than five per cent. on the amount collected" is the language of the statute; and in another section of the Revisal most ample power is given the presiding Judge to make such disposition of the judgment in these cases as right and justice may require. Section 3220 of Revisal enacts as follows:

"The Judges of the Superior Courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen or absolutely remit the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded."

The judgment in question was taken subject to the provisions of this law which affects its force and import throughout; and no vested right, therefore, can be acquired to a commission dependent on the existence and collection of a judgment which his Honor, in the exercise of
(682) this power wisely given him, has deemed it proper to set aside.

We are referred by counsel for the appellant to *S. v. Whitsenhunt,* 5 N. C., 287, as authority for their position. The opinion in that case is very short, containing simply an announcement of the decision that in a proceeding by *scire facias* where costs are taxed, the Solicitor is entitled to a fee of four dollars, and we are not therefore informed as to the reason upon which the decision is based. It was very likely, however, made to rest on the ground that at the time the same was made an attorney of record, in civil cases, when judgment was entered for his client, was allowed a tax fee of four dollars as part of the costs; and the Solicitor, as such attorney, was therefore entitled to this fee whenever the costs of a *sci. fa.* proceedings were imposed upon a defendant. The decision was in 1809, and at that time the fee tax allowed by the fee bill was two pounds, having been reduced from five pounds by ch. 693, Laws 1806, in suits of this character, the old donominational terms being retained in the statute for some time after the Federal currency was established and in circulation. The value of the pound, however, while composed of twenty shillings, varied in the different colonies, and did not at all import the same amount as the English pound sterling. In North Carolina, The Century Dictionary informs us, the pound was equivalent to about two and one-half dollars, being about one-half of the pound sterling; the shillings being proportionately less. Then, as now, there were misapprehensions about the amount of fees to be taxed; some of the Clerks allowing eight shillings to the dollar of the money then coming into general use, and others ten, till the matter was settled by statute at ten shillings, making the sum of two pounds, or forty shillings, allowed as tax fee by the fee bill, the equivalent of four dollars of the new money; and four dollars continued to be the law until 1879, when the fee allowed attorneys as part of the costs (683) in civil suits was abolished; ch. 45, sec. 1879; and since that time there has been no statute allowing a tax fee as part of the costs in civil cases.

There is, therefore, no authority, statutory or otherwise, for taxing this fee in *sci. fa.* cases in favor of Solicitors, and the ruling of the Court below in disallowing the fee is affirmed.

While we are of opinion that the Court below was correct in its judgment, we think it well that the Solicitor appellant has brought the matter before us, for the practice as to the taxing on this fee has not been uniform throughout the State, the decisions having left the question somewhat uncertain, and it was eminently desirable that it should be authoritatively determined.

There is no error, and the judgment of his Honor disallowing the fee is affirmed.

Affirmed.

STATE and NORA WILKES v. JAMES ADDINGTON.

(Filed 22 May, 1907.)

Bastardy—Child Born Dead—Fine—House of Correction—County Commissioners—Right to Hire Out Defendant—Imprisonment—Police Regulation.

1. A proceeding in bastardy is of a civil nature, not a criminal prosecution, and intended merely for the enforcement of a police regulation.
2. The intent of the Legislature, Revisal, sec. 259, in the use of the word "fine" was in the sense of a punishment for a criminal offense, and such cannot be imposed by the Court in proceedings in bastardy when the jury finds the issue of paternity against the defendant.
3. Under Revisal, sec. 262, the Court has no jurisdiction to enforce its order of "support" by committing the defendant "to the house of correction, to wit, the common jail, with authority of the Commissioners to have him work on the public roads, allowing the sum of ten dollars a month for his labor, to be paid into the Court for the use of the *feme* plaintiff and paid to her in satisfaction of the said allowance." When there is no house of correction in the county, the Court can only commit him to jail until the performance of the order of support.
4. Under Revisal, sec. 259, the intention is to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born does not affect the right of the mother to "support"; among other things, she is entitled to pay for medical attention and medicine for herself, and the burial expenses of the child, consequent upon the defendant's unlawful act. Revisal, secs. 253 and 254.

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BASTARDY PROCEEDING, commenced before a justice of the peace and tried on appeal by *Cooke, J.*, and a jury, at February Term, 1907, of BUNCOMBE.

The evidence tended to show that the *feme* plaintiff had been delivered of a bastard, which had passed through the full period of gestation, but was born dead. It further tended to show that the defendant was thirty-eight years of age and the mother of the child sixteen years old; that she was sick for several weeks before and for several weeks after her confinement, and all the time was under the care of a physician; that she supplied herself with medicines and paid the child's burial expenses.

The defendant moved to dismiss the proceeding upon the ground that it will not lie where the child was still-born. He also requested the Court to charge the jury that the issue, "Is the defendant the father of the bastard child begotten upon the plaintiff?" should be answered "No," for the reason that no child had been born alive for the defendant to support. Both the motion and the prayer for this instruction being refused, the defendant excepted. The jury found the issue in favor of the plaintiffs, and the Court, thereupon, adjudged that the defendant pay a fine of one dollar, an allowance to the *feme* plaintiff of forty

dollars, and the costs, and "in default of such payment the de- (685) fendant was sentenced and committed to the house of correction, to wit, the common jail of Buncombe County, for the term of six months, with authority to the County Commissioners to have him to do work on the public roads of the county, the sum of ten dollars per month to be allowed for his labor, which shall be paid into Court for the use of the *feme plaintiff,* and paid to her in satisfaction of the said allowance and the fine and costs." The defendant excepted to the judgment and appealed.

R. S. McCall for defendant.

Assistant Attorney-General, Frank Carter and *H. C. Chedester, contra.*

WALKER, J., after stating the case: This Court in two recent decisions has fully determined the nature of this proceeding. It has been adjudged to be civil and not criminal in its nature, and is intended merely for the enforcement of a police regulation. *S. v. Liles,* 134 N. C., 735. It being in the nature of a civil proceeding, and the issue of paternity being tried according to the rules of evidence and procedure applicable to such a proceeding (*S. v. Edwards,* 110 N. C., 511), a mere finding of the issue against the defendant, that is, that he is the father of the child, would not authorize the imposition of a fine, which is a pecuniary punishment for a criminal offense, or a contempt (which is *quasi*-criminal), imposed by the Court upon conviction. *S. v. Burton,* 113 N. C., 655; 13 A. and E. (2 Ed.), 53.

It is true the word "fine" does not always mean a pecuniary punishment of an offense inflicted by a court in the exercise of criminal jurisdiction. It has other meanings, and may include a forfeiture, or a penalty recoverable by civil action. *People v. Nedrow,* (686) 122 Ill., 363; *Hanscombe v. Russell,* 11 Gray (77 Mass.), 373; *R. R. Co. v. S.,* 22 Kan., 1; Black's Dict., p. 494; 13 A and E., *supra.* The true signification of the word when used in a statute must depend somewhat upon the context, and the meaning should be gathered from the intention, if the latter can fairly be ascertained from the language used. In ordinary legal phraseology, it is said, the term "fine" means a sum of money exacted of a person guilty of a misdemeanor, or a crime, the amount of which may be fixed by law or left in the discretion of the Court, while a penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done. *Lancaster v. Richardson,* 4 Lansing (N. Y.), 136; 13 A. and E., *supra,* and notes. While the words "fine" and "penalty" are often used interchangeably to designate the same

thing, we think it will accord more with the true intention of the Legislature if we hold that in the Act of 1879, ch. 92 (Rev., sec. 259), the word "fine" was used in the sense of punishment for a criminal offense. In the first place, the amount is not fixed or certain, which is the general characteristic of a fine, but not of a penalty, the amount of the latter being certain, though the Legislature might perhaps impose a penalty of uncertain amount. *Commissioners v. Harris,* 52 N. C., 281; *S. v. Cainan,* 94 N. C., 883; *S. v. Crenshaw,* 94 N. C., 877; *S. v. Rice,* 97 N. C., 421. In the second place, the statute requires that the defendant shall be committed in default of the payment of the fine, and lastly, this Court has so construed the statute in former decisions. *S. v. Burton,* 113 N. C., 655; *S. v. Cagle,* 114 N. C., 835; *Myers v. Stafford, ibid.,* 231; *S. v. Wynne,* 116 N. C., 981. This being so, the fine cannot be imposed in a proceeding which is not criminal, and upon the (687) verdict of a jury, where the issue submitted is tried like those in other civil cases. Otherwise the defendant would be subjected to conviction and punishment as for a criminal offense without the rights and advantages he would have in a trial upon indictment and the plea of not guilty. *S. v. Liles,* 134 N. C., at p. 737. Whether this provision of the statute is void and of no effect for the reasons we have given, or whether the fine may be imposed upon conviction in an independent prosecution, we need not decide, as that question is not before us. *S. v. Liles,* at p. 741. We only decide that the fine could not be exacted in this proceeding.

Nor could the Court require the defendant to do work upon the public roads. The Revisal, sec. 262, authorizes him to be committed to the house of correction. Whether or not this provision is constitutional we need not say. There is no house of correction in Buncombe County, as appears by the judgment. The Court could only commit him to the jail until he performed its order. It has been held by us that the Legislature did not intend to punish an immoral or unlawful act, but merely to enforce obedience to the just requirement of the law, that the putative father should provide for the support of his offspring, and save the mother and the county harmless. *S. v. Brown,* 46 N. C., 129; *Ward v. Bell,* 52 N. C., 79; *S. v. Edwards,* 110 N. C., 511. This question is fully discussed in *S. v. Morgan,* 141 N. C., 726, and the conclusion reached that this part of the judgment is unwarranted. Whether the defendant can take the insolvent debtor's oath is also a question that is not presented.

The other objections of the defendant are untenable. The death of the child at its birth can make no difference as to the right of its mother to institute the proceeding. The statute expressly authorizes the mother to proceed against the putative father before the child is born, that

is, when it is *en ventre sa mere.* Revisal, secs. 253 and 254; (688) *S. v. Crouse,* 86 N. C., 617. The Court may continue the proceedings until the birth of the child. Sec. 258. This clearly implies that the proceedings may be commenced during pregnancy. *S. v. Wynne,* 116 N. C., 981. The Judge was right in excluding from the judgment an order for a bond of indemnity, as the county, by reason of the fact that the child was dead when born, was not exposed to any charge for its support or maintenance. But the allowance to the mother was properly ordered. The statute simply requires that this allowance shall be made without directing how the money shall be spent. This leaves it discretionary with her as to how she will apply it. She was compelled to pay for medical attention and medicine for herself, and the burial expenses of the child, all consequent upon the defendant's unlawful act. Why should he not be made to reimburse her? It appears from the statute that this allowance could be made before her delivery of the child, if there is no continuance of the trial and the proceeding is then prosecuted to judgment. It is intended to secure to her either probable expenses or to reimburse her actual outlay.

This eliminates the fine and the alternative sentence of imprisonment in the house of correction with direction that the defendant be worked on the public roads. The allowance will stand, and the defendant may be imprisoned in the county jail until he pays it and the costs, or until he is otherwise discharged according to law.

There was error in the judgment of the Court.

Modified.

Cited: *S. v. McDonald,* 152 N. C., 804; *S. v. Currie,* 161 N. C., 278.

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STATE v. J. J. HICKS.

(Filed 27 May, 1907.)

Indictment—License to Practice Dentistry—Legislature—Constitutional Law—Burden of Proof—Evidence.

1. The Legislature has constitutional authority to regulate the practice of dentistry under Revisal, sec. 4468, forbidding any person to practice who has not graduated at a reputable dental school and received a certificate of proficiency or qualification from the Board of Dental Examiners, etc.; under section 4470, making the requirements inapplicable to any person who was a dental practitioner in this State before 7 March, 1879, if on or before 25 February, 1890, he should file a verified statement with the Board of Dental Examiners showing his name, residence, date of diploma or license, and date of commencing practice here; under section 3642, making it a misdemeanor to practice dentistry without first having passed the required examination and received the certificate.

2. While Revisal, secs. 4468, 4470, and 3642, are of a penal nature and strictly construed, they will receive a reasonable interpretation to discover their intent; the burden of proof is upon the defendant to show he came under the provision of Revisal, sec. 4470, and in the absence of evidence that he practiced dentistry in the State before the specified time, or had filed the required statement, having admitted that he had not passed the requisite examination or received the certificate, a motion to quash the indictment is properly refused.
3. The defendant, under an indictment for practicing dentistry without complying with the statute, is not excused because the designated officers had not furnished, as required of them, blanks upon which to make the statement under Revisal, sec. 4470, if he has not substantially complied with the provisions of the statute in making his statement without having the blanks.
4. Time for filing the statement to practice dentistry under sec. 4470, Revisal, is not of the essence of the enactment; by a present compliance therewith the defendant will be entitled to a certificate to be registered under Revisal, sec. 4468, and thus become lawfully qualified to continue the practice of his profession.

THIS was a criminal action, tried before *Ward, J.,* and a jury, at March Term, 1907, of CLEVELAND.

The defendant was prosecuted in the Court below upon a war-
(690) rant issued by a justice of the peace charging him with having, in October, 1906, "unlawfully and wilfully practiced dentistry without having passed the examination and obtained the certificate required by law, contrary to the form of the statute." He was convicted by the justice, and appealed to the Superior Court. There the defendant moved to quash the warrant because, first, the act of the Legislature under which it was issued is unconstitutional, and, second, it is not alleged that the defendant was not engaged in the practice of dentistry in this State before March 7, 1879. The warrant was amended by permission of the Court so as to meet the last objection, and the motion to quash was then overruled.

It was admitted that the defendant had not passed an examination before the State Board of Dental Examiners and received a certificate. There was evidence tending to show that he was engaged in the practice of dentistry in Catawba County, where he resided, and in other counties of this State on and prior to 7 March, 1879, and had continuously since been so engaged, and was practising in Cleveland County at the time mentioned in the warrant. There was also evidence tending to show that he was not so engaged before the year 1884. Evidence was also introduced which tended to prove that the defendant went with his attorney to the office of the Clerk of the Superior Court of Catawba County, where he resided, on 15 July, 1889, and made and filed with the Clerk an affidavit to the effect that he was lawfully engaged in the practice of dentistry before 3 March, 1887, in said county, and that he paid the Clerk his fee for a transcript of the same. This affidavit was filed

in a book known as the Registry of Dentists. It was further in evidence that blanks for registration had not been furnished to the Clerk by the State Board of Examiners, as required by law. (691)

At the close of the testimony the Court charged the jury that if they believed the evidence and were satisfied beyond a reasonable doubt of the existence of all the facts testified to by the witnesses, they should convict the defendant. The jury returned a verdict of guilty; judgment was entered thereon, and the defendant appealed, having duly reserved his exception to the charge of the Court.

Hayden Clement and *B. C. Beckwith* for the State.
Quinn & Hamrick and *T. M. Hufham* for defendant.

WALKER, J., after stating the case: The course of legislation upon the subject of dentistry has been somewhat eccentric. The Acts of 1879, ch. 139, made it unlawful and a misdemeanor for any person but an authorized physician and surgeon to practice dentistry, unless he had graduated and received a diploma from some reputable dental institution or had received a certificate from the Board of Examiners of the State Dental Society. Persons who had engaged in the practice of dentistry prior to the ratification of the Act of 7 March, 1879, were excepted from its operation. The provisions of that law were inserted substantially in The Code of 1883, and will be found in secs. 3148 to 3156, inclusive. The Legislature, on 3 March, 1887 (Laws 1887, ch. 178, sec. 4), amended the law by requiring all dentists within six months from the ratification of the act to be registered as therein provided with the Secretary of the State Board of Dental Examiners in a book for the purpose, and also specially required that the registration should follow a form to be prescribed by the said board, which should, upon application, provide blanks prepared by it. It was also required that the secretary of the board should furnish a certified list of those who had registered to the Clerk of the Superior Court of each county, to be entered by him in a book or registry kept for the purpose. Failure (692) to register as required by the act was made unlawful and a misdemeanor. Laws 1889, ch. 238, extended the time allowed for registration twelve months from the date of its ratification, which was 25 February, 1889, or until 25 February, 1890, and then provided as follows: "The State Board of Examiners shall within the above-prescribed time forward the necessary blanks for registration to the Clerks of the Superior Courts of the respective counties, whose duty it shall be to notify all persons practicing dentistry of the said requirements in said counties." There were other amendments of the law not material to the point discussed in this case. The substance of the law was in-

serted in the Revisal of 1905 as secs. 4468, 4469, 4470, 3642, and 3643, except that sec. 4, ch. 178, Laws 1887, does not seem to have been brought forward, though a somewhat similar enactment in regard to physicians and surgeons is to be found in the Revisal as sec. 3646. The omission of that section of the Act of 1887 is perhaps substantially supplied by other sections of the Revisal already mentioned. Section 4468 of the Revisal forbids any person to practise dentistry who has not graduated at a reputable dental school and who has not received a certificate of proficiency or qualification from the Board of Examiners. This certificate must be registered, and a failure to have it registered works a forfeiture of the certificate, which will not be restored except upon the payment of a penalty of twenty dollars to the board for the general school fund. Section 4470 provides that section 4468 shall not apply to any person who was a dental practitioner in this State before 7 March, 1879, if on or before 25 February, 1890, he had filed a verified statement with the Board of Dental Examiners showing his name, residence, date of diploma or license, and date of commencing the practice of dentistry. Section 3642 makes it a misdemeanor to
(693) practice dentistry without having first passed the required examination and received a certificate. This is the substance of what has been done in the way of securing the proficiency of those engaged in the practice of dentistry. Legislation of a similar kind has been held to be valid in several comparatively recent decisions of this Court. *S. v. Call,* 121 N. C., 643; *S. v. McKnight,* 131 N. C., 717; *S. v. Biggs,* 133 N. C., 729; *Ewbank v. Turner,* 134 N. C., 77. This disposes of the defendant's first objection raised by his motion to quash. The other objection was fully answered by the order of the Court amending the warrant.

The offense denounced by the statute as criminal is practising dentistry without having first passed an examination and received a certificate as provided by law. Revisal, sec. 3642. It is, then, a violation of section 4468 that is made a misdemeanor, and the subsequent section (4470) was intended to segregate all those who had practised dentistry prior to 7 March, 1879, into a distinct class and except them from the operation of section 4468, and consequently from the penal provision of section 3642, if (or provided that) they had complied with the Acts of 1887, ch. 178, sec. 4, by filing a verified statement with the secretary of the Board of Dental Examiners on or before 25 February, 1890. This is the plain meaning of the law, and while of a penal nature and to be construed strictly, yet it must at the same time receive a reasonable interpretation so as to discover the real intention of the Legislature and to execute its will. If any hardship results, it is not of our making. Under this construction and the relative position of the several sections

we have mentioned, the settled rule of law is that "the excepted cases need not be negatived in the indictment or warrant, nor is proof required to be made in the first instance on the part of the prosecution. In such circumstances, a defendant charged with the crime, who seeks protection by reason of the exception, has the burden of prov. (694) ing that he comes within the same." *S. v. Connor,* 142 N. C., 700. This principle, as thus clearly stated by *Justice Hoke* in that case, is elementary, and its application to a case like the one we now have in hand was not doubted by any of the Judges, although there were dissenting views expressed. We were all agreed as to that principle. See, also, *S. v. Norman,* 13 N. C., 222; *S. v. Tomlinson,* 77 N. C., 528; *S. v. Heaton,* 81 N. C., 542; *S. v. Lanier,* 88 N. C., 658; *S. v. George,* 93 N. C., 567; *S. v. Downs,* 116 N. C., 1064; *S. v. Call,* 121 N. C., 649; *S. v. Welch,* 129 N. C., 580; *S. v. Blackley,* 138 N. C., 622. The burden was therefore on the defendant, if he claimed exemption from the general provision of the law, to show that he had practised before 7 March, 1879, and *also* that he had complied with the law as to filing a statement with the secretary of the Board of Examiners as required by section 4470 of the Revisal. There was no evidence that he did this, but it was proved by himself that he had filed merely an affidavit with the Clerk of the Superior Court, and not with the secretary of the board, and the affidavit did not in its terms conform to the statute. It did not state the place of his residence, nor did it state the material and essential fact, namely, the date when he commenced the practise of his profession. So that he has wholly failed in these respects to bring himself within the exemption of section 4470.

But he assigns as an excuse for non-compliance, that the board was required to prescribe the manner of verifying the statement required to be filed by him and the secretary to furnish a blank upon which it could be made (Laws 1887, ch. 178, sec. 3; Laws 1889, ch. 228, sec. 2), neither of which duties was performed by the officers designated. We would accept this as a valid, legal excuse, if he had filed a properly worded written statement with the secretary of the board. The statute states clearly what the statement shall contain, and it was (695) easy for him to have complied with it. But he did not do so, or attempt to do so. The authorities are to the effect that he had no right to practise simply because the officers had not performed their duty, as they could have been compelled by *mandamus* to do so. Their failure to comply with the law, in the language of *Brickell, C. J.,* "affords to the appellant no excuse or justification for continuing to do business without the license." *Carpet Co. v. State,* 118 Ala., 143-154. The principle has been recognized as sound in its application to mere police regulations having no connection with the fiscal affairs of the govern-

ment, in the celebrated case of *Royall v. Virginia,* 116 U. S., 572, especially at pages 579, 580, and 582. *Lord v. Jones,* 24 Me., 439. Our case is stronger against the defendant than any of those we have cited, as here the defendant could have substantially complied with the law, as we have said, by filing his own statement in writing with the secretary.

A case which seems to be directly in point is *Gosnell v. State,* 52 Ark., 228. The statute therein construed related to the practice of dentistry, and was much like our act in its phraseology, except as to the furnishing of blanks; but under our construction of the Act of 1889 that is not a material difference. That case also affirms the constitutionality of the legislation. The opinion of the Court closes as follows: "It is competent for the Legislature to regulate the practice of dentistry and dental surgery in such way as will not deprive the citizens of the right to follow a lawful avocation. While it was and is unlawful to practice dentistry or dental surgery after the lapse of three months from the passage of the act, without the requisite certificate, the appellant may make his application and proof that he was practising at the date of the passage of the act, and thereupon he will be entitled to a certificate authorizing
(696) him to practice." Following the suggestion there made, and as it appears to us, that the time of filing the necessary statement with the secretary of the dental board is not of the essence of the statutory requirement, but is, in its nature, directory, if the defendant shall file a statement conforming to the directions of section 4470 of the Revisal, he will be entitled to a certificate to be registered as required by section 4468, and upon thus complying with the law he will be lawfully qualified to continue the practise of his profession. That the provision as to the time was not regarded by the Legislature as vital to the protection of the people from quacks and empirics, or of any great importance in determining the right to practise, appears from the fact that from March, 1879, to March, 1887—eight years—no such certificate or registration was required, but the exemption was general and unconditional as to those who had practised before 7 March, 1879, for The Code, sec. 3156, provided that it should be. We must hold that time is not of the essence of the enactment, for if it was the law would be oppressive, if not unconstitutional, as depriving the defendant of all right to practise.

The defendant, having admitted that he had not passed the requisite examination and received a certificate from the State Board of Dental Examiners, was guilty, unless he came within the exemption, and of this there was no evidence, as we have shown.

No Error.

Cited: *S. v. R. R.,* 145 N. C., 556; *St. George v. Hardie,* 147 N. C., 96.

CASES DISPOSED OF WITHOUT WRITTEN OPINION AT FALL TERM, 1906.

GOODEN *v.* LUMBER CO. From Currituck. *W. M. Bond* for plaintiff; *Pruden & Pruden* and *Shepherd & Shepherd* for defendant, appellant. Affirmed.

DAVIS *v.* R. R. From Tyrrell. *Aydlett & Ehringhaus* and *Meekins & Leigh* for plaintiff, appellant; *Pruden & Pruden* and *Shepherd & Shepherd* for defendant. Affirmed.

JENNINGS *v.* WHITE. From Pasquotank. *Adylett & Ehringhaus* for plaintiff; *W. M. Bond* and *C. E. Thompson* for defendant, appellant. Affirmed. (Two cases by this title, both affirmed.)

BROWN *v.* R. R. From Bertie. *Winston* for plaintiff; *Day, Bell & Allen* for defendant, appellant. Affirmed.

S. *v.* JOHNSON. From Pitt. *Attorney-General* for State; *J. L. Fleming* and *F. G. James* for defendant, appellant. Dismissed for failure to perfect appeal.

S. *v.* RIVES From Pitt. *Attorney-General* for State; *Skinner & Whedbee* for defendant, appellant. Dismissed for failure to perfect appeal.

DUFFY *v.* INS. CO. From Craven. *W. D. McIver* and *O. H. Guion* for plaintiff; *Hinsdale & Son* and *W. W. Clark* for defendant, appellant. Affirmed.

MEREDITH *v.* R. R. From Craven. *W. D. McIver* for plaintiff; *Simmons & Ward* for defendant, appellant. Affirmed.

THOMAS *v.* TEL. CO. From Craven. *D. L. Ward* for plaintiff; *W. W. Clark* and *F. H. Busbee & Son* for defendant, appellant. Affirmed.

GAY *v.* R. R. From Greene. *Aycock & Murrell* and *Wooten & Wooten* for plaintiff; *Galloway & Albritton* and *L. I. Moore* for defendant, appellant. Affirmed. (698)

HARRISON *v.* STICKNEY. From Wilson. *Connor & Connor* and *F. A. Woodard* for plaintiff, appellant; *Pou & Finch* and *Murray Allen* for defendant. The Court being evenly divided (CONNOR, J., not sitting), judgment below affirmed.

HEARTT *v.* POOL, appellant. From Wake. Dismissed for failure to print the record.

JONES *v.* TEL. CO. From Harnett. *W. A. Stewart* for plaintiff; *R. C. Strong* and *Shepherd & Shepherd* for defendant, appellant. Affirmed.

JACKSON *v.* NEUSE RIVER MILLS. From Wake. *J. N. Holding* and *S. G. Ryan* for plaintiff, appellant; *R. H. Battle* for defendant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINION.

ELLIS *v.* MITCHELL, appellant. From Wake. *R. H. Battle* and *W. J. Peele* for plaintiff; *S. G. Ryan* and *J. N. Holding* for defendant. Affirmed.

SMITH *v.* MARSH. From Cumberland. *T. H. Sutton* for plaintiff, appellant; *Robinson & Shaw* and *N. A. Sinclair* for defendant. Affirmed.

HOWELL *v.* BARFIELD. From Robeson. *Wishart & Shaw* and *D. J. Lewis* for plaintiff, appellant; *McLean & McCormick* and *McIntyre & Lawrence* for defendant. Affirmed.

HALL *v.* R. R. From Robeson. *McIntyre & Lawrence* for plaintiff; *McLean & McCormick* for defendant, appellant. Affirmed.

S. *v.* HOUGH. From Anson. *Attorney-General* and *Walter Clark, Jr.*, for the State; *H. H. McLendon* for defendant, appellant. Affirmed.

S. *v.* LITTLE. (Appeal by State.) From Anson. *Attorney-General* and *Walter Clark, Jr.*, for the State; *H. H. McLendon* for defendant. Affirmed.

S. *v.* LITTLE. From Anson. *Attorney-General* and *Walter Clark, Jr.*, for the State; *H. H. McLendon* for defendant. Affirmed.

S. *v.* SCOTT. From Union. *Walter Clark, Jr.*, acting Attor-
(699) ney-General, for the State; *Williams & Lemmond* for defendant, appellant. Affirmed.

S. *v.* ALSOBROOKS. From Union. *Walter Clark, Jr.*, for the State; *A. M. Stack* for defendant, appellant. Affirmed.

CARTER *v.* TEL. CO. From Chatham. *H. A. London & Son* for plaintiff; *Busbee & Son, W. A. Montgomery* for defendant, petitioner. Petition of defendant to rehear dismissed.

LEDBETTER *v.* DELINTING CO. From Richmond. *J. D. Shaw* and *Morrison & Whitlock* for plaintiff, appellant; *Busbee & Busbee* for defendant. Affirmed.

ROWELL *v.* LITTLE. From Union. *A. M. Stack* for plaintiff, appellant; *Adams, Jerome & Armfield, J. C. Sikes* and *Robinson & Caudle* for defendant. Affirmed.

TURNER *v.* LAWS. From Orange. *Frank Nash* for plaintiff, appellant; *J. W. Graham* and *S. M. Gattis* for defendants. Affirmed.

GUNTER *v.* TOBACCO CO. From Durham. *Boone, Giles & Boone* for plaintiff; *Winston & Bryant* for defendant, appellant. Affirmed.

ROBERSON *v.* R. R. From Guilford. *J. A. Barringer* for plaintiff; *King & Kimball* for defendant, appellant. Affirmed.

S. *v.* GARNER. From Davidson. *Attorney-General* for State; *E. E. Raper* for defendant, appellant. Affirmed.

S. *v.* ADAMS. From Davidson. *Attorney-General* for State; *Walser & Walser* and *E. E. Raper* for defendant, appellant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINION.

TYSINGER *v.* FURNITURE CO. From Davidson. *Brooks & Thompson* and *Taylor & Scales* for defendant. Affirmed.

MILLER *v.* R. R. From Rowan. *R. L. Wright and P. S. Carlton* for plaintiff, appellant; *T. C. Linn* for defendant. Af- (700) firmed.

WALL *v.* SMITH, appellant. Dismissed for failure to prosecute.

MILLER *v.* MILLER, appellant. Dismissed for failure to prosecute.

DOBSON *v.* R. R. From Surry. *W. L. Rees* for plaintiff, appellant; *Manly & Hendren* for defendant. Affirmed.

BEAM *v.* ADDERHOLDT. From Lincoln. *Self, Whitener & Mauser* for plaintiff, appellant; no counsel *contra.* Affirmed.

SHUMAKE *v.* WILKESBORO. *Finley & Hendren* and *F. D. Hackett* for defendant, appellant. Affirmed.

GAST *v.* CROUCH. From Catawba. *E. B. Cline* for plaintiffs; *Hufham & Williams* for defendant, appellant. Affirmed.

DORSEY *v.* BRIDGES. From Rutherford. *McBrayer & McBrayer* and *B. A. Justice* for plaintiffs, appellants; *S. Gallert* for defendant. Affirmed.

LYMAN *v.* LYMAN, appellant. From Buncombe. Dismissed for failure to print record.

MARTIN *v.* COOPER. From Haywood. *W. B. & H. R. Ferguson* and *W. T. Crawford* for plaintiff, appellant; no counsel *contra.* Affirmed.

BRISCOE *v.* JORDAN. From Gates. *Bond* for plaintiff. Dismissed under Rule 17.

EBORN *v.* LUMBER CO. From Craven. Dismissed for failure to print.

WORSLEY *v.* KEECH. From Edgecombe. Dismissed under Rule 17.

HARRELL *v.* WEBB. From Edgecombe. Dismissed under Rule 17.

S. *v.* WILLIAMS. From Wake. Dismissed under Rule 17.

MCCORMICK *v.* BURKE. From Robeson. Dismissed under Rule 17. (701)

MCKINNON *v.* R. R. From Robeson. Dismissed under Rule 17.

HOBGOOD *v.* MATCH CO.; TRUST CO. *v.* BATTLE, and TRUST CO. *v.* BENBOW. From Guilford. Dismissed under Rule 17.

MILLING CO. *v.* COLTRANE. From Cabarrus. Compromised and dismissed by consent.

BURGE *v.* TEL. CO. From McDowell. Settled.

CHEDESTER *v.* MOORE. From Buncombe. Dismissed under Rule 17.

QUEEN *v.* COOPER. From Haywood. Dismissed under Rule 17.

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NEGLIGENCE—*Continued.*

26. The jury, under the charge, having found the issue of negligence against defendant, under the principle established in the *Greenlee* and *Troxler cases*, both the defenses of assumption of risk, which ordinarily includes the negligence of a fellow-employee, and that of contributory negligence, are closed to defendant, unless, perhaps, the negligent conduct of the injured employee should amount to recklessness. *Ibid.*

27. Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment, and the Court properly submitted a separate issue as to this matter. *Ibid.*

NEGOTIABLE INSTRUMENTS.

1. Under the Negotiable Instruments Statute (Rev., ch. 54 secs. 2335-2336) cashiers' checks, whether certified or otherwise, are classed with bills of exchange payable on demand; and if negotiated by endorsement for value without notice and within a reasonable time, a holder can maintain the position of a holder in due course. *Manufacturing Co. v. Summers*, 102.

2. Under Revisal, sec. 2201, "a holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." *Ibid.*

3. Under Revisal, sec. 2202, which provides that where an instrument, payable on demand, is negotiated an unreasonable time after its issue, the holder is not deemed a holder in due course, and section 2343, which provides that in determining what is a reasonable or unreasonable time, regard is to be had to the nature of the instrument and the facts of the particular case, where a party obtained a cashier's check for $1,824 from a bank in the State and negotiated the same to a party residing in Virginia in five days thereafter, such negotiation was within a reasonable time. *Ibid.*

4. Under Revisal sec. 2173, which enacts "that an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time," such an indebtedness is sufficient consideration to constitute one a holder for value within the meaning of the law merchant. *Ibid.*

5. Where the evidence and verdict established that the title of the party who negotiated the check to defendant was defective the burden under Revisal, sec. 2208, was on the defendant claiming to be a purchaser in good faith for value and without notice, to make this claim good by the greater weight of the evidence; and the Court erred in charging that the burden was upon the plaintiff to prove that the defendant was not a holder in due course. *Ibid.*

6. The authority to draw, accept or endorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that if, if the purpose of the agency cannot otherwise be accomplished. *Bank v. Hay*, 326.

PRESUMPTIONS.