ANNOTATIONS INCLUDE 172 N. C.

# NORTH CAROLINA REPORTS

VOL. 144

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CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

---

SPRING TERM, 1907

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BY

ROBERT C. STRONG,

STATE REPORTER.

---

ANNOTATED BY

WALTER CLARK.

(2 ANNO. ED.)

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OF THE

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## SPRING TERM, 1907

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# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

## SPRING TERM, 1907

## J. H. DARDEN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 February, 1907.)

**1. Negligence—Notices in Car—"Invitation" to Platform.**

It is not negligence on the part of a passenger on a railroad car wherein is posted notices reading, "Passengers will not occupy the platform while the train is in motion," to leave his seat and go upon the platform of the car for the purpose of getting off at his destination, when the train had slowed down almost to a complete stop, and "All off!" had been called out by the conductor.

**2. Proximate Cause—Duty of Brakeman to Alighting Passenger.**

When the brakeman on the train saw, or could have seen, a passenger in the act of alighting from the car of a slowly moving train at his destination, and signaled the engineer to "go ahead," and in consequence of which the passenger was injured by the sudden jerking forward of the train, the proximate cause of the injury was the negligence of the brakeman.

**3. Duty of Brakeman to Alighting Passenger.**

When a brakeman on a train saw a passenger alighting from a car at his destination, it was his duty to see that the passenger had already descended to the ground before signalling the engineer to "go ahead."

ACTION, tried before *Neal, J.*, and a jury, at August Term, 1906, of HALIFAX.

This action was brought to recover damages for an injury re- ( 2 ) ceived by the plaintiff while alighting from defendant's train.

The plaintiff testified that he boarded the train at Scotland Neck, and had a ticket for Springhill, his destination. The conductor took up the ticket and informed the brakeman that he had a passenger for Springhill. The signal blew for the station of Springhill and the

train slowed up and almost came to a stop. Some one called, "All off for Springhill!" and he got up from his seat near the door and stepped out upon the platform. It was a very dark night, and while he was in the act of getting off the car steps to the ground the brakeman, standing near, threw up his lantern and called, "All off for Springhill!" The engineer opened his throttle and the train jerked off.

It was in evidence by defendant's witness that there were three notices posted up in the car, one on each side and one at the door, reading: "Passengers will not occupy the platform while the train is in motion." There was also evidence in contradiction of the plaintiff's testimony as to the speed of the train at the time in question, and that the one who first called the station of Springhill was the conductor.

Appeal by defendant.

*Daniel, Travis & Kitchin for plaintiff.*

*Day, Bell & Dunn and Murray Allen for defendant.*

BROWN, J. We have examined with care each of the exceptions set out in the record, and think they are without merit, but do not deem it necessary to notice them *seriatim*. The argument, as well as brief, of the learned counsel for the defendant was largely devoted to an attempt to show that the recent case of *Shaw v. R. R.*, 143 N. C., 312, is a controlling authority as to this case. We are of opinion that there is a marked difference between the two.

( 3 ) In *Shaw's case* it was not intended to absolve the company from liability for the negligent act of its servant or to overrule the principle laid down in *Hodges v. R. R.*, 120 N. C., 555; *Cable v. R. R.*, 122 N. C., 892; *Watkins v. R. R.*, 116 N. C., 961, and similar cases. The Court, not intending to overrule its decisions in the above cited cases and many others of like import, was careful to distinguish the *Shaw case* by observing, "Nor did she go out (on the platform) at the invitation of the defendant's agent," and further on by adding, "There is no suggestion that the conductor was upon the platform and no evidence that the plaintiff was invited to go there preparatory to leaving the train."

In the case at bar the evidence of the plaintiff tended to prove that he boarded the defendant's mixed train at Scotland Neck for Springhill; that the conductor, when he took up his ticket, told the brakeman to stop at Springhill; that when the train had almost come to a complete stop, the plaintiff got up from his seat preparatory to getting off; that some one called out, "All off for Springhill!" That he went out on the platform and started to get off. The plaintiff further says: "Just as I was in the act of stepping off, one foot on the bottom step and the other ready to put to the ground, the brakeman threw up his

lantern (it was dark) and halloed, 'All off for Springhill!' The engineer opened his throttle and the train jerked off. He pulled it suddenly and threw me on the ground. It bruised and sprained my foot, and I have been suffering from it ever since." The plaintiff further testified that throwing up the lantern is a signal for going ahead, and that at the time he undertook to alight, the train had "almost come to a stop."

It is useless to discuss the alleged negligence of the plaintiff in attempting to alight from a moving train, for, if his evidence is to be believed, the proximate cause of his injury in being thrown to the ground was the premature signaling to the engineer by the brakeman to "go ahead." Had it not been for the brakeman's negli- ( 4 ) gence, the plaintiff would doubtless have stepped safely to the ground. The brakeman knew that the plaintiff was to get off at Springhill, for the conductor had told him so. The brakeman had called out, "All off for Springhill!" and was at the steps, or near them, and could easily have seen the position of the plaintiff as he was alighting. The brakeman's carelessness and haste to "go ahead" was the palpable cause of the plaintiff's fall. It was his duty to see that his passenger had descended from the steps to the ground before signaling the engineer.

Affirmed.

*Cited: Smith v. R. R.*, 147 N. C., 452; *Kearney v. R. R.*, 158 N. C., 528, 534, 549, 555; *Thorp v. Traction Co.*, 159 N. C., 35, 37.

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MOSELLA KELLY v. LEFAIVER & CO.

(Filed 19 February, 1907.)

**Process—Agency for Receiving and Collecting Money—Insufficiency.**

When a person is not acting for a corporation in the course of its business or closing it out, or in making a general disposition of its property after it has ceased to do business, but is simply acting as a caretaker as a matter of friendship, without compensation, he is not an agent of such company for receiving and paying out moneys upon whom process may be served under section 440, Revisal of 1905, though he may have sold and received pay for one or two articles and applied the proceeds in payment of the corporation's watchman.

MOTION to dismiss an action for lack of service of process, heard before *McNeill, J.*, at December Term, 1906, of BEAUFORT.

On summons duly issued, the sheriff made return: "Received 27 September, 1905. Served 27 September, 1905. Lefaiver & Co. not to

be found in this county. Served on George Leach, by leaving a copy and reading the summons to him, who is in charge of the property."

On affidavits submitted, the court found the pertinent facts to
( 5 ) be as follows: "A summons was issued and attachment proceedings had, as appears in the record, which said summons and attachment proceedings are made a part of these findings. The defendant was a foreign corporation at the time of the issuing of the writ herein, and owned a sawmill plant in the western part of the city of Washington, but not then being operated; that George T. Leach was manager of a lumber company known as the Eureka Company, and was about 100 yards distant from plant of defendant corporation, and Leach procured a watchman for defendant for their plant; that defendant had left one tank of lubricating oil of the value of $4.50 and gasoline of the value of $2.50; that this was on hand when plant stopped operating and was for the use of the plant, and Leach sold same for $7 and applied it in payment of the watchman's services, and for this the defendant sent Leach money to pay watching services, and he paid the watchman for his services and for taking down machinery or part of machinery; he paid some workmen on one occasion $10; that Leach got no salary nor was to get any, but his duty was to look after the property as an act of friendship, and there being no other transaction than the above when Leach received and paid out money on account of defendants. This was all the evidence offered by defendant's counsel in the case; that Leach paid salary to watchman, and, except $10 to other parties, money was paid only to the watchman for his services."

On these facts the action was dismissed for want of service of process, and plaintiff excepted and appealed.

*W. C. Rodman for plaintiff.*
*Ward & Grimes for defendant.*

HOKE, J., after stating the case: Our statute on this question (Revisal, sec. 440) provides, among other things, that service of summons on a corporation may be made by delivering a copy thereof to a
( 6 ) local agent of the company; and enacts further, "That any person receiving or collecting moneys in this State, for or on behalf of any corporation of this or any other State or government shall be deemed a local agent for the purpose of this section." And the sole question presented is whether George T. Leach was an agent, within the meaning of the statute, on whom service of process against defendant company could be properly made.

It will be noted that the person in question was not an agent in the course of the company's business while it was being operated, nor in closing out said business, nor in making general disposition of the com-

pany's property after it had ceased to do business. In fact, he was not an agent of the company at all, nor even an employee in the ordinary acceptation of the term, but simply a caretaker—acting, as found by the court, out of friendship and without salary or any pecuniary recompense. True, he sold out one tank of lubricating oil for $4.50 and also sold $2.50 worth of gasoline, which he applied in payment of the watchman's services; but we are clearly of opinion that this single instance of handling money could by no reasonable interpretation be considered the "receiving or collecting moneys for or on behalf of the corporation" within the meaning of the statute referred to.

This view finds support in the case of *Moore v. Bank,* 92 N. C., 590, and in no way conflicts with *Copland v. Telegraph Co.,* 136 N. C., 11, cited and relied upon by counsel for plaintiff. In the *Copland case* the person on whom process was served was beyond question the local agent of the company. He was in sole charge of the company's property at the point, and in control of its business, and had "received messages from ships at sea for pay," though "the office had not yet been opened up for general business." And the Court held that in such case it was not necessary that the person on whom service should be made should have actually received money on behalf of the company ( 7 ) to constitute him a local agent within the meaning of the act, if the facts otherwise showed that he was such local agent. For methods of service when a company had ceased to do business and no officer or local agent can be found on whom process can be served, see Revisal, secs. 1243 and 1448.

In the present case, we think his Honor was correct in holding that there had been no legal service of process, and the judgment dismissing the action for want of service is

Affirmed.

*Cited: Whitehurst v. Kerr,* 153 N. C., 82.

M. L. COGGINS v. ÆTNA INSURANCE COMPANY.

(Filed 19 February, 1907.)

1. **Fire Insurance Policies—Validity of "Iron-safe Clause."**

The limitation of liability of a fire insurance company contained in the "iron-safe clause" is reasonable and valid.

2. **Producing a General Statement of Values Not a Compliance.**

It is not a compliance by the insured with his contract to produce a complete itemized inventory of stock on hand for him to produce a general statement of aggregate values; and such alone being no compliance, the question of substantial compliance does not arise.

3. **What Inventory Must Show.**

An inventory must show "a detailed and itemized enumeration of the articles composing the stock, and value of each," so that it may appear that the articles are embraced by the contract of insurance, and that the price of each, and the sum total, are reasonable.

4. **Premium Entire, Separate Risks Identified.**

When the amount of insurance under the policy is specifically apportioned to the building and the goods therein contained in fixed amounts as to each, and the premium is entire and the risks substantially identical, the obligation of the insurer is single, and the insured cannot recover as to either when he fails to produce the books and inventory required by his contract of insurance.

( 8 ) ACTION to recover on a policy of insurance, tried before *McNeill, J.*, and a jury, at May Term, 1906, of JACKSON.

There was evidence tending to show that plaintiff, having conducted for several years a general mercantile business at Fernhurst, Jackson County, N. C., in May, 1904, established a subsidiary business at Erastus, N. C., 2 miles distant from the other store, and conducted same till the loss hereafter referred to. This second enterprise was carried on in a small storehouse, 18 by 25 feet, and a side room, 7 by 25 feet, making the entire floor space 25 by 25, the house being valued by estimate at $300.

In January, 1905, the plaintiff procured a policy of insurance in defendant company on the structure at Erastus, N. C., and the merchandise therein contained, consisting principally of groceries, boots and shoes, and clothing; the amount of insurance on the store being fixed in the policy at $200 and that on the goods at $1,500.

On the night of 17 April, 1905, the storehouse at Erastus and all the goods therein contained was destroyed by fire, and defendant company, having failed and refused to pay the insurance, the plaintiff (claiming that his loss by reason of destruction of store was $300 and that the goods destroyed at the time amounted to $2,100) instituted the present action to recover the amount due on the policy.

At the close of plaintiff's testimony, on motion of defendant, the action was dismissed as on judgment of nonsuit, and plaintiff excepted and appealed.

*Walter E. Moore, Shepherd & Shepherd, and Coleman C. Cowan for plaintiff.*

*Merrick & Barnard and King, Spalding & Little for defendant.*

HOKE, J. Defendant resists recovery in this case by reason of alleged breach of certain stipulations of the policy comprehended under the general term, *"the iron-safe clause."* These stipulations, as ( 9 ) contained in the present policy, are as follows:

"1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

"2. The assured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy.

"3. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

And the breach assigned is for violation of the first and second items of the clause, to wit, that the insured made no inventory and kept no books as required by these provisions of the contract.

This "iron-safe clause," frequently attached to policies of insurance, has been very generally upheld by the courts as a reasonable contract limitation on the risk which should be properly borne by the company. *Knight v. Insurance Co.*, 111 Ga., 122; *Sowers v. Insurance Co.*, 113 Iowa, 551; *Lozano v. Insurance Co.*, 78 Fed., 278; *Insur-* ( 10 ) *ance Co. v. Kearney*, 98 Fed., 314.

These decisions and the reasons given to support them are, we think, well considered, and the clause, therefore, when properly made a part of the contract of insurance, will be adjudged with us a valid and binding stipulation.

In the two cases before this Court where the question has been raised, *Bray v. Insurance Co.,* 139 N. C., 390, and *Parker v. Insurance Co.,* 143 N. C., 339, and in which recovery by the plaintiff was sustained, the fire occurred within thirty days from the date of the policy, and by the express terms of the contract the provision known as the iron-safe clause, while incorporated in the policy, had not become effective.

In construing this clause, the better considered authorities seem to be to the effect that it should receive a reasonable interpretation, and that only a substantial compliance should be required. *Brown v. Insurance Co.,* 89 Texas, 591; *Insurance Co. v. Kemendo,* 94 Texas, 367; *Insurance Co. v. Redding,* 68 Fed., 708; *Insurance Co. v. Kearney,* 94 Fed., 314; *s. c.,* 180 U. S., 132. There are decisions, however, which hold that a literal compliance should be exacted. But whatever may be the correct rule, there has been no compliance in the present case.

The plaintiff, giving evidence in his own behalf (and his was the only oral testimony produced at the trial), testified as follows: "The defendant's agent asked me in regard to an inventory, and I said to him I did not have an inventory; that I only took an assay of the goods about once a year. He then asked me if I had any inventory of my stock here at home, and I told him no." (Record, p. 17.) And again, on pages 21 and 22, plaintiff testified further as follows: "Yes, I had another store. The two stores were 2 miles—may be a little further—
apart. I have been running the other store about six or seven
(11) years. The first stock in the new store was made partly out of
the old store; the goods were in boxes and were just carried to the other store. I had moved these goods there in May, 1904. They had been in my other store and had not been there but just a little bit. They consisted of dry goods, clothing, hardware, tinware, groceries, and shoes. I never separated those bills. There were also some drugs—just a general line. No, I never kept any books of the Erastus store. Just a memorandum. I have the sale-books. I have the memorandum of the books kept. I just tore the leaves out of the book and have them there in my vest pocket. Here are the credit accounts."

Plaintiff's counsel endeavored to supply the data which would furnish an approximate estimate of the amount of goods by offering as exhibits certain invoices of goods which plaintiff had sent from the principal store to the store at Erastus, and of some which he had purchased for the latter store after the enterprise was under way. A part of these invoices were burned in the store, but other and much the greater part

had, it seems, been copied onto two or three leaves of the ledger of the home store. But these invoices and the entries made from them do not all amount to an inventory of the goods. They are simply a general statement of the aggregate value of goods sent by plaintiff from one store to the other, and frequently the kind of goods is altogether omitted. Thus, the amount of bills of goods taken from Fernhurst store to Erastus store:

| | |
|---|---|
| No. 1. Shoes | $377.45 |
| No. 2. Dry goods | 259.86 |
| No. 3. Mixed bills | 83.29 |
| No. 4. Mixed bills | 68.89 |

etc., showing five others, termed mixed bills. Then three "bills for suits"; then bill for shoes, aggregating $1,342.34.

In *Roberts v. Insurance Co.*, 19 Tex. Civ. App., 344, an inven- ( 12 ) tory is defined to be "A detailed and itemized enumeration of the articles composing the stock, with the value of each." And other decisions and law books generally give substantially a similar definition. *Insurance Co. v. Knight, supra; Insurance Co. v. Calhoun,* 28 Texas Civ. App., 338; *Insurance Co. v. Kemendo,* 94 Texas, 367; Black's Law Dict., 643.

In *Kemendo's case, supra, Brown, J.,* delivering the opinion, stated the object and purpose of inventory as follows: "The object of having an inventory made was not to ascertain the gross value of the property insured, but to ascertain the different articles that went to make up the stock in order that the insurance company might test the correctness of the claim in two respects: (1) whether the articles of which the stock was composed all belonged to the class of goods covered by the policies; (2) whether the valuations attached to the different items, and which went to make up the total sum expressed, was reasonable." Speaking further on this subject—and the comment is appropriate to the facts before us—the judge said: "If the assured had furnished everything from which the information contracted for could be with reasonable certainty ascertained, then the question of substantial compliance would be before the court; but where there is no compliance whatever, there can be no question of substantial compliance." And so it is here.

There has never been any inventory taken of the goods comprising the stock of this Erastus store, the one covered by the policy. There is not now and has never been any data from which such an inventory could be reasonably approximated.

The plaintiff, himself, testifying to this question, very correctly and properly said: "No, I do not know how much hardware, groceries, and shoes I had. I never separated these bills. There were also some drugs

( 13 ) —just a general line." The court was right, therefore, in holding that on the evidence of plaintiff there had been a breach of the first stipulation in the iron-safe clause.

Plaintiff then takes the position that while this ruling would prevent a recovery for the loss of the goods, he should still be allowed to recover for the loss of the storehouse, inasmuch as the policy placed a definite and distinct portion of the insurance on the building. But we cannot so interpret the contract. True, the amount of the insurance is apportioned, a definite sum being specified for the building and another for the goods. It is also true that the stipulations of the iron-safe clause are more especially addressed to the insurance of the goods; but the premium on the policy is entire; the concluding stipulation is to the effect that if the insured fails to produce the set of books and inventories as required by the contract, the policy shall become null and void, and the "failure shall constitute a perpetual bar to any recovery thereon"; and, furthermore, the goods are insured "while they are contained in the storehouse, and not elsewhere"; thus making the risk on the goods and on the building substantially identical.

According to the evidence, the goods were placed in a small frame structure 25 by 25 feet, not worth over $300, where the destruction of the one would almost of a certainty involve the destruction of the other; and the physical hazard of the risk and the moral hazard, as affected by these stipulations in question, were one and the same. In such case we are clearly of the opinion that the contract is not divisible, and that a breach of the stipulation will go to the entire measure of the obligation.

We are aware that there is much conflict among the decisions on policies of this character, where separate amounts are named on different items or kinds of property and the premium is one and entire. Many of the decisions are to the effect that whenever the premium is
( 14 ) entire and undivided, the obligation is likewise indivisible, and that a breach of a stipulation when it so provides will bar any and all recovery in case of loss.

This was so held in the well considered case of *Knight v. Insurance Co.,* 111 Ga., *supra,* and in which many authorities are cited. There are cases to the contrary, as in *Miller v. Insurance Co.,* 14 Okla., 81, *s. c.,* 65 L. R. A., 173, cited by plaintiff's counsel, in which a recovery for the building was sustained, notwithstanding there had been a breach of the iron-safe clause established; the clause being expressed in the exact language of the one contained in this policy; and quite a number of cases are cited as supporting authority.

Without going into any extended review of these different decisions, we are of opinion that the great weight of authority, as well as the bet-

ter reason, establishes the position that when to the fact that the premium is entire there is added the fact of identity of risk, the obligation is single, and on breach of the stipulation all recovery is barred.

This question of identity of risk being held the determinative factor in policies of this kind, where the amounts are separate and the premiums entire, is very well treated in a note to *Wright v. Insurance Co.*, 19 L. R. A., 211, the case being taken from 12 Mont., 474, where a number of decisions on this subject are considered and reviewed.

There are cases in our own Court where this identity of risk has been made a controlling feature in the decision. *Cuthbertson v. Insurance Co.*, 96 N. C., 480; *Biggs v. Insurance Co.*, 88 N. C., 141. In this last case, *Ruffin, J.*, for the Court, said: "But it is not necessary that we should further advert to them or attempt to reconcile them, for according to no one of them is there a doubt but that in a case like ours, in which the property insured consists of a single storehouse and the goods kept therein, a breach as to part will work a forfeiture ( 15 ) as to the whole. In such case it is impossible to introduce any new element of carelessness by lessening the interest of the owner in one species of the property, so as to increase the risk thereof, without at the same time adding to the hazard of the other. Every risk that can attend the one must attend the other, and consequently the same rule must apply to both."

We hold that on the entire evidence no recovery could be had, and the action was properly dismissed.

Affirmed.

*Cited: McIntosh v. Insurance Co.*, 152 N. C., 53; *Arnold v. Insurance Co., ib.*, 236.

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A. T. NEWSOME v. Q. T. BUNCH.

(Filed 19 February, 1907.)

**Parent and Child—Custody of Child—Habeas Corpus—Revisal, Secs. 180 and 181.**

Where a child then less than one year old had been placed by its father in the custody of its grandparents, with whom it had lived about eight years and the father now claims the right of custody, and the court found as facts that he had not abandoned the child; that there was no objection to him as a proper custodian, and that the interests of the child will not be prejudiced by giving him the custody of it: *Held*, that this Court, on appeal, will not disturb an order made by the court below, in the exercise of its sound discretion, that the child be restored by the grandparents to the father, it being proper under the facts and circumstances of the case and under Revisal, secs. 180 and 181.

NEWSOME *v.* BUNCH.

DEFENDANT'S APPEAL, in *habeas corpus* proceedings, from the order of *Ward, J.*, rendered 3 January, 1906, in CHOWAN, granting plaintiff custody of his minor child.

*N. Y. Gulley and W. S. Privott for plaintiff.*
*W. M. Bond for defendant.*

( 16 ) WALKER, J. This case was before us at the last term, and will be found reported in 142 N. C., at page 19, where the facts not herein mentioned are stated. We there directed certain additional findings to be made. His Honor has found, in compliance with our order, that the child was not abandoned by its father (the petitioner) to its grandparents (the respondents), and that the interests and welfare of the child will not be materially prejudiced by its restoration to the petitioner.

The father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed, and it has been said that where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still, the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person for good and sufficient reasons. *In re Lewis,* 88 N. C., 31; Hurd on Habeas Corpus, 528 and 529; Tyler on Infancy, 276 and 277; Schouler on Domestic Relations, sec. 428; 2 Kent's Com., 205. But as a general rule, and at the common law, the father has the paramount right to the control and custody of his children, as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance, and education. 21 A. and E. Enc., 1036; 1 Blackstone (Sharswood), 452, and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, "when the empire of the father gives place to the empire of reason." 1 Blk., 453. It appears in this case that the child is under 10 years of

( 17 ) age, and that the petitioner and the respondents are equally qualified in every respect as fit and proper persons with whom to intrust the care and custody of the child; and, further, it is found as a fact that the father has in no way surrendered his natural and preferred right to such custody. Under these circumstances, we are unable to see why the petitioner is not entitled to have the custody of the

child awarded to him, as was done by the order of the court below. It would seem that the case comes directly and clearly within the decision of this Court in *Latham v. Ellis,* 116 N. C., 30, if it is not also substantially covered by the provisions of Revisal, secs. 180 and 181. See, also, *Musgrove v. Kornegay,* 52 N. C., 71; *Harris v. Harris,* 115 N. C., 587; *Ashby v. Page,* 106 N. C., 328; *In re Lewis,* 88 N. C., 31; *Thompson v. Thompson,* 72 N. C., 32, where the law in regard to the father's right of custody in respect to his child is discussed by the Court in its different phases as presented by the facts of those cases.

There is no legal duty or obligation resting upon the grandfather to support and educate his grandchild, whereas the father does rest under such an obligation. This fact should have some weight with the court in deciding a controversy between them as to the child's custody, apart from the natural claim the father has to the first consideration, as the death of the grandparent or his refusal longer to care for the child might leave the latter without any natural guardian or protector and result in his becoming a charge upon the community.

While the court, in the exercise of a sound discretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his offspring. There is no room for ( 18 ) the exercise even of a sound discretion in favor of the grandparents who now have possession of the child. Speaking for himself, and not committing the Court to his view, the writer of this opinion would hesitate to remove the child from its present custody, if the law were more elastic, and we were vested with a larger discretion than is given by the law. We must follow the precedents and the general principles of justice established by them, though the result may be contrary to what we may consider as the real merits of the particular case, and though by the facts, even as found by the court, our sympathies may be enlisted in behalf of the grandparents. The insistence upon his strict right under the circumstances may not be very creditable to the petitioner, yet the law is inexorable in such a case, and cannot be made to yield in deference to a mere sentiment or to a tender regard for the feelings of one of the parties; nor are we permitted to exercise an arbitrary discretion.

No error.

*Cited: In re Turner,* 151 N. C., 477; *In re Jones,* 153 N. C., 315, 317; *Littleton v. Haar,* 158 N. C., 568; *Howell v. Solomon,* 167 N. C., 590; *In re Fain,* 172 N. C., 791, 792, 794.

CHARLES E. SNIPES v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 19 February, 1907.)

1. **Street Railways—Relation of Passenger—His Right.**

A person who has appropriately indicated his desire to become a passenger on a street car, whatever his destination, and who in good faith is in the act of boarding it when stationary at its regular stopping place, is entitled to all the rights of a passenger, and such person is not bound to prepare for, or anticipate, a sudden starting of the car.

2. **Care Required of Conductor.**

The conductor of a street car is not excused by his failure to observe that all passengers are not safely on board, and by his not seeing an intended passenger in the act of boarding, before giving the signal to start.

3. **Exceptions—Record—Brief.**

Exceptions noted of record and generally referred to in the brief as being relied on, without specifying the contention of error, will not be considered.

(19) ACTION, tried before *Neal J.*, and a jury, November Term, 1906, of HALIFAX. The defendant demurred *ore tenus* to the complaint. Demurrer overruled, and defendant excepted.

Plaintiff alleged that on 1 October, 1905, while he was in the act of boarding defendant's trolley car, at Virginia Beach, in the State of Virginia, the employees in charge of the car, without notice or warning, suddenly started the car, jerking plaintiff down; that he was thrown under the moving car and injured, whereby it became necessary to amputate his arm. Defendant denied that plaintiff, at the time of the injury, was a passenger. It also denied any negligence, and alleged that plaintiff by his own negligence contributed to the injury. The usual and appropriate issues were submitted to the jury. From a verdict and judgment for plaintiff, defendant appealed. The exceptions are set out in the opinion.

*Daniel, Travis & Kitchin for plaintiff.*

*Day, Bell & Dunn, Murray Allen and Aycock & Daniels for defendants.*

CONNOR, J., after stating the case: There was testimony tending to show that on the day upon which the plaintiff was injured, he, together with two companions, were at Virginia Beach, and desired to return to Norfolk over defendant's road. They passed the depot and took seats in a car on the side-track, remaining there some twenty minutes. When the car came in from Norfolk going to Twenty-fourth Street Station, it

stopped at Seventeenth Street Station to permit passengers to alight and get on, remaining there two or three minutes. While plaintiff was on the car on the side-track, the other car, with a trailer, ran up between him and the depot. One of his companions asked the ( 20 ) motorman which car was going to Norfolk first, and was told "This one"; he passed in front of it, and when he was on the side, being an open summer car, with step extending entire length, and had gone two-thirds its distance, took hold of the upright with his right hand and put his foot on the step to board the car, when it suddenly started, throwing plaintiff off and jerking him around so that his arm caught under the car, etc.

The defendant's contention, that at the time of the injury plaintiff was not a passenger, and that, therefore, defendant owed him no duty, is presented by appropriate motions, followed by requests for instruction. It appears that defendant's trolley is operated upon what is termed the Zone System, in the manner described by the witnesses. The defendant's testimony tended to show that the car which plaintiff attempted to board was not going in the direction of Norfolk, but to Twenty-fourth Street. It appears that persons desiring to go to Norfolk board the car at Seventeenth Street going to Twenty-fourth and returning by Seventeenth Street, their purpose being to avoid the crowd—securing seats at Twenty-fourth Street. It was in evidence that on the day of the accident several persons did so.

The defendant's counsel earnestly contend that as plaintiff intended going to Norfolk, the car which he attempted to board not heading in that direction, he was not at the time of his injury a passenger. The relative rights and duties of persons who are either on or in the act of boarding a street car, and the employees of the company, have been so recently and clearly discussed and stated by this Court in *Clark v. Traction Co.*, 138 N. C., 77, in which *Mr. Justice Brown* cites the authorities and draws the conclusions therefrom, that we do not deem it necessary to do more than refer to the opinion, and apply the law to the facts of this case. His Honor instructed the jury: "Whenever a person goes to the usual stopping station of a street railway, intending ( 21 ) in good faith to take passage, and informs the motorman or conductor, by either word or signal, that he wants passage, or if the car is standing still, and he indicates by his movements in very close proximity to the car, near enough to touch it, that he is trying to board the car, then he becomes entitled to all the rights of a passenger, even before he secures a seat, and the conductor should give him the rights of a passenger. It is the duty of a street car conductor to know when he starts his car that no person attempting to embark is, at that moment, with one foot on the platform and the other on the ground and with his hand on

the railing, in the act of getting on board, or is otherwise in a position of danger. It is the duty of the conductor, before giving signal to start, to look around and see that all passengers to take passage at that place are safely on board; and failure to do so is not excused by the fact that he does not see an intending passenger. The passenger has the right to rely upon the care and protection of the company's employees, and he is not bound to prepare for or even anticipate a sudden and unexpected start of the car." To this instruction defendant excepts. We find no error in the instruction. The measure of duty on the part of the defendant, laid down for the guidance of the jury, is in strict accordance with the best considered authorities and with the reason of the thing. His Honor followed this instruction with a clear presentation of the defendant's contention, to which there is no exception. The "intending passenger" is not required to procure a ticket, nor is any provision usually made for his doing so. It is immaterial to the conductor, unless asked, whether he is taking the car going to his proposed destination. The stopping of the car at the usual and appointed place is an invitation to all persons desiring to do so, to board it, and when he indicates his purpose in any appropriate way, the invitation is thereby accepted,
( 22 ) establishing the relation of passenger and carrier, with all of its reciprocal rights and duties. His Honor correctly interpreted and applied the law. The jury found the facts, and unless there was error in other respects, the appeal cannot be sustained.

The record contains thirty-nine exceptions. Many of them are pointed to paragraphs of his Honor's statement of the contentions of the parties, containing no proposition of law. The brief, while in the most general way suggests that they are relied upon, makes no suggestion that there is any error in either statement or the form of expression used. It is not very clear to us why exceptions of this character are put in the record. They do not contain any "question of law or legal inference," and are not, therefore, within the scope of our investigation. For failure to state a contention of the appellant, no exception will lie unless based upon a request to the judge to state such contention. For an unfair, prejudicial statement of a contention, an exception, if properly made, will be sustained. We find no suggestion of such error in the record or the brief. While it is stated in the brief that defendant relies upon a large number of exceptions referred to by number only, no error is pointed out or suggested otherwise than by the statement that they are relied upon and assigned for error. We do not think that the record in this respect conforms to the rules of the Court. Rule 19 (2). In view of the rule that exceptions not relied upon in the brief will be deemed waived, it is unfair to appellee for the Court to consider exceptions grouped in large numbers without suggestion as to the alleged error complained of.

We have examined the entire record, and find no error. His Honor's rulings in all respects conform to well-settled principles of law and procedure. There was much controversy in regard to the way in which plaintiff was injured, every phase of which was submitted to the jury with appropriate instructions. They have, as it was their province to do, found the facts. ( 23 )

The judgment must be

Affirmed.

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GARRETT & CO. v. ISADORE BEAR.

(Filed 19 February, 1907.)

**1. Corporation Residence.**

The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business.

**2. Removal Not a Matter of Right.**

When suit has been commenced by a corporation returnable to the county of its residence as fixed by its charter, the defendant cannot, as a matter of right, remove it to a different county of which the defendant is a citizen and resident, though the plaintiff may have moved its principal place of business to another State.

**3. Motion to Remove Made Too Late.**

A motion to remove a cause from one county in the State to another as a matter of right, when complaint has been filed, and time to file answer has expired, is made too late.

**4. Agreed Time Allowed for Answer.**

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove.

**5. Motion to Remove, Where and When Made.**

A motion to remove a cause must be made in the district and during term of court.

**6. Refusal of Motion to Remove Not Reviewable.**

Refusal of Superior Court judge to order removal of cause for convenience of witnesses and in the interest of justice, is not reviewable in the Supreme Court.

APPEAL by defendant from order of *Neal, J.*, at December Term, 1906, of HALIFAX, refusing defendant's motion to remove to NEW HANOVER. Relevant facts stated in the opinion of the Court. ( 24 )

*Daniel, Travis & Kitchin for plaintiffs.*

*J. D. Bellamy, Rountree & Carr, Day, Bell & Dunn, and Shepherd & Shepherd for defendant.*

CLARK, C. J. This action was brought to Halifax Superior Court. The defendant, a resident of New Hanover County, asked for a removal to that county as a matter of right. The court found as facts: That the plaintiff was created a corporation under the laws of this State, with its home office in the county of Halifax, where it still owns real and personal property and does some business; that it keeps its stock-books and records of all directors' and stockholders' meetings there, and holds all such meetings in said county according to the provisions of the charter, and has always done so; but in September, 1903, it removed its principal place of business and home office for transaction of business to Norfolk, Va. The court further found that the summons was issued 17 March, 1906, returnable to June Term, 1906 (beginning 4 June); summons was served 30 March and complaint filed 22 May; that at the request of the defendant, the plaintiff consented that the defendant should have till 15 July to file answer, without prejudice to the plaintiff's right of trial at August Term; that on 7 July the defendant sent to the judge in vacation a motion to remove to New Hanover, upon which he took no action; that at August Term, by consent, the defendant was allowed to file answer, and the motion to remove was continued without prejudice to the next term, at which the court held that the defendant was not entitled to remove as a matter of right, and refused to remove the case as a matter of discretion, and also refused to remove for convenience of witnesses, because no affidavit was filed.

( 25 ) The residence of a corporation for the purposes of Federal jurisdiction is in the State creating it. Whether a corporation should be held a "citizen" of the State creating it, for the purpose of removal to the Federal court, has always been questioned, and the opposite ruling has been and is productive of much evil, but seems settled. The plaintiff is a resident of North Carolina, and as between the counties within the State, Revisal, sec. 422 (Laws 1903, ch. 806), is explicit: "For the purpose of suing and being sued, the principal place of business of a domestic corporation shall be its residence." The residence of the plaintiff is marked out by its charter, which requires its directors' and stockholders' meetings to be held in Halifax County. In *Ex parte Scollenberger,* 96 U. S., 377, *Waite, C. J.,* says: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter," adding that it may "transact business anywhere unless prohibited by its charter or excluded by local laws." Welty on Assessments, p. 106, de-

fines the residence of a corporation as follows: "The residence or domicile of a corporation has been defined to be where the governing power of the corporation is exercised; where those meet in council who have a right to control its affairs and prescribe what policy shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business." This is quoted and approved in *Grundy v. Coal Co.*, 94 Tenn., 309. The action was therefore properly brought in Halifax County, where the "plaintiff resided." Revisal, sec. 424.

Even had it been otherwise, the motion to remove as a matter of right (and not for convenience of witness or to secure an impartial trial) came too late. It should have been made at the return term "before time of answering expired," when complaint has been filed. Revisal, sec. 425; *Riley v. Pelletier,* 134 N. C., 316. The agreement for an extension of time till next term was, besides, of itself an ( 26 ) acceptance of jurisdiction and a waiver of any right to remove. *Howard v. R. R.,* 122 N. C., 952; *Riley v. Pelletier, supra.* The same reasoning as to waiver of extension of time applies to removals to the Federal court and from one county to another. In *Roberts v. Connor,* 125 N. C., 45, there is nothing to the contrary; the Court holding that it was error to order the removal, added that it would be *obiter* to discuss whether the motion had been made in apt time. Nor could the motion be made out of term or out of the district. *Howard v. R. R., supra.* The refusal to remove for convenience of witnesses and in the interest of justice is not reviewable.

Affirmed.

*Cited: Robeson v. Lumber Co.,* 153 N. C., 122; *Ford v. Lumber Co.,* 155 N. C., 352; *Oettinger v. Live Stock Co.,* 170 N. C., 153; *Byrd v. Spruce Co., ib.,* 435.

R. L. DUFFY v. A. AND N. C. RAILROAD COMPANY ET AL.

(Filed 26 February, 1907.)

**Railroads — Negligence — Public Crossing—Obstruction—Proximate Cause—Contributory Negligence.**

It is error in the court below to sustain a demurrer to a complaint alleging that the defendant unlawfully, wrongfully, and unnecessarily obstructed with its freight train a public crossing, which was the proximate cause of an injury received by the plaintiff when his horse was running beyond his control, though the mere obstruction at the time did not, in itself, constitute negligence, unless unnecessary and unlawful.

DUFFY *v.* R. R.

ACTION to recover damages, heard at Fall Term, 1906, of CRAVEN, on demurrer, *Shaw, J., presiding.* From judgment sustaining demurrer, plaintiff appeals.

*D. L. Ward and R. B. Nixon for plaintiff.*
*Simmons, Ward & Allen for defendant.*

( 27 ) BROWN, J. The portion of the complaint material to be considered on this appeal states in substance: That on 10 March, 1906, the plaintiff was driving along the macadamized road in the City of New Bern when his horse became frightened and began to run. The horse ran for some distance, and when the plaintiff turned a corner in the street and came within one block of the railroad crossing, he saw that the defendants had a long freight train standing across the street, which made it impossible for him to pass. He alleges that the freight train was unnecessarily there, and had been there for a long time across the street, and extended for some distance on either side of the street, so that he could not pass. He had either to run into the train or attempt to turn out into an alley just before reaching the train, which was the only outlet he had. In attempting to turn, his buggy was overturned and plaintiff was seriously injured, as set out in his complaint.

While the use of the public highways and streets belongs to the public by common right, we fully agree with the learned counsel for the defendant that the fact that the defendant company's train was at this particular time obstructing the highway does not in itself constitute negligence. The railroad company has a right on its roadway to move its locomotives with or without cars attached, to and fro, in making up its trains, shifting its cars from one train to another, and to stop its trains when necessary in the ordinary course of such work. And any harm sustained by reason of such shifting and stopping is *damnum absque injuria. Morgan v. R. R.,* 98 N. C., 247. Neither do we gainsay the proposition that where a railroad track crosses a public highway, both a traveler and the railroad company have equal rights to cross, but the traveler must yield the right of way to the railroad company in the ordinary course of its business. But the gravamen of this plaintiff's complaint is "that the said defendants *unlawfully, wrongfully,* and
( 28 ) *unnecessarily* blocked up and obstructed the said street for a long time prior and subsequent to the time when plaintiff approached it as aforesaid," and that the direct consequences of such wrongful obstruction was the injury to plaintiff. If true, this constitutes negligence. *Morgan v. R. R., supra; Harrell v. R. R.,* 110 N. C., 215; *Dunn v. R. R.,* 124 N. C., 252.

The burden of proof will, of course, be on plaintiff to establish such unnecessary and wrongful obstruction of the street, and that it was the

immediate or proximate cause of the injury. The defense of contributory negligence must be set up in the answer, as we find no facts stated in the complaint which as a matter of law constitute contributory negligence.

The defendant will answer over.

The judgment of the Superior Court is

Reversed.

*Cited: Johnson v. R. R.*, 163 N. C., 442; *Pruitt v. Power Co.*, 165 N. C., 418.

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E. K. BOWDEN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 February, 1907.)

**Railroads—Negligence—Arrest of Passenger.**

It is not the duty of a railroad company to protect a passenger by resisting a known officer of the law in arresting him, or to adjudge the right of the officer in so doing, and the consequent delay of the train is no evidence that the conductor aided in making the arrest.

CIVIL ACTION to recover damages for neglect in protecting plaintiff, a passenger on defendant's train, heard by *Shaw, J.*, and a jury, at October Term, 1906, of CRAVEN.

The court submitted the following issues: ( 29 )

1. Was plaintiff a passenger of defendant company? Answer: Yes.

2. Did the defendant company through its agents and employees wrongfully aid, abet, or encourage a wrongful assault on the plaintiff, as alleged? Answer: Yes.

3. Did the defendant company neglect, fail, and refuse, through its agents and employees, to protect the plaintiff from a wrongful assault and insult, as alleged? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $500.

From the judgment rendered, defendant appealed.

The evidence pertinent to the case is stated in the opinion.

*D. L. Ward and W. D. McIver for plaintiff.*

*Simmons, Ward & Allen for defendant.*

BROWN, J. We think the motion to nonsuit the plaintiff should have been allowed. We find in the record no evidence that defendant's servants were remiss in the discharge of any legal duty imposed upon them

in respect to the plaintiff. The entire evidence tends to prove that plaintiff "ran away" with a 16-year-old girl for the purpose of marrying her, and they were passengers on defendant's train. The brother of the girl telegraphed to the chief of police of Jacksonville, N. C., to arrest the couple, stating that they had eloped. The moment the train arrived, the chief and his assistant, fully armed, boarded the train to make the arrest. The plaintiff, apprehending arrest, had gone in the water-closet without the knowledge of the conductor, and bolted the door on the inside. The officers demanded the key of the conductor, who instructed the porter to give it up. The key was of no avail, so the officer presented his pistol through the window of the closet and compelled plaintiff to unbolt the door and surrender. The officers took the couple off the train. The conductor then proceeded on his jour-
( 30 ) ney, the train having been detained a few minutes longer than usual because of the difficulty of the officers in arresting the plaintiff. The conductor knew the chief of police, and that he was an officer of the Town of Jacksonville. We see nothing in the evidence which tends to prove that the conductor aided, abetted, or encouraged the arrest of plaintiff. The key to the closet was surrendered only upon the demand of the chief of police, who was evidently prepared to execute his purpose by force. As plaintiff had concealed himself in the closet without the knowledge of the conductor and bolted the door on the inside, the surrender of the key is no evidence of a purpose to actively aid and abet the officers. The fact that the train remained at the station a few minutes longer than usual was almost unavoidable under the circumstances, and is no evidence that the conductor had aligned himself with the officers to aid them in making the arrest. The most that can be said is that the conductor did not resist the officers in executing their purpose to arrest plaintiff. It is not the duty of a conductor to resist a known officer of the law in making an arrest.

In a case very much like this, which seems to have escaped the vigilance of the astute counsel, this Court has said: "It would be vain and unreasonable to require the conductor to resist a known officer of the law from making an arrest." *Owens v. R. R.*, 126 N. C., 139.

It is not intended that railroad trains and stations shall become "cities of refuge" for persons charged with crime, nor will the law impose upon the agents of the company the duty to pass judgment upon the right of a known officer of the law to make an arrest.

We think the case above cited is clearly decisive of this, and we direct that the motion to nonsuit be allowed. *Hollingsworth v. Skelding,* 142 N. C., 246.

Reversed.

*Cited: Tussey v. Owen,* 147 N. C., 337.

(31)

WALTER F. MORTON ET AL. v. BLADES LUMBER COMPANY.

(Filed 26 February, 1907.)

1. **Administrator—Debt of Intestate—Assignment to Administrator.**

An administrator of the maker of a note carrying mortgage security may buy the debt and security with his personal funds and have them assigned to himself.

2. **Subrogation.**

An administrator who has purchased with his own funds a note and mortgage made by his intestate, may avail himself of the security, and collect from the estate the amount he has paid therefor, with interest, being subrogated to the rights of the creditor.

3. **Unregistered Deed or Assignment Between Parties.**

An unregistered deed of conveyance of lands is good between the parties and their heirs, in the absence of intervening rights of creditors or purchasers. The same principle applies to an unregistered assignment of a mortgage.

4. **Nonsuit and Appeal.**

When the judge below intimates the opinion that the plaintiff cannot maintain his action upon the allegations of his complaint, if taken as true, he may assign the ruling as error, and appeal.

5. **Deed of Administrator—Fraud on Heirs—Equity—Will Set Aside—Purchaser With Notice.**

Equity will set aside a conveyance of lands made under the power of sale in a mortgage, procured through collusion with an administrator in fraud of the rights of the heirs at law of his intestate, in the absence of intervening rights of creditors or purchasers.

ACTION, heard before *Shaw, J.*, and a jury, November Term, 1906, of CRAVEN.

Plaintiffs, heirs at law of M. F. Morton, prosecute this action for the purpose of vacating and setting aside a sale of lands which descended from their ancestor, and redeeming same, etc. The complaint sets forth: (1) That their father owned the land in controversy. (2) That he conveyed it by way of mortgage to the Farmers and Merchants Bank for the purpose of securing the payment of a note of $175. (3) That thereafter he died intestate. (4) That John A. Morton was duly appointed and qualified as administrator of said estate. These (32) averments are admitted by the answer.

Plaintiffs further alleged:

"6. That afterwards, to wit, on 25 June, 1901, the defendant W. B. Blades and others, trading as Blades Lumber Company, procured to be assigned to the defendant J. A. Morton the note to secure which the mortgage above referred to . . . was made for the sum of $160." This allegation was denied.

"7. That plaintiffs are informed and believe that the said Farmers and Merchants Bank never assigned to the said J. A. Morton the said mortgage deed and the lands conveyed thereby, in this . . . that no such assignment is recorded, and they are informed and believe that no such assignment was made." To this allegation defendants answered: "That while defendant is informed and believes that the assignment referred to in allegation 7 is not recorded, as alleged, and the allegation that the same is not recorded is not denied: that the rest of said allegation is denied on information and belief."

Plaintiffs further alleged that the said J. A. Morton, "attempting to foreclose said mortgage, executed to W. B. Blades a deed purporting to convey said land for the sum of $350." That said Blades procured the sale by said J. A. Morton for the purpose of enabling him to buy the same to the injury of the plaintiffs. That said land is now worth $7,000, and was, at the time of the sale, November, 1901, worth a sum largely in excess of the amount bid therefor. That said Blades conveyed said land to defendant corporation, which took title with notice of all of the facts set forth. These allegations are denied.

Plaintiffs moved for judgment upon the pleadings. Motion denied.

Plaintiffs, upon the intimation of his Honor that they were not
( 33 ) entitled to recover, submitted to a judgment of nonsuit and appealed.

*W. D. McIver for plaintiffs.*
*W. W. Clark and Moore & Dunn for defendant.*

CONNOR, J. Plaintiffs' counsel, in his brief, says that the exceptions raise two questions of law: "(1) Can the administrator buy up the outstanding mortgage on his intestate's land and then exercise the power of sale therein to foreclose the heirs of his intestate? (2) Can the assignee of a mortgage on land exercise the power of foreclosure without first registering the assignment?"

If the expression, "buy up the mortgage," be understood as simply taking an "assignment of the mortgage," as distinguished from taking a conveyance of the land with the transfer of the power of sale conferred upon the mortgagee, it is settled by numerous and uniform decisions of this Court that he cannot do so. *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312.

The language of the seventh paragraph of the complaint is not very clear. From the statement in the case on appeal and the argument here, it seems that the real contention of the plaintiff is that if such assignment was made, it was not valid without registration. The answer, while not very clear in this respect, may reasonably be construed as

denying that no assignment was made and admitting that none was registered. We do not understand the plaintiffs to contend that the assignment of the note by the bank to J. A. Morton, the administrator, operated as an extinguishment of the debt and security, leaving the administrator a simple contract creditor of his intestate. We can perceive no good reason why the administrator may not, with his own funds, purchase and take an assignment of a note outstand- ( 34 ) ing against his intestate and avail himself of any securities held by the creditor. *Williams v. Williams,* 17 N. C., 69 (22 Am. Dec., 729). In *Turner v. Shuffler,* 108 N. C., 643, it is said: "In such case the administrator is entitled to be subrogated to the rights of the creditor whose debts he paid with his own funds." 18 Cyc., 570. Of course, upon familiar principles, he would be entitled to collect from the estate of his intestate only the amount paid out by him, with interest; he would not be permitted to speculate upon or make profit by buying in the debts of his intestate. 18 Cyc., 572. It is equally manifest that he will not be permitted to use any advantage in the way of securities or otherwise, which he has thus acquired, to the injury of the other creditors, or the distributees or heirs. His relation to the estate will subject his transactions to the same elementary principles which apply to other trustees or fiduciaries.

In the present state of the pleadings we are not sufficiently informed in respect to the character of the assignment, if any, executed by the bank to Morton, to enable us to hold that plaintiffs were entitled to judgment upon their motion, or demurrer *ore tenus* to the answer. It appears from the statement of his Honor in the case on appeal that plaintiffs relied in support of their motion upon the fact that the assignment of the mortgage was not registered. We concur with his Honor that, as between the parties and their heirs, it was not required to be registered. Treating it as a deed of conveyance, carrying the legal title, we know of no statute or decision requiring its registration when the rights of no creditors or purchasers intervene.

This controversy is between the assignee of the mortgagee and the heirs of the mortgagor. In *Williams v. Brown,* 127 N. C., 51, the same objection was made to the validity of an assignment. The Court does not seem to have deemed it of serious import. In the condition of the pleadings, his Honor correctly refused plaintiffs' motion ( 35 ) for judgment.

The record states and the judgment recites that his Honor intimating that plaintiffs could not recover upon the allegations in the complaint, they submitted to judgment of nonsuit and appealed. Defendants move in this Court to dismiss the appeal for that, having voluntarily taken judgment of nonsuit, they cannot except and appeal. For this position

they rely upon *Merrick v. Bedford,* 141 N. C., 504. The practice which has always prevailed in respect to the right of a plaintiff upon an adverse ruling to submit to a nonsuit and appeal is clearly pointed out in the opinion of *Mr. Justice Brown,* citing a number of cases. This case comes within the rule which permits the practice pursued by plaintiffs. "When on the trial the court intimates the opinion that the plaintiff cannot maintain his action, he may, in deference to the opinion of the court, submit to a judgment of nonsuit, assign ground of error, and appeal to this Court." It would be a waste of time to proceed with the trial in the face of an expression of opinion by the court that, if every fact alleged in the complaint be proven, the plaintiff cannot recover, and must at the end of the trial go out of court. Such was the plaintiffs' position. The motion to dismiss the appeal cannot be granted.

This leaves the single inquiry open, whether, upon the facts alleged in the complaint, if established, plaintiffs were entitled to any relief. Assuming that the mortgage was assigned in terms which vested the power of sale in J. A. Morton, and that, pursuant thereto, he sold the land and conveyed to Blades; and assuming, further, that plaintiffs prove, as alleged, that Blades procured this to be done "with intent and for the purpose of gaining the same to the loss of plaintiffs," ( 36 ) and that "said sale was collusive and not fair"; that the land was worth "a sum largely in excess of the price bid": have the plaintiffs no equity to call upon the Court for relief? It is alleged that all of the plaintiffs, except Walter F. Morton, are infants. We cannot think that if the plaintiffs establish these allegations they are without remedy in a court of equity. If Blades wished to purchase the land at a foreclosure sale, and, for that purpose, entered into an agreement with the administrator, whose duty it was to protect the estate, to procure an assignment of the note and mortgage and sell the land at much less than its true value, it would at least behoove the defendant company, taking "with full notice of all the facts," as alleged, to show that there was absolute fairness in the transaction. It will be observed that the complaint alleges that on 25 June, 1901, the administrator paid only $160 for the note and on 11 November, 1901, sold the land for $350. The administrator files no answer. The plaintiffs were entitled to proceed to try the issues raised by the pleadings. The judgment of nonsuit must be set aside, to the end that the parties may take such further action as they may be advised. It is so ordered.

Reversed.

*Cited: S. c.,* 152 N. C., 55; 154 N. C., 340; *Jones v. Williams,* 155 N. C., 191; *Weil v. Davis,* 168 N. C., 302; *Parrott v. Hardesty,* 169 N. C., 669.

CHARLES Q. BAKER v. N. AND S. RAILROAD COMPANY.

(Filed 26 February, 1907.)

1. **Railroads—Negligence—Evidence—Counsel's Statement of Pertinency.**

When it is contended in defense to an action for negligence, that the horse hitched to a conveyance containing the plaintiff was standing near the railroad track, apparently under control of the driver, but became unruly and got upon the track too late for the observant engineer of an approaching train to avoid the injury, which contention is disputed, it is error for the court below to exclude an answer to an appropriate question, when it is stated by the defendant's counsel to be for the purpose of showing that the plaintiff had said to the witness that the horse had stopped near the crossing, though the answer would be cumulative to testimony previously given by one who had heard the conversation, the testimony proposed to be elicited being an admission of the plaintiff himself, and therefore naturally stronger than that of the other witnesses.

2. **Special Instructions—Facts Reasonably Assumed from Evidence.**

It is the duty of the trial judge to give a requested prayer for special instruction, which is correct in itself, material to the case, and based upon certain phases of facts reasonably assumed upon the evidence; and a general and abstract charge of the law applicable to the case is not sufficient. The error is not cured by giving such requested charge upon an unanswered issue concerning which the instruction was not asked.

3. **Imputed Negligence.**

The doctrine of imputed negligence does not apply to one who is in a conveyance as a guest of another, and who is not driving at the time or in charge of the conveyance.

APPEAL from *McNeill, J.*, and a jury, Fall Term, 1906, of ( 37 ) PASQUOTANK.

This action was brought to recover damages for injuries received at a railroad crossing, which plaintiff alleges were caused by the negligence of the defendant in the management of one of its trains. The plaintiff and Bud Mann were riding in a buggy with Cecil Williams, who was driving. The horse and buggy belonged to Cecil's father. The three occupants of the buggy were all boys about 15 years old. They drove over the crossing to a cotton mill in Elizabeth City to collect their wages, and finding that they could not get their money at that time, they drove back, intending to hitch the horse to a tree on the other side of the track, and when they had reached the crossing the horse became frightened at the whistle of the engine, which was blown about that time, and backed on or very near the track, so that he could not be driven across.

When the train came in full view of the crossing it was about ( 38 ) one-quarter of a mile away, and the dangerous position of the plaintiff and his companions could easily have been seen by the engineer. The engine struck the buggy and killed Cecil Williams and Bud Mann,

and severely injured the plaintiff. This was plaintiff's version of the facts.

The defendant alleged that when the boys got in the buggy at the mill, Cecil Williams said that he intended to drive to the crossing and stop so as to "gentle" his horse, and that he did drive to the crossing and stop his horse very near the track. That the horse was standing there apparently under control of the driver when it was first seen by the engineer, and that when the train had approached too near the crossing to be stopped before reaching it, the horse became unruly and got upon the crossing. That immediately the fireman notified the engineer, and he reversed the engine and did all that could be done to stop the train, but failed to do so, as it was too near the crossing when the danger was first discovered, to be stopped in time to avoid a collision with the buggy.

There was evidence to sustain each of these contentions. The defendant had introduced a witness, M. H. Snowden, who testified that he heard a conversation between plaintiff and F. L. Garrett a few months after the accident, in which the former stated that Cecil Williams said when they left the mill that he would drive to the crossing and stop there to "gentle" his horse, and that he did drive there and stop. The fireman testified that the horse was standing at the crossing when last seen by him before the engine was reversed. The defendant proposed to prove by F. L. Garrett what the plaintiff had said to him in that conversation as to "why the horse was driven up close to the track." The testi-
( 39 ) mony was offered in order to show that the horse had stopped on reaching the crossing, and to corroborate the fireman, who testified that the horse was standing there when last seen by him before the engine was reversed. This evidence was excluded by the court. There was testimony to the effect that the engineer applied the brakes as soon as he saw the horse and buggy approaching the crossing, and when the horse stopped near the crossing, and appeared to be under control, he released the brakes and the train continued at its former speed, that is, 50 miles an hour, until the engineer was notified by the fireman of the danger, and reversed the engine. He could not see the horse and buggy when he was told by the fireman of the danger, as the boiler of the engine obstructed his view, he being on the right-hand side of the cab.

The defendant requested the court to charge the jury that if the engineer applied the brakes when he first saw the horse and buggy approach the crossing, and then released them when the horse stopped and stood near the crossing, apparently under the control of the driver, and the horse did not start to cross the track until it was too late to stop the train and prevent the collision, and the engineer then did all that could be done to stop the train, the defendant was not guilty of any negligence, and they should so find. The court did charge, at the defendant's re-

quest, that "If the horse was stopped before he reached the track, and appeared to be under control, defendant was not required to stop the engine or slacken the speed because of the presence of the buggy and horse, and was not guilty of negligence in failing to do so on that account, and the jury shall so find." Issues as to negligence, contributory negligence, the last clear chance and damages were submitted to the jury.

The substance of the instruction which was requested by the ( 40 ) plaintiff upon the first issue, as to the defendant's negligence, and refused by the court, as to that issue, was given upon the third issue, as to the last clear chance. The court charged generally that if the engineer failed to exercise ordinary care in approaching the crossing after he saw the position of the horse and buggy, and this caused the collision, the jury should answer the first issue "Yes"; otherwise, they should answer it "No." The jury, answering the first issue, found that the plaintiff was injured by the negligence of the defendant, and in answer to the second issue, that there was no contributory negligence. They assessed the damages, but did not answer the third issue. Defendant's motion for a new trial was overruled, and judgment entered for the plaintiff, from which the defendant appealed.

*Aydlett & Ehringhaus and J. B. Leigh for plaintiff.*

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

WALKER, J., after stating the case: The defendant asked the witness Garrett, "What was said by the plaintiff, in the conversation with him, as to why the horse was driven close to the track?" If the defendant's counsel had not indicated what they expected to elicit from the witness by this question, the ruling of the court excluding it might perhaps be sustained upon the principle that the competency and materiality of proposed testimony, which is ruled out, must appear before we can see that any error has been committed by the court. *Knight v. Killebrew,* 86 N. C., 400; *Sumner v. Candler,* 92 N. C., 634; *S. v. McNair,* 93 N. C., 628; *S. v. Skidmore,* 109 N. C., 795; *S. v. Dula,* 61 N. C., 437. But here the defendant's counsel stated, as the record afterwards shows, that the question was asked for the purpose of showing that the horse and buggy were stopped at the crossing, as contended by the defendant and testified by the fireman, it appearing by the previous ( 41 ) testimony of the witness Snowden, who heard the conversation between the plaintiff and Garrett, that the former had so stated in that conversation. Even if the evidence was merely cumulative to that of Snowden, it was nevertheless competent and relevant, and being that of the witness who himself had the conversation with the plaintiff, it was perhaps entitled to greater weight and would receive more consideration from the jury than that of Snowden. The prior testimony of Snowden

clearly shows its relevancy, even if the statement of counsel as to what they expected to prove was not in itself sufficient for that purpose. The offer of proof included not only the declaration of Cecil Williams, *in via*, as to where he was going, which was part of the *res gestæ* (*S. v. Dula, supra*), but the further fact that he actually stopped at the crossing. We were not told why the evidence was excluded. It was not hearsay, and being otherwise competent and material, because it tended to sustain the defendant's theory as to how the injury was caused, it should have been admitted.

The general charge of the court in respect to the degree of care required of the defendant's servant in approaching the crossing with the train would perhaps have been fully sufficient in the absence of any request for more specific instructions. *Boon v. Murphy,* 108 N. C., 187; *S. v. Jackson,* 13 N. C., 563; *Patterson v. Mills,* 121 N. C., 258; *Cowles v. Lovin,* 135 N. C., 488; *Yow v. Hamilton,* 136 N. C., 357. It is also true that the court is not obliged to adopt the very words of an instruction asked to be given, provided in responding to the prayer it does not change the sense or so qualify the instruction as to weaken its force.

*Brink v. Black,* 77 N. C., 59; *Chaffin v. Manufacturing Co.,* 135
( 42 ) N. C., 95. These are rules which are observed in all appellate courts. But it is an equally well established rule that if a request is made for a specific instruction, which is correct in itself and supported by evidence, the court, while not required to adopt the precise language of the prayer, must give the instruction, at least in substance, and a mere general and abstract charge as to the law of the case will not be considered a sufficient compliance with this rule of law. *Knight v. R. R.,* 110 N. C., 58; *Chesson v. Lumber Co.,* 118 N. C., 59; *S. v. Dunlop,* 65 N. C., 288; *Young v. Construction Co.,* 109 N. C., 618. We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case, unless it was specially requested so to do. *Simmons v. Davenport,* 140 N. C., 407. It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer. We have so distinctly held recently in *Horne v. Power Co.,* 141 N. C., at p. 58, in which *Justice Connor,* speaking for the Court and quoting with approval from *S. v. Dunlop,* 65 N. C., 288, says: "Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state

of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence."

Whether the horse and buggy were on the crossing, and the dangerous situation of the plaintiff and his companions was observed or could have been discovered by the engineer, when the engine first ( 43 ) came in view, so that it could have been stopped in time to prevent the collision; or whether when first seen by the engineer the horse was standing near the crossing, apparently under the control of its driver, and continued in that position until it was too late for the train to be stopped before reaching the crossing (*Markham v. R. R.*, 119 N. C., 715), were the two alternative phases presented by the evidence, and the defendant had the right by a special instruction to require the court to direct the attention of the jury to the theory upon which it relied, provided it was supported by evidence, and we think it was. The court should, in response to the prayer, have instructed the jury specially as to the law arising upon the recited facts, if they should find them to exist, and in refusing to do so there was error. *Savage v. Davis*, 131 N. C., 159. The fact that the court gave the instruction on the third issue did not cure the error in refusing it on the first, as the jury did not answer the third issue at all, having found that there was no contributory negligence. The instruction on the third issue, therefore, was of no avail to the defendant, and its liabiilty was left to depend solely upon the response to the first issue, without any definite instruction as to proximate cause or the last clear chance having reference to the special facts of the case.

It is unnecessary to consider the remaining questions, as they may not again be presented. It may be said, though, upon the issue as to contributory negligence, that if the act of Cecil Williams in driving to a point near the crossing for the purpose of "gentling" his horse was negligence on his part, it cannot be imputed to the plaintiff, who was merely riding with him in the buggy as his guest, and unless the plaintiff was otherwise negligent, the finding of the jury on the second issue was correct. The doctrine of imputed negligence is so ably ( 44 ) and exhaustively discussed by *Justice Douglas* in *Duval v. R. R.*, 134 N. C., 331, a case much like this one, that we are satisfied simply to refer to that case without further comment.

There must be another trial because of the errors above pointed out.

New trial.

*Cited: Patterson v. Lumber Co.*, 145 N. C., 45; *Stout v. Turnpike Co.*, 157 N. C., 368; *Kearney v. R. R.*, 158 N. C., 554; *Shepherd v. R. R.*, 163 N. C., 522; *Irvin v. R. R.*, 164 N. C., 18; *Marcom v. R. R.*, 165 N. C., 260; *Smith v. Tel. Co.*, 167 N. C., 256; *Lloyd v. Bowen*, 170 N. C., 219; *Hunt v. R. R., ib.*, 444; *Coal Co. v. Fain*, 171 N. C., 647.

SOPHIE SCOTT ET AL. v. BLADES LUMBER COMPANY.

(Filed 26 February, 1907.)

1. **Statute of Limitations—Principal.**

The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the power of sale contained in the mortgage may be exercised within ten years after the maturity of the principal.

2. **Statute of Limitations—Power of Sale Optional Upon Default of Interest.**

The statute of limitations does not begin to run upon default in payment of annual interest upon the principal, when the power of sale contained in the mortgage is optional with the mortgagee upon default of either interest or principal of the debt.

3. **Executors—Sale Under Mortgage Contract—Designated by the Will.**

When a power of sale in a mortgage is given to the mortgagee, "his executors," etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of the statute and the contract in the mortgage.

4. **Foreign Executors—Attempted Conveyance—Assignment of Debt.**

A deed to real property made by foreign executors by virtue of authority in the will is void in North Carolina unless the executors qualify here, and operates only as an assignment of the debt and security, and not as a conveyance of the land.

5. **Foreign Executors—Deed—Subsequent Qualification.**

A deed made by foreign executors to purchasers at a sale under the power of sale in a mortgage is an execution of the contract in the mortgage, and the subsequent probate of the will in the county wherein the lands lie, relates back to the time of and validates such deed, when there are no intervening rights of third persons.

(45) ACTION, tried before *Shaw, J.*, and a jury, November Term, 1906, of CRAVEN. Upon intimation of the court that he would charge the jury to answer the issues in favor of the defendant, if they believed the evidence, the plaintiff submitted to a nonsuit and appealed.

*W. D. McIver for plaintiff.*

*W. W. Clark and Moore & Dunn for defendant.*

CLARK, C. J. Stephen Scott, in June and July, 1888, executed to P. M. Barber two mortgages falling due five years thereafter, with power of sale in Barber, "his executors and assigns," upon default. Barber died domiciled in Pennsylvania in 1891, leaving a will appointing executors also residing in that State, where the will was proved, and the executors qualified there. They have never qualified nor taken out letters in this State, and the will was not proved or recorded here until after the commencement of this action. The executors, on 23 Novem-

ber, 1896, executed a deed for the mortgaged premises and assigned the mortgages also to the Clark Lumber Company. In 1899 the executors sold the property, after due advertisement, under the power of sale, and conveyed the same to the purchaser, the Blades Lumber Company, the defendant herein.

This is an action by the plaintiffs, the heirs at law and widow of Stephen Scott, who have remained in possession, against the Blades Lumber Company, to recover damages for conversion of timber on said tract.

The plaintiff contends: ( 46 )

(1) "That ten years having expired since the first year's interest on the mortgage fell due, July, 1889, the power of sale is extinguished by the lapse of time." The principal of the mortgage did not fall due till July, 1893, and the sale was in December, 1899. The power having been exercised within the ten years thereafter, the legal proposition does not arise. It is true there was also power of sale for default in payment of annual interest, but it does not appear that there was such default, and if shown, the sale being optional, there could be no foundation for the running of the statute till 1893, independent of the ruling in *Menzel v. Hinton*, 132 N. C., 660 (since changed by Revisal, 1044), that there is no limitation as to power of sale.

(2) "That the conveyance by the executors to the Clark Lumber Company in 1896 deprived the executors of all right to sell under the power of sale." But the foreign executors could not sell and convey real estate in this State by any authority in the will, unless they had qualified here. Revisal, secs. 5 (2) and 28 (1). 18 Cyc., 1231. Their deed to Clark Lumber Company in its effect was nothing more than an assignment of the debt and mortgage. The power of sale remained in them. A sale under such power is not under the authority of the will, but by virtue of the contract in the mortgage. If the proceeds of sale under the foreclosure have not been paid over to the assignees, that does not affect the title conveyed by the deeds to the purchasers at said sale, nor would that concern the plaintiffs.

(3) "That the executors not having qualified in this State, and the will not having been proved or recorded here till after the sale under the power of sale, such sale was unauthorized and void." The power of sale is contractual, and the executors of the mortgagee are designated in the power of sale. The executors named in the will take by virtue of the contract; they are simply designated and pointed out by the will. They derive no power or authority from the will; hence, a for- ( 47 ) eign executor can execute such power without qualifying here. 18 Cyc., 1232; 13 A. & E. (2 Ed.), 918; 28 A. & E. (2 Ed.), 774. It is necessary, however, that the will should be proved and recorded in

this State, where the land lies, but such probate may be made after the conveyance and will relate back and validate it, provided no rights of third parties have intervened. 18 Cyc., 1232, and cases cited. If the power had not been conferred upon the executors by the terms of the power of sale, they could still have exercised the power by virtue of Revisal, 1031, as an incident to the contract.

In instructing the jury to answer the issues in favor of the defendant, there was

No error.

*Cited: Hall v. R. R.,* 146 N. C., 346; *Glascock v. Gray,* 148 N. C., 349; *Bank v. Pancake,* 172 N. C., 514.

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RICHARD I. SMITH v. AYDEN LUMBER COMPANY.

(Filed 26 February, 1907.)

1. **Conveyance—Real Property—Probate Officer an Employee.**

A proper officer to take acknowledgment of grantors and privy examination of married women to conveyances of land is not disqualified to act therein when he is an employee of the grantee, without any interest in the land conveyed.

2. **Deeds—Sufficient Registration—Notice.**

The registration of a deed showing the probate, including the separate examination of the wife, and the order of registration, and the names of the grantors, but omitting a copy of their signatures at the end of the instrument, is sufficient notice under section 980, Revisal 1905.

3. **Registration—Notice—Duty of Grantors.**

When the register of deeds receives from the grantors a deed for registration, the filing for registration is sufficient notice under section 980, Revisal 1905, and the duty of the grantors respecting such registration is at an end.

( 48 ) MOTION to dissolve restraining order, heard at chambers before *Shaw, J.,* at Snow Hill, GREENE County, 4 December, 1906. The motion was allowed, and plaintiff appealed.

*J. L. Fleming and Skinner & Whedbee for plaintiff.*
*Jarvis & Blow, F. C. Harding, and L. I. Moore for defendant.*

CLARK, C. J. Two questions are presented by this appeal:

1. Is the deed under which the defendant claims void because the acknowledgment of the grantor and privy examination of his wife were

taken before a notary public who was an employee of the grantee? It is true that a deed cannot be acknowledged before nor the privy examination of a *feme covert* be taken by an officer who has any interest in such conveyance either as a party, trustee, or *cestui que trust,* and the registration upon such certificate would be invalid and not even notice to creditors and subsequent purchasers. *Long v. Crews,* 113 N. C., 256; *Lance v. Tainter,* 137 N. C., 249. But here there is no evidence that the notary public who took the acknowledgment of grantors and privy examination of the *feme covert* had any interest whatever in the property or the conveyance. There is no complaint from the grantors nor any allegation or proof of wrongdoing. The notary public happened to be an employee of the grantee. It is often the case that a notary public is clerk in a bank, but this does not disqualify him from taking acknowledgment of papers executed by or to the bank. That the officer, here a notary public, is not disqualified by reason of being an employee of the grantee, without any interest in the property, is held in *Bank v. Ireland,* 122 N. C., 576.

2. Was the deed duly recorded according to law so as to be sufficient notice under Revisal, sec. 980? The only irregularity alleged is the failure of the register to copy upon his record, at the end of the copy, the names of the grantor and wife. In every other respect ( 49 ) the deed was accurately transcribed on the record, including the probate and order of registration. These last recited the names of the grantors and the proof and adjudication that they had duly signed and delivered said deed and acknowledged their signatures, and also the privy examination of the wife. In the body of the deed as registered the names of the grantors are set out. This was full notice. *Heath v. Cotton Mills,* 115 N. C., 208. Any reasonable man must have seen that the failure to copy the signatures at the end was a mere inadvertence. If there was any doubt on the point, there was sufficient notice, surely, to put the plaintiff upon inquiry. Besides, when the grantee delivered his deed, properly executed, acknowledged, and probated, to the recording officer, his duty was done. It was not his duty to supervise the copying by the register of deeds. The filing for registration is itself constructive notice. This is fully discussed and decided in *Davis v. Whitaker,* 114 N. C., 280, where it is said, quoting from *Parker v. Scott,* 64 N. C., 118: "In contemplation of law the deed in trust was duly registered from the time of its delivery to the register, and from that time was good against creditors," and this principle is there applied to deeds under Code, sec. 3654, now Revisal, sec. 2658. In *Cunninggim v. Peterson,* 109 N. C., 33, the register declined to receive the deed for registration till his fees were paid, and it was held that the grantee leaving the deed in the office was "not filing for registration."

In *Heath v. Cotton Mills,* 115 N. C., 208, it was held that where the record represents on its face, as by recitals or otherwise, that the instrument was sealed and, in fact, it was duly sealed, the record is valid and sufficient as notice, though it does not show a copy of the
( 50 ) seal or any device representing it. This ruling was quoted and approved in *Strain v. Fitzgerald,* 130 N. C., 601 (on the rehearing). The same reasoning applies here, where the deed recites the name of grantors and the probate recites the acknowledgment of signatures, which were really appended, but were left off by the register of deeds in copying the deed upon his records. Such mere clerical errors do not make void the legal effect of the registration. *Royster v. Lane,* 118 N. C., 156.

The order vacating the restraining order is

Affirmed.

*Cited: Brown v. Hutchinson,* 155 N. C., 211; *Hopkins v. Lumber Co.,* 162 N. C., 534; *S. v. Knight,* 169 N. C., 339.

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BEAUFORT LUMBER COMPANY v. JOHN B. PRICE ET AL.

(Filed 26 February, 1907.)

1. **Quit-claim Deed—Interest Passed.**

Giving a quit-claim deed is no assertion of title, but a conveyance only of such interest as the maker has in the subject-matter.

2. **Quit-claim Deed—Estoppel in Pais.**

A quit-claim deed for land reciting an invalid tax deed as the source of title, made by the attorney of plaintiff to the defendant, the plaintiff receiving the consideration, is not an equitable *estoppel in pais,* and the plaintiff may assert its rights under a registered deed therefor to the timber growing upon the land.

MOTION by defendants to dissolve injunction, heard by *Shaw, J.,* at October Term, 1906, of CRAVEN. The motion was granted, and plaintiff appealed.

The plaintiff company seeks to enjoin the defendants from cutting and removing timber from the land described in the complaint, alleging ownership, etc. Defendants, denying that plaintiff is the owner, aver that they are the owners of said lands, and allege that plaintiff
( 51 ) threatens to cut and remove timber, etc. The court, by consent, found the following facts:

That on 1 June, 1899, one Boyd and his infant children were the owners of the land in controversy, and that the same was listed in Craven County for taxes for the year 1899.

That on 26 October, 1899, for the sum of $100 and the costs of the special proceeding instituted for the purpose, the timber on said land was sold and conveyed to the plaintiff by deed registered on 26 October, 1899.

That on 5 June, 1900, said land was sold for taxes for the year 1899 by the sheriff of Craven County.

That R. A. Nunn, attorney at law, representing the Beaufort County Lumber Company, purchased the land at said tax sale to protect the timber rights of the plaintiff.

That on 30 January, 1903, the sheriff of Craven County executed a tax deed for said land to said R. A. Nunn.

That R. A. Nunn, as attorney as aforesaid, on 30 January, 1903, for $25, executed and delivered to the defendants a quit-claim deed for his interest in the property, and that said sum was turned over to the plaintiff.

Judgment was rendered for defendants, and plaintiff appealed.

*Simmons, Ward & Allen and Moore & Dunn for plaintiff.*
*W. W. Clark and H. C. Whitehurst for defendant.*

CONNOR, J., after stating the case: It is conceded that, by purchasing the standing timber subsequent to the listing of the land for taxation, the plaintiff company took title subject to the lien acquired by the State. It follows, therefore, that the purchaser at the sale by the sheriff for taxes would, if the law had been complied with, have acquired a good title to the land, including the standing timber. It is also conceded that more than two years having elapsed between the day ( 52 ) of the sale, 25 June, 1901, and the date of the deed, 30 January, 1903, Mr. Nunn acquired no title to either the land or timber. It is expressly provided by sec. 66, ch. 16, Laws 1899, that the purchaser at a tax sale may, within one year from the date of such sale, call for a deed, and by section 83, that if he shall fail within two years from said sale to demand a deed or institute a suit for foreclosure, the certificate "shall cease to be valid." Revisal 1905, sec. 2905.

The title of Boyd and his children to the land of the plaintiff corporation to the timber was, therefore, not impaired, nor in any manner affected, by the tax sale or the deed made pursuant thereto. Neither of them have executed any deed or paper-writing parting with the title. It is insisted that, as against the defendants, the plaintiff, by the execution of the deed by Mr. Nunn, has lost its title to the timber. It never having had any title to the land, the controversy is limited to the title to the timber.

Defendants, conceding that Mr. Nunn's deed was invalid, and that no interest, right, or title passed by it, contend that because of its execution by him in the light of the facts found by the court, the plaintiff has, by way of estoppel, lost its title, and that it has passed to and vested in them, or at least that plaintiffs are precluded from claiming it.

It is elementary learning that among the other methods by which title to land may pass is that of estoppel. There is porbably no doctrine of the law which has received more careful and anxious study, or given the courts more concern in its application, than that of estoppel. *Chief Justice Pearson,* in an opinion evincing much thought and research, says: "According to my *Lord Coke,* an estoppel is that which concludes and shuts a man's mouth from speaking the truth. With this for-
( 53 ) bidding introduction, a principle is announced which lies at the foundation of all fair dealing between man and man, and without which it would be impossible to administer law as a system." *Armfield v. Moore,* 44 N. C., 157.

The deed made by Mr. Nunn to defendants contains no words of conveyance, but is carefully restricted to apt words of release, "remise, release, and quit-claim." Out of abundant caution he confines the deed to "all estate, right, title, interest," etc., which he has in or to the premises. In this respect it essentially differs from the language of the deed in *Richardson v. Levi,* 74 Texas, 359, cited by defendants. The deed contains no warranty of title. The distinction, in respect to estoppel upon the grantor, between conveyances in which it appears from the language used that the grantor, either expressly or impliedly, asserts that he is the owner of the land, and those in which he in the same way indicates that he is conveying only such interest as he may have, is clearly pointed out by *Mr. Justice Walker* in *Hallyburton v. Slagle,* 132 N. C., 947. It is elementary learning that a quit-claim deed operates only as a release of such interest as the maker has, or as may be specifically named. It is for this reason that no estoppel grows out of such a. deed. Nothing in respect to the maker's interest is asserted. The very terms of the deed puts the purchaser upon notice that he is buying a doubtful title. "In form, a quit-claim deed is like the common-law release—a derivative or secondary common-law form. In substance, it is similar to an original common-law deed creating an estate, and not requiring for its operation any estate in possession or otherwise in the grantee. In effect, it transfers to the grantee whatever interest the grantor has in the property described, be it a fee, chattel interest, a mere license, or nothing at all." 9 A. and E., 104. It implies a
( 54 ) doubtful title in the party executing it. *Kerr v. Freeman,* 33 Miss., 292. For this reason, subsequently acquired interests do not pass. *McAllister v. Devane,* 76 N. C., 57; *Carson v. Carson,* 122 N. C., 645.

The learned counsel for defendants concedes that if the Court is of the opinion the deed from Nunn is a quit-claim, no estoppel, by deed, accrues against the plaintiff. He insists, however, that upon the facts found by the court, an *estoppel in pais,* sometimes called an equitable estoppel, precludes the plaintiff from asserting title against defendants. In *Devereux v. Burgwyn,* 40 N. C., 351, *Pearson, J.,* says: "A right can only be given up by the consent of the party, evidenced by a release. A right can only be lost or forfeited by such conduct as would make it fraudulent and against conscience to assert it. If one acts in such a manner as *intentionally* to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages. If one stands by or allows another to buy property to which he has the title, he will not, on account of this fraud, be permitted, in a court of equity, to assert his right." The doctrine has been asserted and applied in many cases by this Court. In *Saunderson v. Ballance,* 55 N. C., 322, the defendant was present and heard the purchaser inquire of the former owner whether the title was good, and heard the reply that it was, he saying nothing. The purchaser by such statement was induced to purchase the land "at a full and fair price." *Judge Battle* says: "There can be no doubt that the trustee thought he was selling an undisputed fee simple in the whole tract of land, *and the bidders were laboring under the same impression.*" Defendant was held to be estopped.

In *Mason v. Williams,* 53 N. C., 478, *Judge Battle,* after dis- ( 55 ) cussing the authorities, says: "When a person purchases a chattel from another who is not the owner, and it is admitted by the parties, or found by the jury *as a fact,* that the purchaser was induced to make the purchase by the declarations or acts of the true owner, the latter will be estopped from impeaching the transaction." In that case there was a "case agreed," with a provision that the court should instruct the jury upon the law. His Honor, being of opinion that plaintiff was estopped, charged the jury to find for the defendant. The learned justice said: "If, then, in the present case, it had been stated as an agreed *fact* that the defendant purchased the steam engine from Pescud in consequence of what the plaintiff told Pescud, or in consequence of the conduct of the plaintiff at the time of the sale, we should say that the latter could not recover. That fact cannot, however, be inferred by the court from anything stated in the case agreed, and it must be left as a question for the jury." The cause was tried at a succeeding term of the Superior Court, and again came to this Court. It is reported in 66 N. C., 564. The judge submitted the question to the jury upon instructions in ac-

cordance with the opinion. From a verdict for defendant, plaintiff again appealed. The entire question was reargued by eminent counsel, and a majority of the Court held that, as the fact was found by the jury that defendant was induced to make the purchase by the declaration or acts of the plaintiff, he was estopped. The case is thus made to turn upon the fact that he was induced to buy by the conduct of plaintiff. *Pearson, C. J.,* filed a vigorous dissenting opinion, insisting that, upon all of the evidence, there was no estoppel, in which *Justice Dick* concurred and *Justice Boyden* "concurred in the principles set out." In *Holmes v. Crowell,* 73 N. C., 613, *Reade, J.,* said: "In order to
( 56 ) create an *estoppel in pais,* it must appear: (1) That defendant (party sought to be estopped) knew of his title. (2) That plaintiffs did not know, and relied upon the defendant's representations. (3) That plaintiffs were deceived." This definition is in exact accord with Bigelow on Estoppel (5 Ed.), 570. Bispham Eq., sec. 289. "The party setting up the estoppel must actually be deceived by the conduct of the other party," citing *Patterson v. Lyth,* 11 Pa., 53. "The principle runs through the whole doctrine of estoppel, that a man is only prevented from alleging the truth when his assertion of a falsehood or his silence has been the inducement to action by the other party." Mr. Pomeroy, after a most exhaustive discussion of the doctrine, says: "Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, actions, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that, so relying upon it and induced by it, he should take some action. The cases all agree that there can be no estoppel unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action." Bispham Eq., sec. 811; *Sumner v. Seaton,* 47 N. J. Eq., 103. See, also, *Sherrill v. Sherrill,* 73 N. C., 8; *Humphreys v. Finch,* 97 N. C., 303. The party claiming by estoppel must not only show conduct which was calculated to mislead, but must show affirmatively that he has relied upon the conduct of the party against whom he invokes the doctrine. *Drouin v. R. R.,* 74 Vt., 343; 16 Cyc., 744.

The defendant's claim is based upon the fact that Nunn, representing the plaintiff, purchased the land at the tax sale to protect the timber interest. That he afterwards executed the quit-claim deed, re-
( 57 ) leasing, in consideration of $25, all of his right, title, and interest, and that he afterwards paid the amount to plaintiff.

Assuming, for the purpose of the argument, that Nunn was acting throughout the transaction as the agent of plaintiff, we fail to discover any act on his part working an *estoppel in pais* against plaintiff. There

is nothing in the quit-claim deed asserting any ownership of the land or timber by the plaintiff or himself. In the most unmistakable terms he confines his deed to a conveyance of *his* interest. He sets out his title by referring to the deed under which he claims "being the same land sold on 5 June, 1900, by the sheriff of Craven County, N. C., to R. A. Nunn, as property listed by Jesse Boyd, as per tax list 1899." It is impossible to find in this language any representation of title other than that derived from the tax sale. The court does not find as a fact, nor is there any finding from which such fact can be inferred, that Nunn was authorized to make the deed, or that any officer or agent of plaintiff made any statement, or by his presence, at the time of the execution of the deed, did any act or was in a position requiring him to speak, which could mislead defendants. Nunn made no statement, either in the deed or otherwise, calculated to mislead the defendants. On the contrary, he expressly directs their attention to the source of his title and recites that he is releasing only such interest as he has.

It appears that the plaintiff company gave, in 1899, more than $100 for the standing timber, and it is admitted in the pleadings that it is now worth that sum, whereas the defendants paid Nunn but $25 for his quit-claim deed for 100 acres of land. This, in the light of the other facts found, is entirely consistent with the conclusion that defendants were, for the inconsiderable sum of 25 cents per acre, taking chances on a tax title. This inference is strengthened by the fact ( 58 ) that Nunn got his deed from the sheriff on the same day on which he made deed to defendants. It does not appear from the finding of the court that defendants knew that Nunn was the attorney for plaintiff or that he had purchased at the tax sale to protect the title to the timber. In the absence of such finding, we do not perceive how defendants could have supposed they were buying the plaintiff's title to the timber. So far as appears, defendants did not know that plaintiff owned the timber. If, for the purpose of this discussion, they be fixed with notice by the registration of the timber deed, they must be understood as purchasing Nunn's title with notice that plaintiffs claimed the timber, which is very far from showing that they supposed they were getting plaintiff's title thereto. If they did not know that Nunn was representing plaintiff, how could they have been induced by his deed to suppose that they were acquiring plaintiff's property? When one claims to have acquired title by estoppel, the burden of proof is upon him to show the facts out of which the alleged estoppel grows.

The case, as stated by his Honor, comes to this: The land belonged to Boyd and his children, the timber to the plaintiff Nunn, who, we will assume, supposing that he had a tax title, sells and executes a quit-claim deed to defendants for such interest or title as he has. He purchased

at the tax sale, for the benefit of plaintiff, which fact does not appear to have been known to defendants. We are unable to see how any element of an equitable estoppel appears in the transaction. If Nunn had acquired title under his deed from the sheriff, defendants would have taken it and plaintiff would have lost the timber, not by way of estoppel, but because the lien of the State for tax assessed was prior to the plaintiff's deed. Nunn, having acquired no title and not representing
( 59 ) that he had any, and no one else having, either by words, conduct, or silence, made any representation that was untrue, there can be no *estoppel in pais*. The fact that Nunn "turned over" the $25 to plaintiffs is entirely consistent with the other facts. Presuming, as it is fair to do, that he stated to plaintiff at the time of doing so that he had, in consideration of the amount, executed to defendants a quitclaim deed for his interest in the land, why should the acceptance of it have the effect of passing plaintiff's interest in the timber? By accepting the money, plaintiff undoubtedly ratified Nunn's act—the sale of *his* interest in the land—which was all that he had undertaken to convey. After accepting the money, plaintiff was estopped from disavowing Nunn's act—nothing more.

The only relief asked in the complaint is an injunction restraining defendants from cutting and removing timber. His Honor, upon the trial, dissolved the restraining order and adjudged that defendants "go without day," etc. Pending the appeal, there is no injunction restraining defendants from cutting the timber.

It should be certified to the court below that in dissolving the restraining order there was error. Plaintiffs may, if so advised, move the judge having jurisdiction for a restraining order until the regular term, when such proceeding may be had in accordance with this decision as may be necessary to protect the rights of the parties. *R. R. v. Olive,* 142 N. C., 257.

Reversed.

*Cited: Mfg. Co. v. Rosey, post,* 374; *Bryan v. Eason,* 147 N. C., 292; *Abernathy v. R. R.,* 150 N. C., 107; *Coble v. Barringer,* 171 N. C., 450.

( 60 )

JOHN C. GREEN v. E. E. WILLIAMS.

(Filed 26 February, 1907.)

**1. Processioning — Controversy, Real — Title Involved — Ejectment — Sufficiency of Petition.**

When the petition and answer in a proceeding for processioning show that the controversy is real and that the parties are in possession of the lands, claiming them as their own, concerning which the boundary line is in dispute, it is error for the court below to dismiss the proceeding for want of sufficient allegation in the petition, and to try the case as an action of ejectment merely, although the title to land may have become involved incidentally.

**2. Processioning a Matter of Right.**

Where there is a dispute between adjoining proprietors in possession of land as to the true dividing boundary line, either of them, under a proper petition and by regular proceedings, may have, as a matter of right, such line processioned under sections 325 and 326 of Revisal 1905.

**3. Processioning—Evidence Sufficient.**

A map made by the surveyor appointed in the proceedings for processioning put in evidence to support petitioner's contention as to the true line, and the evidence corroborating it, with such matters as tend to show inaccuracies of surveys and measurements, should be submitted to the jury under proper instructions from the court below.

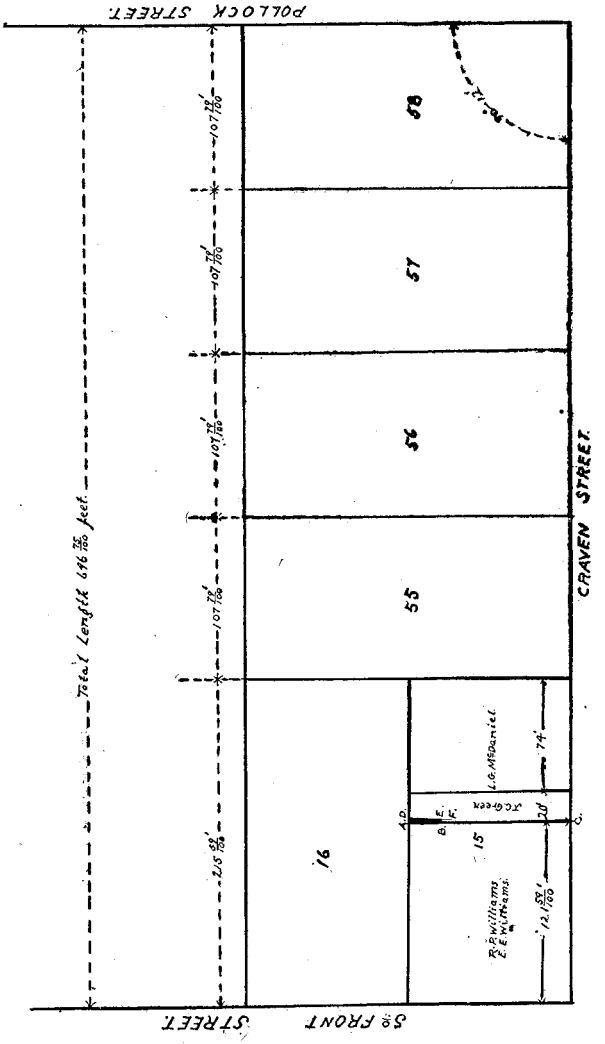
**4. Burden of Proof.**

The burden is upon the petitioner to establish his contention as to the true boundary line.

CIVIL ACTION, tried before *Shaw, J.*, and a jury, at November Term, 1906, of CRAVEN. Judgment for defendant, from which plaintiff appealed.

This is a proceeding for the purpose of having the lands of the petitioner and the defendants processioned and the dividing line separating them ascertained. The case was heard only as to the defendant E. E. Williams, no judgment being prayed as to the other two defendants. The plaintiff alleged that he owned a lot in New Bern, fronting 20 feet on Craven Street and extending back, with that width, 107 feet and 3 inches, and lying between the lot of the defendant E. E. Williams and that of the defendant Daniels, and that the bound- ( 61 ) ary line between his lot and that of Williams is in dispute. The defendant Williams denied the plaintiff's ownership, but admitted his possession of the lot he claims to own. The clerk ordered a survey to be made by A. Cheney, who surveyed the lots and filed a plat showing the true dividing line to be as contended by the plaintiff. ( 62 ) The defendant excepted and appealed.

At the trial in the Superior Court the surveyor was introduced by the plaintiff as a witness, and testified that he started at an established corner at the west intersection of Pollock and Middle streets and meas-




ured along the line of Pollock Street and then along the line of Craven Street, and in that way, and by other methods detailed by him, he located the true line as described in the plat, which agreed with the plaintiff's claim.

H. A. Brown testified that his father, who was city engineer and is now dead, showed him the corner at Pollock and Middle streets.

It is unnecessary to recite more of the evidence, which was quite lengthy. At the close of the testimony the court, on motion of the defendant, dismissed the proceeding, and the plaintiff appealed.

*Moore & Dunn and Ernest M. Green for plaintiff.*
*W. D. McIver for defendant.*

WALKER, J., after stating the case: It is suggested in the brief of the defendant's counsel that the court held the petition insufficient to sustain the proceeding as one for processioning the land, and tried the case as an action of ejectment. We think this view of the matter was erroneous, as the petition states facts sufficient to entitle the petitioner to proceed under sections 325 and 326 of the Revisal (Laws 1893, ch. 22). The petition and the answer clearly show that there is a real and, indeed, a serious dispute between the parties as to the true location of their dividing line.

We are also of the opinion, without reviewing the facts in the ( 63 ) case, that there was sufficient evidence to carry the case to the jury. Where there is to be another trial, it is better not to discuss the merits of the case or to comment upon the testimony further than is necessary to decide that there is some evidence for the consideration of the jury. The testimony of the surveyor, A. Cheney, and of the witness Brown, who is also a surveyor, was of such a character that the jury might reasonably decide therefrom as to the position of the true line dividing the one lot from the other. Whether the witnesses started at the right corner and accurately measured the intervening street lines and city lots, and whether in other respects they proceeded correctly, are questions for the jury to pass upon, under instructions from the court, the burden being upon the plaintiff. *Hill v. Dalton,* 136 N. C., 339.

The entire case is now constituted in the Superior Court by the defendant's appeal, and all controverted matters can be there tried and determined. We forbear to reopen the question as to the method of procedure in such cases, for that matter has recently undergone exhaustive discussion, and the practice, we think, has been settled. *Parker v. Taylor,* 133 N. C., 103; *Hill v. Dalton,* 136 N. C., 339 (*s. c.,* 140 N. C., 9); *Smith v. Johnson,* 137 N. C., 43; *Stanaland v. Rabon,* 140 N. C., 204; *Davis v. Wall,* 142 N. C., 450; and *Woody v. Fountain,* 143 N. C., 66.

Our processioning act is similar in some respects to the "writ of perambulation" at common law, which is sued by consent of *both* parties

when they are in doubt as to the bounds of their respective estates, and is directed to the sheriff, who is commanded to make the "perambulation" with a jury, and to set the bounds and limits between them in certainty. Fitz. Nat. Brev., 133. There it was done by consent of the parties, and when there was no dispute as to the title, and none
( 64 ) as to the right to occupy the adjoining tenements, while with us either of the adjoining proprietors, where a dispute as to the true dividing boundary has arisen, is entitled to have the land processioned, without the other's consent, and even when the question of title may become incidentally involved, and then all controverted matters, where there has been an appeal, are settled by the jury under the guidance of the court.

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

New trial.

*Cited: Brown v. Hutchinson,* 155 N. C., 207; *Whitaker v. Garren,* 167 N. C., 661.

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WALTER CLARK v. PATAPSCO GUANO COMPANY.

(Filed 26 February, 1907.)

1. **Issues—Contentions Preserved.**

When under the issues submitted a party to a suit has a fair chance to develop his case to the jury, and may preserve his defenses under proper requests for special instruction, and the rights of the parties are determined and the judgment supported by the finding, it was not error in the court below to refuse the issues tendered.

2. **Issues Tendered Covered by Charge Under Issues Submitted.**

It is not error in the court below to refuse an issue tendered if, under the issues submitted and under full and correct instructions of the judge below, with proper reference to the evidence, the issues of fact involved are correctly submitted to the jury.

3. **Issues—Pleadings.**

It is not error in the court below to refuse an issue of fact not raised by the pleadings.

4. **Evidence—Sufficiency.**

Evidence that the plaintiff had a dam to prevent the overflow of water from a river upon his land and which never broke until the erection below of a cross-dam by the defendant; that the cross-dam prevented the natural overflow water from the river being carried down a natural flood channel on defendant's land, and that since the erection of the cross-dam

by the defendant the plaintiff's dam had broken three times during freshets on account of ponding water against it, is such open and visible connection between cause and effect as to make it proper to be submitted to the jury, especially as the plaintiff had testified that the first break in his dam was caused by the defendant's cross-dam ponding water back and against it.

**5. Damages—Flood Waters—Servient Tenant.**

A landowner holds his land subject to natural disadvantages as to flood or surface waters, and he is liable to an adjoining owner for such damages as may result proximately from his erecting a dam across the natural flood channel of a river on his own lands, whereby water is ponded upon the lands of such adjoining owner.

**6. Tort Feasors—Liability.**

*Tort feasors* contributing to the same injury are jointly and severally liable, and the one who puts in motion one cause of the injury is liable to the same extent as if it had been the sole cause, the law not undertaking to apportion the liability.

ACTION, tried before *Shaw, J.*, and a jury, at June Term, ( 65 ) 1906, of HALIFAX. From a judgment for plaintiff, defendant appealed.

The plaintiff alleges that he owns and cultivates a tract of land in Halifax County, containing about 1,400 acres and lying on the south side of the Roanoke River, and the defendant owns and cultivates a large tract of land which lies above the plaintiff's and between it and the said river. The plaintiff and those under whom he claims have for many years maintained, on what is now his farm, a dam or embankment, which is parallel with the said river and about one-half mile therefrom, for the purpose of preventing the flooding of the plaintiff's cultivated lands by the waters of the river which overflow its banks in times of high freshets. There is a large bend in said river just opposite the farms of the plaintiff and defendant, the same beginning on defendant's farm, extending out in a north or northeast direction, and ending just below plaintiff's farm. Extending across said bend, from about where it begins on defendant's farm to where it ends below plaintiff's farm, is a wide natural depression, or drain, ranging in width from about 300 yards to a mile, which is the natural course, ( 66 ) or drain, for a large portion of the waters of said river in times of freshets and floods. Said drain runs about parallel to plaintiff's dam, between it and the river, and not only affords room for the spread of the waters of the river, but takes the overflow waters, or the greater part thereof, across said bend and past plaintiff's farm very much more rapidly and quickly than the same could be taken by the course of the river. In 1897 the defendant wrongfully and unlawfully erected a cross-dam from a point on Roanoke River about opposite the lower part

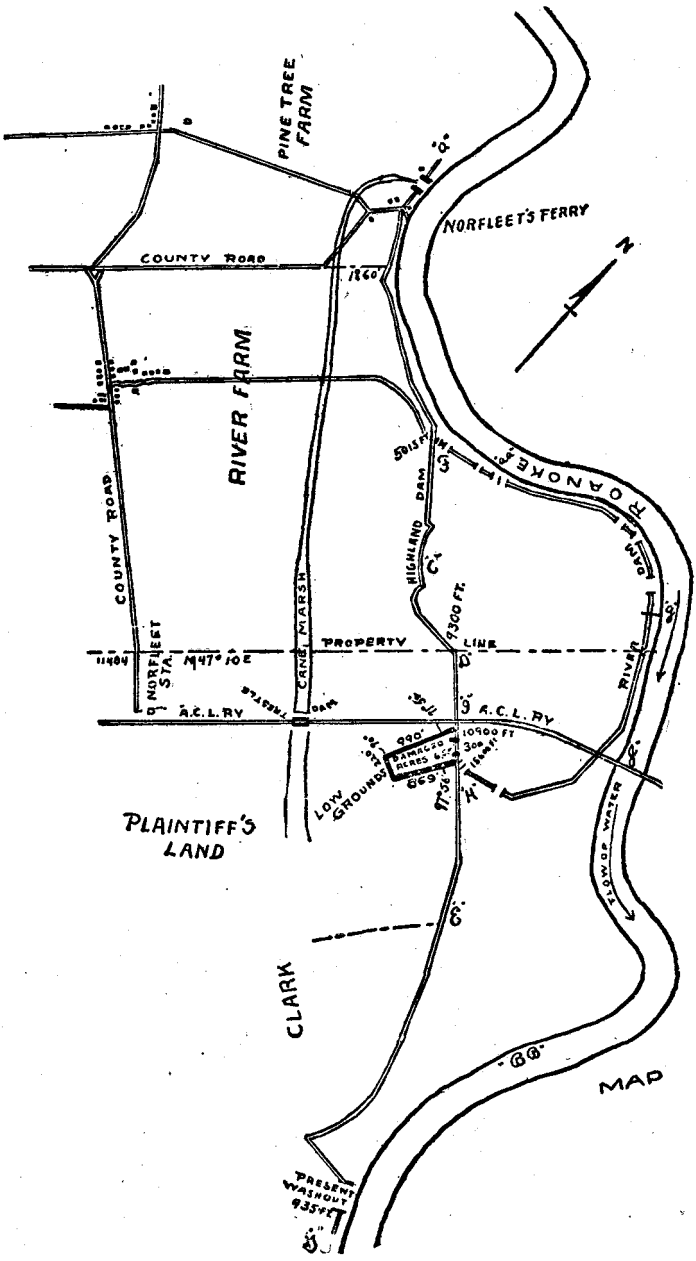
of plaintiff's dam, across said depression or drain, to the plaintiff's dam near its lower end, extending the same over the lands of one W. H. Josey, and for a short distance over the plaintiff's land, and joining it to the plaintiff's dam without plaintiff's consent. Said cross-dam runs at about a right angle to plaintiff's dam, and was made higher and much stronger than his dam. The defendant has ever since wrongfully and unlawfully maintained said cross-dam.

That the defendant wrongfully and unlawfully erected a dam or embankment from the end of said cross-dam next to the river up and along said river to a point some distance above plaintiff's farm, and thence across to the high-land of the defendant's farm, the latter part of said dam being called the "upper dam." The defendant wrongfully and unlawfully maintained said dams until 25 May, 1901.

It is further alleged that the defendant unlawfully and wrongfully obstructed the natural flow of the water in the river and caused the same to pond and collect in larger quantity than it otherwise would have done. It is then alleged that in May, 1901, there was a large freshet in the river, and the defendant's upper dam, by reason of its negligent and faulty construction, gave way, and the waters of
( 68 ) the river were thrown upon the plaintiff's land in much greater volume and with much greater force than would have been the case if the said dam had not been there, and that the lower or cross-dam stopped the flow of the water as it rushed down the said natural drain or depression and caused it to be ponded back on the plaintiff's land and against his dam so that it broke and the water escaped through the breach thus made and flooded the plaintiff's lands, to his great damage. The plaintiff also alleges separately that the said wrongful acts of the defendant were negligently done, in respect not only to the manner of constructing the dams, but to the obstruction of the natural flow of the water.

The material allegations of the complaint were denied by the defendant, which pleaded specially that it had acquired an easement, by twenty years adverse user, to maintain the lower or cross-dam as well as the other dams described in the complaint, and that it owed no duty to the plaintiff concerning the same and had committed no wrong to him by reason of the alleged acts of which he complains.

In order to show that the plaintiff's dam was broken by the ponding of water back upon it, and that this was caused by the cross-dam of the defendant obstructing the natural flow of the water from the river down the natural depression or channel and through the defendant's land, the plaintiff proposed to show by his own testimony that since the cross-dam was erected his dam had been broken several times at the same place. The defendant restored it each time it broke, and the




A to Z—Highland Dam. A to C—Defendant's part of Highland Dam. C to D—Josey's part of Highland Dam. D to E—Plaintiff's dam: E to Z—E. T. Clark's part of the Highland Dam. F to G—Sand Dam or Upper Dam. G to H—Cross-dam or "Bull Buster."
The break in plaintiff's dam is indicated by the line across his dam near "H."
The letter I indicates the point where the railroad crosses the plaintiff's dam, and where the railroad company broke the same.
The letter J indicates railroad bridge across the river, there being a trestle from I to J.
The Butterworth and Smith dams are above A and are not shown on this map.
The Highland Dam continues up the river and beyond the Butterworth and Smith lands.
The plaintiff claims that the whole of the lowland outside the Highland Dam is the flood channel of the Roanoke River, that is, from "AA" to "BB."

plaintiff testified that when restored it was not as good a dam as it was before the first break. It was about the same height, though not as thick. This evidence was admitted over the defendant's objection. The plaintiff had previously testified that the break in his dam was about 10 feet from the defendant's cross-dam—right at the junction of
( 69 ) the two dams. The witness also testified that if the upper dam and the cross-dam were not there, the natural course of the overflow water during freshets would be down the deep depression on the defendant's land, and that his dam had not broken until the cross-dam was built, the latter being higher and thicker than his dam. There was evidence tending to show that the deep depression on the defendant's land served as a natural drain or flood channel for the waters of the river in times of freshets. The defendant's proof tended to show that the plaintiff's dam was stronger and better when it was restored than it had been before. The parties introduced testimony which tended to sustain their respective contentions.

The defendant in apt time requested the court to submit the following issues to the jury:

1. Did the defendant by its maintenance of its river dam wrongfully cause any injury to the plaintiff?

2. Did the defendant have an easement to maintain said dam?

3. Did the plaintiff enter into an agreement with the defendant to forego any right to recover damages if the defendant would restore plaintiff's dam to the condition in which it was before the injury?

4. Did the defendant comply with said agreement?

5. What damage, if any, has plaintiff sustained?

The court refused to submit the issues, and defendant excepted. The court then submitted three issues, which, with the answers thereto, were as follows:

1. Did the defendant negligently obstruct the natural flow of the flood waters of Roanoke River by its dams, and cause the same to collect and be thrown against plaintiff's dam in greater volume and force than they naturally would have been, and thereby break plaintiff's dam and flood and injure his farm, as alleged? Ans.: No.

2. Did defendant by its dam wrongfully and unlawfully obstruct the natural flow of the flood waters of Roanoke River and cause the
( 70 ) same to collect and be thrown upon plaintiff's dam in greater violence and force than they otherwise would have been, and thereby break the same and flood and injure plaintiff's farm, as alleged? Ans.: Yes.

3. What damage, if any, is plaintiff entitled to recover? Ans.: $1,000.

The court charged the jury in part as follows: "The plaintiff contends that outside of said dam and between it and the main channel of the river there is a natural depression or drain 300 or more yards wide, which is a natural flood channel of Roanoke River, that is, a channel through which the overflow waters of the river naturally flow whenever the waters rise sufficiently high to overflow the banks of the main channel of said river, and the court charges you, if you find this to be true, that there was such a flood channel between the plaintiff' dam and the river, that the defendant had no right to obstruct said channel with his dam or dams, unless the defendant has shown by a preponderance of evidence that it had an easement or prescriptive right to do so." "That water resulting from an overflow in districts where flood waters cover great tracts of land may be treated as surface water, and the landowner incurs no liability where in protecting his land from such overflow he throws the water upon an adjoining proprietor, except when he diverts or obstructs water from the flood channel of such stream, for the flood channel of a stream is as much a natural part of it as is the ordinary channel." The defendant excepted to each of these instructions.

The other facts pertinent to the exceptions relied on in this Court are stated in the opinion. There was a judgment upon the verdict for the plaintiff, and defendant appealed.

*Daniel, Travis & Kitchin for plaintiff.*

*Day, Bell & Dunn, Aycock & Daniels, and Murray Allen for defendant.*

WALKER, J., after stating the case: There are only two exceptions discussed in the appellant's brief, and those not mentioned ( 71 ) are to be taken as having been abandoned under Rule 40 of this Court. 140 N. C., 666. While we are not required to consider them, they have been examined and found to be without merit.

The court below need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute is fully met. *Hatcher v. Dabbs,* 133 N. C., 239; *Falkner v. Pilcher,* 137 N. C., 449; *Jackson v. Telegraph Co.,* 139 N. C., 347. This case is much like the one last cited in principle. Here, as in that case, the defendant, by proper requests for instructions, could have had the benefit of all the defenses which are covered by the issues it tendered, and indeed the charge of the court presented the case to the jury, under

the issues submitted, in every possible aspect, except as to the settlement with the plaintiff, and this was not pleaded. That matter was, therefore, not properly before the court, as it was not made an issuable fact by the pleadings. The question of easement was submitted to the jury under the second issue with full and correct instructions as to what would constitute an easement and with proper reference to the evidence relating thereto. The jury were directed to answer the second issue "No" if they found that an easement to maintain the dam existed. They answered the issue "Yes," thereby finding that there was no easement. We do not think the defendant was in any sense prejudiced by this action of the court. *Cowles v. Lovin,* 135 N. C., at p. 488; *Deaver v. Deaver,* 137 N. C., 246. If the defendant succeeded in showing
( 72 ) that the easement existed at any time, there was evidence of non-user for as much as twenty years (*Crump v. Mims,* 64 N. C., 767), and whether there had in fact been such disuse was a question for the jury. They gave their verdict on this point against the defendant. This disposes of the questions of easement and settlement. The question raised by the defendant's first issue was certainly embraced by the second issue submitted by the court. Indeed, the latter more clearly and definitely presented the precise matter in controversy, and was, therefore, the more preferable of the two, as will hereafter appear.

The two questions reserved, under the rule, in the defendant's brief, and to which the argument before us was mainly addressed, relate, first, to the competency of the plaintiff's testimony as to the several breaks in his dam after the defendant's cross-dam was constructed, and, second, to the liability of the defendant for having obstructed the flood channel of the river on his own land by his cross-dam and thereby diverting the water to the plaintiff's dam and causing the same to break and his lands to be flooded.

As to the relevancy of the evidence admitted by the court, the ruling, we think, was free from error. The plaintiff testified that before the cross-dam was erected the overflow or flood water of the river was accustomed to pass down the depression at the foot of his dam without doing any injury thereto, and that his dam was broken by the ponding of the water back against it, which was caused by the obstruction of the defendant's cross-dam to its natural flow. He further stated that his dam had never been broken by the water before the erection of the cross-dam, but that after its erection it had broken three times during freshets, on account of the ponding of the water. There was no objection
( 73 ) when he testified to the first break in his dam in May, 1901. We do not see why the evidence as to all the breaks was not relevant to the issue. If the dam had not been injured before the cross-dam was erected and the water was ponded back, and the plaintiff's dam was

broken several times after it was erected, this would seem to indicate a causal connection between the erection of the dam and the injury which followed. There was the positive evidence of the plaintiff as to the cause of the first break in the dam, namely, the freshet and the cross-dam; and, if necessary, this should be considered in passing upon the testimony to which objection was taken. If by relevancy is meant the logical relation between the proposed evidence and the fact to be established, the testimony was admissible when tested by this definition. It is not a case where conditions are required to be the same, or at least similar, as where a comparison between two things is made to ascertain if they have the capacity to produce the same effect, as in *Rice v. R. R.*, 130 N. C., 375, and *Bullock v. Canal Co.*, 132 N. C., 179; nor is the question like that raised in *Warren v. Makely*, 85 N. C., 12, and *Burner v. Threadgill*, 88 N. C., 361, where it was attempted to show the value of one tract of land by comparing it with that of an adjoining tract. Our case is more like that of *Johnson v. R. R.*, 140 N. C., 581, and the class of cases to which it belongs, in each of which the plaintiff, in order to show that sparks from a certain engine had set his property afire, was permitted to show that the engine had emitted sparks shortly before or after the fire. *Knott v. R. R.*, 142 N. C., 238. In *Aycock v. R. R.*, 89 N. C., 321, the fact that a train had just passed was held to be presumptive evidence that it had caused the fire, which was discovered near its track. Under the circumstances of this case there was an open and visible connection between the obstruction of the water by the cross-dam and the subsequent breaking of the plaintiff's dam. ( 74 ) The law does not require a necessary connection, which would practically exclude all presumptive evidence but such as is reasonable, and not latent and conjectural. *Bottoms v. Kent*, 48 N. C., 154; *Johnson v. R. R., supra.* The evidence which was admitted fulfills that requirement. We do not hold that this evidence is sufficient of itself to establish the fact of injury to the plaintiff's dam, but that the breaking of his dam three times, under all the circumstances to which he testifies, is fit to be considered by the jury, in connection with the other facts, upon the question as to whether defendant's dam caused the alleged injury. It is more than conjectural evidence.

This brings us to the consideration of the principal question in the case: Could the defendant legally obstruct what is known as the flood channel of the river by erecting a dam across it and thereby force the water back upon the plaintiff's dam to his injury, as already described? We think it is thoroughly well settled that it cannot, but is liable for the damages which resulted proximately from its wrongful act. "Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have not only its ordi-

nary channel, which carries the water at ordinary times, but it must have, also, its flood channel, to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as the ordinary channel. It is provided by nature and it is necessary to the safe discharge of the (increased) volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners." 3 Farnham on Waters, secs. 879 and 880. It is further said, by the same
( 75 ) author, that the courts are very nearly agreed that the flood channel must be considered as a part of the stream, and no structures or obstruction of any kind can be placed in its bed which will have a tendency to dam the waters back upon the property of another riparian proprietor. The depression or drain which is mentioned in the evidence is a high-water channel of the kind described. It is auxiliary to the main channel, relieving it when the water is high and the swollen stream overflows its banks, the low places on the river acting as natural safety valves in times of freshets. These depressions or channels being provided by nature for the safe discharge of the large volume of water when the bed of the stream becomes incapable of retaining it, the course which the flood water is in the habit of taking through them cannot be changed or obstructed to the injury of adjoining private landowners. Farnham on Waters, sec. 880. The wrong committed in blocking such a channel is of the same character as that of one who closes a natural drainway on his own land and thereby causes the land of an upper proprietor to be flooded by the backwater.

The principle governing this case has frequently been recognized and applied by this Court. In *Overton v. Sawyer,* 46 N. C., 308, it was held that without reference to the plaintiff's acquisition of an easement by presumption, the defendant had a right to have the water allowed to pass off his land through a natural drain, and when the plaintiff, by means of an embankment across the drain, obstructed the flow of the water and thus interfered with the rights of the defendant, the latter had a cause of action against him for the resulting injury to his property. So in *Pugh v. Wheeler,* 19 N. C., 50, the Court decided that ponding water back upon another's land by any act which impedes its natural flow is a clear and direct invasion of the proprietary interest in
( 76 ) the land itself and is an actionable wrong, unless protected by a grant of the right so to do or by an easement in some other way acquired. It was asserted in *Porter v. Durham,* 74 N. C., 767, as being an elementary principle, which is founded on reason and equity, and common both to the civil and common law, that the owner of land cannot raise any barrier or dyke, even for the better enjoyment of his own property, so as to obstruct the natural drainage of another's land

and thus intercept and throw back the water upon it. "An owner may not use his property absolutely as he pleases. His dominion is limited by the maxim, *Sic utere tuo ut alienum non lædas.*" Numerous cases to the same effect may be cited. *Shaw v. Etheridge,* 48 N. C., 300; *Hair v. Downing,* 96 N. C., 172; *Wilhelm v. Burleyson,* 106 N. C., 381; *Staton v. R. R.,* 111 N. C., 278; *Rice v. R. R.,* 130 N. C., 375; *Mizell v. McGowan,* 125 N. C., 439.

The principle, in its application to flood waters, is clearly stated in Jones on Easements, sec. 729, where it is said generally that water which in times of freshet overflows the bank of a stream, and is accustomed to flow over adjacent lowlands in a defined stream, is to be treated as a watercourse, rather than as surface water, and a riparian owner is not allowed to stop the flow by erecting barriers to the injury of another. See, also, 13 Am. and Eng. Enc. (2 Ed.), 687; *Jones v. R. R.,* 67 S. C., 181. In discussing a somewhat similar question in *Staton v. R. R.,* 109 N. C., 337, the Court, by *Merrimon, C. J.,* said: "A party must submit to the natural disadvantages and inconveniences incident to his land, unless he can in some lawful way avoid and rid himself of them. But he has no right, as a general rule, to rid himself of them by shifting them by artificial means to the land of another, when naturally and in the order of things they would not go upon such land or affect it adversely." To the same purport is the language of the Court ( 77 ) in *Mizell v. McGowan,* 120 N. C., 134. "The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course under reasonable limitations, and the subserviency of the lower tenant to this easement, are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear the servitude to the superior, and must receive the water that falls on and flows from the latter. The servient tenant cannot complain of this, because *aqua currit et debet currere ut solebat.*" If a riparian owner can raise the banks of a stream so as to confine the flood water and prevent its overflowing his land, without occasioning any injury to the property of others, he may do so, but he must suffer the consequences of any failure in the attempt. Jones on Easements, sec. 729. He cannot set up a barrier to the flow of the water in its natural or accustomed channel if it will result in injury to his neighbors. This Court has said in *Staton v. R. R.,* 111 N. C., 278, that, in adapting his property to any use, the landowner is subject to the law of adjoining proprietors and to the maxim, *Sic utere tuo ut alienum non lædas.* If in such adaptation the adjacent owner's rights of property are violated, he is entitled to compensation, not so much on the ground of a want of

skill or diligence in constructing the work of improvement, as for the reason that by injuring his neighbor's land he has to that extent invaded his right of property. It is the wrong done, and not the manner of doing it, that primarily determines the liability. Applying these principles to the facts of this case, we find that the court fully and correctly instructed the jury as to the liability of the defendant for ob-
( 78 ) structing the flood channel of the river and ponding the water back upon the plaintiff's lands, leaving it to them to find the facts upon which such liability depended. He also charged the jury upon the question of surface water as favorably to the defendant as the law permitted. The jury found that there was a flood channel which had been wrongfully obstructed to the plaintiff's damage, and this finding was made under instructions of the court based upon evidence and free from any error we have been able to discover.

The fact that other causes may have concurred with the defendant's wrong in producing the injury does not relieve it of liability; for *tort feasors* contributing to the same injury are jointly and severally liable. *Dillon v. Raleigh,* 124 N. C., 184. "When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle in the law, that he who contributes to a wrong, either civil or criminal, is answerable as doer. And it is immaterial to this proposition whether that to which he contributes is the violation of a responsible person, or of an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease." Bishop Non-Contract Law (1889), sec. 39; Barrow on Negligence, 25; Cooley on Torts (3 Ed.), p. 1471; *Slater v. Mersereau,* 64 N. Y., 138.

The other exceptions, which are not mentioned in the brief of the defendant's counsel, disclose no reversible error, as we have stated, and require no special comment.

No error.

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

*Cited: Aden v. Doub,* 146 N. C., 13; *Roberts v. Baldwin,* 151 N. C., 408; *ib.,* 155 N. C., 281; *Garrison v. Machine Co.,* 159 N. C., 288; *Gross v. McBrayer, ib.,* 374; *Hodges v. Wilson,* 165 N. C., 328; *Hinton v. Hall,* 166 N. C., 481; *Barefoot v. Lee,* 168 N. C., 90; *Guthrie v. Durham, ib.,* 576.

( 79 )

ROSA L. JONES, ADMINISTRATRIX, v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 5 March, 1907.)

**Negligence—Evidence—Nonsuit.**

The mere killing by a railroad train of an employee engaged in its operation raises no presumption of negligence, and a judgment of nonsuit was proper when the witness for plaintiff testified, without other evidence as to negligence of the defendant, that he and plaintiff's intestate brought a turn of wood to the shanty-car of the train; that the witness remained thereon; the plaintiff's intestate went back with the apparent intention of bringing another turn; the train started and went forward after the usual signals were given therefor, and that the plaintiff's intestate was killed; as such does not establish sufficient facts from which actionable negligence could be inferred.

ACTION to recover damages for alleged negligent killing of plaintiff's intestate, tried at October Term, 1906, of CRAVEN, before *Shaw, J.*, and a jury. At the close of the plaintiff's evidence and on motion of defendant the action was dismissed as on judgment of nonsuit, and the plaintiff excepted and appealed.

*D. L. Ward for plaintiff.*
*Simmons, Ward & Allen for defendant.*

HOKE, J. There is no presumption of negligence arising against a railroad company from the mere fact that an employee has been killed while engaged in the operation of one of its trains, without any proof *ultra* tending to show negligence on the part of the company or establish facts from which such negligence could be reasonably inferred. 6 Thompson on Neg., sec. 7652. An application of this principle to the facts of the present case will fully sustain the ruling of his Honor in dismissing the action.

The deceased was conductor in charge at the time of one of the defendant's freight trains, which had stopped at some point on the road to take on blocks of wood—presumably for use in the de- ( 80 ) fendant's "shanty-car."

Ben Merritt, a brakeman, and the only witness who testified as to the occurrence, said that "he and the deceased each got a turn of wood, and the witness put his on the shanty-car and remained upon the car; that the captain (the deceased) started back towards the pile, apparently intending to get another turn of wood, and that in a short time the train started, after having given the usual signals for doing so, and soon thereafter the deceased was found at or near the track," having been

run over and fatally injured by the train. The witness said that after the captain started toward the pile, he (the witness) was not in a position to see farther, and did not know where the deceased was when the train started—whether he was on or off the train, nor whether he had or had not given the engineer the signal to start. There is nothing, therefore, which shows or tends to show actionable negligence against the company, nor facts from which such negligence could be reasonably inferred, except the mere fact that the deceased, an employee of the company, was run over and killed by the defendant's train.

The ruling of the judge below, therefore, must be sustained.

Affirmed.

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( 81 )

W. H. MOORE v. N. Y. GULLEY.

(Filed 5 March, 1907.)

1. **Pleadings—Complaint—Demurrer—Fraud—Judgment in Separate Action.**

In a suit brought to set aside a verdict and judgment in a former and different action for fraud and circumvention, an allegation of the complaint of fraud and suppression of material evidence is, alone, insufficient, and the demurrer properly sustained.

2. **Complaint—Demurrer—Perjury—Record Evidence.**

A demurrer to a complaint alleging false parol testimony concerning a material fact upon the trial of a former and different action between the same parties is properly sustained. Equity requires the party seeking it to be free from laches, and the production of a higher grade of evidence than mere parol, such as conviction of perjury. so there may be an end to the litigation.

APPEAL from judgment sustaining a demurrer, before *Biggs, J.*, at January Term, 1907, of FRANKLIN.

This action was brought to set aside a verdict and judgment and for a new trial in a former action between the same parties for the recovery of a tract of land, in which the present defendant was plaintiff and the present plaintiff was defendant. It is alleged, substantially, that the defendant swore falsely as to the boundaries of the land in dispute, in that he testified that he had surveyed the same and run a line, and that according to the survey and location of the line his deed covered the land; and further that James I. Moore, under whom the plaintiff (Moore) claimed, was present when the survey was made and assented to the location of the line. It is then alleged that "this testimony constituted an estoppel upon the plaintiff" and was false, as the testimony

of the chain-bearers, and another witness who was present when the survey was made, will show, they having expressed a willingness to testify that James I. Moore was not present at the time mentioned, and that in fact he was not in the county; that the plaintiff has received a letter from the defendant, in which the latter "im- ( 82 ) pliedly admits that he may have been mistaken in his testimony when he swore that James I. Moore was present and consented to the running of said line and survey, which constituted an estoppel"; that the matters to which the defendant thus testified were not set out in his complaint in that suit. It is further alleged that the defendant fraudulently obtained from James I. Moore possession of the Rhem deed, which contains a true description of the land, and which the defendant suppressed; that by reason of the conduct alleged, the defendant (Gulley) was enabled to secure a judgment in the former suit, and that the plaintiff did not have the opportunity to meet his testimony at the trial. He is advised that the alleged facts constitute fraud in law and invalidate the verdict and judgment. The court below sustained a demurrer to the complaint, and the plaintiff appealed.

*B. B. Massenburg for plaintiff.*
*William H. Ruffin and W. M. Person for defendant.*

WALKER, J., after stating the case: The general doctrine, as heretofore approved by this Court when we had separate jurisdictions of law and equity, was that if a verdict be obtained in an action at law by fraud, circumvention, or perjury, a court of equity might decide that the party should consent to set aside such verdict and have the matter tried *de novo* in the court of common law; in other words, a court of equity could require a party to give his adversary a new trial; but this power was exercised with extreme caution and the application of the doctrine greatly restricted, and it was confined to cases which presented peculiar circumstances, and due regard was paid to the maxim, "It is for the public good that there be an end to litigation." *Burgess v. Lovengood,* 55 N. C., 457. The law has continued to be as thus de- ( 83 ) clared.

In this case it does not seem to us that there is any sufficient allegation of fraud or circumvention. The plaintiff states in his complaint that a deed containing the true boundaries of the land was suppressed by the defendant, but it does not appear that this was done with the design to prevent the plaintiff from establishing the lines or that it actually did prevent him from doing so, or that the plaintiff made any effort to have the deed produced at the trial of the case, or that other means were not available for proving the boundaries. 14 Enc. Pl. and Pr., 748, 749.

The plaintiff seems to have gone into the trial without relying upon the production of the missing deed, and he has not alleged facts which entitle him in law to complain of any conduct of the defendant in respect thereto. It may be added that the plaintiff does not state that the facts in regard to the alleged suppression of the deed had not come to his knowledge before the end of the trial or before the expiration of the term at which the judgment was rendered. It does not, therefore, sufficiently appear that he did not have the time and the opportunity, during the trial, to produce the witnesses named in his complaint for the purpose of contradicting the testimony of the defendant, if it was untrue; nor is it made to appear that if he did not ascertain what would be the testimony of those witnesses before the trial was completed, he did not discover it in time to move for a new trial before the adjournment of the court, and thereby obtain the relief which he now seeks. There must have been no laches on the part of the plaintiff, if he would show himself entitled to the favorable consideration of the court of equity. *Powell v. Watson,* 41 N. C., 94; *Dyche v. Patton,* 43 N. C., 295; 14 Enc. Pl. and Pr., 748. It is true, he alleged generally that he did not have the opportunity to meet the case made by the testi-
( 84 ) mony of the plaintiff in the former suit, but it in no way appears why he did not, or that he made reasonable and proper effort to do so, or that his inability to do so, if he made the effort and failed, was due to any fraud or circumvention of the defendant in this case. It frequently happens that a party loses by reason of the unexpected character of his adversary's testimony, but while this may furnish ground for an application to the court in the same cause for a new trial, if he has been surprised without any fault on his part, it is not sufficient to sustain an independent action for relief against the verdict and judgment, unless there has been some fraudulent conduct or perjury.

The principal contention of the plaintiff is that the defendant testified falsely as to the survey of the line and the location of the boundary when James I. Moore was present and assenting. This is clearly not sufficient as an allegation of perjury. Even if the testimony was false in fact, it is not charged that it was knowingly or corruptly false. It may have been untrue, and yet the defendant have been honestly mistaken in giving it. The reference to the letter received by the plaintiff from the defendant does not aid this defective allegation. It rather tends to show that if the evidence was false in fact, it was mistakenly and not designedly so.

But the plaintiff does not allege that there has been any conviction for the imputed perjury, and this objection is fatal to the complaint. In this respect, the rule as laid down by the *Lord Keeper* in *Tovy v. Young,* Prec. in Ch., 193, has been generally adopted: "New matter may

in some cases be ground for relief, but it must not be what was tried before; nor when it consists in swearing only, will I ever grant a new trial unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, has been convicted of perjury or the jury attainted." Numerous cases have been decided in this Court involving the question now presented to us, and we believe that ( 85 ) in all of them the principle stated in *Tovy v. Young* has been followed, and a conviction of the alleged perjury required as a condition of granting equitable relief. *Burgess v. Lovengood* and *Dyche v. Patton, supra; Stockton v. Briggs,* 58 N. C., 309; *Horne v. Horne,* 75 N. C., 101.

If facts such as those stated in the complaint were held by us to have laid a sufficient foundation for a suit to annul what has been solemnly adjudicated in a former action and to entitle the plaintiff to a retrial of the case, the result would be that, as has been well said, "all causes would end in chancery," and the trial of actions at law might, to say the least, be seriously embarrassed. We should, even in the rightful exercise of the undoubted jurisdiction invoked, proceed with the greatest caution. The reason of the rule requiring a previous conviction of the witness, upon an indictment for the perjury charged against him, has been said to be, besides the inconvenience of repeated trials, the difficulty of knowing whether upon another trial the same or new witnesses would swear to the whole truth and nothing but the truth; hence, to induce the Court to interfere, the falsehood of the former testimony must be shown, not merely by other witnesses, but by evidence of a higher grade, by writing, or by the unimpeachable record of a conviction for perjury. *Peagram v. King,* 9 N. C., at p. 608; *Dyche v. Patton, supra.* If we should listen to the complaints of those who come before us with evidence of less conclusive force, the administration of the law might easily be turned into a mockery. We can do no better than to quote the apt and impressive words of the counsel for the plaintiff (afterwards Chief Justice of this Court) in *Peagram v. King, supra,* when discussing a question similar to the one we now have in hand: "It is not sufficient that the verdict be unjust or even that the evidence upon which ( 86 ) it was founded was false; perfect justice cannot be expected to be administered in a human tribunal, and we must expect always to have wrong decisions, either from the mistakes in judgment of the judge, the defect of proof offered by the one party or the falsehood of that produced by the other. With this danger before us, which must always exist while adjudications are made upon the statements of witnesses who are liable to be corrupted, a necessity seems to have been felt of adopting the maxim, 'There must be an end to litigation.' Public convenience, as well as the interest of the parties, requires it. It results

from the palpable truth of the position that a second or a third or any number of trials will not and cannot, in the nature of things, insure a final decision absolutely just." In that case, no previous conviction was required to be shown, because the witness was dead and had made a dying declaration, in which he confessed the perjury. But for these facts the decision would surely have been the other way, as this Court said in *Dyche v. Patton, supra.*

A copy of the record in the former suit of *Gulley v. Moore* was sent up as a part of the case on appeal. It is not mentioned in the complaint as an exhibit, nor by any proper pleading and reference is it incorporated with the complaint. If we consider the case according to ordinary rules, this record is not within the range of the demurrer, it being something separate and apart from the complaint. We deem it but just to the defendant to state that, from what appears in that record, this action seems to be a mere renewal of litigation which has heretofore been practically settled adversely to the plaintiff; and the specific allegations he now makes against the defendant of false swearing and unfair conduct appear to have been tried by a jury and decided against
( 87 ) him, when he had a full and fair opportunity to establish them, if they were true. No inference unfavorable to the defendant can fairly be made in this case, as we are confined to the facts stated by his adversary in his complaint; but, on the contrary, if we examine the record of the former suit, we find that every inference should be made in his favor, as he has so far succeeded in all his controversies with the plaintiff, including this one. A demurrer was no doubt filed in this case, instead of an answer, to put an end to the litigation, and it was properly filed, as the complaint fails to state any cause of action.

His Honor took the correct view of the case, and his ruling on the demurrer is sustained.

Affirmed.

*Cited: S. v. Arthur,* 151 N. C., 568; *Kinsland v. Adams,* 172 N. C., 766.

McCONNELL BROTHERS v. SOUTHERN RAILWAY COMPANY.

(Filed 5 March, 1907.)

1. **Railroads—Suitable Cars—Perishable Goods.**

A railroad company must furnish suitable cars for perishable goods accepted for shipment.

2. **Railroads—Refrigerator Cars—Undisclosed Arrangements—"Icing"—Liability—Burden of Proof.**

When the defendant railroad company is not compelled to accept perishable goods for shipment, but does so under an arrangement with a refrigerator company whereby the latter company was to furnish cars for perishable goods and do the necessary "icing," the former company to handle such cars in the course of its business, the railroad company is liable to the shipper for damages caused by the neglect to do the "icing" required, the shipper having no knowledge or notice of the contract and holding the bill of lading of the railroad company, the burden of proof being upon the plaintiff to show negligence only.

3. **Measure of Damages—Liability—Partial Exemption.**

The measure of damages to shipment of a carload of perishable goods, caused by defendant's negligence, is the net value at destination after deducting commissions and cost of sale, and a stipulation in the bill of lading that such should be the value of the goods at the place of shipment is, *pro tanto*, a partial exemption of liability from the effect of the defendant's negligence, and is void.

( 88 )

ACTION, tried before *Allen, J.*, and a jury at September Term, 1906, of BUNCOMBE. Verdict and judgment for plaintiff. Defendant appealed.

*Julius C. Martin for plaintiff.*
*Moore & Rollins and Charles A. Webb for defendant.*

CLARK, C. J. This is an action for negligence in failing to properly care for and ice a car-load of melons shipped from Bamburg, South Carolina, to Philadelphia, which arrived at their destination in bad condition and were sold for a small price. The defendant denied that the melons were damaged for lack of icing and that the plaintiff's claim was made within thirty days. These were issuable facts, which were submitted to the jury and were found adversely to the defendant.

The bill of lading was executed by the defendant company, but the defendant claims that it did not transport perishable products of this nature; that it merely furnished the plaintiff the car of a refrigerator company whose duty it was to ice the melons and keep them in good condition, and that if there was any default in this respect, whereby the plaintiffs were damaged, they should look to the refrigerator company

and not to the defendant company. The court charged that if the plaintiff obtained the car from the refrigerator company or took the bill of lading from the defendant, with the knowledge that the defendant did not hold itself out as transporting such freight, but was furnishing the car on behalf of the refrigerator company, with which it had made a contract to furnish such cars to shippers of perishable goods,
( 89 ) then the defendant was not liable, notwithstanding the bill of lading was given in the name of the defendant; that the defendant's agent at Bamburg could be the agent of the refrigerator company as well as of the defendant, and though said agent signed the bill of lading in the name of the defendant and received the money for icing the car and entered the memorandum of such payment upon the bill of lading, the defendant would not be liable for failure to properly ice the melons if the plaintiffs had notice that the defendant or its agent was furnishing the car as agent of a refrigerator company and not for the defendant. The defendant excepts to the last paragraph only, and we find no error therein of which it has cause to complain. The rest of the paragraph is not before us for review, as the plaintiff is not appealing. The contract on its face was made with the defendant. The court charged that the defendant was not compelled to accept perishable freight, but was liable for proper care if it received it for shipment; and that the burden of proving negligence by the defendant, by the greater weight of evidence was upon the plaintiffs.

The prayers and charge were more fully stated, but the above is their pith and substance. If the defendant, common carrier, accepted perishable goods for shipment, it was its duty to furnish suitable care therefor (Wood Railways, sec. 430), and it became liable for any negligence in failing to use proper and customary appliances. If it furnished a refrigerator car, and the plaintiffs knew or had notice that their contract for icing was with this latter company, the judge properly told the jury that for any neglect to properly ice the melons the plaintiffs' recourse was against the refrigerator company, notwithstanding the bill of lading was given by the defendant and the money for icing was paid to the defendant's agent, for in such case the defendant would have
( 90 ) been liable only for unreasonable delay in delivery of car at destination.

The defendant could not by any stipulations in the bill of lading contract to limit its liability for negligence in transporting goods which it receives for carriage. *Everett v. R. R.*, 138 N. C., 68; *Parker v. R. R.*, 133 N. C., 335; *Gardner v. R. R.*, 127 N. C., 296; *Mitchell v. R. R.*, 124 N. C., 238; Sutherland Damages, sec. 904.

The damages were properly estimated upon the net value of the melons at the place of delivery, above commissions and expenses of sale

(Sutherland, *supra,* sec. 918; Hutchison on Carriers, p. 910); and this notwithstanding a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment. *Ruppel v. R. R.,* 167 Pa. St., 179, 181; *Willock v. R. R.,* 166 Pa. St., 184 (where numerous authorities are collected); *R. R. v. Ball,* 80 Texas, 603; Sutherland, *supra,* sec. 918. The consignor ships to get the benefit of the market price at the place of destination, and a contract in case of negligence that the damages shall be measured by the price at the place of shipment is *pro tanto* an agreement for partial exemption for the carrier's negligence, and is void. *Everett v. R. R., Ruppel v. R. R.,* and *Willock v. R. R., supra.*

No error.

*Cited: Winslow v. R. R.,* 151 N. C., 254; *Stringfield v. R. R.,* 152 N. C., 128, 137; *Harden v. R. R.,* 157 N. C., 243, 248; *Mule Co. v. R. R.,* 160 N. C., 223.

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(91)

L. V. HART v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 March, 1907.)

1. **Evidence—Statements to Third Persons.**
   Where a witness testifies that he has truly stated to a third person, of his own knowledge, a fact which he has since forgotten, the testimony of such third party as to what the statement was is competent.

2. **Measure of Damages—Time and Place—Woods—Judge's Charge.**
   The measure of damages to plaintiff's woods caused by the negligence of the defendant is the reasonable worth of the property at the time and place or locality of destruction, and it was not error in the court below to refuse to charge that such was the value of the wood standing in the woods, plus the cost of cutting.

ACTION, tried before *Cooke, J.,* and a jury, at October Term, 1906, of EDGECOMBE. Verdict and judgment for plaintiff. Defendant appealed.

*G. M. T. Fountain for plaintiff.*
*John L. Bridgers for defendant.*

CLARK, C. J. This is an action to recover the value of cord-wood burned by a fire alleged to have been negligently set out by sparks from the defendant's engine. One Melton testified that as agent for the plaintiff he superintended the cutting and cording of the wood and reported the number of cords to the plaintiff; that the number thus reported was correct, though he does not now remember the exact number; that these

reports were sometimes made in writing and sometimes verbally. The written reports were admitted in evidence without objection. The plaintiff testified that the reports were made by Melton, as stated, and that he paid for the number of cords reported by him and that he kept a record of the number. He further testified, over the defendant's objection, what the total number was which had been reported by Mel-
( 92 ) ton and recorded by himself, and which he had paid for. This was competent. "Where a witness testifies that he has truly stated to a third person, of his own knowledge, a fact which he has since forgotten, the testimony of such third party as to what the statement was is competent." 16 Cyc., 1198 (v); 1 Elliott Ev., secs. 389, 390; *Shear v. Van Dyke,* 10 Hun., 528.

The court charged the jury that the measure of damages was the value of the wood in the locality where it was, and not what it could be sold for elsewhere, and refused to instruct them, as prayed, that "the measure of damages was the value of the wood standing in the woods, plus the cost of cutting." In this there was no error. "When property is lost or destroyed by the negligence of another, the usual rule as to the measure of damages is the reasonable worth of the property at the time and place of its destruction." *Rippy v. Miller,* 46 N. C., 480; 13 Cyc., 148 (c); *Fowler v. Insurance Co.,* 74 N. C., 89; *Grubbs v. Insurance Co.,* 108 N. C., 480; *Boyd v. Insurance Co.,* 111 N. C., 378. The learned counsel for the defendant laid stress upon the word "locality," but we think the judge meant by this the "place," *i. e.,* the value of the wood corded up in the woods where it was when burnt, and that the jury must have so understood him.

No error.

*Cited: Jones v. Flynt,* 159 N. C., 99.

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( 93 )

C. ALEXANDER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 March, 1907.)

1. **Railroads—Penalty—"Transport."**

A statute (Revisal 1905, sec. 2632) imposing a penalty upon a railroad company omitting or neglecting to "transport" goods, merchandise, etc., within a reasonable time, does not include within its meaning the delivery thereof, delivery necessarily requiring the concurrence of the consignee and having a distinctive meaning.

**2. Penalty Statutes—Construction.**

A statute imposing a penalty must be strictly construed in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act complained of does not fall clearly within the spirit and letter thereof.

**3. Statute—Prima Facie Case—Burden of Proof.**

When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was *prima facie* reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff.

CLARK, C. J., dissenting.

ACTION, heard before *Long, J.*, and a jury, on appeal from a court of a justice of the peace, at December Term, 1906, of MARTIN, to recover a penalty provided in section 2632 of Revisal 1905. Verdict and judgment for plaintiff. Defendant appealed.

This action was begun before a justice of the peace by summons "for the nonpayment of the sum of $27.50 due by penalty as provided in section 2632, Revisal of 1905, and demanded by said plaintiff." From a judgment for plaintiff in the Superior Court, defendant appealed. The following issues were submitted to the jury:

1. Did the defendant receive the goods for shipment, as alleged, at Jamesville, consigned to plaintiff, on 10 August, 1906?

2. Did the defendant fail to transport and deliver said goods ( 94 ) within a reasonable time?

3. Did defendant's agent, on 14 August, inform the plaintiff that the goods had not arrived, and that he had marked them "short"?

4. When did the defendant deliver the goods?

The jury, by consent, responded affirmatively to the first and third issues, and to the fourth, "20 August, 1906." Defendant objected to the second issue, and tendered, in lieu thereof, the following: "Did the defendant fail to transport said goods within a reasonable time?"

The testimony tended to show that the goods, a crate of bottles and a barrel of bottles, were delivered to defendant at Jamesville to be shipped to plaintiff at Williamston, N. C. On 14 August defendant delivered to plaintiff "one crate of bottles and one barrel of bottles, and he paid the freight, 16 cents. When plaintiff opened the packages he found that they were not his property. He notified defendant's agent on 17 August. He said that they belonged to some one else; looked and could not find plaintiff's goods, although they were on the defendant's platform at Williamston on 14 August. Defendant's agent, by mistake, marked the freight bill "short" on 17 August. He delivered the goods to plaintiff on 20 August. Jamesville and Williamston are on defendant's road and about 11 miles apart, there being no intermediate sta-

tions. Plaintiff made demand of defendant's agent for the goods prior to 20 August, who told him that they were not there; looked, and could not find them.

Defendant moved for judgment upon the entire evidence. Motion denied. Defendant requested his Honor to instruct the jury: "If they should find from the evidence that the goods in question were in fact transported from Jamesville, N. C., to Williamston, N. C., the
( 95 ) point of destination, within a reasonable time, although the defendant's agent told the plaintiff the goods were not there on 14 August, and marked the freight bill 'short,' then the plaintiff is not entitled to recover in this action." The instruction was refused, and defendant excepted.

His Honor, so the record states, "told the jury, in substance, that it was not only the duty of the defendant to transport the goods within a reasonable time, but also their duty to deliver them within a reasonable time."

Defendant excepted to his Honor's refusal to give the special instruction prayed, and to the submission of the second issue. From a judgment on the verdict, defendant appealed.

*No counsel for plaintiff.*
*H. W. Stubbs for defendant.*

CONNOR, J., after stating the case: The plaintiff sues for the penalty imposed by section 2632, Revisal, upon any common carrier which shall "omit or neglect to transport within a reasonable time any goods, merchandise, or articles of value received by it for shipment," etc. The words "reasonable time," for the purpose of fixing the standard of duty, is defined to be "the ordinary time required for transporting such articles between the receiving and shipping stations." A delay of two days at the "initial point," etc., is not to be charged against such transportation company as unreasonable, and shall be held *prima facie* reasonable, and a "failure to transport within such time shall be held *prima facie* unreasonable."

We had occasion in *Walker v. R. R.*, 137 N. C., 163, to consider and, in so far as was necessary, upon the facts there presented, construe the statute. *Mr. Justice Walker*, writing for the majority of the Court,
( 96 ) said: "The word 'transport' does mean to carry or convey from one place to another, but it also means to remove—and this is one of the primary significations, according to the lexicographers." While *Mr. Justice Douglas* wrote a dissenting opinion upon other phases of the case, in which the *Chief Justice* concurred, he concurs in the construction put upon the word "transport," in so far as it is involved in the

present appeal, saying: "It is from the Latin word *'transportare,'* compounded from the words *'trans,'* meaning over or beyond, and *'portare,'* to carry. It does not mean simply to remove from one place, but includes also the idea of carrying to another place." For the purpose of disposing of this appeal, the adoption of either definition of the word "transport" leads us to the same conclusion. The Supreme Court of the United States, in *Gloucester Ferry Co. v. Pa.,* 114 U. S., 203, says: "Transportation implies the taking of persons or property at some point and putting them down at another." Webster defines the word "transport" thus: "To carry or bear from one place to another; to remove; to convey; as to transport goods; to transport troops." International Dict., 1530; Black's Law Dict., 1184. His Honor was of the opinion that the word included delivery; hence, he submitted the second issue, directed to the inquiry whether the defendant did, within a reasonable time, "transport and deliver" the goods, and, in accordance with that view, instructed the jury that it was the duty of the defendant not only to transport the goods, but to deliver them within a reasonable time. The exception to this ruling presents the question upon which the decision of this appeal depends. It is undoubtedly true that the common law imposes the duty upon every common carrier to receive, transport, and deliver all goods, merchandise, etc., offered for that purpose, and that for a failure to do either it is liable to an action for damages.
For failing to *receive* goods, a penalty is imposed by section ( 97 ) 2631, Revisal.

We find, upon an examination of the authorities, that the word "deliver" is of entirely different origin and signification from the word "transport." To "transport" an article, it must be received and retained by the person charged with the duty; whereas, to "deliver," the person intrusted with the possession of it must part with it; hence, the word is compounded of *de* and *liberare,* "to set free; to set at liberty; to give over"; this, of course, importing that the duty of transporting has been discharged, completed, because the *delivery* can only be made after the *transportation* is complete. Webster's Inter. Dict., 386; Century Dict., Vol. II. "A delivery of an article consists in handing the article to the person to whom delivery is made." *Bellows v. Folsom,* 27 N. Y., Supr. Court (4 Rob., 43). "As between carrier and consignee, delivery implies the mutual acts of the two." *U. S. v. McCreary,* 11 Fed., 225.

Again, it is evident that the Legislature had in mind the distinction between the duty to "transport" and to "deliver," because the former is the act of the carrier without the intervention or aid of the consignee; whereas the latter cannot be accomplished without the concurrence of the consignee. A person upon whom the duty to transport is imposed is the sole actor; whereas the duty to deliver necessarily involves the

acceptance by the person to whom delivery is to be made, or, as said by the Court, it "implies the mutual acts of the two." The idea of parting with the possession and control of an article or paper-writing as an essential element in the delivery of it is illustrated in many instances—as in the delivery of a deed which is separate and distinct from signing and sealing, but equally essential to its validity. *Daniel, J.*, in *Moore v. Collins,* 15 N. C., 388, says: "A deed may be delivered by
( 98 ) words, without any act of delivery by the grantor, as if the writing sealed lieth upon the table, and the feoffer or obligor saith to the feoffee or obligee, Go and take up the said writing, etc. . . . The words must amount to an authority or license, in the person addressed, to take possession of the deed, and a reception of the instrument by the person spoken unto must follow the speaking of the words. Whenever the words evidence an assent in the feoffer or obligor to part with the writing as a deed, and, at the same time, evidence a willingness that the person spoken unto should take the writing as a deed, and a reception of the writing by the person addressed follows the speaking, then the words amount to a delivery." The Legislature could not have intended to impose a penalty upon the carrier for not doing something which necessarily involved the presence and acceptance by the consignee or his agent. If the consignee live in the country, or at some distance from the depot, or for any cause fails to call for the goods within the four days, it cannot be that the carrier should be liable to a penalty for not delivering, when there was no person to whom delivery could be made. It is for this reason that upon the completion of the transportation, that is, the carrying from the point of shipment to the destination, he must, when called for, deliver. If not called for, a new duty, with different measure of liability, is imposed upon the carrier. He must place the goods in a warehouse or other proper place and care for them until called for—he ceases to be a carrier and becomes a warehouseman. *Hilliard v. R. R.,* 51 N. C., 341, wherein *Ruffin, J.*, says: "Naturally, a contract to carry goods from one point of a railroad to another point, on the same road, is fulfilled by the transportation of them to the point of destination and having them there in a state ready to be delivered. . . . Considering the unload-
( 99 ) ing upon arrival and, in the absence of the consignee, the depositing in the warehouse as parts of the transportation, the Court sees no reason why, ordinarily, the liability as carrier should not terminate with the transit of the goods. After the goods are placed in the warehouse the owner's interest is protected by another responsibility of the company which arises—that of a warehouseman, bound to take ordi-

nary care of the goods." The Court held that the carrier was under no legal liability to give the consignee notice of the arrival of the goods. *Clark v. R. R.*, 85 N. C., 423.

We note that in section 2641 the Legislature was advertent to the distinction between the words "transport" and "deliver," and imposed upon the carrier the duty to "deliver," etc.

It would seem clear that the duty to carry—transport—is essentially different from the duty, at the termination thereof, to deliver to the consignee. It is true that upon the receipt of the goods the law imposes both duties—but to be performed in their own order. If the question were in doubt whether the word "transport," as used in the statute included the word "deliver," the well settled canons of construction of penal statutes make it our duty to resolve the doubt for the defendant.

Applying the rule by which courts should be guided in the construction of a penal statute, *Bynum, J.*, in *Coble v. Shoffner*, 75 N. C., 42, says: "It cannot be construed by implication, or otherwise than by express letter. It cannot be extended by even an equitable construction, beyond the plain import of its language. If, therefore, even the intent of the Legislature to embrace such a case was clear to the Court from the statute itself, we cannot so extend the act, because such a construction is beyond the plain import of the language used."

It is said that we should see, in the statute, the evil intended (100) to be remedied, and so construe it that such evil may be repressed and the remedy advanced. This is undoubtedly the general rule in the construction of statutes. This suggestion has been heretofore made and disposed of by the same learned judge. "In construing a penal statute, we are not allowed, as in the case of those which are not penal, to look at the motives or the mischief which was in the legislative mind. The rule is peremptory that the case must fall within the plain language of a penal statute before the penalty can attach." *Ib.*, 44. As was said by *Mr. Justice Ashe* in *Whitehead v. R. R.*, 87 N. C., 255: "The rigid rules of the common law with reference to the liability of common carriers should not be applied to a case involving the violation of a penal statute." Such has been the uniform rule of construction from the earliest times.

It would seem that such an elementary proposition would neither require nor justify the citation of authority, but a proper deference to the opinion of our brethren who differ from us makes it proper to reëxamine the foundations of the law. In *Jenkinson v. Thomas*, 4 Tenn., the *Chief Justice* said: "If we had the power of legislation perhaps we should think it proper to extend the penalties created by the statute; . . . but as it is our duty to expound and not to make acts of Parliament, we must not extend a penal law to other cases than those

intended by the Legislature, even though we think they come within the mischief intended to be remedied." Again, one of the sages of the law admonishes us that "A penal law shall not be extended by equity; that is, things which do not come within the words shall not be brought within it by construction. The law of England does not allow of constructive offenses, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it is clearly within both
(101) the *spirit* and the *letter* of the statute imposing such penalties. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges and not by the express authority of the laws." Potter's Dwarris Statutes, 247. It would be a work of supererogation to cite authorities and the multitude of decided cases to show both the wisdom and uniformity of this rule of law. We dare not depart from it, even by the suggestion involved in Lord Macaulay's brilliant rhetoric. When courts are called upon to declare and enforce well settled legal principles sanctioned by the wisdom of the sages of the law and the experience of the ages, they may not take notice of the parties to the controversy. We must declare the law as in our conscience and judgment we believe it to be. We dare not, without violating both, do otherwise, no matter whether the parties be natural persons or corporations. The Legislature has used words which we find have a clear, well defined meaning; we know of no other way of ascertaining what it meant.

It is conceded that the duty to deliver does not arise until the article is called for; but it is contended that by refusal or failure to do so, when demanded, the penalty is incurred. It is undoubtedly true that a failure to deliver when demanded subjects the carrier to an action for damages—it may be, as for a conversion, making him liable for the value of the article—but this liability is entirely independent of any statutory duty. We are not advised of any statute imposing a penalty for this breach of duty. Possibly the evil suffered by the public for failure of carriers to transport goods within a reasonable time, which attracted the attention of the Legislature and induced it to enact the statute upon which this action is founded, did not extend to failure to deliver, after the transportation was complete, and it deemed the common-law
(102) remedy sufficient protection to the consignee. It is apparent that a statute imposing a penalty for failure to deliver would be guarded with provisos in respect to demand, etc. However this may be, it is a question for the lawmaking department to deal with. We simply give to the language used in this statute its ordinary, usual, and well defined meaning, in holding that the duty to transport does not include the duty to deliver. They are separate and distinct duties imposed by law.

For a failure to perform the first in a reasonable time, a penalty is imposed; for a failure to perform the second, the consignee has his action for damages.

The testimony showed that the goods were received for shipment 10 August, 1906, and were at Williamston, their destination, on 14 August. The statute declares that *prima facie* this was a reasonable time for transportation. It will be observed that the standard fixed by the statute by which to measure reasonable time is the ordinary time required for carrying, etc. This distance between Jamesville and Williamston is stated to be 11 miles. Whether the goods were transported within a reasonable time, measured by the statutory standard, is a question for the jury, the burden upon the facts found being with the plaintiff to show that the time was unreasonable. The question in controversy was whether the goods were transported within a reasonable time. In refusing to submit an issue directed to that question and in instructing the jury, as set out in the case on appeal, there was error, for which defendant is entitled to a

New trial.

CLARK, C. J., dissenting: It is found by the jury, by consent, that the goods were received by the defendant at Jamesville, N. C., 10 August, 1906, and were not delivered to the consignee at Williamston till 20 August. It is admitted that the goods were applied for by the consignee on 14 August and again on 17 August. Williamston (103) is only 11 miles from Jamesville, and there is no intermediate station. This is an appeal from a judgment for a penalty of $20 for unreasonable delay under Revisal, sec. 2632. The jury found that there was unreasonable delay in getting the goods from Jamesville to the plaintiff at Williamston. It would not seem that this conclusion could be reasonably controverted. The defense is that the goods really reached Williamston 14 August and were in the warehouse of the defendant, but that the agent of the defendant there delivered to the consignee on 14 August a different package, and on 17 August erroneously told the consignee that the goods had not come; but finding on 20 August that the goods were there, so informed the consignee, who came that day and got them. The defendant contends that it did not fail to "transport" the goods in a reasonable time, because in fact they got to Williamston by 14 August, though it denied them to the consignee till 20 August.

The defendant is surely "sticking in the bark." There is no technical mystery in the word "transport." It simply means "to carry." The contract which the defendant made by the bill of lading was not merely to carry the goods from Jamesville to Williamston, but from the consignor at Jamesville to the consignee at the defendant's station at Wil-

liamston. It includes, according to the due and recognized course of dealing of common carriers and by the very terms of the contract, taking the goods from the consignor at the defendant's station at Jamesville and their delivery to the consignee at the defendant's station at Williamston. Nothing else would be a discharge of the contract in the bill of lading to transport the goods from "A" at one point to "B" at another. It is not contended by the consignee that the goods should be delivered to him elsewhere than at the defendant's warehouse in
(104) Williamston; but there was certainly no compliance (till 20 August) with the contract to deliver to the consignee, for he applied at the defendant's depot at that place and was refused the goods. They are not carried or transported to him at Williamston when on his application at the proper place he is denied them.

The "carrying" or "transporting" of goods within a reasonable time is a common-law duty. The Revisal, 2632, simply enforces the discharge of that duty by the penalty therein provided. The common-law duty of transporting goods to the consignee was not performed if upon application of the consignee at the office of the carrier the goods are not delivered to him.

It is a matter of vital importance to the public that carriers shall perform their common-law duty of carrying goods to consignees without unreasonable delay. Both Congress and the State legislatures have been engaged in framing statutes to regulate the conduct of common carriers, by prohibiting excessive charges and prohibiting discrimination and delays in the discharge of their duties to the public, and in other respects. It cannot be a reasonable and just construction of Revisal, sec. 2632, that the Legislature meant that this railroad has discharged its contract and legal duty to carry these goods to the consignee at Williamston by carrying them to Williamston, but refusing them to the consignee when he applied for them. That is to "make the law of none effect." It is to "keep the word of promise to the ear, but break it to the hope."

It was probably negligence, and not intentional untruth, that the agent at Williamston denied that the goods were there. So it would have been if the goods had lain at Jamesville. It was not necessary that unreasonable delay in transporting the goods to the consignee should be
(105) willful. That there is another statute, Revisal, sec. 2631, compelling the carrier under a penalty to receive goods when tendered, in no wise takes from the purview of the contract in the bill of lading the duty of transporting them thereafter, and carrying them, not merely to Williamston, but delivering them to the consignee at that place, when demanded by him. The goods do not necessarily go into the carrier's warehouse at the place of destination, but are often delivered from the car or the platform. The defendant's agent at the destination is as

much a part of the "transporting" force as the shipping clerk at the place of origin. Delay due to the negligence of either is the negligent delay of the carrier.

This is a remedial statute. It should be given the plain, everyday, well understood meaning of the words which are used to guarantee the enforcement of the duty of the railroad company to carry the goods to the consignee when applied for by him at the place of destination. It is said by Macaulay in his History of England (ch. 12), quoting a current statement, that an ingenious lawyer could "drive a coach and six through an act of Parliament." However that may have been as to the lawyers of England in the courts of that day, it is not true in the courts of this State, whose earnest object, in this case as in all others, is to ascertain and effectuate, not defeat, the intent of the Legislature, especially as to remedial legislation widely affecting the business of the State. The difference between the members of the Court is as to what was the relief which the Legislature meant to guarantee shippers by this statute. It could hardly have deemed that it would be any relief to the public to require the common carrier merely to transport the goods without unreasonable delay to its warehouse at the destination, while denying their possession to the consignee when demanded. The goods are still unreasonably delayed as long as delivery of (106) them to the consignee is refused without cause. What can it matter to the consignee where the goods are detained, so long as they are in fact unreasonably detained by the carrier and refused to him? Was it the object of the statute to prohibit merely unreasonable delay in carrying the goods to the destination, or to secure their prompt receipt by the consignee at the destination?

The object of the Court being to search for and ascertain the intent of the Legislature in enacting Revisal, sec. 2632, it will throw light upon that investigation to note that in section 2641 in the same subchapter it is provided that when only a portion of the shipment has reached the place of destination, "the carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received, upon payment or tender of the freight charges due upon such portion." It is not controverted here that the freight was paid, and if the transportation of part of the consignment includes delivery to the consignee, there must be a violation of the statute giving a penalty for unreasonable delay, when all of the goods are received and none are delivered when (as here) the freight is paid and the goods are demanded.

Besides, section 2633 of the same subchapter provides: "Upon payment or tender of the amount due on any shipment which has arrived at its destination, . . . such common carrier shall deliver the freight in question to the consignee or consignees." These sections, 2633 and

2641, show that a delivery of goods upon demand is a constituent element in discharging the duty of transporting the goods to the consignee, an unreasonable delay to do which justly subjected the carrier to the small penalty of $20 here recovered for taking ten days to carry this consignment 11 miles from the consignor at one station to the
(107) consignee at the next station upon the same road, there being no station between. If the statute cannot be enforced because the defendant's negligence and delay in getting the goods from the consignor to the consignee occurred after they reached the defendant's station at Williamston instead of before, then the law as thus construed is a very defective relief to the public from the evil intended to be remedied, and gives to any carrier free hand to destroy the business of any consignee, if disposed to discriminate against him.

NOTE.—The General Assembly, by chapter 461, Laws 1907, just enacted (8 March), has provided that Revisal, sec. 2632, under which this action was brought, "shall be construed to require the *delivery* at destination within the time specified."

*Cited: Stone v. R. R., post,* 224; *Wall v. R. R.,* 147 N. C., 411; *Poythress v. R. R.,* 148 N. C., 396; *Reid v. R. R.,* 149 N. C., 426; *Mfg. Co. v. R. R.,* 152 N. C., 668; *Grocery Co. v. R. R.,* 170 N. C., 244.

E. L. FAISON ET AL. v. S. R. ODOM.

(Filed 12 March, 1907.)

**Wills—Devise—Heirs—Children—Intention—Rule in Shelley's Case.**

A devise of certain lands in trust to the use of one, and after his death to his issue forever, when it appears in an ulterior limitation that the words "issue" and "children" were used in the will as correlative terms, passes only an equitable estate for life to the first taker, and an equitable estate in fee to his children, the *Rule in Shelley's case* having no application.

EJECTMENT, heard at October Term, 1906, of SAMPSON, before *Jones, J.,* and a jury. The plaintiffs claimed title under the will of William Faison, as remainderman. His Honor held that E. L. Faison, the plaintiff's father, took a fee under said will under the *Rule in Shelley's case,* and that the plaintiffs took nothing. The plaintiffs submitted to a nonsuit and appealed.

(108) *George E. Butler for plaintiffs.*
*John D. Kerr and F. R. Cooper for defendant.*

BROWN, J. The plaintiffs' right to recover depends upon the construction placed upon the eighth item of the will of William Faison, dated 18 May, 1855, and which, relieved of unnecessary surplusage, reads as follows: "I give, devise, and bequeath unto my son, Matthew J. Faison, and his heirs, in trust for the use and benefit of my son Edward, during his life, my Chestnut lands on the west side of the Six Runs, etc., and after the death of my said son Edward, to his issue forever; and in case of his death without leaving issue, I give, devise, and bequeath the lands devised in trust to him unto his surviving brothers and their heirs; and in case of their death before him and leaving children, to such issue and their heirs."

In this will the testator devises an equitable estate for life to Edward Faison and an equitable estate in fee "to his issue forever." The limitation over to the surviving brothers would not prevent the application of the rule, had the first devise been to Edward Faison and his heirs or the heirs of his body.

There have been cases where it was the manifest intention of the testator that the second taker should take, not from him, but from the first taker; then the words "children," "issue," etc., as well as the word "heirs," have been construed in some jurisdictions as words of limitation, and the *Rule in Shelley's case* applied. *Brinton v. Martin,* 197 Pa. St., 618. In the will under consideration there is no manifest intention that Edward Faison should be the root of a new succession and that those in remainder should take as his heirs. In order to bring the rule into operation, the limitation must be to the "heirs *qua* heirs" of the first taker. "It must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class." 25 A. & E., 650, and (109) cases cited.

When the devise is to one for life and after his death to his children or issue, the rule has no application unless it manifestly appears that such words are used in the sense of heirs generally. 25 A. & E., *supra,* 651, and cases cited.

In this will the word "issue" is evidently used in no such sense, but as a correlative term for children, and this word is not sufficient to indicate a purpose to create an estate of inheritance in Edward Faison. *Hauser v. Craft,* 134 N. C., 329, and cases cited; *Starnes v. Hill,* 112 N. C., 1; *Rollins v. Keel,* 115 N. C., 68. That the word "issue" is used in the sense of children is indicated plainly in the ulterior limitation to the surviving brothers, in which the testator uses this language: "and in case of their death before him and leaving children, to *such issue* and their heirs."

We are of opinion that Edward Faison took a life estate only in the land in controversy, and that the plaintiffs, his children, take the land in fee, and their father being now dead, they are entitled to possession, unless the defendants can show some other and better title of defense.

New trial.

*Cited: Faison v. Kelly,* 149 N. C., 284; *Ford v. McBrayer,* 171 N. C., 423.

(110)

G. B. GORDNER v. BLADES LUMBER COMPANY.

(Filed 12 March, 1907.)

1. **Action—Trespass Quare Clausum Fregit—Remedy—Possession.**

Action of trespass *quare clausum fregit* is the appropriate remedy for wrongful invasion of another's possession of realty. It lies for wrongful injury to the possession, and in order to recover it is necessary for plaintiff to show that he had actual or constructive possession at the time of the alleged injury.

2. **Proof—Actual Possession—Time.**

Plaintiff's evidence of the possession of the land, without fixing the time, is insufficient. He must show his possession to have been at the time of the alleged trespass in order to prove actual possession, and to sustain his action thereon.

3. **Proof—Constructive Possession—Title—Entry—Time.**

When actual possession is not sufficiently shown and constructive possession relied on, the plaintiff must show title in himself and present right of unobstructed entry at the time of the alleged wrong.

4. **Constructive Possession—State—Subsequent Grant.**

Evidence by plaintiff of a grant to himself from the State made after the time of the alleged trespass is insufficient to show constructive possession necessary to maintain the action of trespass *quare clausum fregit.*

5. **Same—Adverse—Title—State—"Color."**

When plaintiff relies upon constructive possession by reason of title, and no grant from the State or thirty years adverse possession is shown, it is incumbent on plaintiff to establish title by adverse occupation and claim of ownership under color for twenty-one continuous years prior to the alleged trespass, and such occupation for nineteen or any less number of years than twenty-one is not sufficient.

6. **Pleading—Answer Sufficient.**

An answer alleging that the defendant "is advised, informed, and believes that the first article of the complaint is not true, and therefore denies the same," is sufficient to raise the issue.

ACTION in nature of trespass *quare clausum fregit,* tried before *Shaw, J.,* and a jury, at November Term, 1906, of CRAVEN.

(111) At the close of plaintiff's testimony, on motion of defendant, the action was dismissed as on judgment of nonsuit, and plaintiff excepted and appealed.

*Loftin & Varser for plaintiff.*
*W. W. Clark and Moore & Dunn for defendant.*

HOKE, J. The action of trespass *quare clausum fregit* is the appropriate remedy for the wrongful invasion of another's possession of realty. It lies for injury to the possession, and, in order to sustain the action, it is required that the plaintiff should establish by proper proof that he was in the actual or constructive possession of the property at the time the wrong was done. *S. v. Reynolds,* 95 N. C., 616; *Patterson v. Bodenhamer,* 33 N. C., 4; *Smith v. Wilson,* 18 N. C., 40.

If there is no evidence of actual possession, and the plaintiff seeks to recover by reason of constructive possession, it becomes necessary for him to show title and that such title existed in him at the time of the alleged trespass. *McCormick v. Monroe,* 46 N. C., 13; *Drake v. Howell,* 133 N. C., 162.

An application of these principles to the facts of the present case fully sustains the ruling of the trial judge in dismissing the action.

There is no sufficient evidence of actual possession in plaintiff at the time of the wrong done to justify a recovery by him. He testified to an arrangement made by him with one White, some time in the year 1899, by which White was to hold the land for him. White, it seems, denied this tenancy, and some court has sustained the claim of White in this denial.

But, accepting the plaintiff's version as true, this leaves it entirely uncertain and indefinite as to what time in 1899 the agreement was made with White, and when White assumed the possession (112) under and by virtue of this alleged agreement.

We can discover no evidence in the record of any cutting of the land after March, 1899; and the burden being on the plaintiff to establish the wrong, his evidence fails to show that the trespass was committed while he was in actual possession of the property, and no recovery, therefore, can be had by him on that ground. *Edmonston v. Shelton,* 49 N. C., 451.

True, plaintiff testifies that a few days after taking his deed from the administrator, he went upon the land and found some persons cutting timber, and they had then cut, or there had been cut to that time, about 200,000 feet; but if this is all the occupation he had of the property, and he was then without any title, this would be no such possession as the law protects. In the absence of title, the wood-choppers were as much in possession as plaintiff. *Morris v. Hayes,* 47 N. C., 93.

The plaintiff, then, must recover, if at all, by reason of constructive possession, which, as heretofore stated, makes it necessary for him to show that he had the title at the time of the alleged trespass. In the

endeavor to do this, the plaintiff offered a grant of the State for the land to himself, bearing date in 1902, many years after the alleged trespass; and so this does not at all meet the requirement. *Drake v. Howell, supra.*

Plaintiff also offered a deed for the land from Anne Randall to William Mitchell, bearing date 1804, and a line of *mesne* conveyances, apparently regular, conveying this interest to himself; his own deed, under this claim, bearing date in March, 1899, and presumably, a few days before the cutting had ceased.

(113) No title from the State by grant or thirty years adverse possession having been shown to this time, on the facts presented, in order for plaintiff to establish a good title by reason of these deeds he would have to show that he or his predecessors, or he and they together, had occupied the land under or while holding them, for some continuous period of twenty-one years prior to the trespass.

The evidence, as now contained in the record, fails to show continuous occupation for a longer period than eighteen, or, at most, for nineteen years. No title, therefore, has been shown under either claim at the time of the alleged wrong; and the plaintiff having failed to show either active or constructive possession at such time, upon the entire evidence, his action was properly dismissed as on judgment of nonsuit.

The Court is also of opinion that the answer of defendant to plaintiff's allegation of ownership and trespass—a similar and specific denial having been made as to each—"that it is advised, informed, and believes that the first article of plaintiff's complaint is not true, and therefore denies the same," is sufficient in form to raise the issue, and the exception of plaintiff addressed to that question was, therefore, properly overruled. *Kitchin v. Wilson,* 80 N. C., 191.

On the record and evidence, as now presented, there is no error, and the judgment below is

Affirmed.

*Cited: Waters v. Lumber Co.,* 154 N. C., 233; *Barfield v. Hill,* 163 N. C., 265.

(114)

M. S. TREMAINE v. JOHN W. WILLIAMS.

(Filed 12 March, 1907.)

1. **Deeds—Conveyances—Standing Trees—Sufficiency.**

Standing trees are a part of the realty, and a conveyance of title thereto has to be sufficient to convey realty; and a contract for cutting timber, without the proper words of conveyance and a sufficiently definite description of the land upon which the same is standing, is void against purchasers for value under a sufficient deed subsequently registered.

**2. Deeds—Registration—Possession—Notice—Statute.**

Purchasers for value under a sufficient and registered deed are not affected with notice by the possession of those under a prior deed, if invalid or registered upon an invalid probate. No notice, however full or formal, can supply the notice by registration required by the statute.

**3. Admission of Title—Contract with Grantor—Personal Covenant.**

An admission by the defendant in his answer, that the title to the timber passed to the plaintiff, estops the defendant from asserting the right to cut it under a contract previously made by him with the grantor, such being a personal covenant, and not one running with the land.

ACTION in DUPLIN to recover damages of the defendant for cutting trees. On 23 October, 1906, plaintiff obtained an order restraining defendant from cutting the trees into timber upon the land in question. A motion was made by plaintiff before *Jones, J.*, at chambers in Kenansville, on 23 October, 1906, to continue the order to the final hearing, and from the judgment of his Honor the defendant appealed. The pertinent facts are stated in the opinion.

*Stevens, Beasley & Weeks for plaintiff.*
*H. D. Williams and Murray Allen for defendant.*

CLARK, C. J. The plaintiff's grantor, James M. Williams, and the defendant entered into the following contract, 20 April, 1905:

I, James M. Williams, have agreed to let John W. Williams (115) put a steam mill on my land near Hallsville, Duplin County, N. C., and John W. Williams is to pay me $1.50 per thousand for pine timber, the same to be measured at the mill by the Doyle rule as it is delivered there before any is sawed; and John W. Williams may keep said mill there for twelve months, with privilege of five years, provided he pays for the timber as cut, at no time to have on hand over 30,000 feet of pine timber unpaid for. And J. W. Williams is to pay for cypress logs $2 per thousand, and shall not keep on hand more than 20,000 feet unpaid for at any time, and what is held unpaid for shall be subject to the debt for the price agreed upon, and said James M. Williams may sell the same within sixty days from the time of measurement if J. W. Williams fails to pay for it. The undersigned parties to contract do agree to above conditions. JAMES M. WILLIAMS.
J. W. WILLIAMS.

This agreement, duly probated, was recorded in the office of register of deeds for Duplin County, 15 January, 1906. On 18 January, 1906, said James M. Williams and others executed to the plaintiff a deed for the timber upon two tracts of land described therein, one for several tracts combined into one tract of 753 acres, the other 97 9/10 acres, all

lying in Duplin County, which deed was recorded 20 January, 1906. The complaint alleges that the defendant is wrongfully cutting timber on aforesaid premises, and asks for damages and a restraining order. The answer admits that the plaintiff is owner of the timber on the land described in his deed, and that the defendant is cutting it, but avers that under the above agreement with one of plaintiff's grantors, J. M. Williams, the defendant is entitled to cut the timber, paying
(116) plaintiff therefor at the rate specified in the agreement between defendant and said J. M. Williams. There were contradictory affidavits whether or not plaintiff had notice of said agreement between Williams and the defendant when he took his deed. The order of the court allowed the defendant to saw up all logs on hand severed from the land and remove the timber, but enjoined the cutting of any more logs to the hearing. The defendant appealed.

Standing trees are a part of the realty, and can be conveyed only by such an instrument as is sufficient to convey any other realty. *Ward v. Gay,* 137 N. C., 399; *Drake v. Howell,* 133 N. C., 165; *Green v. R. R.,* 73 N. C., 524; *Mizell v. Burnett,* 49 N. C., 249; *s. c.,* 69 Am. Dec., 744. The agreement between J. M. Williams and defendant is not sufficient to convey the timber. It contains no operative words or words of conveyance. This defect is fatal, and as to realty cannot be helped out by parol (*Ward v. Gay, supra*), nor by the prior registration of the defective instrument. When the grantee in a conveyance of realty has it recorded, his title cannot be affected by any notice of a prior unrecorded conveyance (if there had been such), nor by notice that another is in possession with claim of title. Revisal, sec. 980. "No notice to purchaser, however full and formal, will supply the place of registration." *Quinnerly v. Quinnerly,* 114 N. C., 145. Of course, if the instrument recorded is not a conveyance, there has been no prior registration of a conveyance.

Even if the agreement between Williams and defendant had contained words of conveyance, it was void for lack of description of the tract upon which the timber stood. There was no offer to show that Williams owned only one tract, or that the timber was on the tract where the engine stood. On the contrary, it was alleged and admitted that
(117) there were several tracts. The answer having admitted the ownership of the timber by plaintiff under his deed from J. M. Williams, we cannot understand how the defendant can assert any right to cut it by virtue of his agreement with J. M. Williams.

The title to the timber in the plaintiff being admitted, the agreement is merely a personal covenant. It is certainly not a covenant running with the lands, which, besides, is not claimed to have passed to the defendant.

It is not controverted that the money for the logs already sawed, and for logs on hand which the defendant is permitted to saw up, is to be paid to plaintiff at the price named in the contract with Williams. The order restraining the defendant from cutting any more trees embraced in the conveyance to the plaintiff is

Affirmed.

*Cited: Manufacturing Co. v. Rosey, post,* 372; *Piano Co. v. Spruill,* 150 N. C., 169; *Wood v. Lewey,* 153 N. C., 403; *Burwell v. Chapman,* 159 N. C., 212; *Buchanan v. Clark,* 164 N. C., 71; *Bank v. Cox,* 171 N. C., 81; *Allen v. R. R.,* 171 N. C., 341.

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T. C. HILL v. JONAS H. BROWN.

(Filed 12 March, 1907.)

**Supreme Court Decision—Contracts—Dormant Stipulations—Rights.**

There can be no vested right in the decision of the Supreme Court, but such decision is, as a dormant stipulation in a contract, construed with reference to the time it was made, and a subsequent overruling of the decision by the same Court will not disturb it.

ACTION heard by *Jones, J.,* at November Term, 1906, of DUPLIN. The judge found *the facts in accordance with agreement of counsel.* From judgment for plaintiff, defendant appealed.

*Stevens, Beasley & Weeks for plaintiff.*
*H. D. Williams and Murray Allen for defendant.*

BROWN, J. It appears from the case agreed that the land in (118) controversy was partitioned in 1897 by decree of the Superior Court of Duplin in a proceeding to which this plaintiff and defendant, and all the other owners, were parties, except the children of Pallie Whaley. The final decree confirming the partition was entered 5 March, 1897. In August, 1903, defendant Brown acquired title to the share of the Whaley children. It is contended that he is estopped by the principles laid down in *Carter v. White,* 134 N. C., 466, from setting up against the plaintiff such outstanding interest so acquired. It is contended by defendant that (1) *Carter v. White* was first correctly decided, and the subsequent decision is erroneous; (2) a contract valid under a judicial decision in force when the contract is entered into cannot be impaired by a subsequent judicial decision.

In an able and learned argument, Mr. Allen, of counsel for defendant, asks us to overrule the last decision rendered in *Carter v. White,* 134

N. C., 466. It is not necessary that we should take that into consideration, as we are with the defendant upon the second contention, so far as it applies to the facts of this case, which are on "all-fours" with those stated in *Carter v. White.* In both cases the defendant in partition proceedings, after final decree therein, acquired an outstanding interest from an owner who was not a party, and attempted to set it up against the plaintiff in such proceeding.

When the *Carter case* was before this Court at August Term, 1902, it was held that defendant was not estopped. It is said in the opinion: "So the plaintiff's contention is that, by reason of said decree, defendant is estopped from setting up his interest acquired from Land, notwithstanding Land was not a party to the special proceeding."

The Superior Court held with the plaintiffs, and this Court said: "In so holding his Honor was in error." When the case was con-
(119) sidered again at Spring Term, 1904, the purport and general scope of the opinion of 1902 was recognized in both the opinion of the Court and the dissenting opinion of the *Chief Justice.*

Between the promulgation of the two decisions this defendant purchased the outstanding interests of the Whaley children. In so doing we think he is protected by the principles of law set forth in the opinion of this Court in 131 N. C., p. 14, notwithstanding the majority of this Court in 1904 took a different view.

We deduce the well settled principle from a number of authorities, that the law of contract enters into the contract itself and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it and as it is construed at the time the contract is made. *Napier v. Jones,* 47 Ala., 96; *Davis v. Montgomery,* 51 Ala., 146; *Herndon v. Neave,* 18 S. C., 354; *Haskett v. Maxey,* 139 Ind., 66; 19 L. R. A., 379. The annotator says, in commenting on the last cited case: "The effect of judicial decisions as the law of a contract made while the decisions are in force, although they are overruled before the time for enforcing the contract, is recognized in the above decision. The justice of this doctrine is apparent."

In *Haskett v. Maxey, supra,* the Court held: "The construction of a statute of descent established by the decisions of the courts at the time of a quit-claim by heirs claiming under the statute becomes a part of the contract and must govern the rights of the parties as against a different construction thereafter adopted by overruling the former decisions."

In *Farrior v. Mortgage Co.,* 12 L. R. A., 856, the Supreme Court of Alabama says: "Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to
(120) know the law better than the courts, or to know what the law

will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefit of the contract entered into in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort at the time of the transaction, and no fault can be imputed to him, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the State." The principle is recognized by recent decisions of our own Court. In *S. v. Bell,* 136 N. C., 677, it is applied in a criminal action by *Mr. Justice Connor,* speaking for the Court, in these words: "While it is true that no man has a vested right in a decision of the Court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the Court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed."

In a case of great importance at last term the subject is elaborately considered by *Mr. Justice Walker* and the principle we apply in this case fully recognized and applied there. *Hill v. R. R.,* 143 N. C., 539. In that case the learned justice comments upon *S. v. Bell* as follows: "This Court in *S. v. Bell* 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, 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 (121) proper course to pursue, and would any other have commended itself to our sense of right? The opposite rule would have met with strong condemnation, as being contrary to the plainest principles of justice."

We think, upon well established authority, supported by sound principles of justice and public policy, that the defendant is not estopped from setting up his interest in the land acquired in 1903. Upon the agreed facts, the judgment of the Superior Court is

Reversed.

*Cited: Mason v. Cotton Co.,* 148 N. C., 511; *Jones v. Williams,* 155 N. C., 190; *Acker v. Pridgen,* 158 N. C., 340.

J. H. SESSOMS v. LEIGH R. SESSOMS.

(Filed 12 March, 1907.)

1. **Partition—Wills—Estates—Fee Tail—Statute—Fee Simple.**

A devise to S. and the lawful heirs of his body forever confers an estate fee tail, converted into a fee simple under the statute. Revisal 1905, sec. 1578.

2. **Wills—Devise—"Lend."**

In the construction of a will the word "lend" will be taken to pass the property to which it applies in the same manner as the use of the words "give" or "devise," unless it is manifest that the testator did not intend an estate to pass.

3. **Wills—Estates—Fee Simple—Contingency—Limitation of Fee—Statute.**

When by the operation of the statute a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the act of 1827, sec. 1581, Revisal 1905.

4. **Shifting Uses—Executory Devise—Construction Unaffected—Statute.**

Revisal 1905, sec. 1581 (Laws 1827), is a rule of construction upholding the second and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate.

(122) SPECIAL PROCEEDINGS for partition of land, transferred on issues raised, to Superior Court in term, and tried before *Neal, J.*, at December Term, 1906, of BERTIE, a jury trial having been waived by the parties.

Petitioners and defendant Leigh R. Sessoms are the children and heirs at law of Joseph W. Sessoms, who died in June, 1906, leaving a last will and testament in which disposition is made of the land in controversy.

The interest of said Joseph W. Sessoms in the land was derived under the following clause in the will of his grandfather, William Sessoms:

"ITEM 3. I lend unto my grandson, Joseph W. Sessoms, the Wyman tract of land, whereon his father H. B. Sessoms, lived and died, the number of acres not known, to him and his lawful heirs of his body forever; and if he should die without lawful heirs of his body, I then lend it to his sister, my granddaughter, Martha Sessoms, and her lawful heirs of her body forever; and I further lend unto my grandson, Joseph W. Sessoms, and my granddaughter, Martha Sessoms, the following

negroes, to wit: Negro woman Jinny, boy Abram, man Watson, boy Washington, girl Gregory, and girl Catherine, to them and their lawful heirs of their bodies forever: *Provided,* if either of my grandchildren mentioned in this item should die without lawful heirs of his or her body, my wish is the surviving one, as the case may be, shall have the above lands and negroes as above stated; and if both of them should die without lawful heirs of his or her body, my wish and desire is that the above mentioned lands and negroes be equally divided between my lawful heirs then living, unto them and their heirs forever."

That William Sessoms, the grandfather, died in April, 1844, (123) and his will was duly admitted to probate May Term, 1844; that Joseph W. Sessoms died, as stated, in June, 1906, and the Martha mentioned in the will of his grandfather, William, died prior to that time.

If, by this clause of the will of his grandfather, Joseph W. Sessoms acquired only a life estate, then partition of the same shall be made as demanded in the complaint; but if Joseph W. Sessoms acquired an absolute estate, then the land must be dealt with as directed by the will of said Joseph.

The court below being of opinion that Joseph W. Sessoms, under his grandfather's will, acquired an absolute estate in the land, adjudged that the will of said Joseph shall control the disposition of the land, and the plaintiffs excepted and appealed.

*Winston & Matthews for plaintiff.*
*Winborne & Lawrence and Shepherd & Shepherd for defendants.*

HOKE, J., after stating the case: The clause in question conferred on Joseph W. Sessoms an estate tail, converted by our statute into a fee simple, Revisal, sec. 1578; and the court below was correct, therefore, in holding that Josph W. Sessoms acquired an absolute estate under the terms of his grandfather's will.

This construction is not affected by the use of the word "lend." This word is not infrequently used in wills as synonymous with "give" or "bequeath" or "devise." There are instances where, from the context or exceptional use of the word, it has been allowed a different significance; but the general rule is, that unless it is manifest that the testator did not intend an estate to pass, the word "lend" will pass the property to which it applies in the same manner as if the word "give" (124) or "devise" had been used; and this, we think, is the clear import of the word in the present case. *Cox v. Marks,* 27 N. C., 361; *King v. Utley,* 85 N. C., 59; *Edgerton v. Aycock,* 123 N. C., 134; *Hinson v. Pickett,* 9 S. C. Eq., 35.

It is further urged on the part of the appellants that Joseph W. Sessoms only acquired a life estate in the land by reason of the limitation

over to his sister Martha and her lawful heirs; the argument being that this limitation over to Martha so qualified the devise to Joseph and "the lawful heirs of his body forever" that these words, "lawful heirs of his body," should not be received in their ordinary acceptation, "carrying the estate to the whole line of heirs of the sort described to take in succession as such heirs," but should be regarded in a qualified sense as a mere *descriptio personarum* or particular description of individuals, by reference to whom, instead of their father Joseph, the succession should be regulated.

But this, we think, is not the correct interpretation of this devise, and the position involves a misconception of the principle which is sought to be applied.

The devise to Joseph and the heirs of his body carries to him the entire estate, and the limitation over to "Martha and her lawful heirs," in case Joseph dies without lawful heirs of his body, is not a qualification of the estate of Joseph, but is a separate estate, which, on a contingent event, would go to Martha direct from the testator under the doctrie of shifting uses, and by way of executory devise. *Smith v. Brisson,* 90 N. C., 284.

Prior to an act of 1827, Revisal, sec. 1581, this limitation over would have been too remote, as being against the policy of the law which condemns perpetuities. But this statute, enacted for the purpose, established a rule of construction by which this and similar limitations could very generally be upheld.

(125) The statute, however, which, as stated, only established a rule of construction by means of which the second estate could, under certain circumstances, be validated and upheld, did not, and did not intend to, change the nature of the first estate or make the second a qualification of the first.

As said by *Smith, C. J.,* in *King v. Utley, supra:* "The act of 1827, which rendered effectual limitations in a deed or will made after 15 January, 1828, depending on the death of a prior devisee, without heirs, heirs of the body, issue, issue of the body, children, offspring, or other relation which were previously held to be too remote and void, does not interfere with the application of the principle in determining the nature and extent of the precedent estate."

We hold, therefore, that Joseph W. Sessoms acquired an absolute estate in the property, and that the same must be disposed of as directed by his will.

In *Bird v. Gilliam,* 121 N. C., 328, cited and relied upon by plaintiff, and also, in *Dawson v. Quinnerly,* 118 N. C., 188, and *Thompson v. Crump,* 138 N. C., 32, it would seem that the Court was not sufficiently advertent to the principle here referred to; and in cases like the present,

where the terms of the devise carry the entire and same estate to the first devisee by the use of words creating an estate in fee or in fee tail, general or special, with limitation over, the two last being made fee-simple estates by our statute, the correct doctrine is held in *Morrisett v. Stevens,* 136 N. C., 160, and *Jones v. Ragsdale,* 141 N. C., 200.

These cases and that of *Whitfield v. Garriss,* 131 N. C., 148, reaffirmed on petition to rehear in 134 N. C., 24, are decisive of the one before us, and the judgment of the court below is

Affirmed.

*Cited: Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Ennett,* 151 N. C., 545; *Perrett v. Bird,* 152 N. C., 221; *Smith v. Lumber Co.,* 155 N. C., 391; *Faison v. Moore,* 160 N. C., 149; *Harrington v. Grimes,* 163 N. C., 77; *Jones v. Whichard, ib.,* 245; *Burden v. Lipsitz,* 166 N. C., 526; *Roberson v. Moore,* 168 N. C., 390; *Shuford v. Brady,* 169 N. C., 227; *Hobgood v. Hobgood, ib.,* 490; *O'Neal v. Borders,* 170 N. C., 484; *Clark v. Wimberly,* 171 N. C., 50; *Springs v. Hopkins, ib.,* 491.

(126)

SAINT PETER'S CHURCH v. JOHN G. BRAGAW, JR.

(Filed 12 March, 1907.)

1. **Tenants in Common—Adverse Possession—Statute of Limitations.**

Actual possession, continuously, openly, and adversely, by the grantee of a tenant in common for twenty years, under a deed describing metes and bounds, will toll the entry and bar the rights of the cotenants by the operation of the statute of limitations.

2. **Deed—Abandonment—Possession—Continuity—Transfer of Right.**

When the continuity of possession has been preserved, to transfer a right is no abandonment of the property. Therefore, when a conveyance of land demands certain requirements after setting forth the covenant, with a provision that the land shall revert if abandoned, the grantee may convey subject to the requirements, when there is no provision of forfeiture and the intention of the original grantors is preserved; and such requirements, in the nature of covenants, are enforcible in a court of equity against subsequent purchasers with notice, though, technically, they do not run with the land.

3. **Deed—Covenant—Condition Subsequent—Doubt—Forfeiture Avoided.**

When a conveyance of land leaves in doubt whether a certain clause is intended as a covenant or a condition subsequent, under the policy of the law to avoid a forfeiture, it will be construed as a covenant, when possible.

CONTROVERSY submitted without action, before *McNeil, J.,* at December Term, 1906, of BEAUFORT.

This is a controversy without action, submitted under Revisal, sec. 803, to determine the validity of plaintiff's title to realty which it had contracted to sell to the defendant and which is a part of two lots in Washington originally owned by Thomas A. McNair, deceased, and devised by him as follows: "I require my executor to give to some religious denomination of good standing who will accept them, two lots adjoining two lots I gave my sister, Pauline, one in the continuation
(127) of Main Street and one in the continuation of Second Street, in the Town of Washington, N. C., including the graveyard, on condition that they keep the said graveyard sacred. I appoint my nephew, William T. Tannahill, my executor." The executor died without having given or conveyed the lots to any one.

On 22 February, 1886, the heirs of Thomas A. McNair, other than W. G. Telfair and Ed. Telfair, for the consideration of $1, conveyed the said two lots to the plaintiff by deed duly executed and sufficient for that purpose, with full covenants of seisin, warranty, and against encumbrances. The deed contained this provision, which was inserted after the covenants: "In the conveyance of this property to the parties of the second part, they are required, first, to inclose the tomb of Augustus Harvey and wife with an iron railing; second, they shall not allow this property to be used as a cemetery; third, in case the parties of the second part should abandon said property, it shall revert to the McNair heirs, parties of the first part." The plaintiff contracted to sell, and the defendant to buy, a part of the said two lots fronting 52 feet on Second Street and extending back with that width and parallel with Academy Street 175 feet, the consideration being $1,500.

It is admitted that "since the execution of said deed (by the heirs of McNair to it) the plaintiff has had continuous, open, actual, and adverse possession of the said land, claiming it as its own against all parties," and that it is a religious society or corporation, and is vested by law with full power to take, hold, and dispose of real and personal property.

At the time of the execution of the deed from some of the heirs of McNair to the plaintiff, the two heirs who did not sign the deed, W. G. Telfair and Ed. Telfair, were of full age.

(128) The plaintiff has inclosed the tomb of Augustus Harvey and his wife (Susanna Blount), as directed in the will of Thomas A. McNair and in the deed of his heirs to the plaintiff, and has "kept and cared for" the same.

The premises have not been used as a cemetery, but for a number of years were used by the board of school trustees of the Town of Washington for public school purposes, under a lease from the plaintiff. The schoolhouse, which was built thereon, was destroyed by fire, and all of

the lots are now vacant. The plaintiff has determined to use a part of said lots, including that part upon which is the tomb of Augustus and Susannah Harvey, for the purpose of building a rectory, "still reserving and keeping intact the said tombs."

The defendant has refused to comply with his part of the contract with plaintiff, upon the following grounds: (1) That all the heirs of Thomas A. McNair did not join in the deed hereto attached, and marked "Exhibit B" (deed to plaintiff). (2) That the plaintiff cannot make him a good title by reason of the third of the clauses in said deed, which come after the covenants of warranty, for that the said clause is a condition subsequent, and that the making of the deed by the plaintiff would be an abandonment of the said property, and that by the terms of the deed under which the plaintiff holds, the land would revert to the heirs of Thomas A. McNair.

It is thereupon agreed by the parties that if the plaintiff has and can convey to the defendant a good and indefeasible title, free from all conditions, trusts, and equities, judgment shall be entered for the plaintiff; otherwise, for the defendant. The court, upon consideration of the case, gave judgment for the plaintiff, and the defendant appealed.

*Bragaw & Harding for plaintiff.*
*Ward & Grimes for defendant.*

WALKER, J., after stating the case: It is admitted that the (129) plaintiff has fully complied with the stipulation in the deed as to the inclosure of the tomb of Augustus Harvey and his wife, and it is also admitted that there has not as yet been any violation of the second stipulation, that the premises should not be used as a cemetery. We will again refer to this clause in another connection.

The two questions discussed in the briefs of counsel relate to the sufficiency of the adverse possession of some of the heirs of Thomas McNair to bar the right of their cotenants, W. G. and Ed. Telfair. This subject has been so recently and so fully considered by us that it would seem to require no further discussion. We held in *Dobbins v. Dobbins,* 114 N. C., 210, that adverse and exclusive possession of the common property by one of the tenants, such as that described in this case, will toll the entry and bar the right of his cotenant if continued for twenty years.

The other question, as to the abandonment, under the third stipulation, should present no insuperable difficulty. Conditions subsequent, especially when relied upon to work a forfeiture, are strictly construed. *Woodruff v. Woodruff,* 44 N. J., 353. The word "abandonment" has a well defined meaning in the law which does not embrace a sale or con-

veyance of the property. It is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property and the external act by which this intention is executed, and that is, the actual relinquishment of it, so that it may be appropriated by the next comer. 1 Cyc., 4. "Abandonment must be made by the owner without being pressed by any duty, necessity, or *utility* to himself, but simply because he desires no longer to possess a thing; and, further, it must be made without a desire that any other person shall acquire the
(130) same; for if it were made for a consideration, it would be a barter or sale, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift." *Stephens v. Mansfield,* 11 Cal., 363. That case involved the very question we have in this one, to wit, whether a sale and conveyance of property was an abandonment of it within the meaning of the law. The same Court has again said: "There can be no such thing as abandonment in favor of a particular individual or for a consideration, as such an act would be a gift or a sale." *Richardson v. McNulty,* 24 Cal., 329. When there is a sale or gift, or a transfer in any other mode provided by law, the continuity of the possession is preserved and the idea of abandonment is necessarily excluded. The authorities uniformly construe the word "abandon" as we have done, and distinguish it from a sale or transfer. Black's Law Dict., p. 4; 1 Words and Phrases, pp. 4, 5, and 11; *Ditch Co. v. Henry,* 15 Mont., 558; *Mitchell v. Carder,* 21 W. Va., 285; *Derry v. Ross,* 5 Col., 300. "There is a great difference," says the Court in *Hogan v. Gaskill,* 42 N. J. Eq., 217, "between abandon and surrender; between abandoning a right or thing and the surrender of such a right or thing to another; between giving it up because it is regarded as utterly useless or valueless, and surrendering, assigning, or transferring it to another as a valuable right or thing. When one surrenders a right or thing to another by solemn agreement in writing, he certainly does not abandon it in the sense in which all understand the word 'abandon.'" That case also presented the identical question we have here. The intention of the McNairs was to have the premises constantly occupied by some one, and a sale by the plaintiff to the defendant will not, of course, contravene that intention.

(131) We deem it proper to refer to the question, though it is not mentioned in the briefs, whether by the second requirement, that the property should not be used as a cemetery, a condition subsequent is annexed to the estate, or whether that prohibition should be regarded merely as a stipulation or a covenant to be enforced by a resort to the equitable power of the court for the purpose of restraining its violation. We are clearly of the opinion that this clause should not be construed

as a condition subsequent, but rather as a covenant or a restrictive clause, observance of which may be compelled by a court of equity. While conditions subsequent may be created without the use of technical words, they must be clearly expressed, as they are not favored in law, and, if it is doubtful whether a clause is a covenant or a condition, the courts will so construe it, if possible, as to avoid a forfeiture. *Graves v. Deterling,* 120 N. Y., at p. 455; *Woodruff v. Woodruff,* 44 N. J. Eq., 349. Words in a deed, not in form expressing either a covenant or a condition, but sufficient to create either the one or the other, will be construed as a covenant rather than as a condition. *Chancellor Kent* said: "Whether the words amount to a condition or a limitation or a covenant may be matter of construction depending on the contract. The intention of the parties to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case." 4 Kent Com., 132. It has been said that there may be a covenant for almost anything (*Lord Eldon* in *Church v. Brown,* 15 Ves., 264), and that covenants have frequently been inserted in conveyances to maintain the (132) eligible character of property adjoining the parcel conveyed, by protecting the owners of it against nuisances or the erection of offensive structures or the carrying on of an injurious trade. It can be easily inferred from the case agreed, if not from the terms of the conveyance itself, that this clause was inserted in the latter to render more eligible the adjoining property in which the grantors had an interest. This is said to be the reasonable presumption in most any case of this kind. "If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement enforcible in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction, and thereby place ourselves in accord with that inclination of the law which regards with disfavor conditions involving the forfeiture of estates. In this connection, it may be noted that there is no clause in the deed giving the right to reënter for condition broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to reënter, yet its absence to that extent frees still more the case from the difficulty of giving a more benignant construction to the proviso clause." *Post v. Weil,* 115 N. Y., at p. 371. We may say in this case, as was said in the case just

cited, which is somewhat similar in principle to ours, that there is no interest which is not adequately protected by regarding the clause as intended to create a covenant or limitation in trust that the property shall not be used for the one certain purpose mentioned. It is more agreeable to reason, as it is to conscience, and it well comports with the character and object of the deed containing the provision against
(133) the use of the premises as a cemetery, if we hold that the office of the latter was simply to restrain the generality of the preceding clauses. The two cases which we have already cited (*Post v. Weil* and *Graves v. Deterling, supra*) are so much in point and discuss the principle on which our case, in this part of it, must turn, so fully and ably, that we may well be content to rest our decision upon the reasons clearly stated therein. See, also, *Hart v. Dougherty,* 51 N. C., 86; *Stanley v. Colt,* 5 Wall., 119; *Lynn v. Hersey,* 103 N. Y., 264; *Baker v. Mott,* 78 Hun., 141; 103 Pa. St., 613; *Dawson v. Inhabitants,* 7 Allen, 125. The clause under consideration has no provision for a forfeiture, while the next and last clause has one, showing clearly the former was intended to operate as a covenant and not as a condition subsequent, a breach of which may involve a forfeiture of the estate conveyed by the deed.

The covenant against using the premises as a cemetery will bind the grantee of the original covenantor with notice and be enforced in equity against him; and in order to fix him with liability it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title and binding those who succeed to it, the question being, not whether the covenant runs with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. *Tulk v. Moxhay,* 1 Hall & T., 105; *Hodge v. Sloan,* 107 N. Y., 244; *Parker v. Nightingale,* 6 Allen, 341; *Morland v. Cook,* L. R., 6 Eq. Cases, 252. Each case, of course, will depend upon its own circumstances, and the covenant will be enforced by the court or its enforcement refused, as the nature of the particular case may,
(134) under the general principles of equity, seem to require. *Trustees v. Thacher,* 87 N. Y., 311.

The stipulation in this case is restrictive, requiring the grantees to abstain from the use of the premises for a certain purpose. There is no clause in the deed specifying how otherwise the premises shall be used or for what special purpose, so as to impress the legal title with a trust in respect to that particular use, or so as by its terms to create an estate upon condition subsequent, or a base, or, more accurately speaking, a qualified fee. *Hall v. Turner,* 110 N. C., 292. The deed simply runs to the church or its trustees generally, without declaring any use

to which the land shall be applied. Such a deed has been held to pass an absolute title in fee which is not forfeited by failing or ceasing to use the property for church purposes (*Cook v. Leggett,* 88 Ind., 211), unless in this case the property shall be abandoned, when by the express terms of the deed it will revert. The recent case of *St. James v. Bagley,* 138 N. C., 384, also is ample authority for this proposition, although it did not involve the precise point we have in this case, as did *Cook v. Leggett.* The question as to when a trust will or will not be raised is fully and learnedly discussed by *Justice Connor* in *St. James v. Bagley.* There are not even any precatory words used in the deed to the plaintiff, and there is nothing from which any intention to create a trust can fairly be inferred.

It appears that two of the heirs of Thomas A. McNair, namely, W. G. and Ed. Telfair, are not parties to this proceeding. They will, of course, not be bound by the admissions in the case or in any way concluded by the judgment. They are proper but not necessary parties under the circumstances of this case, especially as their presence is waived, and as the facts have been agreed upon and the parties to this submission are willing that we should decide as to the soundness of the title upon (135) those facts, the defendant taking the risk of establishing them if any controversy should hereafter arise between him and the two Telfairs. Under the circumstances, we can proceed without them. This course has been pursued in *St. James v. Bagley, supra,* and in other cases to be found in our Reports.

Reviewing the whole matter, we have discovered no error in his Honor's decision upon the case agreed.

Affirmed.

*Cited: Guilford v. Porter,* 167 N. C., 369.

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L. L. STATON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 March, 1907.)

1. **Removal of Cause—Joint Defendants—Several Liability—Single Action—Federal Court.**

   Two defendants participating in the commission of a tort to the injury of the plaintiff are jointly and severally liable, and when the plaintiff has proceeded against them in a single action, the cause is not separable, and cannot be removed by a foreign defendant to the Federal court, though different answers may be made and different defenses relied upon.

2. **Complaint—Domicile—Descriptive Words.**

   In the petition for the removal of a cause to the Federal court, the defendant describes itself as a certain railroad company, and the complaint

alleges that it is a certain "railroad company, of Virginia"; the punctuation, by comma, being, as shown, between the word "company" and the words "of Virginia," the latter words are construed merely as descriptive of the domicile.

3. **Evidence — Corporation Commission Reports — Public Records—Judicial Notice.**

Reports of the Corporation Commission of North Carolina are matters of public record, of which the courts therein will take judicial notice.

4. **Removal of Causes—Federal Court—State Court—Jurisdiction.**

For the purpose of jurisdiction a corporation is a citizen and resident of the State creating it, and cannot remove a suit to the Federal court upon the ground of diversity of citizenship by actual and authorized consolidation with a foreign corporation and a change of its principal place of business, or domicile, to another State, prior to the commencement of the action.

5. **Removal of Cause—Charter Provisions—Jurisdiction Retained—Domesticating Act.**

A corporation existing under an amended charter conferring power to consolidate with other corporations, and containing a provision retaining jurisdiction in the courts of the State granting it, cannot, by prior consolidation with a foreign corporation and the change of its principal place of business to another State, remove a suit to the Federal court upon the ground of diversity of citizenship, such jurisdictional provision being materially different from a corporation filing its charter with the Secretary of State under an act requiring such to be done for the purpose of conferring jurisdiction in such suits upon the State courts.

(136) MOTION of defendant to remove a civil cause from the State to the Federal court, heard before *Cooke, J.*, at October Term, 1906, of EDGECOMBE. From a judgment refusing the motion, defendant appealed.

The plaintiff alleged that during 1760 one Joseph Howell conveyed to trustees a tract of land to be laid off into streets and lots for the purpose of establishing a town; that a town common of not less than 50 acres should be reserved for the use of the citizens of said town; that thereafter the said land was surveyed and streets and lots laid off, and 50 acres set apart for a town common; that a map of the lots, streets, and common was made and duly recorded in the office of the register of deeds of Edgecombe County; that on 30 November, 1760, an act was passed by the Governor, Council, and Assembly incorporating the town of Tarboro, and the said trustees constituted directors or trustees of the town; that thereafter, 18 November, 1786, the General Assembly enacted that a map, plan, and survey of the town, showing the lots, streets, and portion reserved as a town common, then made under the direction of the town commissioners and filed in the office of the Secretary of State and of the board of commissioners of the town, should be
(137) ever thereafter held and deemed to be the bounds and plans of

the town; that by the act of 1852, the General Assembly authorized the commissioners of the town to lay off into lots and streets, in conformity with the plan of the town as then established, the whole or any portion of the common lying on the western side thereof between the inhabited portion thereof and Hendricks Creek, the western boundary of the town, and to sell such lots; that pursuant to said act, Wilson Street was extended 70 feet wide to said creek; that parallel to Albemarle Avenue and west of it, Hendricks Street was laid off and dedicated to the use of the public; that the lot formed by the intersection of said streets was numbered 122, as shown on the map, and was sold pursuant to the authority conferred by said act; that said lot was subsequently purchased and is now the property of the plaintiff, being used with a dwelling-house thereon as a residence for himself and family; that the plaintiff, relying upon the provisions of the deed of Howell to the trustees, and the acts of Assembly aforesaid, and believing that said streets and common would continue to be used only for the purposes to which they had been dedicated, purchased said lot and made valuable improvements thereon, aggregating the sum of $6,000; that surrounding said lot are valuable shade trees; "that the Atlantic Coast Line Railroad Company, of Virginia, is now and has been, at the times mentioned, a corporation organized and existing under and by virtue of the laws of the State of Virginia, and operating a steam railroad in the State of North Carolina, subject to the laws of said State, which runs through Edgecombe County"; that the defendant, the East Carolina Railroad Company, is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of North Carolina, and operating a steam railroad in said State; that without the consent of the plaintiff and without any lawful right or authority, the Atlantic (138) Coast Line Railroad Company, of Virginia, is maintaining and operating a steam railroad in and along Albemarle Avenue upon a track within 29 feet of the plaintiff's residence; that during the year 1889, without legal right or authority and without the consent of the plaintiff, the said defendant constructed and has since maintained and operated a railroad leading from Albemarle Avenue, north of Wilson Street, running diagonally across Wilson Street in front of the plaintiff's premises, and down said street to a point west of the plaintiff's premises on Wilson Street; that in 1902 the said defendant, without the consent of the plaintiff and without lawful authority, constructed and has since maintained other tracks, spur-tracks, etc., in front of the plaintiff's premises, crossing the side-track within 2 feet of his fence; that said defendant has built and maintains a track on said common; that the defendant, the East Carolina Railway Company, without the consent of the plaintiff, and without lawful authority, is maintaining and oper-

ating in and along Albemarle Avenue a steam railroad track under an agreement or arrangement with the Atlantic Coast Line Railroad Company, of Virginia; that the East Carolina Railway Company is owned or controlled by and operated in conjunction with the Atlantic Coast Line Railroad Company, of Virginia, by an agreement between them.

The plaintiff sets out at much length the several acts and doings of the defendants respecting the moving of cars, loading and unloading freight, and otherwise annoying his family, disturbing their peace and preventing them from resting and sleeping at night, thereby injuring their health and creating a private nuisance. He also avers that, without lawful authority, the authorities of the town of Tarboro
(139) intend to sell the common in front of the plaintiff's premises to the defendant, the East Carolina Railway Company, for the purpose of establishing a depot; that the building of another track on Albemarle Avenue will necessarily appropriate that part of the avenue from the Atlantic Coast Line track to the plaintiff's sidewalk, and completely deprive the plaintiff of all use of said street, and renders ingress and egress to and from his premises dangerous and practically impossible; that there is not now so much as 50 acres of the common reserved, and if the common is permitted to be sold for railroad purposes, its value for any other purpose will be destroyed and the plaintiff deprived of his easement therein. Because of the trespass and wrongs set out, the plaintiff demands judgment for damages, and to prevent further injury and interference with his easement and rights in the premises, he asks injunctive relief.

An order was made by *Judge Cooke* requiring the defendants to show cause why a restraining order should not be issued. The defendant, the Atlantic Coast Line Railroad Company, of Virginia, within the time required by law, filed its petition for removal, for that "the defendant, the Atlantic Coast Line Railroad Company, is not a domestic corporation, but is a foreign corporation created under and by virtue of the laws of the State of Virginia, and is a citizen of Virginia and is not a resident or citizen of the State of North Carolina; (2) that at the time the plaintiff instituted his said suit, to wit, 26 September, 1906, and long prior to said time, the said defendant was and is now a foreign corporation, as stated in the preceding paragraph, and a citizen of the State of Virginia; (3) that the plaintiff, L. L. Staton, is a citizen and resident of the State of North Carolina"; that the amount in controversy is the sum of $10,000, and the controversy between the petitioner and the said plaintiff is separable from the controversy between the
(140) plaintiff and the codefendant, the East Carolina Railway Com-

pany. The petition is verified and accompanied by the undertaking required by statute. The court denied the petition and refused to remove the case. Defendant excepted and appealed.

*G. M. T. Fountain for plaintiff.*
*John L. Bridgers for defendant.*

CONNOR, J., after stating the case: The record presents two questions for decision: (1) Is the defendant Coast Line Railroad Company, of Virginia, a foreign corporation? (2) Is the controversy, set out in the complaint, separable as between the plaintiff and the two corporations? It will be convenient to dispose of the second question first. The Removal Act of 1887, sec. 2, provides that only those suits may be removed, by reason of diverse citizenship, in which the controversy is wholly between citizens of different States. A large number of decisions are to be found in the State and Federal Reports in which the term "separable controversy" is discussed. It is not always easy to say upon which side of the line dividing those cases, in which for this cause suit may be or may not be removed, any given case falls. The tendency of the courts has been to narrow the line of cases which are removable under the act. The petitioner is required to comply strictly with the provisions of the statute and bring the case clearly within its terms. Hughes on Fed. Proc., 302.

To constitute a separable controversy "the action must be one in which the whole subject-matter of the suit can be determined between the parties to the separable controversy, without the presence of the other parties to the suit." Moon on Removal of Causes, sec. 140. The question in respect to the separability of the controversy must be determined upon an examination of the plaintiff's complaint. Allega-
tions in the petition respecting the defenses of the several defend- (141)
ants are not to be considered.

In *R. R. v. Dixon,* 179 U. S., 131, *Fuller, C. J.,* says: "It is conceded that if an action be brought on a joint cause of action, it makes no difference that separate causes of action may have existed on which separate actions might have been brought; and, furthermore, it makes no difference that in a suit on a joint cause of action a separate recovery may be had against either of the defendants." The learned *Chief Justice* cites with approval from *Powers v. R. R.,* 169 U. S., 92: "It is well settled that an action of tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers

and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one, for, as this Court has often said, 'a defendant has no right to say that an action shall be severable which the plaintiff seeks to make joint; a separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" In that case the defendant railway company and its employees in charge of its train were sued jointly for injury to the intestate of the defendant in error.

The employees being residents of Kentucky, the Supreme Court
(142) sustained the Court of Appeals of Kentucky in denying the petition for removal.

*Bellaire v. R. R.,* 140 U. S., 117, was a proceeding by the plaintiff municipal corporation of the State of Ohio to condemn a right of way over certain land in which defendant corporation had an interest, together with the other defendants. The railroad company, a Maryland corporation, filed its petition for removal on account of diverse citizenship. *Mr. Justice Gray* said: "The object of the suit was to condemn and appropriate to the public use a single lot of land. . . . The cause of action alleged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned; and that controversy was not the less a single and entire one because the two defendants owned distinct interests in the land and might be entitled to separate awards of damages. The ascertaining of those interests and the assessment of those damages were but incidents to the principal controversy divisible by itself, apart from the right of the other defendants and from the main issue between both defendants on the one side and the plaintiff on the other." *Kohl v. U. S.,* 91 U. S., 367; *Winchester v. Loud,* 108 U. S., 130. "When several persons participate in the commission of a tort, the cause of action accruing to the injured party is joint and several, in the sense that he will have his option to proceed against one or more of the *tort feasors* separately or to join them all as defendants in one suit. But if he elects to treat the liability of the defendants as joint, and proceeds against all of them in one action, it will be regarded as involving but one single controversy between the plaintiff on the one side and all the defendants on the other side, and no one of the defendants can remove the cause to a Federal court on the averment that it contains a separable controversy between the plaintiff and himself alone." Black's Dillon on Removal of Causes, sec. 146;

*Pirie v. Tvedt,* 115 U. S., 41; *Sloan v. Anderson,* 117 U. S., 275;
(143) *Little v. Giles,* 118 U. S., 596.

In *Torrence v. Shedd,* 144 U. S., 527, it is said: "Not only in cases of joint contracts, but in actions for torts which might have been brought against all or against any one of the defendants, separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be separable which a plaintiff elects to be joint. . . . The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

The controversy which the plaintiff, according to his complaint, has with the defendants grows out of his alleged easement or rights in the streets upon which his dwelling is located, and the town common in front of his dwelling, by virtue of the trusts declared in the deed from Howell to Moir and others, and subsequent acts of the General Assembly, and the alleged trespass upon or wrongful interference with such rights for which he claims damages. In addition to this cause of action, he says that the interference is continuous; that other and further acts are threatened by said corporations, for the prevention of which he asks injunctive relief. While he sets out, at length, the acts and conduct of the several defendants, he alleges that they are operating and maintaining their roads, in the matter of which he complains, pursuant to an existing agreement between them, and that the defendant, the East Carolina Railroad Company, is owned or controlled by the other defendant, the Atlantic Coast Line Railroad Company. (144)

It is manifest that the alleged wrongs of which he complains, and the continuance of which he seeks to prevent, are inflicted by the acts of both defendants, and, for the purpose of this discussion, pursuant to an agreement between them. It requires neither argument nor authority to show that if two railroad companies, by agreement, but each using separate tracks and cars, entered upon and occupied plaintiff's premises, without legal right or authority, he would have a right of action against them jointly. If A and B, by an agreement so to do, drive their horses and wagons upon my land, can there be any question that I may join them in one action for damages? And certainly before they have done so I may maintain a bill assuming that I have a right to invoke injunctive relief against them jointly, to restrain the threatened trespass. It will be no answer to my action to say that they may have been sued separately. I am entitled to so join them that at the end of the litigation I am compensated in damages or protected against further interference against both the joint wrongdoers.

We express no opinion upon the merits of the controversy. Assuming the truth to be as alleged, and that the complaint states either an action-

able injury or threatened illegal interference with plaintiff's rights, we are of the opinion that he is entitled to prosecute his action against the defendants jointly, and that, therefore, the controversy is not, for the purpose of removal, separable. The second question raised by the record is of more difficulty, because of the allegations in the complaint and condition of the record.

It is alleged that the petitioning defendant, called in the pleadings "the Atlantic Coast Line Railroad Company, of Virginia," is "a corporation organized and existing under and by virtue of the laws (145) of the State of Virginia." We note that the words "of Virginia" are separated from the word "Company" by a comma. We supposed that the plaintiff referred to and was prosecuting his action against the corporation created by chapter 77, Public Laws 1899, under the corporate name of "The Atlantic Coast Line Company of Virginia," but upon close inspection of the record it appears that the words "of Virginia" are intended to be descriptive of the domicile of the defendant corporation, "the Atlantic Coast Line Company." This construction is sustained by reference to the petition, in which the corporation describes itself as "the Atlantic Coast Line Railroad Company." The report made to the Corporation Commission, a public record of which we must take judicial notice (*S. v. R. R.*, 141 N. C., 846), states that the "Atlantic Coast Line Railroad Company" is "made up" or composed of a number of "constituent companies" in the States of Virginia, North Carolina, South Carolina, Florida, Georgia, and Alabama. It is further stated that the organization and consolidation is made under the laws of the "State of Virginia." The report further states that the charter under which the consolidation in North Carolina is made is the "act of General Assembly of North Carolina, approved 24 February, 1899." By referring to this act we find it to be "An act to amend and reënact chapter 284, Laws 1893, concerning the Wilmington and Weldon Railroad Company, and to authorize that company to change its name to the Atlantic Coast Line Railroad Company of North Carolina."

The act, reënacting the act of 1893, conferred upon the Wilmington and Weldon Railroad Company power to consolidate with any other railroad company and to permit any other railroad company, organized under the laws of this State, having power to consoli- (146) date, to do so with said Wilmington and Weldon Railroad Company. It is expressly provided that this act shall not have the effect of ousting the jurisdiction of the courts of this State over causes of action arising in this State. The act ratified 24 February, 1899, confers upon the Wilmington and Weldon Railroad Company power "to consolidate or merge its railroads with, or to buy or lease the railroad or railroads of any other railroad company with which it may

connect, either directly or indirectly, organized under the laws of this State or of any adjoining State, which, under the laws of this or such other State, may have power to consolidate, merge, sell, or lease its road; and any such other company shall have the right to consolidate, merge, sell, or lease its railroad in whole or in part, with or to the Wilmington and Weldon Railroad Company," etc. The act contains a proviso that such railroad, etc., shall be liable to taxation in this State, and a further proviso that "This act shall not have the effect of ousting the jurisdiction of the courts of this State over causes of action arising within this State: *Provided further,* that any and all corporations consolidated, leased, or organized under the provisions of this act shall be domestic corporations of North Carolina, and shall be subject to the laws and jurisdiction thereof." Section 2 confers upon the Wilmington and Weldon Railroad Company power to change its name to the "Atlantic Coast Line Railroad Company of North Carolina." The report to the Corporation Commission states that the consolidation was completed 1 July, 1902. Prior to 1873 the Williamston and Tarboro Railroad extended from Tarboro in this State to Williamston. The Seaboard and Raleigh Railroad Company was chartered by act of General Assembly, 1873-74, ch. 46, with power to purchase the Williamston and Tarboro Railroad Company. Section 18, ch. 46. Thereafter, Laws 1883, ch. 48, the Seaboard and Raleigh Railroad Company was author- (147) ized to change its name to the Albemarle and Raleigh Railroad Company. The report made to the Railroad Commissioners by the Wilmington and Weldon Railroad Company (1894, page 58) states that the "Albemarle and Raleigh Railroad Company, from Tarboro to Plymouth, consolidated with the Wilmington and Weldon Railroad Company and operated as a prolongation of the Tarboro Branch." The Wilmington and Weldon Railroad Company, after 1894 and up to and including 1899, reported to the Commission as a separate corporation (Report 1899, p. 82), including the branch from Rocky Mount to Plymouth. For the year 1900 "the Atlantic Coast Line Railroad" makes a report to the Commission (p. 98), showing "property operated"—a large number of railroads, including, although the mileage is distributed differently, the Wilmington and Weldon Railroad and its branches. There is nothing in any of these reports indicating in what State the "Atlantic Coast Line Railroad Company" is incorporated, except the statement that the consolidation was made under the laws of Virginia. In the absence of any other statute or public record showing any change in the domicile of the defendant corporation, we look to the act ratified 24 February, 1899, in which the General Assembly conferred the power upon the Wilmington and Weldon Railroad Company to consolidate, etc., expressly providing that "any and all corporations consolidated,

leased, or organized under the provisions of this act shall be domestic corporations of North Carolina and subject to the laws and jurisdiction thereof." If this provision is valid, it would seem that no power is conferred upon the domestic corporation, chartered by the General Assembly of this State during the session of 1833, to change its domicile or become, for any purpose, a foreign corporation.

(148) It is elementary that a corporation is to be deemed a resident, or citizen, of the State in which it is created—its domicile of origin or creation. Clark on Corp., sec. 74. "The residence of a corporation is in the sovereignty by which it was created. It must dwell in the place of its creation and cannot migrate to another sovereignty." 7 A. and E., 694. This is plain enough; but when, by permission of the sovereignty of its creation, it consolidates with a corporation of another sovereignty, difficult and sometimes perplexing questions regarding its relation to the two sovereignties arise.

The statutes and public records show that the Wilmington and Weldon Railroad Company, a domestic corporation, has by permission of the Legislature become one of "the constituent roads" in a line of consolidated railways extending through six States. In the consolidation are a large number of other "constituent roads." To say that each of these roads, chartered in six different States from Virginia to Alabama, have, by the consolidation, become citizens of the State of Virginia, is rather startling. If this result, so far as the Wilmington and Weldon Railroad Company is concerned, has been accomplished by virtue of the power conferred by Laws 1899, ch. 105, in defiance of the express provision in the statute that it should continue a domestic corporation, it would indicate an absence of power in the Legislature to guard the sovereign rights of the State in respect to corporations of its own creation. It would seem perfectly clear that a railroad corporation has no power to change its domicile. While the Legislature may permit a Virginia corporation to come into this State and consolidate with one of her own corporations, we cannot perceive how, in availing itself of such permission, the Virginia corporation may take the North Carolina corporation out of this State into Virginia and so adopt it that the

(149) State by virtue of whose laws it came into existence and continues to exist, loses jurisdiction of it for the purpose of bringing it into her courts to answer for wrongs done her own citizens. While we do not concede that such would be the result of permission to consolidate, in the absence of restrictive words, certainly where, in the statute conferring the power to consolidate, it is expressly provided that the corporation, together with any corporations with which it should consolidate, should remain a domestic corporation, it would seem that such restriction would place the question beyond controversy.

The question involved in this appeal is essentially different from that presented in *R. R. v. Allison,* 190 U. S., 326. There the plaintiff in error was a Virginia corporation. The contention of defendant in error was that, by virtue of the provisions of the statute passed by the General Assembly of this State and the act of the corporation pursuant thereto, it became a domestic corporation. The Court held that by filing a copy of its charter with the Secretary of State it did not become a citizen of this State. Assuming that the defendant Atlantic Coast Line Railroad Company is a Virginia corporation, with power conferred by its charter to consolidate with the Wilmington and Weldon Railroad Company, and that, pursuant to the provisions of the act ratified 24 February, 1899, as stated in its report to the Corporation Commission, the two corporations did consolidate, what is the status in regard to citizenship of the consolidated corporation for the purpose of jurisdiction? It is well settled that the Legislatures of two States cannot by any joint legislation create one corporation having a domicile in each State. *Cooley, C. J.,* in *R. R. v. Auditor,* 53 Mich., 79 (at page 91), discussing the status of corporations chartered by different States, which (150) have consolidated under statutory power, says: "We appreciate very fully the difficulty of determining, under all circumstances, in what light we are to regard the anomalous organizations which are formed by the consolidation of two or more corporations which have received their corporate powers from different sovereignties. . . . It is familiar law that each corporation has its existence and domicile, so far as the term can be applicable to the artificial person, within the territory creating it. It comes into existence, then, by its sovereign will; and though it may be allowed to exercise corporate functions within another sovereignty, it is impossible to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises, in each jurisdiction, the powers the corporation then chartered had possessed, and succeeds then to its privileges. . . . After the consolidation each State legislates in respect to the road within its own limits, and which was constructed under its grant of power, as it did before." The learned *Chief Justice* proceeds to say: "It also necessarily follows, from the doctrine maintained by the Federal Supreme Court in respect to the citizenship of corporations . . . where, therefore, two corporations, created in different States, consolidate, though for most purposes they are not thereafter to be separately regarded, yet, in each State, the consolidated company is deemed to

stand in the place of the corporation to which it then succeeded, and of its members, and consequently to be a citizen of that State for
(151) many purposes, while, in the other State, it would stand in the place of the other corporation in respect to citizenship there." In *Bridge Co. v. Adams Co.*, 88 Ill., 615, the same question was presented. *Breese, J.*, said: "The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty and, as such, create a body politic which shall be a corporation of the two States without being a corporation of each State or of either State. . . . The only possible status of a company acting under charters from two States is that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States it acts under the authority of the State in which it is then acting, and that only, the legislation of the other State having no operation beyond its territorial limits." Both these cases are cited with approval by *Thayer, J.*, in *R. R. v. Mich.*, 69 Fed., 753, in which the authorities are reviewed, and it is held that: "A corporation formed by the consolidation of corporations of three different States, pursuant to the laws thereof, is, within each of such States, a corporation of that State; and the Federal courts have no jurisdiction of a suit against it by a citizen of the State on the ground of diverse citizenship."

The conclusion to which all the authorities come, being founded upon *R. R. v. Wheeler*, 1 Black (66 U. S.), 286, is thus stated by *Judge Thompson*, in his valuable and exhaustive article on Corporations, 10 Cyc., 296: "If the consolidated corporation is sued in a State in which one of the constituent corporations is created, defendant cannot have the cause removed from the State court to the Circuit Court of
(152) the United States, because within that State the corporation is a domestic corporation, and hence a citizen of that State; so that both plaintiff and defendant are in theory of the law citizens of the same State." *Muller v. Downs*, 94 U. S., 444; Moon on Removal of Causes, sec. 129. The law is well stated in Black's Dillon Rem. of Causes, sec. 102, citing *Fitzgerald v. R. R.*, 45 Fed., 812: "Although the consolidated corporation bears the same name in the three States, has one board of directors and the same shareholders, and operates the road as one entire line, and is designed to accomplish the same purposes, and exercises the same general corporate powers and functions in all the States, it is not the same corporation in each of the States, but a distinct and separate entity in each. It is a corporate trinity, having no citizenship of its own, distinct from its constituent members, but a citizenship identical with each. By the consolidation the corporation of one State

did not become a corporation of another, nor was either merged in the other. The corporation of each State had a distinct legislative paternity, and the separate identity of each as a corporation of the State by which it was created, and as a citizen of that State, was not lost by the consolidation. Nor could the consolidated company become a corporation of three States without being a corporation of each or of either. While the consolidated corporation is a unit, and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of three States. Like all corporations, it must have a legal dwelling place. Every corporation, not created by act of Congress, dwells in a State. This consolidated corporation dwells in three States, and is a separate and single entity in each." *Clark v. Barnard,* 108 U. S., 436.

The General Assembly of this State by act of 1899, ch. 77, (153) ratified 13 February, 1899, chartered the Atlantic Coast Line Railroad Company of Virginia. The preamble of the act recites the reasons which induced the Legislature to grant the charter, and in section 2 enacts: "The said Atlantic Coast Line Railroad Company of Virginia is hereby authorized and empowered to maintain and operate the railroad which formerly belonged to the Petersburg Railroad Company in this State," etc. It will be observed by reference to this act that the only purpose of granting the charter was to enable the corporation, in connection with a corporation of the same name created by the Legislature of Virginia, to operate the portion of the Petersburg Railroad located in this State. The Virginia corporation of the same name is not "domesticated" under the "Craig Act," Laws of 1899, ch. 62, but a new corporation was created in this State. Without entering into any discussion of the status of a corporation created in this way, it is sufficient to say that while the defendant is described in the complaint as the "Atlantic Coast Line Railroad Company, of Virginia," the summons is served upon the agent of the "Atlantic Coast Line Railroad Company," who, in verifying the petition, so describes himself. The petition is filed by the "Atlantic Coast Line Railroad Company," and in this name the corporation makes its reports to the State Corporation Commission and is referred to in "Poor's Manual," 1899, p. 397, and 1902, p. 199. We do not find that the "Atlantic Coast Line Railroad Company, of Virginia," makes any report to the Commission. It is probably one of the "constituent roads" of the defendant "Atlantic Coast Line Railroad Company," although it does not so appear in the reports, nor is any reference made to chapter 77, Laws of 1899. We notice further that no power is conferred upon the corporation created by that act to consolidate, unless it be found in the charter of the Petersburg Railroad Company, in 1830, and chapter 149, Laws 1893, extend- (154)

ing the charter of said corporation. It is true that the complaint alleges that the defendant corporation is a Virginia corporation, operating a railroad in this State. As we have seen, there is no statute which has been called to our attention, or which a diligent examination on our part discovers, authorizing the Atlantic Coast Line Railroad Company to operate in this State otherwise than by consolidation with domestic corporations, nor is any such claim made by the corporation in its reports to the Corporation Commission. As a matter of law, the plaintiff is in error in averring the contrary. The question involved is of far-reaching importance to the corporation and the citizens of the State. We are of opinion that the defendant Atlantic Coast Line Railroad Company, in respect to its "constituent roads," domestic corporations, is a domestic corporation, and that, as between the plaintiff and itself, there is no diverse citizenship entitling it to remove the cause into the Federal court.

Affirmed.

*Cited: Hough v. R. R., post,* 701; *Hurst v. R. R.,* 162 N. C., 371, 372; *Pruitt v. Power Co.,* 165 N. C., 419; *R. R. v. Spencer,* 166 N. C., 523; *Cox v. R. R., ib.,* 653, 657, 660; *Gurley v. Power Co.,* 172 N. C., 696.

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J. K. MORISEY, EXECUTOR, v. MARY P. BROWN ET AL.

(Filed 12 March, 1907.)

**Wills—Construction—Specific Devise.**

A devise of "the residue of my lands in Sampson County" is specific, and the land so devised is not, in the absence of express language in the will, or such as clearly indicates the intention of the testator to make it so, chargeable with the payment of pecuniary legacies.

ACTION, heard on the pleadings before *Jones, J.,* at November Term, 1906, of DUPLIN.

(155) D. V. Morisey, on 9 September, 1899, duly executed his last will and testament, in which he gave to defendant Mary P. Brown certain real estate specifically described and "$1,000 in money." He gave to some of the other defendants legacies and devised land to them. To other defendants he devised land. The ninth item of the will is in the following words: "I give to my nieces, Walker and Annie Morisey, daughters of my brother, James K. Morisey, the residue of my land in Sampson County." The executor brings this proceeding for the purpose of having the will construed and to ascertain whether he has the power to sell the real estate devised to pay off the pecuniary legacies,

alleging that he has administered the personal estate and that the balance in his hands is insufficient for that purpose. The defendants admit the allegations in the complaint and contend that the real estate devised in the ninth item of the will is liable for the payment of the legacies. It seems to be conceded that the other devises are specific. His Honor being of the opinion that the land was not liable, rendered judgment accordingly, and defendant Mary P. Brown appealed.

*H. E. Faison for plaintiff, executor.*
*Rountree & Carr for defendant M. P. Brown.*
*J. D. Kerr, H. A. Grady, and A. C. Davis for the heirs.*

CONNOR, J., after stating the case: The principles controlling the decision of this case are simple and well settled. "The real estate of the testator specifically devised is never charged with the payment of legacies, unless either the intention to charge pecuniary legacies upon it is expressly declared or is to be necessarily implied from the context of the will or from the facts and circumstances of the case. The presumption as between the specific devisee and pecuniary legatee is that the testator intends the money legally to be paid first out of the (156) personal property and next out of the real estate which is included in the residue." 2 Underhill on Wills, 396. This is also the rule in regard to debts. *University v. Borden,* 132 N. C., 476. The appellant, conceding this to be the law, insists that the devise of "all the residue of my lands in Sampson County" is a residuary devise. We do not concur in that view. If the word "residue" stood alone, the construction contended for would be correct, but it is limited by the words "in Sampson County." Item 6 of the will gives to other persons "the balance of my real estate in and around Warsaw in Duplin County." These words, in our opinion, make the devise specific as confined to the lands in "Sampson County," thus leaving undisposed of any lands the testator may have had in other counties. Whether he had land in other counties does not appear, either from the will or the pleadings. There is nothing in the will to indicate that he knew or believed that his personal estate would not be sufficient to pay the pecuniary legacies, or that he intended his land to be subjected to the payment of them. Following the well settled rule that such intention must appear, either in express terms or by at least reasonable implication, we cannot charge the legacies upon the land. They must be paid ratably out of the balance in the hands of the executor from the proceeds of the personalty. Such being his Honor's opinion, the judgment must be

Affirmed.

*Cited: Battle v. Lewis,* 148 N. C., 151.

(157)

FRANCES DEAL v. ROBERT G. SEXTON.

(Filed 12 March, 1907.)

1. **Estates—Vested—Child en Ventre sa Mere.**

Upon the death of the father seized of lands, his wife then being *enciente,* the inheritance will immediately vest in the child *en ventre sa mere.*

2. **Purchaser—Rights—Child en Ventre sa Mere.**

The vendee of a purchaser, both for value, of land at sale under proceedings for partition, regularly had by all living parties in interest, takes subject to the vested inheritance of a child *en ventre sa mere* at the time of the sale, not a party to the proceedings by guardian, irrespective of any question of knowledge or information of the purchaser or his vendee.

3. **Lands—Partition Sale—Parties—Class Representation.**

The mother and the only living children cannot represent as a class the unborn child *en ventre sa mere* in partition proceedings of the lands of which the father died seized, so as to pass the inheritance of the unborn child to the purchaser, their interests being conflicting and not mutual.

ACTION to recover a third interest in certain lands, heard upon facts agreed at December Term, 1906, of MARTIN, *Long, J.,* presiding. From the judgment rendered, defendant appeals.

*Ward & Grimes for plaintiff.*
*H. W. Stubbs for defendant.*

BROWN, J. It appears from the case agreed that F. B. Wilson died intestate in 1881, seized in fee of the land in controversy. At the time of his death his wife was *enciente,* and within four months thereafter, on 22 December, 1881, the plaintiff, Frances, was born. On 22 October, 1881, two months before plaintiff was born, the widow, Deborah, and two daughters, Carrie L. and Maude L. Wilson (the only children then born), filed petition for partition and procured the lands of the intestate to be sold and the proceeds divided between them. W. E. Sexton
(158) became the purchaser, who conveyed to defendant for full value. The plaintiff was not made party to the proceedings by appointment of a guardian *ad litem* or otherwise, either before or after her birth, and has received no part of the proceeds of sale. She now seeks to recover her portion of the inheritance.

The question presented upon this appeal is important and perplexing because of the fact that the defendant is a purchaser for value, and because of the great difficulty in purchasers at such judicial sales protecting themselves, having no knowledge of the existence of an unborn child in its mother's womb. If we hold, as we must, that the inheritance

vested immediately in the plaintiff while *en ventre sa mere,* upon the death of the father, the conclusion must follow that such inheritance ought not to be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian *ad litem* was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child *in esse* should be taken from it. The general rule in this country and the acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child *en ventre sa mere* is considered absolutely born. This has been the recognized law of this State since *Hill v. Moore,* 5 N. C., 233, decided in 1809, down to *Campbell v. Everhard,* 139 N. C., 503, decided in 1905. It is also recognized generally by the text-writers and judicial decisions in other States. 4 Kent Com. (13 Ed.), 413; 3 Washburn on Real Property (5 Ed.), 16; Tiedeman on Real Property, sec. 673; 14 Cyc., 39, where the decisions are collected.

The statute law of this State treats the unborn child in its (159) mother's womb with the same consideration as if born. By Canon 7 of Descent, Revisal, p. 1556, a child born within ten lunar months after the death of the ancestor inherits equally with the other children. By section 1582 an infant unborn, but *in esse,* is rendered capable of taking, by deed or other writing, any estate whatever in the same manner as if he were born. *Campbell v. Everhard, supra.* From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born. *Doe v. Lancashire,* 5 T. R., 49; *Thelluson v. Woodford,* 4 Vesey, Jr., 227; *Harper v. Marshall,* 43 Am. Dec., 474, where all the cases are collected.

The old writ of *de ventre inspiciendo* was devised by the courts for the purpose of examining the widow, and was granted in a case where a widow, whose husband had lands in fee, marries again soon after his death and declares herself pregnant by her first husband, and under that pretext withholds the land from the next heir. Such writ commanded the sheriff or sergeant to summon a jury of twelve men and as many women, by whom the female is to be examined *"tractari per ubera et ventrem."* 1 Black. Com., 456; 21 Viner's Ab., 548. Of course, no such unseemly proceedings would be tolerated in this age; but the General Assembly could easily protect the unborn child as well as the innocent purchaser by prohibiting the sale of land for partition until twelve months after the intestate's death.

The question as to the status of the purchaser was considered in *Masne v. Hiatt,* 82 Ky., 314, in which it is held: (1) A child born within ten

months of the death of the intestate is entitled to a share in his estate, as if born and in being at the time of intestate's death. (2) The (160) court had jurisdiction to sell the land on the petition of the guardian of the two other children; but the sale affected only their rights. The right of the unborn child could not in anywise be affected. (3) Having an interest in the land, she could not be deprived of it by any proceeding to which she was not a party, and may recover such interest from a remote vendee of the purchaser at the judicial sale.

The Supreme Court of Illinois reaches the same conclusion and says that a person must have an opportunity of being heard before a court can deprive him of his rights, and that an unborn child, not having been made a party, can recover from those claiming his title, as his rights are not cut off by the decree. *Bolsford v. O'Connor,* 57 Ill., 72.

*Giles v. Solomon,* in New York, 10 Abb. Pr., N. S., 97, note, is very much in point. In that case a bill to foreclose a mortgage executed by the deceased father was filed in January, 1841. A daughter was born to his widow in April, 1841, two days after foreclosure decree was entered. The daughter, not being a party to the foreclosure proceedings, brought her action in 1866 to redeem. The Court held she was not barred by the decree of 1841, and permitted her to redeem her one-seventh by paying one-seventh of the mortgage and interest, and charged the purchaser with back rents.

In South Carolina at one time the courts declined to proceed with a suit to partition the property of the ancestor until twelve months after his death, so as to avoid the possibility of entering judgment which might conflict with the rights of an unborn child. As there was no statute on the subject, the courts of South Carolina discontinued this practice for some reason, and then held that a child *en ventre sa mere* must be regarded as a person in being who could not be bound by (161) a judgment in partition to which he was not a party. *Pearson v. Coulton,* 18 S. C., 47.

It is true that *Judge Freeman,* in his elaborate note to *Carter v. White,* 101 Am. St., 869-870, repudiates this doctrine, and says: "It is believed, however, that the rule cannot prevail and that such a child must be regarded as not in being for the purpose of the suit and as being represented by the parties before the court," etc. The authority cited by the learned annotator is the opinion of the Supreme Court of the United States in *Knotts v. Stearns,* 91 U. S., 638, which seems to sustain him. The fallacy in the position seems to us to be in supposing that the living children can represent the unborn child. It is not a case of class representation. The interests are conflicting and not mutual. It is to the interest of the living heirs to make the division as short as possible, and therefore to keep out the heir who has not yet made his appearance.

*Ex parte Dodd,* 62 N. C., 97, and many similar cases to *Spring v. Scott,* 132 N. C., 548, have no application here, as the object of a partition proceeding is to dissever the interests of the parties, and there is no class representation about it. The tenant in common who is not made a party personally or by guardian *ad litem,* or in some legal way, is not bound by it.

In the forcible language of counsel for plaintiff in their brief, "If the court could take what the law said was hers and sell and convey to another without her even having knowledge of it, or representation, our boasted 'process of law' doctrine is iridescent—a constitutional hallucination."

Affirmed.

(162)

SYLVESTER MATHIS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 March, 1907.)

**Negligence—Plaintiff's Duty—Repairing.**

When under instructions from his superior officer the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and Revisal, sec. 1905, has no application.

ACTION, tried before *Jones, J.,* and a jury, at January Term, 1907, of WAYNE. Judgment for defendant. Plaintiff appealed.

Plaintiff sues to recover damages sustained by reason of injury caused by alleged negligence of defendant, in that while in the employment of defendant he was directed to make certain repairs on a spout in water-tank used by defendant, and that "defendant failed in its duty, in that said spout was defective and out of repair, which fact was well known to defendant's roadmaster in charge of section upon which plaintiff was employed." Defendant denied all allegations of negligence and averred contributory negligence on part of plaintiff.

Plaintiff testified: "I was employed by defendant for seven or eight years, and was, in April, 1905, section master, Dudley Section. My duties were to keep up tracks, look out for buildings along track, keep fire from buildings. Was near Dudley; got a letter from Captain Johnson, roadmaster, to look out for the water-tank. I went down one morning and pulled on side-track down to tank. One of the hands called my attention to the waterspout hanging over track. I turned hands around and put one of them to pulling other side of track back, that is, level up the track. I then went up on the water-tank; found one chain that holds

(163) the weight hitched to waterspout was broken. I called for the bumper, Hagans, to bring me a piece of wire. He brought the wire and handed it to me on a stick. I pulled chain down, put my wire into the weight and fastened it to the chain. There are two small chains that hold up the weight of the spout. Just as I pulled down the other chain hooked to the weight, one of the small chains next to me broke, and the spout flew around and snatched me off and I fell on the ground. . . . I received a letter from the roadmaster, Johnson, about this tank, instructing me to go there and repair it. . . . He told me to look after the tank; chains were rotten."

The plaintiff testified in regard to the character and extent of his injuries, and about going to the hospital. The defendant introduced no testimony in regard to the injury or the manner in which it was inflicted, but introduced a record showing that, upon his application, the plaintiff had, on 11 January, 1905, become a member of the Relief Department, and had, subsequent to the injury, received benefits from the said department. The defendant upon the entire evidence moved for judgment of nonsuit. The motion was allowed, and the plaintiff appealed.

*Dortch & Barham for plaintiff.*
*Aycock & Daniels for defendant.*

CONNOR, J., after stating the case: We concur in the opinion of his Honor that, upon his own testimony, the plaintiff is not entitled to recover. The evidence does not disclose the *use* of a defective "appliance or way" by reason of which the injury was sustained, and does not, therefore, come within the statute, Revisal, sec. 2646. The plaintiff, being told that the chain controlling the action of the spout was rotten, went, by direction of the roadmaster, not to use or operate the spout, but to repair the chain, or put a new one in; knowing, therefore, that (164) it was rotten, he negligently pulled it and thereby caused it to do the very thing he was directed to prevent. The language of the Court in *Dartmouth Spinning Co. v. Acord,* 84 Ga., 16, cited in defendant's brief, is in point: "Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cared for as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole; . . . so far as appears, no one knew more of the state and condition of the machinery than he did; and the object of calling him in the room was that he might ascertain the cause of the trouble and apply the remedy." *Pressly v. Yarn Mills,* 138 N. C., 418. We do not wish to be understood as saying that the mere

fact that an employee who is engaged in the work of repairing machinery is barred of recovery, if injured by defective ways or appliances furnished for that purpose. A number of cases in our reports show the contrary. If the platform upon which plaintiff stood for the purpose of discharging his duty had been rotten or otherwise insecure, or the wire furnished him to repair the spout unfit, and by reason thereof he was injured, there would be no doubt of his right to recover. The plaintiff was sent to repair the spout by replacing the rotten chain with a sound one. He pulled the rotten chain and it broke. We cannot see in this evidence any breach of duty on the part of the defendant. The judgment of nonsuit was correct, and must be

Affirmed.

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(165)

W. B. REYNOLDS, EXECUTOR, v. J. N. TAYLOR ET AL.

(Filed 20 March, 1907.)

**1. Landlord's Lien—Lessors by Distress.**

The landlord's lien under section 1993, Revisal, only attaches under the express terms of the statute, the common-law remedy of lessors by distress not obtaining in this State, and is only given when lands are rented for agricultural purposes, vesting the crops raised on the land in the lessor till the rent therefor shall be paid.

**2. Same—Rent—Store—Lands—Indivisible Contract.**

When the defendant rents a store upon the plaintiff's lands for mercantile purposes and the land for agricultural purposes, under an entire and indivisible contract to pay therefor $40 and a certain portion of the crops to be raised on the land as an entire rent for the store and lands, without apportionment of any distinct part to be paid for the store, and such is established by the verdict of the jury under a correct charge upon a properly responsive issue, the plaintiff has a landlord's lien on all the products grown on the land until the entire rent is paid.

**3. Same—Agricultural Lien—Special Instruction.**

Interveners claiming an agricultural lien have the right to have their contention, supported by the evidence, properly submitted to the jury in the principal charge or in response to their prayers for special instruction, that though the rentings were made at the same time, and in one and the same contract, if the rental of $40 was apportioned for the store and that from the crops apportioned for the rental of the lands, the contract was divisible, and the statutory lien of the landlord would not attach as to the store, and it was error in the court below to ignore or repudiate this position.

**4. Same—Proper Issues Suggested.**

When the plaintiff contends for a landlord's lien and the interveners for an agricultural lien upon the question of an entire or divisible contract, it were better that the issues be specifically framed to determine whether by the terms of the contract the rent was entire for the property as a whole, or whether by the same or a different contract there was a distinct amount apportioned as rent for the building to be used as a store, and, if so, what sum.

APPEAL from justice of the peace, tried before *Long J.*, and a jury, at November Term, 1906, of NASH.

(166) The action was to determine the rightful claim to $40, part of the proceeds from the sale of certain tobacco grown on the land of one Thomas Reynolds, in the year 1903, by one Joseph Tisdale, his tenant, and turned over to one J. N. Taylor, to hold for the party entitled.

The action was instituted by Thomas Reynolds against said Taylor. Thomas Reynolds died since the institution of the suit, and is now represented by Walter Reynolds, his executor.

Defendants Hollingsworth and others were made parties, and claim the amount by reason of an agricultural lien executed by Joe Tisdale for the year 1903, in accordance with Revisal, sec. 2052.

There was evidence to show that Joe Tisdale, under a contract of renting made with Thomas Reynolds, occupied and used a storehouse and certain farming lands attached; that on these farming lands said Tisdale had raised, for said year, certain tobacco which had been sold for $103.95 net, and the $40 in question was a part of this amount; that another part, to wit, one-fifth, had been paid over to plaintiff on the rent, and the remainder had been turned over to the interveners on their agricultural lien.

It was admitted that $40 was still due from Tisdale to plaintiff on the contract.

Plaintiff contended, and offered evidence tending to show, that the contract between Thomas Reynolds and Joe Tisdale was entire and indivisible, in which defendant took the property as a whole, and was to pay therefor, as an entire rent, $40, one-fifth of tobacco and cotton, one-fourth of other crops, and that the balance due of $40 was, therefore, a landlord's lien on the crops on said lands and superior to intervener's claim.

The defendant interveners contended that the contract was severable to the extent that the rent was apportioned, $40 being due for the
(167) storehouse, and therefore the amount of rent remaining unpaid was no lien on the fund in question.

Under the charge of the court the jury rendered a verdict as follows: "Did the tenant, Tisdale, rent the houses and lands at one time and as

one single agreement and contract, and agree to pay as rent for the house $40, and as rent for the land one-fifth of the tobacco and cotton and one-fourth of the balance of the crops? Answer: Yes."

*Austin & Grantham for plaintiff.*
*Jacob Battle for defendants.*

HOKE, J., after stating the facts: The landlord's lien, where the same attaches, by the express terms of the statute is made superior to all other liens. This statutory lien, however, is only given when lands are rented or leased for agricultural purposes.

The statute, Revisal, sec. 1993, provides as follows: "When lands are rented, etc., for agricultural purposes, unless otherwise agreed between the parties, the crops, etc., shall be vested in the lessor till the rent for said *lands* shall be paid."

In *Howland v. Forlaw,* 108 N. C., 567, in considering a claim of this character, the Court held that the common-law remedy of lessors by distress does not obtain in this State; and that, unless specially given by statute, a landlord has no lien on the product of the leased property for rent.

Unless, therefore, the $40 which remains due and unpaid from Joe Tisdale, the tenant, to the estate of Thomas Reynolds, his former landlord, is rent due for *lands* leased for agricultural purposes, there is no lien given by this statute for unpaid rent, and the claim of the defendant, by reason of his agricultural lien, must prevail.

The cause having been instituted in a justice's court, there were (168) no written pleadings, and the plaintiff, stating his claim orally, contended that the contract was entire and indivisible; that Tisdale, under the same, rented the property as a whole, and was to pay therefor $40 and one-fifth of the cotton and tobacco and one-fourth of the other crops as an entire rent; and there was no apportionment of any distinct part of the rent to be paid for the house, and offered evidence tending to support the claim as made.

If this position is established under a correct charge and on an issue properly responsive to plaintiff's claim, as stated by him, then we think the plaintiff has a landlord's lien on all the products grown on the land till his entire rent is paid.

On the contrary, defendant, stating his claim, contended (and offered evidence tending to show) that the contract for the store and the lands were two separate and distinct transactions, entered into at different times. And, second, even if made at one time as an entire contract, that

by its terms a distinct part of the rent was apportioned for the use of the store, to wit, $40; and a portion for the use of the agricultural land, to wit, one-fifth of the tobacco and cotton and one-fourth for the remainder.

If either position contended for by defendant is established, then plaintiff has no lien for the $40 remaining unpaid. It is due and owing for the use of the storehouse for mercantile purposes, and not for lands for agricultural purposes.

An examination of the charge of the court will show that too much stress was laid on the fact that the contract was for the whole property, made at one and the same time; and that the charge ignores, in fact repudiates, the position that, even if this were true, if it were made for the entire property and at one and the same time, and by its terms
(169) apportioned a distinct part of the rent to accrue for the storehouse, to wit, the $40, such rent could, under no proper construction, be awarded as rent of land for agricultural purposes.

Defendant's counsel, in apt time, requested the court to instruct the jury as follows: "1. Even if store was rented at same time the lands were rented, but the land for the fourth and fifth and the store for $40, that the rent of the store would not be a lien of landlord upon crops raised on lands rented for fourth and fifth." The court refused to give said instructions, and the interveners excepted.

"2. That the land and the store might have been rented at same time and still the contracts several, and rent of store not a lien on crops on lands rented for fourth and fifth." The court refused to give said instruction, and the interveners excepted.

We think that both of these positions are substantially correct, and defendants are entitled to have this view presented, either in the principal charge or in response to their prayers for instructions; and for this error there will be a new trial.

It may be well to note that the issue as framed is not fully responsive to plaintiff's claim; and the respective positions of the parties should be either presented on a general issue similar to that tendered by plaintiff, or, if the trial judge desires that the issue should be more specific, it might be framed so as to determine whether by the terms of the contract the rent was entire for the property as a whole or, whether by the same or a different contract there was a distinct amount apportioned as rent for the building to be used as a storehouse; and if so, what sum.

For the error pointed out there must be a new trial, and it is so ordered.

New trial.

(170)

IN RE SAMUEL PARKER.

(Filed 20 March, 1907.)

1. **Appointment of Guardian—Failure to Notify Relative Having Custody of Infant.**

Failure to notify relative in custody of the child of proceedings to appoint guardian is an irregularity, under Revisal, sec. 1772, which does not render the appointment of the guardian void, though not conclusive upon such relative.

2. **Same—Habeas Corpus—Custody of Child.**

Except as between parents, under Revisal, sec. 1853, the right of the custody of a child cannot be determined under the writ of *habeas corpus*, the object of that writ being to remove an illegal restraint.

3. **Same—Findings of Lower Court—Infant Eleven Years Old—No Restraint.**

When it appears from the findings of the court below that the infant, 11 years old, is in the custody of his aunt; that the aunt and her husband are of good character and properly supporting the child with regard to his mental, moral, and spiritual welfare; that the uncle, petitioning in the *habeas corpus* proceedings, has contributed nothing to the support of the child, and has been appointed guardian without the regularity of notice required by the statute, Revisal, sec. 1772; that in the judgment of the court the best interests of the child are subserved by his remaining in the custody of the aunt, the judgment of the court below will not be disturbed, no illegal restraint having been shown upon his findings.

4. **Same—Remedy of Relative in Possession.**

When the uncle of an infant 11 years old has been appointed guardian without notice under Revisal, sec. 1772, to the aunt and her husband having the custody, the guardian can assert his right to custody by civil action for the custody of the child, or the aunt may take appropriate steps to set aside the appointment of the guardian.

HOKE, J., concurring.

HABEAS CORPUS proceedings, heard before *Jones, J.*, at chambers in Kenansville, DUPLIN County, on 31 August, 1906, upon the petition of Egbert Hardy, for the custody of an infant in possession of the respondent. Judgment for respondent. Egbert Hardy, petitioner, appealed.

*Stevens, Beasley & Weeks for appellant.* (171)
*W. S. O'B. Robinson, contra.*

CLARK, C. J. The petitioner, Egbert Hardy, was on 12 December, 1905, on his *ex parte* application, appointed guardian of his nephew, Samuel Parker, an infant without property. The mother of said Samuel died at his birth, and the child was taken by his aunt, Mrs. Swinson, by whom he has been ever since supported and with whom he

still remains. The child's father died a year after its mother. Notice of the application for guardianship should have been given to Mrs. Swinson and other relatives as required by Revisal, sec. 1772. Failure to do this is an irregularity which does not render void the appointment of a guardian, but certainly when it is made without notice to the relative then in charge of the infant, it is not binding upon her. She had no opportunity to oppose the order appointing the guardian, nor to appeal from it, and it is not a decree disposing of the custody of the child as against her.

Besides, "it is well settled that the right of guardianship cannot be tried on *habeas corpus*" (15 A. & E. (2 Ed.), 184); "nor to determine the right of guardianship"; nor "to decide as to conflicting rights to personal custody." *Ib.*, 156. The petition sets out sufficient matter to cause the writ to issue, but upon the investigation it did not appear that the child was detained against its will, and the court found as facts that the child is about 11 years of age, is well cared for by Mrs. Swinson, who took the infant at its birth and has cared for and nurtured it ever since at her own expense; that the guardian has contributed nothing to that end; that the child is sent to school and Sabbath school, and is taken to church regularly, and that the character of his aunt and of her husband is good and the care and training given by them to the infant,

(172) Samuel Parker, are such that it would be to the best interest of said infant for him to remain in the care and keeping of his said aunt and her husband. There being no illegal restraint shown, upon the above findings the court properly remanded the infant to the custody of his aunt.

The object of the writ of *habeas corpus* is to free from illegal restraint. When there is none, the writ cannot be used to decide a contest as to the right custody of a child (except when the contest is between the parents of the child. Revisal, sec. 1853.) *S. v. Cheeseman,* 5 N. J. L., 511; *S. v. Clover,* 16 N. J. L., 419; *Foster v. Alston,* 7 Miss., 406, and numerous other cases cited. 15 A. & E. (2 Ed.), in note 2, p. 156, and in note 2, pp. 184, 185, 186, and notes. The rule is clearly stated by *Chancellor Kent.* In *Wollstonecraft's case,* 4 Johns. Chan., 80, he says that the sole function of the writ in such cases is "to release the infant from all improper restraint, and not to try, in this summary way, the question of guardianship, or to deliver the infant over to the custody of another; that it is only to deliver the party from illegal restraint, and if the infant is competent to form and declare an election, then to allow the infant to go where it pleases, and if too young to form a judgment, then the court is to exercise its judgment for the infant." In short, the writ of *habeas corpus* cannot be used as a claim and delivery of the person.

The guardian must assert his right to the custody of his ward by a civil action against the persons now in charge of him, while they in turn, if so advised, can take appropriate steps to set aside the guardianship. In this summary proceeding by *habeas corpus* the Court can only consider the rights of the child—whether he is under illegal restraint or not; and if he is not, the Court will follow the course laid down by *Chancellor Kent,* quoted *supra.*

Affirmed.

HOKE, J., concurring: I concur in the disposition made of this (173) case for the reason that the placing of the child was in the sound legal discretion of the court; and that, on the facts presented, such discretion was properly exercised when the child was left in the control and custody of its aunt, Mrs. Swinson.

If, as the principal opinion assumes, the appointment of Egbert Hardy as guardian was only irregular, then such appointment is not open to collateral attack, and stands as the judgment of the court until same is reversed on appeal or set aside on motion; and this both as to Mrs. Swinson and all others. *Williamson v. Pender,* 127 N. C., 481; Black on Judgments, sec. 261.

Hardy, then, being the guardian of the person, duly appointed, and the parents of the child being dead, has the *prima facie* right to the custody of the ward; but this superior right of the guardian does not obtain necessarily nor as a matter of law.

The authorities are to the effect that in this country the disposition of the child rests in the sound legal discretion of the court, and that it will be exercised as the best interest of the child may require. *Newsome v. Bunch,* 142 N. C., 19; Tiffany on Persons and Domestic Relations, p. 308; Schouler on Domestic Relations, sec. 240.

The best interest of the child is being given more and more prominence in cases of this character; and, on especial facts, has been made the paramount and controlling feature in well considered decisions. *Bryan v. Lynn,* 104 Ind., 227; *In re Welsh,* 74 N. Y., 299; *Kelsey v. Greene,* 69 Conn., 291.

Again, I think it is well established that, while in *habeas corpus* proceedings concerning the custody of children the power of the court is ordinarily restricted to freeing them from illegal restraint and allowing them to select their placing or go where they please, that this is only true where the child, in a given case, is of years of discretion (174) and sufficient intelligence to determine the question for itself; and where it is otherwise, and the child is not of proper age or sufficient intelligence to determine for itself, the court must decide for it and make orders for its being placed in proper custody. *Musgrove v.*

*Kornegay,* 52 N. C., 73; *In re Wollstonecraft,* 4 Johnston Chan., 79; *Mayne v. Baldwin,* 5 N. J. Eq., 454; Church on Habeas Corpus, sec. 439; 15 A. & E., 185, note 5.

In *Musgrove v. Kornegay, supra,* it is intimated that, so far as the matter is dependent on an arbitrary limit, the age of 12 years in this country, and in cases of this kind, will be considered the age of discretion; in England it seems to have been 14 years, and there being two children—one above, and one below this age—the Court, in determining upon the judgment, said: "As to the one over 12 years of age, we find it settled that the proper order is to discharge the infant and permit him to go where he pleases. And in respect to the other, who is under the age of 12, we find, by the same authority, that the proper order is to restore him to the custody of his father."

In *Mayne v. Baldwin, supra,* the child being 5 years and 7 months of age, the Court said: "In this case, the child is of such tender years the father could properly apply for the writ of *habeas corpus* in his own right without the privity of the child; and it is a case in which, for want of discretion in the child, it is proper that instead of merely delivering the child from improper restraint, an order should be made delivering the child to its father." Citing 3 Hill, p. 399.

And, in the notes of the Encyclopedia above referred to, it is said:

"The power of the court in *habeas corpus* to determine the right
(175) of custody and to award it accordingly is well established by adjudged cases, both in the English and American courts." Citing many cases.

In at least three of the authorities cited in the principal opinion the child had reached the age of 12 and over; and the child was set at liberty because it was held to have the necessary discretion to make such an order proper.

Section 1853, Revisal, was enacted to enable the court to make proper regulations as to the care and custody of children as between husband and wife who are living in a state of separation without being divorced. It seems to be confined to such cases, and has, to my apprehension, no perceptible bearing on the case before us.

I concur in the decision for the reason that it affirmatively appears that the best interests of the child require that it remain, for the present at least, with its aunt, the respondent, and that the legal discretion vested in the court in such cases has been properly exercised.

WALKER, J., concurs in the opinion of HOKE, J.

*Cited: In re Jones,* 153 N. C., 314, 317.

SARAH WALKER AND HUSBAND v. ELLA TAYLOR.

(Filed 20 March, 1907.)

1. **Lands—Devise—Rule in Shelley's Case.**

Land devised by testatrix to her three daughters during their natural lives and the natural lives of the survivors, with remainder over to the heirs at law, providing that should any of the daughters die without issue of her body the share of such daughter shall go to the other daughters, share and share alike, conveys a joint estate in fee under the application of the *Rule in Shelley's Case.*

2. **Lands—Estoppel by Deeds.**

Plaintiff claiming the inheritance of the land by the right of survivorship of her ancestor under the terms of the will cannot deny the fee-simple title of her grantee under a deed thereto made by her for a valuable consideration.

ACTION to try title to land, tried at February Term, 1906, of (176) WAKE, before *Ward, J.,* and a jury. Plaintiff appealed.

*J. C. L. Harris for plaintiff.*
*No counsel contra.*

BROWN, J. The plaintiff claims the whole of the land in controversy as the survivor of three daughters of Gatsey Mitchell under the terms of her will, executed 17 November, 1886, devising the land to her three daughters, Sarah Walker, Louisa Ray, and Isabelle Mitchell, as follows:

"ITEM 5. I devise my real estate, consisting of a house and lot on Cabarrus Street, where I now reside, to my said executor and trustee, to be by him held in trust for my said three daughters for and during their natural lives and for the survivors or survivor for and during her and their natural lives, with remainder over to the heirs at law of my said three daughters, and should any one of the said three daughters die without issue of her body, then such daughter's share shall at the final distribution of said estate go to the others, share and share alike. My desire being that my said daughters shall live at the old home as long as they live; but should either of them at any time desire to hold her part in severalty, then my said executor and trustee is hereby commanded, upon the written request of either of them, to sell said property within as short a time as can be so as not to sacrifice the same, and equally divide the proceeds between such of said daughters or their heirs as may be living at the time, always to the total exclusion of my said son Henry and his heirs."

The land in controversy is a part of the above named Cabarrus Street lot conveyed by deed to Louisa Ray and Isabelle Mitchell in the division

(177) of said lot by deed executed 31 August, 1893, by Andrew Syme, administrator and trustee, and also by these plaintiffs. It appears that on 29 August, 1893, said Syme and Louisa Ray and Isabelle Mitchell executed a similar deed to Sarah Walker for the other part of the Cabarrus Street lot. Both deeds are in form deeds of bargain and sale in fee simple, with full covenants of warranty: Louisa Ray died and Sarah Walker acquired her share by inheritance. Isabelle Mitchell devised her share to defendant, Ella Taylor, by will duly executed 3 January, 1902.

We are of opinion that the plaintiff did not acquire the entire lot by survivorship, and that she is not entitled to the share which Isabelle Mitchell devised to the defendant, for two reasons:

1. The *Rule in Shelley's case* is applicable under the terms of the devise made by Gatsey Mitchell to her three daughters, who took thereunder a joint estate of inheritance in fee. Where a freehold estate is either jointly, severally, or successively given to two persons who are capable of having a common heir, with remainder to their heirs, the rule operates, and such persons take a joint inheritance in fee. 1 Prest. on Estates, 315; 26 A. & E., 646, and cases cited. Where a devise of an estate was made to W. and P. of the use of two tracts of land during the respective lives of each, but at their decease to descend to their heirs, it was held that W. and P. took a fee simple. *McFeely v. Moore,* 5 Ohio, 464; *King v. Beck,* 12 Ohio, 390.

2. Whether the testator of the defendant took an estate of inheritance or not, or whether Sarah Walker was entitled under the will to possession of the whole for life, it is plain that these plaintiffs are estopped to deny that such testator, Isabelle Mitchell, was seized in fee of the land which she devised to defendant. The deed executed 31 August, 1893, by these plaintiffs, Sarah Walker and her husband, and

(178) Hannah Collins, now Jones, to Louisa Ray and Isabelle Mitchell, is based upon a valuable consideration and conveys the lot in fee with full covenants of warranty. It is elementary learning that these plaintiffs cannot now defy the fee-simple title of their grantees, and whatever interest they or either of them acquired under the will of Gatsey Mitchell passed by such deed. *Foster v. Hackett,* 112 N. C., 546; *Hallyburton v. Slagle,* 132 N. C., 955; *Bank v. Glenn,* 68 N. C., 38; *Taylor v. Shuford,* 11 N. C., 131; 16 Cyc., 689.

Affirmed.

*Cited: Puckett v. Morgan,* 158 N. C., 347.

T. J. NEWSOME v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 20 March, 1907.)

1. **Telegraph Companies—Message—Error in Transmission—Sendee's Name Changed.**

When in the transmission of a telegram ordering the shipment of 4 gallons of "corn," meaning corn whiskey, the name of the sender was erroneously transmitted and damages claimed on that account for failure to receive the whiskey, the plaintiff must show by a preponderance of the evidence that the sendee was deceived by the error, and for that reason only failed to ship, and that he understood that corn whiskey was intended.

2. **Telegraph Companies—Message—Error in Transmission—Evidence.**

Where a telegram had been sent, ordering goods which failed to arrive, it is not sufficient evidence to go to the jury upon liability of defendant for damages thereby claimed, to merely show that the sendee of the message had sold plaintiff goods on a credit before and since the time of the sending of the message, as the failure to ship or receive the whiskey may have been from other causes.

ACTION, tried at Fall Term, 1906, of SAMPSON, before *Jones, J.*, and a jury.

The defendant excepted and appealed from the judgment rendered.

*John D. Kerr and George E. Butler for plaintiff.* (179)
*F. H. Busbee & Son and R. C. Strong for defendant*

BROWN, J. This case is reported in 137 N. C., 513, and it is unnecessary to again state the facts. In the opinion of the *Chief Justice,* speaking for the Court, it is there said: "This was error, for two reasons: first, it did not appear in the evidence that the whiskey would have been sent if the message, when received by the sendee, had had the plaintiff's name properly signed thereto." The negligence consists in an error in transmission, the signature of the plaintiff having been written "T. J. Sessoms" instead of "T. J. Newsome," and so delivered to Royal, the sendee. It is, therefore, as already held, incumbent upon the plaintiff to show by a preponderance of the proof that Royal was deceived by the error, and for that reason refused to ship the whiskey. The jury must also be satisfied that Royal understood that the word "corn," used in the message, meant "corn whiskey."

We find no evidence in the record tending to sustain these necessary allegations of fact, and, therefore, hold that the court erred in refusing to give the defendant's prayer for instructions to that effect. The only evidence which, it is argued by plaintiff, tends to support such allegation is that prior to 3 February, 1902, the date of the telegram, the

plaintiff had purchased whiskey from Royal on credit. This fact, if true, is a mere collateral circumstance, and tends to prove nothing. The failure to ship the "corn" can be accounted for on a different hypothesis than the failure to get the message correctly delivered under the circumstances of the case, and therefore the evidence is insufficient. 1 Greenleaf Ev., sec. 12; 1 Stark. Ev., 471, note. Assuming that the message had been correctly transmitted, or that Royal was not misled as to the identity of the sender of the message, and may also have
(180) understood "corn" to mean "corn whiskey," yet he may not have filled the order for other reasons. He may not have had the article on hand at the time; again, he may personally have neglected and overlooked the order and failed, therefore, to ship; or he may have preferred to have the cash before shipping, or the shipment may have gone astray, etc., etc. The proof tendered does not exclude either of the above hypotheses, and is consistent with all.

New trial.

*Cited: Gardner v. Tel. Co.*, 171 N. C., 409.

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JAMES H. SCULL & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 March, 1907.)

**Railroads—Rates—Published Tariff—Opposite Direction—Penalty.**

In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for the recovery of the penalty under section 2642, Revisal, prohibiting railroad companies from charging more than the rate printed in the tariff in force at the time, or more than is allowed by law, it is error for the judge below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly.

ACTION to recover for overcharge on shipment of freight and for a penalty in not refunding same, commenced before a justice of the peace, and tried on appeal, before *Jones, J.*, and a jury, at December Term, 1906, of NEW HANOVER.

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

(181) *J. H. Scull and Marsden Bellamy, Jr., for plaintiff.*

*Davis & Davis for defendant.*

HOKE, J. Our statute law, Revisal, sec. 2642, enacts that no railroad or other transportation company, etc., shall charge more for the transportation of property than the rate appearing in the "printed tariff of such company in force at the time such service is rendered, or more than is allowed by law."

Section 2643 provides the method by which a claim for an overcharge shall be prepared, and establishes a maximum period of sixty days within which the same shall be refunded; and section 2644 imposes a penalty in case the said overcharge is not returned within the time allowed; the penalty, in any case, not to exceed $100.

On the trial below, there was testimony on the part of plaintiff tending to show that an overcharge had been made against them by defendant company, arising, in part, by an erroneous classification of some trees and shrubbery, shipped from Cronly, N. C., to Petersburg, Va., over lines of defendant, and on to Cincinnati, Ohio, by other lines; that demand for such overcharge had been made and filed as directed by the statute, and defendant had failed and refused to return the amount.

The claim was submitted to the jury, and verdict rendered on the following issues:

1. "Did defendant collect, or cause to be collected, from plaintiff an overcharge in freight on goods described in bill of lading, shipped from Cronly, N. C., to Cincinnati, Ohio? If so, how much?" Answer: "Yes; $1.89."

2. "In what amount, if any, is defendant indebted to plaintiff as a penalty, as prescribed by law?" Answer: "$100."

With other testimony on these issues, plaintiff put in evidence (182) a book issued by defendant company, entitled "How to Ship," Exhibit B; also rate issue, No. 4211, Exhibit C; and from these documents, as we gather from the testimony set out, it seems that goods shipped, as these were, boxed and value limited to 3 cents per pound, are rated as fourth class, and that the charge thereon, as fourth class, from Cincinnati to Cronly was 65 cents per cwt.

We speak tentatively as to the contents of these documents, because, though they are marked as Exhibits B and C in case on appeal, they are not in the record; but the testimony set out makes it sufficiently clear that they contain the facts as stated.

There was also evidence to the effect that plaintiff had been charged a much higher rate, and on a different classification from that described in these papers, and a greater rate than that allowed by law.

Defendants offered no evidence. Referring to this testimony, the judge, on the first issue, charged the jury, in substance, that the rate from Cronly to Cincinnati should be the same as that from Cincinnati to Cronly; and if the jury should find, from the greater weight of evi-

dence, that defendant's book, "How to Ship," classified these goods as fourth class and established a rate therein from Cincinnati to Cronly at 65 cents, then the amount charged above that rate would be an overcharge, and the jury should so render the verdict.

In this we think there was error to defendant's prejudice, which entitles it to a new trial of the issues.

It does not at all necessarily or conclusively follow that because a rate is established from Cincinnati to Cronly, that the same rate should prevail from Cronly to Cincinnati. There may be and frequently are facts and conditions which affect the rate in one direction which do (183) not exist and have no bearing or just influence on the rate in the opposite direction. And it is laid down in Judson on Interstate Commerce, sec. 137, that "There is no necessary connection between rates on traffic of the same kind or class in one direction and rates in the opposite direction, as special circumstances, such as flow of traffic, may justify higher rates in one direction than the other. Especially is this the case where the distance is of great length."

Such a rate may, under some circumstances, be evidence on the question as to whether there has been a charge greater than that allowed by law; but the charge of the court referred to makes the rate in one direction conclusive as to the other; and in this, as stated, there is error which entitles the defendant to a new trial.

We have purposely refrained from adverting to the question discussed in the briefs, as to whether, on the facts of this case, the State legislation under which plaintiffs proceed and the relief sought by them are inhibited by the commerce clause of the Federal Constitution and the legislation by Congress in the exercise of this power. It is a question of great and far-reaching importance, and we deem it best that it should be considered and passed upon when the facts are fully ascertained and the issues properly determined.

It may be well to note that should these or similar questions be presented as the results of another trial, and the exhibits referred to are again relied upon and in evidence, the documents themselves or copies thereof should accompany the record.

A careful examination of these papers may, and no doubt will, be required for an intelligent discussion of the subject.

For the error above referred to there will be a new trial, and it is so ordered.

New trial.

*Cited: Hardware Co. v. R. R.,* 170 N. C., 397.

J. A. WITHERS v. J. W. LANE.

(Filed 20 March, 1907.)

**Revisal, Sec. 535—Trial Judge—Intimation of Opinion of Fact.**

Under Revisal, sec. 535, the trial judge is restricted to plainly and correctly stating the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusions of fact, a *venire de novo* will be ordered.

ACTION, tried before *Peebles, J.*, and a jury, at November Term, 1906, of HARNETT. Verdict and judgment for defendant. Plaintiff appealed.

This action was brought to recover the possession of two mules. The plaintiff bought a mule from the defendant for $175 and gave his note for the purchase price, secured by a mortgage on the two mules described in the complaint. He alleged that the defendant had warranted the soundness of the mule he bought, and that afterwards he proved to be unsound; that he returned the mule to the defendant, paying him $30 for the use of it, and they then agreed to compromise and settle their differences, the defendant specially agreeing to surrender the note and mortgage; but that he got possession of the two mules in violation of the agreement and refused to return them.

The court charged the jury, in part, as follows: "It is alleged in the complaint and admitted that in March, 1905, plaintiff conveyed the mules in question to defendant to secure the payment of a note for $175, due 1 October, 1905. This put the title to the mules in the defendant. But the plaintiff alleges that on 1 December, 1905, there arose a dispute between him and defendant as to the soundness of the mule's eyes, and he went to Dunn, saw the defendant, and compromised and settled the whole matter; that the defendant took the mule back, (185) received $30 for its hire, and promised to surrender the note and the mortgage to plaintiff. This action, therefore, depends almost entirely upon how you find the first issue. Upon that issue the burden is upon the plaintiff to satisfy you by the greater weight of evidence that the $30 paid 1 December, 1905, at Dunn, was paid and received in full compromise of the $175 note. If he has done that, then you should answer the first issue 'Yes'; otherwise, you should answer it 'No.' In other words, the whole matter depends upon whether you find the facts to be as testified to by plaintiff or as testified to by defendant and Jethro McLamb. The testimony of plaintiff is not corroborated by a single witness, but is contradicted by his own affidavit filed in this action on 2 December, 1905, the next day after the $30 was paid. In that affidavit

he swore that the mule was his property, and he was entitled to the immediate possession of it. If the settlement was made the day before the mule was taken back by defendant, this affidavit was false. If the affidavit was true when filed, his statement here as to the settlement was false. He is contradicted by the receipt which he took from defendant when the $30 was paid. This receipt says the money was paid on the mule note. He is contradicted by defendant and McLamb, who says the money was paid on the mule note, and nothing was said about a compromise. On the other hand, Lane is corroborated by McLamb, and by the receipt given to plaintiff 1 December, 1905, for the $30; and if you find that the receipt on the $175 (mortgage note) was put there at the time the money was paid, and in the presence of plaintiff, then he is corroborated by that.

"In passing upon the testimony of plaintiff, it is your duty to consider the fact that he is interested in the result of this action;
(186) ascertain, as best you can, what influence this will have upon his testimony; consider what the witness said about his good character; consider the fact that he is contradicted by his affidavit filed in this action and by the receipt he took for the $30, and then give to his testimony that weight and credit which, under all the circumstances, you think it entitled to. If you think he told the truth, you should give to his testimony the same weight and credit you would give to any other witness. Plaintiff testified that, when the $30 was paid, no one was in the office but him and Lane. Lane and McLamb testified that plaintiff Lane, McLamb, and plaintiff's brother, S. W. Withers, were in the room. S. W. Withers was present in the courtroom and a witness for plaintiff, and he did not put him on the stand to support himself and contradict Lane and McLamb. This circumstance you can consider also. When you go to consider Lane's testimony, it is your duty to consider the fact that he is interested in the result of this suit, and you must ascertain, as best you can, what effect that interest had upon the truthfulness of his testimony; consider what the witnesses said about his character, the fact that he is corroborated by McLamb and by the receipt given plaintiff when the $30 was paid, which said, 'Received $30 on mule note,' and then give to Lane's testimony that weight and credit which, under all the circumstances, you think it is entitled to.

"The greater weight of the evidence does not necessarily mean the greater number of witnesses, but it means that testimony which carries home to your hearts and minds the greater amount of conviction. Where conflicts of testimony can be reconciled in a way consistent with the honest convictions of the witnesses, it is your duty to do so; but when it cannot thus be reconciled, it is your duty to determine which lied. The plaintiff says that the $30 was paid in full settlement and com-

promise of the $175 note, and that the mule was taken back by (187) Lane. Lane and McLamb say that the $30 was paid on the $175 note, and not a word was said about any compromise or about taking the mule back. The conflict between these statements cannot be reconciled—the plaintiff lied or Lane and McLamb lied. It is for you to say who told the lie. If the testimony of the plaintiff, unsupported, satisfies you that the $30 was paid for the hire of the mule, which was taken back, and the $175 note and mortgage were to be surrendered, then it is your duty to answer the first issue 'Yes'; otherwise, to answer it 'No.' If you answer the first issue 'Yes,' you should answer the second and fourth issues 'Yes'; and to the third issue, what you find the mules were worth when seized. If you answer the first issue 'No,' you should answer the second and the fourth issues 'No,' and make no answer to the third.

"At the request of the defendant, I here give all the evidence introduced."

His Honor then proceeded to state the evidence. Exceptions to the charge were taken by the plaintiff. A verdict was returned for the defendant, upon which judgment was entered, and the plaintiff appealed.

*Godwin & Davis and D. H. McLean for plaintiff.*
*Stewart & Muse and Godwin & Townsend for defendant.*

WALKER, J., after stating the case: The Legislature has wisely provided that no judge, in charging a jury, shall intimate whether a fact is fully or sufficiently proven, it being the true office and province of the jury to weigh the testimony and decide upon its adequacy to establish any issuable fact. The judge's function is positively restricted to stating in a plain and correct manner the evidence given in the case and to declaring and explaining the law arising thereon. Revisal, sec. 535. He may clearly indicate to a jury what impression the testimony (188) has made upon his mind or what deductions should be made therefrom, without expressly stating his opinion upon the facts. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result will follow the use of language or a form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *S. v. Dancy,* 78 N. C., 437; *S. v. Jones,* 67 N. C., 285. It can make no difference in what way the opinion of the judge is conveyed to the jury, whether directly or indirectly. The act forbids an intimation of his opinion in any and every form, the intent of the law being that each of the parties shall have an equal and a fair chance before the jury. Construing this statute, *Judge Nash* said: "We all know how earnestly, in general, juries seek to ascertain the

opinion of the judge who is trying a cause upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the act was to guard against such results and to throw upon the jurors themselves the responsibility of responding to the facts of the case. Nor is it proper for a judge to lead the jury to their conclusion on the facts." *Nash v. Morton,* 48 N. C., 3.

As this case must go back for a new trial, it will be prudent and perhaps also seemly that we should refrain from commenting upon the testimony and the charge any more than is absolutely necessary for the purpose of deciding the question before us. We cannot read the instructions of the court without being impressed with the belief that its general trend is clearly against the plaintiff; and that it is argumentative cannot well be doubted. It was not intended to be so, we are (189) quite sure, but nevertheless places the plaintiff's testimony in an unfavorable light before the jury, while that of the defendant is treated with greater consideration. Whether the plaintiff had in fact been contradicted or not, was a question for the jury to decide, and not for the court. The latter might very properly have called attention to the apparent conflict in the testimony, and have explained to the jury the nature of the different kinds of evidence, and it may have been within the judge's province to have stated what the evidence on either side tended to prove, but he could not tell the jury what it actually did prove, and this could not be done either by the manner of charging the jury or by the peculiar language employed. Apart from all this, there are expressions of the court which we cannot approve and which we think tended to prejudice the plaintiff. The adverse tenor and tone of the charge must have had the same effect. The general result is that the plaintiff was made to carry a greater burden than the law imposed upon him.

The parties had taken issue upon the fact of settlement, and the plaintiff was entitled to have his testimony fairly considered by the jury, even though his statements had conflicted with those of the defendant and another witness. Instead, his testimony was contrasted with that of the defendant in a way which must have discredited him with the jury at the very outset or diminished the force and weight of what he had said. This was a hindrance to him, if not a distinct handicap.

The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be the right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and (190) imposes its restraint upon the judge, enjoining strictly that he

shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case. The English practice and also the Federal practice permit this to be done, but not ours. With us the jury are the sole and independent triers of the facts, and we hold the right of trial by jury to be sacred and inviolable. Any interference with it is prohibited.

The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but as often as it has been done this Court has enforced the injunction of the statute and restored the injured party to the fair and equal opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been; and we must do as our predecessors have done in like cases. Our view that the charge violates the statute is sustained by the cases already cited, to which the following may be added: *S. v. Bailey,* 60 N. C., 137; *S. v. Thomas,* 29 N. C., 381; *S. v. Pressley,* 35 N. C., 494; *S. v. Rogers,* 93 N. C., 525; *S. v. Dick,* 60 N. C., 440; *Reel v. Reel,* 9 N. C., 63; *Reiger v. Davis,* 67 N. C., 185; *S. v. Davis,* 15 N. C., 612; *Sprinkle v. Martin,* 71 N. C., 441. *Powell v. R. R.,* 68 N. C., 395, seems to be very much in point, and the following language of *Justice Rodman* is applicable to this case: "We think that the general tone of the instructions is warmer and more animated than is quite consistent with the moderation and reserve of expression proper in stating the evidence to the jury in a plain and correct manner, and declaring and explaining the law arising thereon. There are passages which a jury might fairly understand (though not intended) as expressing an opinion on the facts."

We may well close this part of the case with the apt and expressive language of *Judge Manly* when speaking of a similar charge: "This (referring to the statute), we suppose, has been adopted to (191) maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger also from the ever active principle that power is always stealing from the many to the few. We impute no intentional wrong to the judge who tried this case below. The error is one of those casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury." *S. v. Dick, supra.* And we may appropriately add the words of *Chief Justice Taylor,* uttered under like circumstances: "Upon considering the whole of the charge, it appears to us that its general tendency is to preclude that full and free inquiry into the truth of the facts which is con-

templated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey." *Reel v. Reel, supra.* What those eminent jurists have so well said about the duty of the trial judge, under our statute, and the consequences of a violation of it, will, if it is properly heeded, conduce to a more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering
(192) balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged.

The plaintiff also assigned as error the judge's comments and criticisms upon the address of one of his attorneys to the jury, which he alleges were improper and prejudicial. It is not necessary to consider this and the other exceptions, as they may not be presented at the next trial. The error of the court requires that another trial should be awarded.

New trial.

*Cited: Metal Co. v. R. R.,* 145 N. C., 297; *S. v. Ownby,* 146 N. C., 678; *Park v. Exum,* 156 N. C., 231; *Burroughs v. Burroughs,* 160 N. C., 519; *S. v. Bateman,* 162 N. C., 588; *S. v. Harris,* 166 N. C., 247; *Chance v. Ice Co., ib.,* 497; *Speed v. Perry,* 167 N. C., 127; *Medlin v. Board of Education, ib.,* 244; *Bank v. McArthur,* 168 N. C., 53; *S. v. Beal,* 170 N. C., 768; *Lassiter v. R. R.,* 171 N. C., 287; *S. v. Horne, ib.,* 788; *Starling v. Cotton Mills, ib.,* 228; *Swain v. Clemmons,* 172 N. C., 279.

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W. B. TROGDEN ET AL. v. R. J. WILLIAMS ET AL.

(Filed 20 March, 1907.)

1. **Executors—Power to Sell—Option of Purchase.**

A power under a will to executors to sell land is valid, but does not include the power to give an option to purchase.

2. **Same—Delivery of Deed—Condition Precedent—Tender of Price.**

A provision in an option that those to whom it was given should make partial payment for the land and secure the balance of the purchase

price by mortgage thereon within the time specified is binding only upon an unconditional acceptance of and a compliance with the terms, and the delivery of the deed is not a condition precedent to the tender of the price in the absence of a definite agreement to that effect.

3. **Same—Two Executors—Joint Powers—Waiver.**
One of two executors may not waive the condition of time of an option given for the purchase of lands of his testator and fix no time limit for payment, in the absence of express power; and where there are two executors clothed with the power to sell land, such power must be exercised by them jointly; and a waiver by one, otherwise having the power, does not bind the other. This also applies to sale of lands by executors under section 82, Revisal.

4. **Same—Intervening Rights—Waiver—Time the Essence.**
Where one of two executors who have given an option for the sale of lands of their testator waives the condition thereof, and the other, after notice of election by those having the right to take the lands embraced in the option, writes that he is willing to make the deed, but could not comply with further demands not therein contained, and afterwards said he would make the deed with his coexecutor; the letter is not a waiver; and such waiver would be inoperative to revive the extinct option and affect intervening rights, time being of the essence of the contract.

5. **Same—Recorded Option—Notice—Cloud Upon Title—Liability.**
A recorded option on lands given by executors having the power under the will is notice of its terms only, and the time within which it should be exercised; and an unregistered waiver of the time limit by the executors in consenting to execute the deed thereafter is inoperative against a purchaser for value under a sufficient and subsequently registered conveyance, made by those who had the right of election to take the lands embraced in the option, and a court of equity will not place a cloud upon the title by making a decree requiring the executors to convey such title as they may have; and the executors are not liable in damages upon refusing to make such conveyance.

ACTION, heard upon facts agreed, by *Allen, J.*, April Term, 1906 of ONSLOW. Plaintiffs appealed.

The plaintiffs prosecute this action against the defendants, R. J. Williams and H. C. Foscue, executors of Narcissa S. Fonville, deceased, for the purpose of compelling them to specifically perform a contract, or option, in regard to a body of land lying in Onslow County. The other defendants, devisees of Mrs. Foscue and Remick, who purchased from them the same land, are brought in as parties, to the end that they may be bound by the judgment, no relief being asked against them. The cause was submitted to the court for decision upon an agreed statement of facts, the material part of which is as follows:

The land in controversy, some 5,000 acres, belonged to Mrs. Narcissa S. Fonville, who died during the year 1898, having first made and published her last will and testament, appointing the defendants, Williams, and Foscue, executors thereof. The will was admitted to probate July, 1901, and the executors duly qualified. The tes- (194)

tatrix gave the land to her husband, E. W. Fonville, for life, remainder as hereinafter set forth, to her children, the defendant devisees. There are a number of special provisions in the will regarding the distribution of the estate, including the proceeds of the land if sold during the life of the testatrix or by the executors after her death, which do not materially affect the merits of this appeal. As if to remove any "obscurity or doubt," she says in the ninth item: "I do hereby expressly empower my executor or executors of this my will to sell any part or the whole of my land or real estate that I may have any interest in at my death; either for payment of my debts or for any other purpose of this will, at his discretion. . . . Giving this ample power to enable him or them to take advantage of favorable opportunities of sale, etc. . . . I urge them, if they see fit to make a sale or are obliged to do so to make assets, that they do so at the earliest good opportunity—if possible, within three years after my death."

On 16 January, 1905, the defendants, Williams and Foscue, executors, executed and delivered to the plaintiffs, Trogden and Patterson, a paper-writing, the material parts of which are as follows: "This memorandum or agreement entered into, etc., witnesseth: That the said parties of the first part, for and in consideration of the sum of $50 to them in hand paid . . . have agreed, and do hereby covenant and agree, to sell to the parties of the second part, their heirs or assigns, at the option of the said parties of the second part, at any time within the term of ninety days from the date hereof and upon the terms hereinafter set forth, a certain tract or parcel of land, etc. . . . If the parties of the second part shall, within the time herein specified,

(195) elect to purchase said land, then and in that event they shall pay to the parties of the first part, their heirs or assigns, the sum of $10,000 as the purchase price of said land, and in full consideration thereof, as follows, to wit: The sum of $5,000 in cash and the remainder of said purchase money one year after date of first payment; said deferred payment to be secured by a mortgage upon said land, said deferred payment to be credited for amount paid for option. And the parties of the first part covenant and agree, upon the payment of the said purchase money, to convey said lands to the parties of the second part, their heirs or assigns, by good and sufficient deed or deeds."

This instrument was duly proven and registered in the office of the register of deeds of Onslow County on 4 May, 1905. On 15 April, 1905, the defendant R. J. Williams, at his home in Duplin County, in a conversation had with the plaintiff W. B. Trogden, who went there for that purpose, respecting the sale of said land pursuant to the terms and provisions of said paper-writing, said to him, the said Trogden, that it was "not necessary to tender the money," and that said executors were will-

ing to give plaintiffs "a good deed." Subsequently thereto plaintiffs tendered to the said Williams and Foscue, as executors, a deed for the said land, with the names of the said executors, and also all of the devisees and heirs of said Narcissa S. Fonville, and their wives and husbands, as grantees, which said deed the said devisees and heirs at law refused to execute; whereupon it was returned to the plaintiffs with notice that said heirs and devisees refused to sign the same. No other deed has been tendered said executors for their signatures, nor have they tendered any deed to the plaintiffs. At the conversation between plaintiff Trogden and defendant Williams on 15 April, 1905, the defendant Foscue was not present. (196)

On said 15 April, 1905, plaintiffs were willing and able to pay (and have been at all times since said day) the amount named in the paper-writing as the purchase money of said land.

On 14 June, 1905, the defendants James H. Fonville, Narcissa Williams, and E. B. Fonville, devisees and heirs at law of the said Narcissa S. Fonville, deceased, elected to take their shares of said land in specie, and so notified said executors.

On 28 June, 1905, all of the devisees and heirs at law of said Narcissa S. Fonville, deceased, with their respective husbands and wives, except H. C. Foscue and wife, executed to defendant Remick a paper-writing in the following words: "Received of R. C. Remick the sum of $250, being part of the purchase price of all the lands owned by Narcissa Fonville, deceased, in Onslow County, the balance of the purchase money, to wit, $11,750, to be paid as soon as a full, complete, and accurate examination of all titles are made and the deed signed by all the heirs at law and parties interested in said estate of Narcissa Fonville, and the same shall have been executed properly. This 28 June, 1905." This paper-writing is signed by defendant Williams, executor, as the other devisees and heirs at law, save Mr. and Mrs. Foscue. Its execution is duly proven and registered in the office of the register of deeds, 10 July, 1905. In both paper-writings a tract of 75 acres of the Fonville land is excepted. In accordance with the said paper-writing and the agreement between the parties, defendant Remick caused the title to said lands to be examined, and deposited the sum of $11,750 in the Atlantic Trust and Banking Company of Wilmington, N. C., being the unpaid balance purchase money of said lands, under the instructions of the devisees and heirs at law of Narcissa S. Fonville, who instructed the said Remick to let said money remain in said bank (197) until after the termination of this suit; and, if this suit should be decided against the claim of the plaintiffs, that they would execute a deed for the said land to the said Remick and take the money. That the said money was deposited by agreement in the name of J. C. Foster,

trustee, with instructions to pay the same, with the accrued interest, to the heirs and the devisees of Narcissa S. Fonville upon their executing to said Remick a good and sufficient deed in fee for the said lands, with full warranties. The said sum of $12,000, however, is understood to include the purchase price for the interest of Mrs. Gertrude Foscue in said lands, as well as those who signed the contract of agreement. The executors had immediate notice of the execution of the paper-writing of 28 June, 1905. There was some correspondence had between plaintiffs and defendants subsequent to 21 May, 1905, which it is unnecessary to set out in full. During the month of September, 1905, defendant Foscue informed one of the plaintiffs that he was willing to sign a deed as executor, whereupon the plaintiff said that he was willing to accept a deed from the executors. This was subsequent to the institution of this action on 3 July, 1905. The specific relief asked by plaintiffs is: "That defendants Williams and Foscue, as executors as aforesaid, execute to the plaintiffs a sufficient conveyance of the said land as provided in said agreement; for $3,000 damages, and for other and further relief." The action was instituted in Guilford County and removed to the county of Onslow for trial. Defendant Remick answered, admitting portions of the complaint, denying other portions, and pleading affirmatively: (1) That the paper-writing of 16 January, 1905, was a mere option, which defendants had no power, under the will, to give. (2) That
(198) it expired on 16 April, 1905. (3) That he purchased from the real parties in interest on 28 June, 1905, and was ready, willing, and able to comply with his contract. He demanded judgment against the plaintiffs for damages for interfering with his rights, etc., and against his codefendants for specific performance. Defendants' executors answer generally. The other defendants, heirs at law, answer, denying the power of the executors to give the option under which plaintiffs claim, allege their election to take the land under the will, and admit the execution of the contract with defendant Remick.

His Honor, upon the agreed statement of facts, rendered judgment:

1. That the plaintiffs are not entitled to the relief prayed.

2. That defendant Remick is the equitable owner of an undivided four-fifths interest in the land, and that upon payment of the shares of the purchase money deposited by Remick in the bank, the defendants who executed the paper-writing of 28 June, 1905, execute a deed for their interest in said land, and that the decree should have the effect to transfer such interest, etc.

Plaintiffs duly excepted and appealed. The record states that defendant Narcissa S. Williams excepted and appealed. No appeal bond by her is in the record and no brief is filed in her behalf.

*Robert M. Douglas and Frank Thompson for plaintiff.*
*Davis & Davis and H. McClammy for defendant.*

CONNOR, J., after stating the case: In the judgment rendered by his Honor he sets out, with his usual clearness, the question presented by the case agreed.

First, Does the will of Narcissa S. Fonville confer upon the executors the power to sell the lands in controversy? While the language of the will in regard to the disposition of the estate, endeavoring to anticipate possible or probable contingencies, is somewhat obscure, we concur with his Honor that the executors had the power, under the (199) will, to sell the lands. We do not attach importance to the suggested limit of three years within which they should exercise the power. In the view which we take of the case, it is not material. The next question presented is, "If the power of sale is conferred by the will, does this power include the power to execute an option for ninety days?" We concur with his Honor that it does not. There is a marked and well-defined distinction between a contract in which both parties are bound to sell and convey land, postponing the delivery of the deed and payment of the purchase money until some fixed day, even when made dependent upon some condition, and a mere promise on the part of the promisor to permit the promisee to elect at the end of a fixed day whether he will at that time enter into a contract of purchase. The relative rights and obligations are entirely different and are governed by different principles. "An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future." 21 A. & E., 924; *Sitterding v. Gizzard,* 114 N. C., 108; *Hopwood v. McCausland,* 120 Iowa, 218; *Litz v. Gosling,* 93 Ky., 185; 21 L. R. A., 127. The term is well defined in the case of *Black v. Maddox,* 104 Ga., 157, as "the obligation by which one binds himself to sell and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time." The agreement is, of course, invalid unless supported by a valuable consideration. We take it that there can be no doubt that such is the legal definition of the agreement executed by the defendants' executors with plaintiffs on 16 January, 1905. The consideration is sufficient to support the promise. Does the power to sell include the power to enter into an agreement not to sell to any one save (200) the plaintiffs for ninety days, and at the end of that time to sell to no one else, provided they pay the purchase price? As is correctly said by his Honor, an option is easily distinguished from a contract to sell, coupled with one to buy, "and is at least temporarily destructive

of the power which is said to include it. During the ninety days, if the option is valid, the power to sell is suspended and the executors have no right to accept an offer to buy the land, however advantageous it may be."

The learned counsel for plaintiffs insist that, conceding this to be true, an option, when accepted, merges into a contract. That "after the continuing offer or the option is accepted any difference between the two disappears, and the resulting contract is not affected by the nature of the antecedent offer." 21 A. & E., 926. This is undoubtedly true, and this contention presents the next question stated by his Honor, "Was it sufficient within the ninety days to give notice of acceptance without tender or payment of the purchase money?" The answer depends upon the terms of the option. The contract to purchase, by which the relation of vendor and vendee should be established, is not to be completed by notifying the executors of acceptance of the continuing offer; but that if "they shall, within the time hereinafter specified, elect to purchase said land, then and in that event they shall pay" the purchase price, etc. Instances may be found in the books wherein the option is converted into a contract by giving notice of acceptance, and it seems, answering one of the questions discussed, it is not necessary that such notice should be in writing. In the option before us, as we have seen, payment of one-half the purchase money and securing the other half constitute the method of electing to purchase. In
(201) *Weaver v. Burr,* 31 W. Va., 736, the material facts are singularly similar to the case before us. *Woods, J.,* states and discusses the question in the same order adopted by his Honor. When he reaches this question, the learned justice says: "The period of sixty days from 7 June, 1883, mentioned in the option, within which plaintiffs had the privilege of buying the land, . . . expired on 6 August, 1883. During the whole of that period and during the whole of the 6th of August plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of and compliance with the terms thereof. They could not do so by any other acceptance, nor could they comply with the terms in any other manner than by actual payment or tender of the whole price of the land before the sixty days expired. Neither could they withhold the payment, or tender of payment, until a proper deed was executed or survey could be made and the excess number of acres ascertained. It was their privilege to accept unconditionally the terms offered and comply with them by paying or tendering the cash within the sixty days, and thus secure to themselves the right to compel Burr to perform his contract. The delivery of the deed and the payment of the price of the land were intended to be contemporaneous acts, and it was not intended that the de-

livery of the deed should be a condition precedent to the tender of the price." The case is easily distinguished from *Paddock v. Davenport,* 107 N. C., 710.

*Shepherd, C. J.,* in *Cozart v. Herndon,* 114 N. C., 252, says: "It is well settled that in order to constitute a contract there must be 'a proposal squarely assented to.' If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, rejection, or amendment." Clark on Cont., 369; Cyc., 265.

Applying these elementary principles to the facts before us, (202) we cannot sustain the plaintiffs' contention that there was an acceptance of the option. Assuming, as we hold, that a tender was necessary on the day or within the time fixed by the option, it is conceded that none was made; therefore, unless there was a valid waiver, the option, with all of its incidents, ended on 16 April, 1905. The effect of a waiver is to release one of the parties from the terms of the original proposition and substitute for it other terms. If this be done by language, the terms of the new proposition are to be ascertained by the words used; if by conduct, the law gives to such conduct a construction which secures a fair and just result. The defendant Williams, executor, waived, by the language used, the tender of the money according to the terms of the option. No time was then fixed for the payment—the matter in that respect was at large. An option, with other terms, so far as Williams was concerned, was given. Assuming, for the purpose of plaintiffs' argument, that both executors were bound by the language used by Williams, and eliminating any question of the statute of frauds upon the principle upon which *Alston v. Connell,* 140 N. C., 485, and *Lumber Co. v. Corey,* 140 N. C., 462, are based, we have an option, without any limit as to time of acceptance or payment of the money. If it be doubtful whether the power to give an option for ninety days is included in the power to sell, certainly an option without limit cannot be sustained. Of course, if there had been an acceptance of the original option and a payment or tender of the money, the status of the parties would change from that of a proposal by the executors to a contract between them and the plaintiffs for sale; but, as we have seen, in the most favorable view of the transaction for plaintiffs, the option never merged into a contract, and the relation of vendor and vendee was never established. The executors, by waiving the tender, had no right to demand that the plaintiffs purchase the land—it re- (203) mained an unaccepted proposal to sell whenever the plaintiffs paid the purchase money. The question whether, if they had done so within a reasonable time, the relation of vendor and vendee would have been established, is not presented, because they have never tendered the money. The only fact in that connection, found in the case agreed, is

that "subsequently thereto the plaintiffs tendered a deed to the executors, in the execution of which the devisees and heirs at law were required to join. The plaintiffs encounter, in this aspect of the case, two difficulties: The executors never promised that the devisees and heirs at law would join in the execution of the deed. It is true that they did promise to convey by "good and sufficient deeds." It is evident that all parties had in view the power of sale conferred upon the executors by the will, which, as we have seen, was sufficient to enable the executors to convey, and whose deed plaintiffs now say they are willing to accept. Therefore, in demanding the execution of the deed by the devisees, they were not accepting the proposal as made, but imposing a condition upon their acceptance. It may have been desirable to have the signatures of the devisees to the deed, but it was not so "nominated in the bond." Again, the acceptance was not to be manifested by tendering a deed, but by paying "a part of the purchase money and securing the balance," under the option as changed by the waiver, within a reasonable time. This they have never done. The fact that they were willing and able to do is not sufficient. There are a class of cases wherein this averment is sufficient. This is not one of them. There had been no refusal on the part of the executors to perform their part of the contract, which relieved the plaintiffs of the duty of an offer to pay the money. *Grandy v. Small,* 50 N. C., 50.

(204) While we agree with the learned counsel for the plaintiffs that a tender of the purchase money to one of the executors on the day or within the time fixed in the option would have been sufficient, we are of the opinion that a change in the terms of the option, or giving a new option by one executor, did not bind the other. It is true, as insisted by counsel, that in respect to the personal estate of a testator, the title to which vests in the executors jointly, one of them may sell or dispose of it, collect, compromise, and release debts, cancel mortgages and do any other acts necessary and proper in the discharge of their duties. 17 A. & E., 620; *Hoke v. Fleming,* 32 N. C., 263.

The rule is different, however, when a power to sell land is conferred upon two executors. The power must be executed by them jointly; they must join in the sale and execution of the deed. 22 A. & E., 1099; *Debow v. Hodge,* 4 N. C., 368; *Wasson v. King,* 19 N. C., 262; *Smith v. McCrary,* 38 N. C., 204. Provision is made by statute to meet cases of death, etc. Revisal, sec. 82. We are of the opinion that the waiver of Williams did not bind his coexecutor Foscue. Therefore, the option of 16 January, 1905, was not accepted according to its terms. The plaintiffs' counsel insist that, conceding that the executor Foscue was not bound by the waiver of his coexecutor, he ratified it by his letter of 28 July, 1905. Without analyzing the letter, which we think falls far

short of the legal effect sought to be given it by the plaintiffs, it would seem to be sufficient to say that it was not written until a month after the devisees of Mrs. Fonville had elected to take the land in its unconverted form, and so notified the executors. This they were entitled to do. The power of sale was conferred for their benefit; after the expiration of the option on 16 April, 1905, their right to put an end to it by an election could not be prevented by any action on the part of the executors after they had been notified of the election. The defendants' devisees had given the defendant Remick an option, (205) and he had placed the amount of the purchase money in the bank for their benefit. Whatever may be the retroactive effect of a ratification of a contract made by one dealing with his own property, it would be difficult to find any sound principle upon which to sustain the right of an executor, with a naked power of sale, to ratify a void option to the prejudice of the beneficial owners of property more than ninety days after its termination. We do not find in Mr. Foscue's letter of 28 July, 1905, language the legal effect or intention of which indicates a ratification of his coexecutor's waiver of the tender; on the contrary, while he, in a very proper spirit, discusses the moral phases of the transaction, he expressly points out the difficulty which stands in the plaintiffs' way. Among others, referring to the demand of the plaintiffs and the refusal of the heirs to sign the deed, he says: "You, we, nor the court can make them sign the deed, and you won't have the deed unless the heirs sign. Your suit won't lie against the executors for damages, for we are willing to abide the trade." It is true that some time in September, 1905, Foscue told one of the plaintiffs that he would sign the deed, and the plaintiff said that he was willing to accept a deed from the executors. In no aspect could this conversation revive the extinct option and affect rights which had intervened. We have discussed the appeal upon the theory that when an option is given, being, until accepted, binding only on the maker, time is of the essence of the contract; hence, the person to whom it is given must comply with its terms in all material respects. After this is done and a bilateral contract, with all of its incidents, is made, or rather a contract of purchase is entered into, new rights are acquired and new duties imposed. The option is merged into the contract.

We have discussed the questions presented by the case agreed and considered by his Honor because of the importance of a correct decision to the parties, aided, as we have been, by the full and well (206) considered briefs and arguments of counsel, and for the further reason that we, nor those who have preceded us, have been heretofore called upon to discuss them except incidentally. It is manifest that the chief value, at this time, of the large body of land in controversy con-

sists in the standing timber upon it. We know from several causes lately before us and from other reliable and public sources of information that contracts of this character are being made in many sections of the State. Much of the timber and mineral wealth of the State is being sought after by persons who take options, binding only the owners and securing to themselves the opportunity to make profit by selling the option. The rapid advance in the value of real estate, together with the meager knowledge of many of the owners of the real value of their timber and mineral interests, make it the duty of the courts to adhere to the well settled principle that, when such options are given, time will be deemed of the essence of the contract. *Alston v. Connell,* 140 N. C., 485 (p. 491).

In *Wells v. Smith,* 7 Paige Chan., 22 (31 Am. Dec., 274), the Chancellor, discussing the question involved, says: "If the purchaser wished to comply with the contract so as to have the benefit thereof, he should have tendered the money at the day, or have offered to pay the same, and to execute the bond and mortgage for the residue upon the delivery to him of a deed to the premises."

The following statement of the law we think correct: "Generally, if a contract be unilateral, as if it be that A. will convey, provided B. shall on a certain day pay a specified sum, time is deemed of the essence of the contract, and the payment of the sum is a condition to the creation of any right in B. to the performance of the contract." Note to *Wells v. Smith, supra.*

In *Miller v. Cameron,* 45 N. J. Eq., 95, it is said that when the party taking the option is not originally bound and cannot be brought (207) into court, he should be required to show that he had faithfully performed every stipulation on his part. "If he intends to hold the other party to the contract which he has signed, he himself should not be guilty of a moment's trifling without a most satisfactory excuse." It was only after much hesitation and anxious consideration that courts of equity granted decrees for specific performance of unilateral contracts, thinking it more in accordance with sound principles that the aggrieved party be left to his action at law for damages. The rule is settled otherwise, and relief will be granted when the party seeking the aid of the court has complied with the terms of the option. He will not, however, for manifest reasons, be permitted to invoke the equitable doctrine that time is not of the essence of the contract.

The plaintiffs rely upon *Lumber Co. v. Corey,* 140 N. C., 462. In that case, while the general question is discussed, it is expressly said that the "plaintiff tendered performance within the time limited" (p. 470). The plaintiffs say that they are now content to accept the deed of the executors. If there were no other obstacle to decreeing specific perform-

ance, it is obvious that such a deed would not prevail as against the equitable title acquired by Remick. The registration of the option, 4 May, 1905, gave no other notice than that the plaintiffs had a right to pay the money and call for the title within ninety days. Nothing else appearing of record, it would seem that Remick became, by the contract of 28 June, 1905, a purchaser for value when he deposited the full amount of the purchase money in the bank, to be paid when title was made. No deed appearing of record, he was entitled to treat the option as at an end. To make the extension of time to pay the money binding upon subsequent purchasers, the option as changed should have been registered. It was a "contract to convey land," within the language and purpose of section 980 of the Revisal. While a court (208) of equity might, in some cases, compel the vendor to convey such title as he had and the vendee was willing to accept, we do not think that in a case like the one before us, when all of the parties in interest are before the court, and their rights capable of adjustment, we should direct a deed to be made which could have no other effect than placing a cloud upon the title and producing further litigation. Such is not the office of a court of equity.

Upon the entire record, we concur with the judge below that the plaintiffs are not entitled to recover. The decree made by him adjusting the rights of the defendants between themselves is not excepted to. We think it both wise and in accordance with the course and practice of the Court.

The judgment is

Affirmed.

*Cited: Pearson v. Millard,* 150 N. C., 307; *Hardy v. Ward, ib.,* 391; *Clark v. Lumber Co.,* 158 N. C., 145; *Winders v. Kenan,* 161 N. C., 632, 633; *Hedgecock v. Tate,* 168 N. C., 662; *Dalrymple v. Cole,* 170 N. C., 108; *Cozad v. Johnson,* 171 N. C., 643.

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A. H. HERRING AND WIFE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 March, 1907.)

**Witnesses—Prove Attendance—General Rule—Exception—Clerk's Decision—Excusable Neglect—Appeal.**

When a witness is subpœnaed to testify upon an issue as to negligence raised by the pleadings, and there is an amendment made at the term of his attendance eliminating the issue, and thereafter the cause is tried in the absence of the witness, it is an exception to the general rule that only witnesses for successful litigants, under subpœna, examined and

sworn or tendered at the trial can prove their attendance; but the decision of the clerk, approved by the judge, in the absence of appeal therefrom and a motion to set it aside upon the ground of excusable neglect, is conclusive.

MOTION on part of defendant to retax costs, heard before *Allen, J.*, at April Term, 1906, of SAMPSON.

(209) The action was to recover damages for wrongfully causing a fire by an engine of defendant company, and by reason of which certain lands of plaintiffs were burned over and injured.

At October Term, 1903, the action was tried, and judgment rendered in favor of plaintiff for the damages and "costs to be taxed by the clerk."

Defendant insisted that the cost had been erroneously taxed in charging against it the amount of some witness tickets, when these witnesses, subpœnaed by plaintiffs, had been neither examined nor sworn and tendered at the trial.

The motion to retax was denied, and defendant excepted and appealed.

*H. L. Stevens and Davis & Davis for defendant.*
*No counsel contra.*

HOKE, J. The general rule is that when there has been a trial of the cause only those witnesses of the successful litigant can be taxed against the losing party who were under subpœna and who were examined or sworn and tendered at the trial. *Moore v. Guano Co.*, 136 N. C., 248; *Sitton v. Lumber Co.*, 135 N. C., 540; *Cureton v. Garrison*, 111 N. C., 271.

This rule is sometimes modified when it is made to appear, on motion, in apt time, that a witness, who had attended under subpœna, was unavoidably absent at the time of trial, and that his evidence was material. *Loftis v. Baxter*, 66 N. C., 340.

And it is ordinarily only applicable when there has been a trial. Where the action has terminated without a trial, and when no opportunity has been presented for the successful party to examine or swear and tender his witnesses, in such case the liability for costs must

(210) be determined from different data and on other principles. *Henderson v. Williams*, 120 N. C., 339.

There is evidence sent up which tends to withdraw the case from the application of the rule first stated; for ther are two affidavits, uncontradicted, in which it appears that the witnesses in question attended under subpœna when there was an answer of defendant on file which raised issues as to whether defendant's engine negligently started the fire, and also as to the amount of damage.

Subsequently, by leave of court, the pleadings were amended, and the defendant filed an answer admitting the negligence and joining issue only on the amount of damage.

When the change was made, the witnesses in question, who had been subpœnaed to prove the negligence, were excused from further attendance, and so were not present when the trial was had.

We are not required, however, to determine this matter, because, from the facts presented, the defendant is precluded from raising the question as to the costs.

It appears from the record that the defendant has heretofore moved before the clerk of the court to have the cost of these witnesses retaxed; and, after full hearing, the motion was denied by the clerk, and defendant "appealed to Superior Court in term-time."

At May Term, 1905, of Superior Court, before his Honor, *Allen, J.*, present and presiding, the report and order of the clerk was in all respects "ratified, approved, and confirmed." From this judgment no appeal was taken, and no facts are shown which would induce a court to set the same aside, or which would justify such action for surprise or excusable neglect.

The judgment of the clerk on the question of costs would bind the parties unless appealed from. *Cureton v. Garrison, supra;* and the judgment of *Allen, J.*, at May Term, 1905, by which the (211) order of the clerk was approved and confirmed is a conclusion of the matter while it stands undisturbed on motion to set it aside for excusable neglect or by appeal to a higher court.

It is well established that one Superior Court judge cannot review or set aside, as on appeal, the action of a former Superior Court judge which makes final disposition of a substantial right of a party litigant. *Clement v. Ireland,* 138 N. C., 139; *Roulhac v. Brown,* 87 N. C., 1.

As said by *Ashe, J.*, in this last case: "The decision of the first motion was made by a court of competent jurisdiction upon a substantial right which was reviewable by appeal; but no appeal was taken, and such decision must, therefore, govern this case as *res adjudicata.*"

We are of opinion, and so hold, that this judgment referred to, entered at May Term, 1905, is conclusive on the parties, and the judge below properly refused to alter or disturb the disposition made of the matter pursuant to that judgment.

Affirmed.

*Cited: Hobbs v. R. R.,* 151 N. C., 136; *Chadwick v. Insurance Co.,* 158 N. C., 382.

(212)

WENTWORTH BLACKMORE ET AL. v. J. B. WINDERS ET AL.

(Filed 20 March, 1907.)

**1. Ejectment—Bond—Judgment—Condition Precedent.**

A bond, with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining such judgment must be shown by proper averment and proof, or an action against the sureties will be premature.

**2. Same—Pleading—Severable Cause—Demurrer, When Made—Principal—Surety.**

When the chief ground of demurrer to the complaint in an action for summary ejectment covers only the cause of action upon the stay bond, the demurrer is to that extent severable, though containing objections to other matters of the complaint; and it may be sustained as to the sureties and disallowed as to the principals upon grounds distinctly specified and separately assigned; and, being thus special or severable and denying the plaintiff's right to recover all, the objection can be raised *ore tenus* in the Supreme Court, or the Court may notice it *ex mero motu*.

**3. Pleading—Sufficiency.**

Every reasonable intendment and presumption must now be indulged in favor of the pleader, and pleadings inartificially drawn are sufficient if from any portion or to any extent it can be gathered that facts which constitute a cause of action have been alleged; though a motion to make the pleading more definite or certain, or even a demurrer, would have been good to formal defects rendering the pleading unintelligible or uncertain, or arising from the omission of allegations which can be cured by amendment.

ACTION heard before *Jones, J.*, on demurrer at November Term, 1906, of DUPLIN. Demurrer overruled. Defendant appealed.

The plaintiffs in their complaint allege that on 13 May, 1905, they leased to W. L. Carlton the hotel "Northumberland" and the lot on which it stands, for the year 1906, for $480 rent, payable in advance on 1 January, 1906. The lessee, Carlton, assigned his interest to
(213) the defendant Winders, who entered under the plaintiffs, but failed to pay the rent on demand and thereby became indebted to the plaintiffs in the sum of $480 and interest. The lease provided that if the lessee should fail to perform any of its conditions for ten days after notice by the lessor of such failure, the latter might reënter without notice to quit. Winders took possession of the leased premises in December, 1905, and having failed for ten days, after due notice, to pay the rent, the plaintiffs brought summary proceedings before a justice of the peace to oust him. Judgment was given for the plaintiffs, and the defendants appealed to the Superior Court and gave bond in the sum of

$540 to stay the execution or writ of possession, which was conditioned as follows: "If the said Winders shall pay any judgment, which in this or any other action the plaintiffs may recover for the rent of said premises and for damages for the detention thereof, this obligation shall be void; otherwise, it shall remain in full force and effect." The penalty of the bond was increased by order of the Superior Court to $650, and a second bond for that amount was given, with a condition the same as the one in the first. C. F. Carroll was surety on the first bond and C. F. Carroll and W. L. Hill on the second. This suit was brought against J. B. Winders, C. F. Carroll, and W. L. Hill to recover the overdue rent and interest, the plaintiffs further alleging that by reason of making the stay bond the defendants became indebted to them in the sum of $480 (the amount of the rent), with interest, and they pray specially for a recovery of the penalty of the bond, to be discharged by payment of the said debt and the costs, and further for general relief.

The defendants demurred to the complaint. As the demurrer has been lost, we cannot state exactly its contents, but it would appear from the statements in the case and the admissions in the briefs of counsel that the defendants joined in the demurrer and assigned more (214) than one ground. They demurred generally for the reason that the plaintiffs cannot maintain the action at all, and specially because an action will not lie on the stay bond until there has been a judgment for the plaintiffs in the summary proceeding and a failure by the defendant Winders to pay the same, which is not alleged in the complaint. The court overruled the demurrer, and the defendants excepted and appealed.

*Stevens, Beasley & Weeks for plaintiffs.*
*Rountree & Carr for defendants.*

WALKER, J., after stating the case: There are only two questions to be considered in this case: First, whether the plaintiffs can sue upon the bond given by the defendants to stay execution in the ejection proceedings before they have recovered judgment therein, and, second, whether the demurrer, being joint, it should have been overruled if a cause of action is stated in the complaint against any one of the defendants.

The condition of the bond is that it shall be void if the defendant Winders shall pay any judgment which, in the summary proceedings in ejectment or in any other action, may be recovered by the plaintiffs, and "otherwise," that is, if he fails to pay the judgment, the bond shall be of full force and effect, or, in other words, it shall be enforcible against him and his sureties. It would seem to be clear from the very words of the condition that an action on the bond will not lie until there has been

a judgment for the plaintiffs in the ejectment proceedings or in a separate action, for the bond distinctly provides that such a recovery shall be a condition precedent to liability, and this is in accordance with the words of the statute. The bond is intended merely as a security (215) for such rents and damages as may be adjudged to the plaintiffs, and not for those which they fail to allege and show that they have recovered. The suability of the defendants in respect to the bond is therefore contingent, and depends upon the prior recovery, which must be shown by proper averment and proof. The precise question now presented seems to have been decided adversely to the plaintiff's contention in *Robeson v. Lewis,* 73 N. C., 107. See, also, *McMinn v. Patton,* 92 N. C., 371, 376; *Hagan v. Culbertson,* 10 Watts, 393. The provision of the statute, as to the recovery of rent and damages in a suit other than the summary proceedings, was inserted no doubt because the amount of the rent and damages might often exceed the limit of the justice's jurisdiction, and so counsel suggested in the argument. As the plaintiffs do not allege that the event has happened which fixes liability on the bond, this action, as to the obligors, is premature.

As to the second question: The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will (216) stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. 4 Enc., Pl. & Pr., 74 *et seq.; Stokes v. Taylor,* 104 N. C., 394; *McEachin v. Stewart,* 106 N. C., 336; *Halstead v. Mullen,* 93 N. C., 252; *Purcell v. R. R.,* 108 N. C., 414; *Holden v. Warren,* 118 N. C., 327. There should, of course, be at least substantial accuracy in the averments. *Norton v. McDevitt,* 122 N. C., 755. And, indeed, it is required that there should be not only certainty, but clearness and conciseness, and also a compliance with the

other essential rules in the science of pleading, which have been adopted for the purpose of evolving the real issues from the controversy; but if there is any formal defect in this respect, which renders the pleading unintelligible, or the precise nature of the charge or defense be not apparent by reason thereof, it can be corrected on motion (Revisal, sec. 496), or in some cases where there is a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie. *Bowling v. Burton,* 101 N. C., 176; *Mizzell v. Ruffin,* 118 N. C., 69; *Ladd v. Ladd,* 121 N. C., 118.

While the complaint in this case does not separately and distinctly state a cause of action against Winders for the overdue rent, as required by the Revisal, secs. 467 (3) and 469, and as one existing apart from the cause of action based upon his liability, and that of his sureties, as obligors in the stay bond, we yet think that the allegation of the indebtedness of Winders for the rent, though intended by the pleader, perhaps, as matter of inducement, or an introduction to the cause of action on the bond, as would appear from its placing or rela- (217) tive position in the pleading, may be regarded, by a liberal construction of the complaint, as a sufficient statement of a cause of action against him alone for the nonpayment of the rent at its maturity. This is so, although the allegation was made *diverso intuitu.* The two causes of action—the one for the recovery of the rent against Winders on his contract as tenant to pay the same, and the other on the obligation of all the defendants as evidenced by the stay bond—are blended, when good pleading required that they should have been stated and numbered separately; but as this is merely a defect in form not specified in the demurrer and not objected to in any other way, we must hold that there is a cause of action against Winders for the recovery of the rent sufficiently stated in the complaint, and the demurrer as to that cause of action was properly overruled.

The plaintiffs contend that there being one good cause of action stated, though against only one of the defendants, as the demurrer is joint, it should be overruled as to all, and rely on *Conant v. Bernard,* 103 N. C., 315, to sustain the position. In that case there really was but one cause of action against all of the defendants to correct the deed of trust executed by Van Gilder to G. R. Conant for the tract of land described instead of to J. A. Conant and for a different tract, as was intended. The cause of action affected the defendants in the same degree and to the same extent, and the relief prayed for was practically the same against all of them. The complaint being sufficient as to one of the defendants, this Court overruled the demurrer as to all who had joined him in it, without inquiring into its sufficiency as to them. But the tenor of the opinion of the Court, speaking by *Justice Avery,* will dis-

(218) close that stress was laid upon the fact of there being but a single cause of action and a general demurrer to it. *Cowand v. Myers,* 99 N. C., 198, is cited therein as ruling that, where there is only one cause of action, "the demurrer must be to it as a unity, or it will be disregarded." *S. v. Young,* 65 N. C., 579. So in each of the other cases cited by the Court (*Thompson v. Newlin,* 38 N. C., 338, and *Barnwell v. Threadgill,* 40 N. C., 86), the demurrer was to the bill as an entirety, there being only one cause of complaint, and the general rule then existing was applied, that a demurrer must be good throughout, for if it covers too much it will be overruled altogether. Pomeroy on Rem., sec. 577, is also cited for the proposition that "Where a demurrer is filed to several causes of action or to more than one defense, on the ground that no cause of action or no defense is stated, if there is a good cause of action in the one case or one sufficient defense in the other, the demurrer will be overruled as to all, and the same rule (the author says) also applies to a demurrer, for want of sufficient facts, by two or more defendants jointly; it will be overruled as to all who unite in it, if the complaint or petition states a good cause of action against even one of them." He admits that a different rule has been announced, and cites *Wood v. Olney,* 7 Nev., 109, where the subject is fully and ably discussed with reference to the old and to the new system of pleading and practice.

It will be observed that the authorities cited in *Conant v. Bernard, supra,* refer to a demurrer which denies that the pleading or any part of it contains the statement of a good cause of action or a valid defense and which attempts to sweep everything before it. But in our case the chief ground of demurrer, as admitted in both briefs, covers only the cause of action upon the bond, and to this extent it is several, although it may have contained objections to other parts of the complaint. This one ground is distinctly specified and the cause of action on the bond separately attacked. The demurrer may therefore be treated as
(219) if confined to that cause of action only. 6 Enc. of Pl. and Pr., 320; *R. R. v. Sherwood,* 132 Ind., 129; *May v. Telegraph Co.,* 112 Mass., 90; *People v. Lowthrop,* 3 Colo., 428. *Kennagh v. McColgan,* 4 N. Y. Sup., 230, is directly in point.

But however this may be, the defendants now insist in this Court, on behalf of the sureties, that the action on the bond was prematurely brought, and treating this as a special or several demurrer *ore tenus,* we can pass upon the objection, though made here for the first time. Such a defect cannot be waived, and this Court can even notice it *ex mero motu* or without any suggestion from counsel. *Elam v. Barnes,* 110 N. C., 73; *Love v. Commissioners,* 64 N. C., 706; *Hunter v. Yarborough,* 92 N. C., 68; *Burbank v. Commissioners, ib.,* 257. If the

plaintiffs may recover against one of the defendants upon one of the causes of action, but it appears that they cannot recover against the other defendants upon the other cause of action, why permit them to proceed further in the court below as to the latter? One of the leading advantages of the Code system is that it seeks to determine controversies and not to prolong them—to end litigation and not to extend it.

The demurrer has been lost, and the case has been argued and decided upon what appears from the record and briefs of counsel to be its contents. The lost pleading or paper should always be supplied by copy, as required by the statute (Revisal, sec. 504), before the cause is argued here.

The demurrer will be sustained as to the defendants who are sureties on the bond. To this extent the court erred in overruling it, and its judgment is accordingly modified. As to the defendant Winders, it is affirmed. The costs of this Court will be paid equally by the plaintiffs and the defendant Winders.

Modified.

*Cited: Caho v. R. R.*, 147 N. C., 23; *Jones v. Henderson, ib.*, 125; *Garrison v. Williams*, 150 N. C., 676; *Brewer v. Wynne*, 154 N. C., 471; *Bank v. Duffy*, 156 N. C., 87; *Eddleman v. Lentz*, 158 N. C., 69; *Ludwick v. Penny, ib.*, 113; *Womack v. Carter*, 160 N. C., 290; *Brady v. Brady*, 161 N. C., 329; *Cedar Works v. Lumber Co., ib.*, 612; *Lyon v. R. R.*, 165 N. C., 148; *Renn v. R. R.*, 170 N. C., 136; *Lee v. Thornton*, 171 N. C., 214.

(220)

## STONE & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 April, 1907.)

1. **Nonsuit—View of Evidence.**

An appeal from a denial of motion for nonsuit entitles defendant in the Supreme Court to urge any view of plaintiff's evidence which involves the right to maintain the action.

2. **Statute—Penalty—Facts—Amendment.**

In a warrant to recover a penalty under a statute, an averment alone that the amount claimed is "due by penalty," without stating the facts or pointing out the particular statute under which the penalty is claimed, is insufficient; but the judge below may allow an amendment in his discretion.

3. **Same—Railroads—Transport—Reasonable Time—Declaratory.**

Section 2632, Revisal 1905, making it unlawful for certain classes of carriers operating in this State to omit or neglect to transport, within a specified reasonable time, any goods, etc., received by it for shipment

from or to any point in the State, unless otherwise agreed upon, or unless the same be burned, stolen or otherwise destroyed, is declaratory of the common law, and does not exclude any defense as to delay in transportation that could properly be made thereunder, the burden of proof being upon defendant to show reasonableness in delays beyond the ordinary or reasonable time prescribed.

4. Same—Rules of Evidence—Enforcing Common-law Duty.

Section 2632, Revisal 1905, fixing a time limit within which the transportation of goods, etc., by certain carriers shall be *prima facie* reasonable, and beyond which *prima facie* unreasonable, changes the rule of evidence alone, and the penalty imposed is solely to enforce a common-law and admitted duty, and is within the legislative authority.

5. Same—Consignor and Consignee—Owner of Shipment—Revisal, Sec. 2632.

When goods are delivered to a common carrier for transportation and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the "party aggrieved" for the penalty given by section 2632, Revisal.

CLARK, C. J., dissenting.

ACTION, tried before *Jones, J.*, and a jury, at December Term, 1906, of NEW HANOVER.

(221) This was an action prosecuted by the plaintiffs for the recovery of the penalty incurred by defendant for failure to transport freight within a reasonable time, pursuant to section 2632, Revisal. The action was instituted in a justice's court and brought by appeal in the Superior Court of New Hanover. The plaintiffs introduced a bill of lading issued by defendant at Wilmington, N. C., showing shipment by Stone & Co. to Williamson & Brown Sand and Lumber Company, at Cerro Gordo, N. C., for one carload of hay.

B. O. Stone, one of the plaintiffs, testified: "Cerro Gordo is on the line of Atlantic Coast Line Railroad Company, and about 90 miles from Wilmington. We shipped this car of hay 20 April, 1906, to Williamson & Brown Sand and Lumber Company. They were anxious for the hay. In consequence of information, I went to the Atlantic Coast Line Railroad depot and made inquiry of Mr. Graham, chief clerk to local freight agent. I was referred by him to freight agent. He said that he had looked up this car and found it in the yard; it was out of repair and would have to be repaired, and he would endeavor to get it off next day. This was 10 May, 1906. . . ." The Williamson & Brown Sand and Lumber Company paid Stone & Co. in full for the hay after delivery. There was no other evidence. Defendant moved for judgment of nonsuit. Motion denied. Defendant excepted. The court instructed the jury to find for plaintiffs, explaining to them the method of calculating the number of days for which plaintiffs were entitled to recover. Defendant excepted. Judgment and appeal.

*Thomas D. Meares, Jr., for plaintiff.*
*Davis & Davis for defendant.*

CONNOR, J., after stating the case: The motion for judgment of nonsuit entitles the defendant to urge in this Court any view of the plaintiff's testimony which involves his right to maintain the (222) action. It was, therefore, open to defendant to insist, in this Court, as it does in the well considered and interesting brief of counsel: (1) That the statute, upon the provisions of which this action is based, is invalid for the reasons assigned. (2) That, if valid, the plaintiffs do not bring themselves within its terms. Other questions are raised by exceptions to rulings of his Honor during the trial. These we do not deem it necessary to discuss, as, in our opinion, the appeal must be disposed of upon the motion for judgment of nonsuit. It may not be improper, however, to say that we think his Honor had the power, and properly exercised it, to allow the amendment to the warrant. Revisal, sec. 1467. The original warrant was defective in that it neither stated the facts upon which the penalty was alleged to have accrued, nor made any reference to the statute. To simply say that the amount claimed is "due by penalty" is insufficient. The complaint was in the same language. *Scroter v. Harrington,* 8 N. C., 192; *Wright v. Wheeler,* 30 N. C., 184. The complaint, which in the justice's court may be oral, should, at least, inform the defendant what omission of duty he is charged with or under what statute the penalty is claimed.

The defendant insists that the statute is invalid because it is not within the police power vested in the Legislature. It concedes that this Court has recognized the validity of similar statutes imposing penalties upon common carriers for failing to perform their public duty, but says that the question was not considered, and that, in the last case (*Walker v. R. R.,* 137 N. C., 168), the reference to it was *obiter.* In *Branch v. R. R.,* 77 N. C., 347, being the first case in this Court in which an action was brought to recover a penalty for failing to ship goods, *Rodman, J.,* discusses the validity of the statute, and holds that it is clearly within the police power, citing *Munn v. Illinois,* 94 U. S., 113. (223) This case was followed in *Katzenstein v. R. R.,* 84 N. C., 694; *Keeter v. R. R.,* 86 N. C., 348; *Whitehead v. R. R.,* 87 N. C., 260; *McGowan v. R. R.,* 95 N. C., 417, and *Walker v. R. R.,* 137 N. C., 168, and many others. The validity of such legislation has been uniformly sustained in State and Federal courts, and Mr. Rose in his exhaustive note to *Munn's case* says that the question is "too well settled to be longer the subject of controversy." Notes, vol. 9, 26. That certain expressions in the opinion in that case have been criticised, and to some extent modified, is conceded; but the fundamental principle upon which

the power of the State to regulate the conduct of all public service corporations in the discharge of their duties, and prescribe penalties for failure to discharge them, is founded, is not only unshaken, but more firmly established by each declaration of the courts. Freund Police Power discusses the question in all of its aspects.

Defendant insists that, conceding the power to rest in the State, the statute (Rev., 2632) imposes unreasonable burdens on the carrier, and urges upon our attention the case of *R. R. v. Mayes,* 201 U. S., 321. We think that counsel inadvertently fail to note the distinction between the statute there under discussion and that under which this action is prosecuted. The point upon which the decision of that case rested was that the statute, "when applied to interstate commerce, was void as a violation of the commerce clause of the Federal Constitution." It is true that *Justice Brown* says that the statute upon which the action is brought "is not far from the line of police regulation," and expresses the opinion that it falls on the "wrong side" of the line. The decision is confined to its interference with interstate commerce. There the stock was shipped from a point in Texas to Red Rock, Okla. It may be that if the Court was called upon to pass upon the validity of the
(224) statute as a police regulation, it would have held that by giving to it a "reasonable construction," thereby avoiding the difficulties and hardships pointed out, it would have been upheld, as this Court did in *Whitehead v. R. R.,* 87 N. C., 255. However this may be, the statute under which this action is brought does not impose any "hard-and-fast rule" on the carrier. It has always been the common-law duty of a carrier to receive and safely transport and deliver, within a reasonable time, all freight tendered it for that purpose at a proper time and place and in proper condition. In respect to the safe delivery, it is an insurer, except "against the acts of God and the King's enemy"; but as to the time of delivery, the measure of liability is defined to be "reasonable." *Boner v. Steamboat Co.,* 46 N. C., 211; *Foard v. R. R.,* 53 N. C., 238; *Alexander v. R. R., ante,* 93. The latest work on the subject says: "The general rule in reference to the liability of a carrier for delay in the transportation and delivery of goods is that it is required to exercise due care and diligence to guard against delay and to forward the goods to their destination with all convenient dispatch and deliver them promptly." Moore on Carriers, 238. Another author of standard authority states the rule with the additional words, "with such suitable and sufficient means as he is required to provide for his business, which is commonly defined as a reasonable time. This duty to carry within a reasonable time is one engrafted, by the law, upon the principal contract, which is to carry safely." 2 Hutchison Carriers (3 Ed.), sec. 651. In the next succeeding section some of the factors and conditions

which may be taken into consideration in ascertaining what, in any case, is a reasonable time, are pointed out, and in other sections such conditions and circumstances as will excuse delay—citing a number of decided cases. Such being the common-law duty of the carrier, (225) does the statute in this respect make any change in regard to it? The language is: "It shall be unlawful for any railroad company, steamboat company, express company, or other transportation company doing business in this State to omit or neglect to transport, within a reasonable time, any goods, etc., received by it for shipment and billed to or from any place in the State of North Carolina, unless otherwise agreed upon, or unless the same be burned, stolen, or otherwise destroyed," etc. For a violation of the duty imposed, a penalty is given to "the party aggrieved." It is further provided: "In reckoning what is reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping station; and a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fractions thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable, and shall be held to be *prima facie* reasonable; and a failure to transport within such time shall be held *prima facie* unreasonable." As we have seen, the duty imposed by the statute to transport within a reasonable time is but declaratory of the common law, and the definition of reasonable time as "the ordinary time required," etc., does not shorten the time, because the "ordinary time" within which an act is to be done is "the regular—customary—usual" time (21 A. & E., 1007), and is synonymous with "reasonable time," being "as soon as the party conveniently could." *Murray v. Smith,* 8 N. C., 41. Two days are allowed, or "shall not" be charged at the "initial point," and "forty-eight hours at each intermediate point for each hundred miles or fractions thereof." (226) To this extent the statute lowers the standard of duty because it is by no means clear that so much time would be given, under all circumstances, as reasonable. The last sentence in the statute is not very clear, "and a failure to transport within such time shall be held *prima facie* unreasonable." These words cannot refer to time which "shall not be charged," because to do so would be contradictory and destructive of the immediately preceding sentence. No rule of construction would permit this to be done. It is our duty first to reconcile all apparently conflicting language in a statute, and, failing in this, to reject that portion which is so contradictory as to destroy the intention of the Legislature as manifested in the general terms of the act. We think that the last

sentence should, therefore, be referred to the terms "ordinary time," thus making the act to read, "a failure to transport within ordinary time shall be held *prima facie* unreasonable." While we think such would be the law without the concluding words of the section, this construction gives to them a declaratory effect. That it is within the power of the Legislature to make acts or conduct *prima facie* evidence of the fact in issue is well settled. *S. v. Barrett,* 138 N. C., 630. The only other point discussed before us upon which the validity of the statute was attacked is that the words "unless the same be burned, stolen, or otherwise destroyed" impose the imperative duty to transport, permitting no relief for the "acts of God or the public enemy," unforeseen and unavoidable causes. We do not think the statute capable of such construction. While in the exercise of the police power large latitude is given the Legislature, and the courts are reluctant to interfere, they have never hesitated to do so when the statute imposes burdens impossible to be borne or duties impossible of performance, as said by *Justice* (227) *Walker* in *Walker v. R. R.,* 137 N. C., 163: "No text imposing obligations is understood to demand impossible things." We should be slow to find in the language of a statute the imposition of a penalty for the omission to perform a duty, the standard of which is fixed by the law, which did not, either in terms or by necessary intendment, except from its operation causes which a high degree of foresight and precaution could not anticipate or prevent. Without going beyond the terms of this statute, we find a clear recognition of the elementary principle of justice that no obligation is to be imposed to do impossible things. The penalty is imposed for failure to transport within a "reasonable time"; because an exception is made—"when otherwise agreed," or where the goods are "burned, stolen, or otherwise destroyed"—it is not to be supposed that in all other respects an arbitrary "hard-and-fast" rule is prescribed. These are exceptions to the general rule of "reasonable time," and cannot be construed to impose any higher duty or greater burden than are imposed by the general rule. Again, quoting the well considered language of *Justice Walker* in regard to the construction of this statute: "We must regard the context and the general scope of the law, as well as the mischief to be suppressed and the remedy provided for that purpose, so as to arrive at the intention of the Legislature." We do not find in the language of the statute any indication of an intention to require common carriers to transport freight in any other than a reasonable time, or any purpose, as in section 1967, Code, to fix the time at any specific number of days. It would be impracticable to do so in regard to transporting goods. Eliminating the time "not charged," the standard of "reasonable time" fixed is "ordinary time." The question whether, in the light of the distance, and all other condi-

tions proper to be considered, the transportation is made within (228) such time, would be for the jury. "Each case must be referred to its own peculiar circumstances, having regard to the mode of conveyance, nature of goods, season of the year, character of the weather, and the ordinary facilities for transportation under the control of the carrier." *R. R. v. Ragsdale,* 46 Miss., 458. The cases illustrating the principle may be found collected in 5 A. & E., 245; 6 Cyc., 442. The burden of proof to show the conditions preventing the transportation within the ordinary time required for carrying the goods would be on the defendant, the statute expressly making such failure *prima facie* evidence of unreasonableness. As said by *Rodman, J.,* in *Branch's case, supra:* "The Legislature considered the common law liability insufficient to compel the performance of the public duty. . . . The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty." We are all, therefore, of the opinion that the statute is clearly within the police power and is reasonable in its provisions.

The defendant says, however this may be, the plaintiffs are not the parties "aggrieved," who alone are entitled to sue. It is undoubtedly true that in the absence of any suggestion that the goods were not shipped "open," the delivery to the carrier taking a bill of lading to the consignee vests in the consignee the title to the goods, making the carrier liable to him for failure to transport and deliver. "*Prima facie* the consignee is the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, the latter being commonly the agent of the consignee, and he only can sue the carrier for non-delivery, though a receipt was given to the consignor. The carrier is entitled to consider and bound to treat the consignee as (229) such owner, unless it is advised that a different relation exists, or unless notice of such fact is to be implied from the manner of shipment, as when the goods are sent c. o. d." Moore on Carriers, 188; Tiffany on Sales, 195; *Crook v. Cowan,* 64 N. C., 743; *S. v. Patterson,* 134 N. C., 612; *Ober v. Smith,* 78 N. C., 316. This we do not understand to be denied, but it is contended that there is evidence in the record from which a jury could infer that the plaintiff retained some interest in the goods, or was not to receive payment until delivery, and that therefore they were "aggrieved" by the failure to transport within a reasonable time, bringing the case within the principle announced in *Summers v. R. R.,* 138 N. C., 295. *Mr. Justice Hoke* says in that case: "Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them on delivery to the railway, the company receives them as the agent of the vendee or consignee, and such person would be

the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and W. & Son, the plaintiff was not getting credit for the returned goods until they were received by W. & Son." In *Grocery Co. v. R. R.*, 136 N. C., 396, it was expressly stated in the bill of lading: "Destination, Franklinville, N. C. Consignee's address as information only, and not for purpose of delivery." There, of course, the failure to ship "aggrieved" the consignor; the goods remained his property, thus falling within the exception to the general rule. In *McGowan v. R. R.*, 95 N. C., 417, and other cases under section 1967 of The Code, the question could not arise because the penalty was given to "whoever should sue for same." The only evidence throwing any light on the question is, "They (the consignees) were anxious for the hay; they had paid in full for the hay after
(230) delivery." We fail to see how any inference could be drawn from this testimony taking the case out of the general rule by which the title vested in the consignees, and that for failure to ship they were the parties aggrieved. It is manifest that the statute does not contemplate that two penalties should be recovered for the same breach of duty; it is equally manifest that upon this evidence the consignee may sue. We should not regard the last proposition open to debate, and certainly by the same process of reasoning the plaintiffs may not maintain the action. A judgment in this case would not protect the defendant from a suit by the consignees. It is suggested that the plaintiffs were out of their money until the delivery of the hay to the consignees. The answer is obvious, there is nothing to indicate the terms upon which the hay was sold. Again, suppose it be conceded that they sold and shipped to be delivered "open" for cash. That is, that although the hay was to be paid for cash, it was shipped "open." Certainly such terms did not prevent title vesting in the consignee by delivering to the carrier. If, therefore, the fact that by reason of the delay the plaintiffs were out of their money twenty days, and thereby were entitled to sue for the penalty as the party aggrieved, it is equally clear that as consignees were during the same time "out of their hay" by reason of the failure of their agent, the carrier, to transport within a reasonable time, and were thereby "aggrieved"; so that from this process of reasoning both consignor and consignees were "aggrieved," and could sue for the penalty. The argument proves too much. Again, it is said, "they may have bought also subject to approval." Surely it will not be contended that jurors should be invited to find a fact in regard to which there is not a scintilla of proof. The testimony shows that the consignees are the only parties aggrieved, and therefore entitled to sue. His Honor
(231) therefore erred in denying the motion to render judgment of

nonsuit. Let this be certified, to the end that such judgment be entered in the Superior Court of New Hanover County. *Hollingsworth v. Skelding,* 142 N. C., 246.

Error.

CLARK, C. J., dissenting from conclusion: Fully concurring as to the constitutional right of the Legislature to impose penalties upon common carriers for unreasonable delay in the discharge of their duties, and that only one party is entitled to recover the prescribed penalty, it seems to me that whether the plaintiff is an "aggrieved party" upon the facts of this case was an issue of fact which if raised by plea might have been submitted to the jury, and not a conclusion of law to be determined upon a motion for nonsuit. The statute does not restrict the recovery to the consignee, but to the "party aggrieved." Therefore the consignor may be the party aggrieved. Indeed, there are cases, and this may be one of them, in which both the consignor and consignee are "aggrieved." In such cases, though only one party can recover, the recovery may be had by that one of them which first institutes action, just as where the penalty is given to "any one who shall sue for the same."

Here the evidence is that the consignor was not paid till after the long delayed delivery of the goods, and that such delay caused the consignor, the plaintiff, to go to the trouble to look up the goods. The plaintiff lay out of his money during the delay. There is no evidence that the consignee ordered the goods, or was aggrieved by the delay. But concede that presumedly he was, the above evidence that the plaintiff was also aggrieved should have been submitted to the jury. If both the consignor and consignee were aggrieved, the question is not which was most aggrieved, but which first instituted the action. Hutchison Carriers (3d Ed.), secs. 1304-5-6-7.

The penalty is in the nature of a public regulation to secure (232) the discharge of the duty of delivery of freight without unreasonable delay. The penalty is recoverable by the plaintiff, if aggrieved. The above evidence tends to show that the plaintiff suffered some detriment (whether greater than that suffered by the consignee or not is immaterial), and the judge properly refused the motion to nonsuit. In the recent cases of *Grocery Co. v. R. R.,* 136 N. C., 396, and *Summers v. R. R.,* 138 N. C., 295, the Court sustained a recovery of such penalty by the consignor.

The gist of the action is the "unreasonable delay" by the carrier. Whether the consignor or consignee was most inconvenienced is not material. Either that shows any evidence to that end and first brings the action should be entitled to recovery. Unlike the common-law action, it is not necessary to show actual damage.

*Cited: Watson v. R. R.*, 145 N. C., 239; *Efland v. R. R.*, 146 N. C., 138; *Rollins v. R. R., ib.*, 155, 158; *Jenkins v. R. R., ib.*, 179, 184; *Cardwell v. R. R., ib.*, 219; *Davis v. R. R.*, 147 N. C., 70, 71; *Wall v. R. R., ib.*, 408; *Fanning v. White*, 148 N. C., 545; *Manufacturing Co. v. R. R.*, 149 N. C., 262; *McRackan v. R. R.*, 150 N. C., 332; *Garrison v. R. R., ib.*, 581; *Reid v. R. R., ib.*, 758; *Gaskins v. R. R.*, 151 N. C., 20, 21; *Lumber Co. v. R. R.*, 152 N. C., 77; *Stationery Co. v. Express Co., ib.*, 344; *Buggy Corporation v. R. R., ib.*, 120; *Elliott v. R. R.*, 155 N. C., 236; *Ellington v. R. R.*, 170 N. C., 37; *Grocery Co. v. R. R., ib.*, 246; *Horton v. R. R., ib.*, 386; *Aydlett v. R. R.*, 172 N. C., 49; *Tilley v. R. R., ib.*, 364.

## J. W. FLOARS v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 3 April, 1907.)

1. **Insurance—Oral Contract to Insure—Written Policy—Delivery—Right of Parties.**

Though an oral contract of insurance or to insure will be upheld as a general rule, such contract merges into the written policy subsequently accepted by the insured; and while such written policy stands as embodying the contract, the rights of the parties must be determined by its terms and conditions.

2. **Same—Fraud or Mistake.**

To enable the holder of such policy to recover in accordance with a previous oral contract differing from the written policy taken and held by the insured, the written policy must be corrected, either for fraud or mistake.

3. **Contracts—Reformation and Damages—One Action.**

In proper instances our courts, having both legal and equitable jurisdiction, have authority to reform a contract and award damages in the same suit.

4. **Same—Mutual Mistake—Authority of Agent.**

To correct the written policy on the ground of mistake, it must be alleged and shown that the mistake is mutual—on the part of the company and the insured; and when the agent is one of limited and restricted power, it must be further shown that the policy as claimed is one within the power possessed by the agent, either expressed or implied.

5. **Same.**

Where the agent had no power to issue policies, and was not the general agent of the company, but a soliciting agent of restricted powers, his mistake concerning a policy to be issued, which was contrary to the rules and regulations of the company and which it did not authorize, cannot be imputed to the company.

6. **Same—Policy Intended.**

In the present case there is no evidence of any mistake on the part of the company, or that it delivered a policy differing from the one it intended to deliver.

**7. Same—Conduct of Insured Binding—Query.**

Even if there had been a mutual mistake established, whether on the facts of this case the acceptance of the policy by the insured without reading it, and holding same for three months without complaint or protest, the policy as held would not bind the parties, *query.*

ACTION, tried before his Honor, *Webb, J.,* and a jury, at Au- (233) gust Term, 1906, of WAYNE.

Plaintiff testified, in substance, that during September, 1904, in Fremont, N. C., at the instance of one Bridgers, a soliciting agent of the company, plaintiff signed an application for an accident insurance policy in defendant company, on the representation of the agent that for the premium agreed upon the policy applied for would confer on plaintiff, in case of total loss of one eye, the right to recover one-third of the face of his policy, which was to be $1,000.

That some time after signing application an accident policy was forwarded to plaintiff from Goldsboro, N. C., signed by M. G. Bulkey, president, and Walter E. Faxon, secretary of defendant company, and purporting to be countersigned at Greensboro, N. C., by (234) William B. Merrimon, general agent of the company.

That on receipt of the policy plaintiff put same away without reading it; and about three months thereafter, plaintiff having suffered the total loss of one eye, made the formal application for payment of the one-third. But it was found that the policy held by him did not, for such loss, provide for payment of one-third of its face, to wit, $333.33⅓, but stipulated only for a current indemnity for time lost, amount ing to $15, which company had tendered and still offers to pay.

That company had sent witness a check for the $15, and plaintiff had returned same. That they again sent check for this amount, which plaintiff refused to accept, but held check, which is still uncashed.

Plaintiff further testified that he thought the policy held by him was the one he had bought, but found that it was not the one he had bought.

That Mr. Bridgers, the agent, thought that he was selling witness the policy which would give him an indemnity of one-third of its face in the event of the total loss of one eye, and that plaintiff would not have taken the policy unless he had thought it was like Mr. Bridgers said.

These facts are substantially set forth in the pleadings.

The policy sent up as an exhibit contains numerous provisions stipulating for current indemnity for certain classes of injuries and absolute indemnity for others, but does not contain a stipulation for absolute indemnity to amount to one-third face value in case of loss of one eye.

Defendant offered no testimony.

At the close of the evidence, the court having intimated an opinion that on the testimony, if believed, plaintiff could not recover, plaintiff

(235) excepted; and, in deference to such adverse intimation, submitted to a nonsuit and appealed.

*Aycock & Daniels for plaintiff.*
*Dortch & Barham for defendant.*

HOKE, J., after stating the case: It seems to be well established that, in the absence of some statutory inhibition, an oral contract of insurance, or to insure, will be upheld if otherwise binding, except, as suggested by one author, in the case of guaranty insurance. Vance on Insurance, 148; Beach on Insurance, vol. 1, sec. 438, note 2. And further, that the enactment of a statute which establishes a standard form for a policy, the statute being only affirmative in its terms, will not invalidate an oral contract. *Hicks v. Insurance Co.,* 162 N. Y., 284.

This and other decisions also hold that, in making a valid oral contract of insurance, general in its terms, the law will read into the contract the standard policy as fixed by the statute, and that, in order to recover on such a policy, the claimant must comply with the necessary and material requirements of such a policy or establish a waiver thereof on the part of the company.

While these principles are very generally admitted, it is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties.

(236) Like other written contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain. Vance on Insurance, pp. 163, 348; Beach Insurance, secs. 495, 496; *Insurance Co., v. Mowry,* 96 U. S., 547.

In the citations from Vance, just made, at page 163, the author says: "When the contract of insurance is finally complete, it is customarily embodied in a formal written instrument termed a policy. This instrument merges all prior or cotemporaneous parol agreements touching the transactions; and, upon accepting it, the insured is conclusively presumed, in the absence of fraud, etc., to have given his assent to all of its terms." And on page 348 he says: "The rule that all prior parol agreements are merged in a subsequent written contract touching the same

subject-matter is now too well established to need the support of cited authority. Therefore, when a policy of insurance, properly executed, is offered by the insurer and accepted by the insured as the evidence of their contract, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intend to be bound. If any previous agreement of the parties shall be omitted from the policy, or any term not theretofore considered added to it, the parties are necessarily presumed to have adopted the contract as written as the final form of their binding agreement."

The same author, referring to a decision of the Supreme Court of the United States in *McMaster v. Insurance Co.*, 183 U. S., 25, which might be construed as militating to some extent against the position maintained by the author, says: "It is true, as has been heretofore explained, that there is a tendency on the part of some courts, in effect, to enforce the equitable remedy of reformation in actions at law (237) upon insurance contracts, when the equitable position of the insured is unusually strong, as when the Supreme Court of the United States held in *McMaster v. Insurance Co.* that the insured, by accepting a policy, was not conclusively bound by a stipulation inserted therein without his knowledge or consent. But with the exception of such cases, in which the insurer is clearly estopped to insist upon this rule of law, it must be universally held that a writing, accepted as a contract, contains all the terms to which the parties have given their consent, and no others."

As a matter of fact, this decision was made, in part, to depend on the correct date when the policies of insurance became effective; and the Court held that on the face of the policies as they stood, they bore date at a time which would enable plaintiff to recover, and no correction was required. The application, made a part of the policy, required a different date—the one contended for by defendant; and in the conflict the Court gave the construction more favorable to the insured, to wit, the date on the face of the policy, and sustained a recovery at law.

In *Insurance Co. v. Mowry, Mr. Justice Field* states the doctrine we are discussing as follows: "The entire engagement of the parties, with all the conditions upon which its fulfillment could be obtained, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions were omitted, the parties could have had recourse, for a correction of the agreement, to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

In the case before us, then, the written policy having been delivered and accepted, this instrument, as it now stands, ex- (238)

presses the contract of the parties; and as it contains no assurance of indemnity of the kind required to sustain the plaintiff's demand, no recovery can be had unless the policy can be corrected or reformed. And, there being no allegation or suggestion of fraud, such correction can be obtained, if at all, only on the ground of mistake.

In courts like ours, possessing both legal and equitable jurisdiction, there is no reason why this relief should not be given and damages recovered in the same action. And in some jurisdictions this double relief has been awarded in either courts of law or equity. May on Insurance, sec. 566; Kerr on Insurance, sec. 72. There is no difficulty, therefore, as to the jurisdiction of the court.

But, on the facts presented, is plaintiff entitled to the relief demanded? And here it may be well to note that plaintiff if not seeking to be relieved of his contract relations and recover premiums paid. The relief sought is to correct and reform the instrument and hold the defendant to the contract as corrected.

In the first class of cases, and under certain circumstances, a contract will be set aside for mistake of one of the parties, on the ground that the minds of the parties had never agreed on the same thing at one and the same time. But in the second, in order to reform a contract and enforce it as reformed, it is familiar learning that the mistake must be that of both the parties. To hold otherwise would be not to reform, but to make the contract.

As said in Kerr on Insurance, sec. 72, p. 146: "If reformation be sought solely on the ground of mistake, it must appear that the mistake was mutual and common to both parties. A court cannot create
(239) for the parties a contract which they did not both intend to make. A mistake on one side may be ground for rescinding, but not for reforming, a contract."

And it will be noted further that the agent in this case was not a general agent of the company, having power to assume risks and issue policies, as in *Grabbs v. Insurance Co.*, 125 N. C., 397. In that well sustained opinion, *Mr. Justice Douglas* shows that the term "general agent" is not defined or affected by the extent of the territory in which he works, but that the term must be referred to the powers exercised in the work which he does. Thus, "It is needless to say that the expression 'general agent,' recurring in the above opinion (*Berry v. Insurance Co.*, 132 N. Y.), was used in its legal sense as implying general powers, and not in the geographical sense in which it is usually employed by insurance companies." But in the case here considered it clearly appears that the agent had no such powers. He was an agent with restricted powers. He took applications for insurance, and would have at least implied authority to do what was reasonably necessary to carry out this

power; but he had no power to issue policies, and there was nothing in this transaction to show that such power was within the scope of his actual or implied authority. When the applications were forwarded, the company issued the policies. The contracting parties were the plaintiff and the company, and to reform the policy there must have been a mutual mistake on the part of both plaintiff and company.

As said in *Cooper v. Insurance Co.*, 50 Pa. St., 299: "The evidence was not admissible for the purpose of reforming the policy, for the mistake was not that of both the insured and the company. It is not enough that the agent of the company was also mistaken, for he was not a contracting party; and the mistake was not, therefore, mutual."

There is no evidence here of any mistake on the part of the (240) company, and none tending to show that it did not issue the very policy it intended.

Again: In order to reform a policy by reason of an alleged mutual mistake of the applicant and agent, it should be shown that the contract, as claimed, must be one that the agent had the power to make.

In Joyce on Insurance, vol. 1, sec. 716, the doctrine is stated as follows: "Where an agent is authorized to act in the premises, and, through his mistake or fraud, the policy fails to express the real contract between the parties; or if, by inadvertence or mistake of the agent, provisions other than those intended are inserted, or stipulated provisions are omitted, there is no doubt of the power of a court of equity to grant relief by reformation of the contract. . . . But where an agreement made with an agent is not one he had the authority to make, and its terms are not communicated to or accepted by the principal, and is not a binding contract between the parties, there can be no reformation." Citing *Fowler v. Insurance Co.*, 28 L. J., Chan., 225. See, also, *Fleming v. Insurance* Co., 42 Wis., 615.

The defendant, in its answer, alleges that the contract claimed by the plaintiff was one that its agent had no authority to make. And this being an agency with special and limited powers, we think the burden is on the plaintiff to show that the contract was within the agent's power, real or apparent. *Biggs v. Insurance Co.*, 88 N. C., 141; *Bank v. Hay*, 143 N. C., 326.

There is also strong authority for the position that on the facts of this case the relief sought would not be open to plaintiff, even if there had been a mutual mistake in the preliminary bargain, and by persons with full power to contract, for the reason that plaintiff accepted the policy with the alleged stipulation omitted without having read same, and held it without a protest for three months. *Upton v. Trible-* (241) *cock*, 91 U. S., 45.

It is certainly the general rule that where a person of mature years and sound mind, who can read or write, signs or accepts a deed or formal written contract affecting his pecuniary interests, there being no fraud or artifice to mislead him, he will be conclusively bound by its terms. And in a well considered case in Wisconsin, *Bostwick v. Insurance Co.*, reported in 92 N. W., the position is maintained that unless there has been some fraud or deceit practiced, or something done or said to put a party off his guard at the time the written document is delivered and accepted, it is his duty to read it; and that he is not relieved of this duty by the mere fact that a policy is sent which differs from one that has been agreed upon by him and the company's agent.

There is some conflict in the cases, however, on this point; and we rest our decision on the grounds first stated:

1. That no mistake is alleged on the part of the company, and therefore the mistake is not mutual.

2. That there is no evidence tending to show that the agent had any power to make the contract as claimed by plaintiff.

*Gwaltney v. Insurance Co.*, 132 N. C., 925, cited and relied upon by plaintiff, does not apply here. There was a case to recover premiums on the ground that the contract of insurance had been wrongfully broken by the company. The suit was not to reform the contract, but proceeded on the idea that the contract had terminated, and the question of mutual mistake was not involved. Furthermore, the agent in that case was said to be one having general powers, and his acts, relied upon to sustain a recovery, were within the scope of his real or apparent authority.

(242) We think the judge below gave a correct intimation that, on the facts presented, plaintiff has established no right to relief, and the judgment below is

Affirmed.

*Cited: Cathcart v. Insurance Co., post,* 625; *Sykes v. Insurance Co.*, 148 N. C., 22; *Medicine Co. v. Mizell, ib.*, 387; *Gray v. Jenkins*, 151 N. C., 83; *McCall v. Tanning Co.*, 152 N. C., 650; *Frazell v. Insurance Co.*, 153 N. C., 61; *Lancaster v. Insurance Co., ib.*, 288; *Clements v. Insurance Co.*, 155 N. C., 61, 62; *Briggs v. Insurance Co.*, 155 N. C., 77; *Wilson v. Insurance Co., ib.*, 175; *Gazzam v. Insurance Co., ib.*, 339; *Robinson v. Life Co.*, 163 N. C., 419; *Lea v. Ins. Co.*, 168 N. C., 483; *Allen v. R. R.*, 171 N. C., 342.

O. M. BRITT v. CAROLINA AND NORTHERN RAILROAD COMPANY.

(Filed 3 April, 1907.)

1. **Railroads—Negligence—Employment—Two corporations.**

In an action for damages through defendant's negligence the plaintiff must show his employment; and if employed by one of two corporations in the hands of the same receiver, and he is injured while engaged in working for the other under the instructions of the receiver, evidence of such employment is sufficient to go to the jury in an action against the corporation for whom he was working when injured.

2. **Same—Evidence Conflicting—Jury.**

When, in an action for damages arising from alleged negligence of the defendant it is contended that plaintiff was employed by a different corporation and not in the particular work in which the injury was occasioned, and the evidence is conflicting, the jury should find the facts from the evidence under proper instructions from the court.

3. **Negligence—Defective Appliances—Evidence—Jury.**

It is the duty of the employer to furnish reasonably safe appliances to be used by the employee in the discharge of his employment; and evidence that a certain one of two chains for loading logs upon a car was defective, that plaintiff notified defendant's manager thereof and requested other chains usually used in such work, which the manager promised to furnish, and instructed the plaintiff to proceed with the work in which the injury was occasioned, is sufficient to go to the jury upon the question of negligence.

4. **Negligence — Fellow-servants—Other Servants' Concurring Negligence—Intervening Acts—Proximate Cause.**

Under Revisal, sec. 2646, the defendant railroad corporation cannot escape liability owing to negligent act of fellow-servant, and, if it undertakes to load logs upon its cars when it is the duty of another corporation to do so, it assumes liability for the negligent acts of the employee of such other corporation, not independent and intervening acts to avoid liability, but which, concurring with other negligent acts proximately causing the injury, focalize into one proximate cause producing the result.

5. **Negligence—Assumption of Risk—Contributory Negligence.**

The employee assumes no risk in the proper use of defective appliances after notifying the employer thereof, who promises to remedy the defect; but he must use them with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence, which would bar his recovery.

6. **Nonsuit—Appeal—View of Evidence.**

In an appeal from a judgment of nonsuit, the plaintiff's evidence is taken in the view most favorable to his contention, and so construed in all its aspects.

ACTION, tried before *Council, J.*, and a jury, at December (243) Term, 1906, of ROBESON.

The plaintiff sues the defendant company, in the hands of a receiver, for damages for injuries alleged to have been sustained while in its employment, by reason of defective ways furnished in discharge of his duty, and negligence of its employees. The defendant was at the time of the injury a corporation operating a railroad between Lumberton, N. C., and Marion, S. C. Prior to the time of the injury defendant's property had, by order of the Circuit Court of the United States, been placed in the hands of W. J. Edwards, receiver, who was, pursuant to said order, operating said railroad. Plaintiff alleged that, at the time of said injuries, he was in the employment of said corporation under the control and direction of said receiver; that among other duties assigned to him he was required to aid in loading the cars of said railroad; that on the day of said injury one of the flat cars of said corporation, attached to an engine and other cars, was upon the track of defendant for the purpose of being loaded with logs, the property of the Southern Saw-
(244) mill Company, for transportation. That the usual and proper manner of loading the car was to place skids, one end resting on the side of such car and the other end on the ground or embankment on the side of the track. That the logs lying on the ground or placed on the embankment were drawn over the skids up to and on the car by means of iron chains, one end of which was put around the log and the other end carried over the car and to the opposite side, when mules, hitched to the chains, pulled the log up on the car. The complaint described the manner in which the logs were usually, and by a safe method, drawn up on the car, the adjustment of the chains, etc., and alleged that the manner in which the chains were adjusted by defendant at the time he sustained the injury was unusual, unsafe, and dangerous. That prior to the day of the injury he had frequently notified defendant's superintendent that the manner in which chains were adjusted and the logs drawn up on the car was unsafe and dangerous, and that said superintendent had promised to furnish proper chains for said purpose. That on the day of the injury plaintiff was in the discharge of his duty, aiding in loading the car, when, by reason of the defective and dangerous method of adjusting the chains, and the sudden and unannounced movement of the mules, under the direction of the driver, the log fell from the skid and injured plaintiff. That the driver of the mules was an employee of defendant, being one of a loading crew furnished for that purpose. Plaintiff further alleged that "the immediate and proximate cause of his injury was the failure of the defendant to provide a safe appliance and double chains with which to do said work, although demanded of defendant, and its failure in the conduct of the work to observe ordinary care and prudence in starting the train of mules, without notice or warning, to pulling at the leg, which fell upon plaintiff," etc.

Plaintiff set forth for a second cause of action substantially the (245) same allegations, except that he averred that the driver of the mules and himself were in the joint employment of the sawmill and the defendant, and that if the defendant had furnished a double chain with which to have done the work he would not have been injured, notwithstanding the sudden driving of the mules, etc.

The defendant denied all of the material allegations of the several causes of action set forth in the complaint. Appropriate issues were submitted to the jury. At the conclusion of the testimony his Honor, upon defendant's motion, directed judgment of nonsuit. Plaintiff excepted and appealed.

*McIntyre & Lawrence, E. M. Britt, R. E. Lee, and Iredell Meares for plaintiff.*

*McLean, McLean & McCormick for defendant.*

CONNOR, J. The plaintiff's appeal calls into question his Honor's opinion that there was no evidence fit to be submitted to the jury upon which a finding could be predicated in his favor. The first proposition which plaintiff must make good is that at the time of the injury he was in the employment of the defendant. If he has failed in producing evidence proper to go to the jury tending to sustain this position, he must fail in his action. In this regard the testimony, which for this turn we must take to be true, is that both the defendant railroad company and the Southern Sawmill Lumber Company, a corporation engaged in cutting, sawing, and shipping logs, were in the hands of W. J. Edwards, as receiver; that the lumber company shipped its logs over the defendant road, loading them on cars in substantially the manner described. That one McNeely was in the employment of the receiver or superintendent of defendant railroad company. Plaintiff testified: "In February, 1904, I was working on a log train of the defendant (246) company; was conductor of a log train; had been about three months. I was assigned or put in charge of this train as conductor by Mr. McNeely, who was at that time the general superintendent of the defendant company. Mr. McNeely told me to take the log train and run it to the best advantage of the railroad and the mill; to see that logs were loaded and unloaded; to collect passenger fares and to see that no one rode on the train except the train crew, unless they paid fare. Directions were given by Mr. McNeely as to the movement and operation of the train, etc. He also gave me time-tables of schedules, and told me to be careful to avoid collision with other trains, etc. . . . The local conductor and engineer were under my control. The movement of trains was directed by me. . . . Mr. Edwards told me that he expected me to help load the logs on the cars, and that, however well he liked me, if

I did not do this, he would get some one in my place who would do this work. This conversation or instruction from Mr. Edwards occurred while I was operating the train and put in charge of it as conductor." The plaintiff, upon cross-examination, said "I went to Kingsdale in May, 1899, accepted employment with the Southern Sawmills. Mr. King was in charge. Remained there, under several superintendents, until Mr. Edwards took charge as receiver in Spring of 1903. Did practically the same work under all the superintendents. After Mr. Edwards took charge, until November, 1903, my work was regularly in the woods examining timber. Can't tell who paid me for my services. Went to the office and got my pay, but do not know who paid it—who furnished it. Think my name was on the pay-roll of the mills to the time of injury. Won't swear that my name was ever on the pay-roll of
(247) defendant company. The wages were paid me at the office of the mill; this was after Edwards was appointed receiver. Was hurt in the afternoon, after dinner. The logging force had been there from early morning. Did not go down with train in the morning—don't know what conductor did." There was much other testimony from plaintiff upon the question of employment, some of which tended to sustain and some to contradict his contention. It is manifest that some confusion in regard to his relation to the two corporations grows out of the fact that Mr. Edwards was receiver of both and operating both. It does not appear what, if any, relation they bore to each other. The plaintiff says that Mr. Edwards told him that the reason why he wished him to serve the defendant company in the manner testified to was "to save expense."

While the payment of or promise to pay wages, in consideration of services rendered, establishes the relation of employer and employee, other considerations may be sufficient, as, if A. employs B. to serve himself and another, the fact that A. pays the entire wages will not necessarily prevent the other from being, in respect to the services rendered, the employer or master of B. The theory of the plaintiff is that Edwards, being the receiver of both corporations, employed or retained him in the service of the lumber mill, with the agreement between Edwards and himself that in addition to his services to the mill he should, when so directed by the receiver, serve the defendant company. That pursuant to this agreement he rendered the service as described by him, and was under contract obligation to help load the car. Mr. Edwards, as receiver of both corporations, had the power to make such a contract, and it was prudent for him to do so "to save expense." The adjustment of the wages between the two corporations, for which he was receiver, may well have been left to him. It did not concern plaintiff if he was willing to render the service to both corporations, as he
(248) says he did. In *Rouke v. White Moss Coll. Co.*, L. R., 2 C. P.

Div. (1877), 205, *Cockburn, C. J.*, says: "Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The principle is well stated by *Miller, C. J.*, in *Vary v. R. R.*, 42 Iowa, 246: "A person may be the general servant of one and the special servant of another; that is, he may perform special services for one while he is the general servant of another, and while performing such special service he will be the servant of the one for whom such services are performed, as to that particular service." It is true that there both companies paid the plaintiff. It is not suggested, however, this fact was, by any means, controlling in fixing the relation of the parties. It is clear that Edwards, receiver of the mills, would have had no right to require the plaintiff, by reason of his contract to serve the mills, to serve the defendant as conductor, etc., without his (plaintiff's) consent. When plaintiff consented to do so, he became, by virtue of that contract, *quoad* that service, the servant of the defendant company. He did not thereby become the joint servant of the two companies, but rather contracted with Edwards, receiver of the defendant company, that he would serve defendant as conductor, etc. In the case cited the Court says that if the contract was for joint service, the servant has his election to sue either. The theory of the defendant is that the mills, for the purpose of loading its logs on defendant's car, furnished the "loading crew" and appliances, and that plaintiff, as the employee of the mills, was present, aiding in the work. That defendant took no part in loading the car, leaving it entirely to the mills. If this be the correct interpretation of the testimony (249) the plaintiff must fail in his action. The testimony of the plaintiff is not so clear that the court may say, as a matter of law, what is the truth of the controversy. It is a question for the jury under proper instructions by the court. Certainly more than one inference may be drawn from the evidence. As we interpret the complaint, there is no allegation of a joint service. The plaintiff rests his case upon the theory that, *quoad* the service rendered, he was the employee of defendant company. Assuming, for the purpose of further considering the appeal, that plaintiff's allegation that he was the employee of defendant is sustained, we proceed to inquire whether there was any evidence fit to be submitted to the jury, tending to show a breach of duty on the part of defendant. That it is the duty of an employer to furnish to the employee reasonably safe ways and appliances with which he is employed is too well settled to require or justify the citation of authority, and is conceded by the learned counsel for defendant. There is evidence tending to show that the chain furnished for loading the car was not safe and not such as

was in general use by railroads for that purpose, and that plaintiff had notified defendant's superintendent thereof, and that he had promised to furnish him other chains. Plaintiff testified: "Mr. Edwards told me that Mr. McNeely would give me instructions, and if anything was needed, Mr. McNeely would get it for me. This was while I was working on the train, some time in the latter part of 1903. This was the last of the two conversations I had with Mr. Edwards. After I began service of this train I found that we needed more chains to load logs, also wrapping chains. I asked him to furnish them, and he agreed to do so.

Some time after this I went to see him, and inquired if the chains
(250) had come, and he told me he had not ordered them, but would order; for me to get two links of the size chain wanted, bring to his office, and he would get chains. I did this, and he said he would have chains in a very short time; for me to work on until chains came. I told him what I wanted with chains and how I wanted to make my loading chain." Here witness explained model and illustrated how he was hurt. The model was used in the argument before us, illustrating the manner in which logs were loaded on flat cars and the alleged defect in the adjustment of the chain. Plaintiff also testified that he knew what kind of chains are in general use by railroads for loading logs. He explained to the jury the manner in which the work was done. We think that the testimony, in this aspect of the case, entitled the plaintiff to have the issue, upon the question of defective or unsafe ways, etc., submitted to the jury. The defendant insists, however, that assuming this to be true, the plaintiff is not entitled to recover, because, upon his own testimony, such defective ways, etc., were not the proximate cause of his injury; that the negligent driving of the mules while one end of the log was off the skid was the cause of the injury. It appears that the mules had stopped and, under the method used in controlling their movement, the driver should have waited for the signal from a man who stood on the flat car. The plaintiff was standing on the ground by the side of the skid for the purpose of watching and, if necessary, keeping the logs straight on the skids. In this aspect of the case plaintiff testified: "I don't remember hearing the driver tell the team to start up, but think he did, and started up team unbeknowing to me. That is what snatched the log off. If the team had stood still until I straightened the log, why then it would have went on all right without any damage. The log fall-

ing off was due to a single chain. It would not have gone on the
(251) car until it was straightened. After the log was in the shape it was, after putting one end ahead of the other, the team was stopped, and I was making the attempt to straighten the log; if the driver hadn't started the team, I could have straightened the log all

right, and it would have no doubt gone on the car after it had been properly straightened on the skids; that is what I was there for."

In reply to a question of the court, after explaining the situation of the log, the plaintiff said: "That the driver starting unexpectedly was the cause of the accident." Defendant insists that, upon this testimony, the proximate cause of the injury was the action of the driver in starting the mules without warning, thereby throwing the log upon plaintiff. Conceding that plaintiff was in defendant's employment, and that the chains furnished him for loading were not such as were in general use, and that, at the moment preceding the injury the log, by reason of the defect in the chain, was not straight on the skids, and that plaintiff, in the discharge of his duty, was in the act of straightening it so that it would have gone on the car in safety, it insists that an independent cause intervened and produced the result—that is, moved the log, throwing it from the skids and causing it to fall upon the plaintiff. This contention presents an interesting question in the solution of which other phases of the testimony must be noted. The plaintiff, to meet this contention, says that the driver was also in the employment of the defendant company, and that, being a fellow-servant, the defendant is responsible for his negligence. We do not discover any evidence tending to show that the driver was in the service of defendant, otherwise than as the employee of the mill.

The case, then, comes to this: The defendant, owing to the public the duty of receiving and transporting freight, places a car upon its track at a place and in a position to receive logs from the lumber (252) mills for shipment; the defendant furnishes the chains and directs the plaintiff, its employee, to aid in loading the car; the lumber mills furnish the mules and driver to perform the duty assigned to them in the work. The duty is imposed upon the defendant to receive the logs for shipment, and this, we think, includes the duty of loading them upon the car. So far as it affected its employees, it was its duty to provide reasonably safe ways and appliances, and to adopt safe methods for doing the work. If, instead of loading the cars, the defendant permitted the shipper to do so, it assumed a responsibility to its employees that the shipper would likewise use safe ways, etc.

We had occasion to consider this question in *Wallace v. R. R.*, 141 N. C., 646 (p. 661), where we said: "If the defendant permits its shipper to load its car, it is as much and in the same degree liable for an injury sustained by its servant by negligence on the part of the shipper as if its own servant had loaded it." The case, in this respect, may be likened to those in which a railroad corporation has leased its property, wherein it is uniformly held that the corporation is liable for injuries sustained by the negligent operation of the property by the

lessee. *Smith, C. J.,* in *Aycock v. R. R.,* 89 N. C., 321, says: "The defendant company, leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servant, operating its own train." This principle has been enforced in numerous cases by this Court. *Logan v. R. R.,* 116 N. C., 940; *Phelps v. Steamboat Co.,* 131 N. C., 12. A number of cases illustrating the principle are collected in the notes
(253) to 2 Labatt Master and Serv., 1618. "If a person employs another to perform a duty which he would have to discharge if another were not employed to do it for him, such employee, as to that service, stands in the master's stead with relation to other persons," *Moore v. R. R.,* 85 Mo., 588; *R. R. v. Peterson,* 162 U. S., 346. The doctrine is thus stated by *Justice Field* in *R. R. v. Herbert,* 116 U. S., 647: "It is well settled that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant, so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that, in regard to these matters his employer will make adequate provision that no danger shall ensue to him." Again it is said: "A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of an independent contractor." *Toledo B. and M. Co. v. Bosch,* 101 Fed., 530; *Pullman Car Co. v. Laack,* 18 L. R. A., 215.

The conclusion to which all of the authorities, supported by reason, brings us is this: The defendant owed to the lumber mills the duty of receiving at such convenient place as it might designate, the logs,
(254) and loading them upon its cars for shipment. It owed to the plaintiff, when directed in the course of his employment to aid in the loading, the duty to furnish safe ways, appliances, and careful coemployees. If this duty to load the cars was delegated to another, and the plaintiff directed to aid in the work, the defendant remained liable for the negligence of such other person in the same manner as if it had sent its own servants to do the work. So far as the duty of the defendant to the plaintiff is concerned, in respect to furnish safe ways, appliances, and coemployees to aid in the work, the lumber mills and

its employees were the servants of the defendant. *Allison v. R. R.*, 64 N. C., 382. The plaintiff and the driver of the mules were therefore engaged in a common employment in loading the car. This results, not from any contract relation between the driver and the defendant, but from the relation of employer and employee between the lumber mills and the driver, and the undertaking by the mills, either by permission or pursuant to contract with the defendant, to load cars. This being so, the negligence of the driver is imputed to the defendant in so far as it brought injury to the plaintiff.

We do not deem it very material to inquire whether the lumber mill was, in loading the car, an independent contractor or was the employee of the defendant or acting simply by its permission. The result of its negligence, so far as the plaintiff is concerned, is the same. In no aspect of the case can the defendant escape liability upon the doctrine of the nonliability of the negligence of a fellow-servant. Revisal, sec. 2646.

We are thus brought to an examination of the contention of the defendant that the proximate cause of the plaintiff's injury was not the defective ways (chain), but the negligence of the driver in starting the mules. The principle invoked by defendant is recognized and uniformly enforced. It is well stated in *Harton v. Telephone Co.*, 141 N. C., 455. When the original negligence is insulated from the (255) injury by the intervention of some independent, efficient agency, such agency will be deemed the proximate cause of the injury. The difficulty confronting the defendant consists in the necessity that the intervening agent be independent—that is, not related to the defendants or its negligence; whereas here, as we have seen, the negligence of the driver is imputed to the defendant—is its negligence. The essential element of independence is not only absent, but the negligence of the driver combined with the first negligence of defendant, and by such combination focalized the two negligent acts and became the efficient cause of the plaintiff's injury. One breach of duty resulted in placing the log in a dangerous position, and, while the plaintiff was endeavoring in the discharge of his duty to straighten the log upon the skids, another negligent act of defendant threw it upon him. The case does not come within the principle invoked by defendant. The act of the driver causing the mules to start was not that of an independent agent. We are of the opinion that the case is otherwise distinguished from *Horton's case, supra,* in that the negligence of the defendant resulting in placing the log in a dangerous position had not expended its force; it was at the moment a menace to the plaintiff, and the act of the driver was not the intervening efficient cause of the injury—it was concurrent with the first cause. The two causes concurred, combining or focalizing into one proximate cause producing the result. It is not necessary to discuss this

phase of the case. Defendant insists that plaintiff is barred of a recovery because he continued to use the chain with knowledge of its unfitness for the service. It is well settled that where the servant notifies the employer of the defective condition of the appliance, and he promises to remedy such defect, the servant, relying upon such promise, may (256) remain in the service, using such appliance without assuming the risk of injury in its proper use. The defect imposes upon the servant the duty to exercise due care in the use of the appliance, having regard to its defective condition. As has been frequently said by us, while the servant does not in such cases assume the risk, if he is guilty of contributory negligence in the use of the appliance, he cannot recover. *Pressly v. Yarn Mills,* 138 N. C., 410, where the authorities are collected and commented upon. This defense is open to defendant, as modified by the decisions in *Greenlee v. R. R.,* 122 N. C., 977, and *Troxler v. R. R.,* 124 N. C., 189.

As the motion for judgment of nonsuit was based upon the plaintiff's evidence, the judgment, granting the motion, does not indicate upon what aspect of the testimony his Honor was of the opinion that plaintiff was not entitled to maintain his action. This condition of the record, together with the range of the arguments, makes it necessary to consider the testimony in all of the aspects of the case.

We have, as the motion to nonsuit necessitates, treated the testimony as true, and given the plaintiff the benefit of that view of it most favorable to his contention. It is proper to say that there is to be found in his testimony grounds for other inferences favorable to defendant's contention; these were not open to us in reviewing the judgment of nonsuit. We are of the opinion that, for the reasons stated, the testimony as it bore upon the several issues raised by the pleadings should have been submitted to the jury under proper instructions by the court. To that end there must be a

New trial.

*Cited: S. c.,* 148 N. C., 37; *Christman v. Hilliard,* 167 N. C., 6; *Cochran v. Mills Co.,* 169 N. C., 62; *Deligny v. Furniture Co.,* 170 N. C., 203.

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STATE EX REL. MARY A. MOSELEY ET AL. v. W. A. JOHNSON, ADMINISTRATOR OF W. N. PEDEN, THE UNITED STATES FIDELITY AND GUARANTY COMPANY ET AL.

(Filed 3 April, 1907.)

1. Trial—Argument—Improper Language of Attorneys—Duty of Judge.

It is the duty of the trial judge, when objection is made to language used by attorneys in their argument to the jury as improper, to note down the language at the time, with the exception, to avoid any question thereafter.

**2. Same—New Trial—Exception.**

Improper and reprehensible language, uncorrected by the trial judge, is ground for a new trial; but when it appears from the inspection of the record that the findings of the jury were fully justified by the evidence and practically the same as the conclusions of three referees before whom the case was heard, and that a new trial would probably result in similar conclusions, this Court will exercise a sound discretion as to granting a new trial.

**3. Issues Submitted Sufficient—Issues Tendered.**

Exceptions to issues which cover every phase of the case, giving opportunity to present evidence of every defense relied on, cannot be sustained, though an issue was tendered and refused which would have better presented the contention upon a certain phase.

**4. Evidence Sufficient—Confidential Agent—Dealings—Fraud Presumed.**

When it appears that an administrator who claims property of his intestate by purchase or gift from his intestate had acted as his confidential agent prior to his death, that his intestate was a feeble old man at the time of such purchase or gift, and confided to his management his estate, the burden is on the administrator to show a full and sufficient consideration, if claimed by purchase, and that his intestate knew what he was doing, had capacity to understand it, and that no undue influence was exercised by him, if claimed by gift.

**5. Order of Reference—No Exception—Judge's Discretion.**

A plaintiff who does not except to an order of reference is not entitled as of right to a jury trial upon his exception to the findings of the referee, but he is entitled to have the judge below review the findings, and, for his own information, the judge may, in his sound discretion, submit the question to the jury, especially where the facts depend upon doubtful and conflicting testimony.

**6. Administrator—Sale of Securities—Value—Evidence.**

When an administrator has sold certain securities of his intestate, the value of such as evidenced by the sale is not conclusive, and evidence of market quotations at different times and testimony of witnesses thereof are competent to go to the jury upon the question of their real value; and it is not error in the judge below to admit as evidence of market quotations those appearing in a daily newspaper published in the State of the corporate securities wherein they had a market value.

**7. Sureties—Liability—Solvency of Principal.**

The liability of a surety upon an administrator's bond for his individual debt to his intestate, incurred prior to his death, depends upon the solvency of the administrator at the time of his qualification. In the event of solvency, the administrator is charged with his personal obligations as a cash asset, and the sureties can only be relieved by establishing the continuing insolvency of the administrator during the full period of his administration. For the administrator to avoid official liability, the burden of proof is on him to show his insolvency and total inability to pay.

**8. Same—Evidence.**

A written statement of his financial condition, made by the administrator to the sureties prior to the execution of the bond, showing solvency,

is proper to go to the jury with docketed judgments in the administrator's favor and other evidence of the extent and value of his estate.

**9. Administrator's Account—Item Not Chargeable—Correction.**

When it appears that the administrator, under the verdict of the jury, has been properly charged with all disputed items except one, and there was no definite evidence to sustain this item, it will be deducted from the sum total, and the judgment below affirmed.

**10. Consideration of Prayers for Instruction—No Error in Charge.**

When prayers for special instruction are presented to the judge in apt time, his refusal to consider them is error, even if adjournment is necessary to give time therefor; but a new trial will not be granted when it appears from the charge given that there was no error of which either party had just cause of complaint and that the prayers were substantially given.

**11. Demurrer—Answer—Waiver.**

When a defendant interposes a demurrer to the complaint, which does not appear to have been acted upon, all rights thereto are waived by the subsequent filing of an answer.

(259) DEFENDANTS' APPEAL.

THIS action is brought by the relators, certain of the distributees of W. N. Peden, against the administrator of said Peden and the surety on his administration bond, the United States Fidelity and Guaranty Company, for an account and settlement, and to recover the sum due each distributee. Those of the distributees who are not parties plaintiff are made defendants. The cause was referred, upon motion of plaintiffs, to three referees, to which order defendants duly excepted in apt time. The referees reported at length, and find a balance due by the administrator of $31,265.20, 7 August, 1905, to which report the defendant, the administrator and surety company, filed numerous exceptions, demanded a trial by jury of the issues raised by the exceptions and tendered along with their exceptions certain issues arising thereon.

The cause came on to be heard before his Honor, *Jones, J.*, at October Term, 1906, of the Superior Court of SAMPSON County, who submitted the following issues to the jury, towit:

1. When did James A. Peden die? Answer: September, 1894.

2. When did W. N. Peden die? Answer: 21 November, 1895.

3. When did the defendant W. A. Johnson administer upon the estate of W. N. Peden and file his bond with the United States Fidelity and Guaranty Company as surety? Answer: 8 November, 1897.

4. Did the defendant W. A. Johnson, prior to the time of his administration, receive from W. N. Peden, as attorney in fact and agent of said W. N. Peden, the choses in action, cash, notes, bonds, stocks, de-

bentures, coupons, and other evidences of debt devised and be- (260) queathed to W. N. Peden by James A. Peden; if so, when? Answer: Yes; 18 or 19 October, 1894.

5. If so, did W. A. Johnson, as such agent and attorney in fact, retain the custody, control, and management of said securities from their reception during the lifetime of W. N. Peden and up to the time he administered upon the said estate? Answer: Yes.

6. What was the cash value of choses in action, bonds, stocks, notes, checks, cash, and coupons inventoried by the defendant W. A. Johnson? Answer: $38,045.19; $37,245.19; interest on Ocean Steamship bonds, $800.

7. What was the value of the personal property, cash, choses in action, which went into the hands of W. A. Johnson, as attorney in fact and agent of W. N. Peden, and which were omitted from the inventory filed by the defendant? Answer: $20,424.

8. Were the proceeds of the sale of the bonds of the Lehigh and Wilkesbarre Coal Company collected by W. A. Johnson and turned over or paid out under the direction of W. N. Peden during his lifetime? Answer: Yes.

9. Was the payment of the $2,888.70 to F. C. Sollee by W. A. Johnson made by consent and direction of W. N. Peden? Answer: Yes.

10. Were the disbursements, other than to the distributees as appears on the inventory and return of W. A. Johnson's administration to the clerk, proper and just? Answer: Yes.

11. What amount has the defendant W. A. Johnson retained as commissions? Answer: $2,135.45.

12. Did the intestate W. N. Peden, prior to his death, sell and convey or give to W. A. Johnson the Chicago and Rock Island Railroad bonds, $11,000, and the Chicago, Milwaukee and St. Paul Railroad bonds, $3,000? Answer: Yes.

13. Did the intestate W. N. Peden sell and convey or give to (261) W. A. Johnson the $4,500 United States bonds? Answer: No.

14. What amount, if any, of interest on notes and bonds, debentures and stock inventoried by W. A. Johnson did said Johnson receive and fail to return? Answer: Nothing.

15. Was the defendant W. A. Johnson solvent on 8 November, 1897, at the time he took out letters of administration? Answer: Yes.

16. If the said W. A. Johnson was solvent on 8 November, 1897, what was he worth in excess of his personal property exemptions, homestead and other liabilities? Answer: $30,000.

17. What amount has the defendant W. A. Johnson, administrator, paid to the respective distributees of said estate? Answer: To Mary A. Moseley, $4,350; Anna C. Johnson, $2,500; Ida C. Hubbard, $6,000;

W. M. Peden, $1,000; Howard Peden, $1,600; Bettie F. Miller, $250; W. H. Peden, $600; Martha A. Peden, $715; Mary E. Hall, $700; Anna C. Anderson, $1,650; Madge Faison, $250. Total, $19,615.

18. What amount was the defendant W. A. Johnson indebted to the estate of W. N. Peden at the date of his administration for property converted and not returned in his inventory? Answer: $20,720.

19. In what amount are the defendants indebted to the plaintiffs? Answer: $36,768.74, now due estate of W. N. Peden.

From the judgment rendered by the Superior Court, the defendant Johnson, administrator, and his surety on the administration bond appealed to this Court.

*Stevens, Beasley & Weeks and George E. Butler for plaintiffs.*
*John D. Kerr, F. R. Cooper, and A. C. Davis for defendants.*

(262) BROWN, J. It would extend this opinion to a most unreasonable length for us to consider *seriatim* the eighty-six exceptions to the rulings of the court below, and would be of no practical value; therefore, we will group the principal contentions under appropriate heads. The exceptions that have given us most trouble are those directed to certain objectionable language used by counsel for plaintiffs in addressing the jury. The language is set out in the case on appeal, together with the defendants' exceptions thereto, and it appears therein that his Honor permitted the objectionable language and argument to go to the jury unrebuked. We are left somewhat in doubt as to what actually transpired by another statement in the case on appeal (which appears to have been made up by the judge), as follows: "In reference to the 15th and 16th exceptions of the defendants, the court does not recollect that the language was used by plaintiffs' attorneys. There were objections to the arguments while court was busy writing the charge, that consumed many hours. The discussion and argument was very warm and heated on both sides, and much latitude was allowed on all the arguments, and clerk will insert this statement of the court immediately after and in connection with exceptions 15 and 16." In this connection we will remind the judges of the Superior Court that, when objection is made to language used in the course of the argument, it is their duty to stop the discussion and take it down and then and there note the exception, so there can be no question made afterwards as to what actually transpired. If the language alleged to have been used on the argument of the case before the jury is correctly stated, it was exceedingly reprehensible, and if the able judge who tried the case permitted it to go unrebuked, he committed an error, and one to be deplored.

In this connection we call attention to the forcible comments (263) of *Mr. Justice Walker* in the opinion in *Hopkins v. Hopkins,* 132 N. C., 28, as to the duty of the court and attorneys. That is a case in which a new trial was granted because counsel overstepped the limits of propriety, and were permitted to do so by the court over the appellant's objection.

We would feel compelled to grant a new trial in this case because of such error were we not fully convinced that the defendants have not been at all prejudiced thereby, assuming that the objectionable language was used, which seems to be left in doubt by his Honor's statement. The case was tried by three referees and again by a jury, and practically the same conclusions reached in both trials. Nineteen issues were submitted to the jury, who found for the defendants on several, one of them involving over $14,000, upon which they might well have found for plaintiffs. A careful examination of the evidence convinces us that the findings of the referees and the jury were fully justified by the evidence, and that a new trial would undoubtedly result in a similar conclusion. Under the circumstances, we feel that the plaintiffs ought not to be put to the great expense of another trial on account of the alleged indiscretion of their attorneys.

The exception as to the issues cannot be sustained. Those submitted appear to cover every phase of the case, and under them the defendants had opportunity to present evidence of every defense relied upon. The form of the issues is of little consequence if the material facts at issue are clearly presented by them. *Paper Co. v. Chronicle,* 115 N. C., 147; *Fleming v. R. R.,* 115 N. C., 676.

It appears that James A. Peden died in Florida in October, 1894, possessed of a large personal estate, consisting of stocks and bonds, which passed under his will almost entirely to his brother, W. N. Peden. The referees find, and the evidence tends strongly to prove, that (264) W. N. Peden, deceased, and William A. Johnson went to Florida on 12 October, 1894, immediately after the death of James A. Peden, and there passed into the hands of William A. Johnson, as agent and attorney in fact for W. N. Peden, the following stocks, bonds, and securities, received by him from Francis C. Sollee, curator of the estate of James A. Peden, and from various depositories in Florida and Georgia: Eleven bonds Chicago and Rock Island Railroad Company, $11,000; three bonds Chicago, Milwaukee and St. Paul Railroad, $3,000; bonds Lehigh and Wilkesbarre Coal Company, $5,000; bonds United States Government, $4,500; bonds of North Carolina, $2,600; bonds Ocean Steamship Company, $1,000; City of Savannah bonds, $4,000; certificates National Bank of Florida, $2,000; certificates Mer-

chants Bank of Savannah, $400; certificates Southwestern Railroad of Georgia, $7,900; certificates Atlanta and West Point Railroad, $2,800; debentures Central of Georgia Railroad, $9,200; cash in bank at Savannah, $2,800; debentures Atlanta and West Point Railroad, $6,100. That all of the foregoing property was delivered into the hands of William A. Johnson, as agent of W. N. Peden, from Francis C. Sollee, curator of the estate of James A. Peden, and from various depositories in the States of Georgia and Florida. That, in addition to the property set out in the above finding of fact, there was delivered to the said W. A. Johnson certain stocks of the Clinton Loan Association, and certificates of deposit in the same, amounting in all to about the sum of $15,000 par. That at the time of the delivery of said stocks and securities to William A. Johnson in November, 1894, dividends had been declared and interest had accrued on the same which had not been collected by James A. Peden and F. C. Sollee, curator; and divi-
(265) dends were afterwards declared and interest accrued on the same, all of which was collected by William A. Johnson, as follows: United States bonds, accumulated interest in 1896, $180; North Carolina bonds, one dividend, December, 1894, $104; City of Savannah bonds, 1894-1895, $205; National Bank of Florida, 1894, 1895, 1896, and 1897, $600; Merchants Bank of Savannah, 1894, 1895, 1896, and 1897, $74; Atlanta and West Point Railroad, 1898, dividends, $588; debentures in same, interest to 1898, $1,281; Southwestern Railroad of Georgia, stock dividends, 1897-98, $1,643; Ocean Steamship bonds, 1894-1904, $550.

W. N. Peden died intestate on 21 November, 1895, and on 21 September, 1897, defendant Johnson qualified as his administrator, with the defendant company as surety on his bond in the penal sum of $30,000. On 8 February, 1898, the administrator filed his inventory, setting forth the assets which he avers belong to his intestate's estate. A number of the securities received from James A. Peden's curator were not included in the inventory; they or the proceeds thereof being claimed by the administrator as his property. In the report of the referees and on the trial in the Superior Court the defendant, administrator, has been charged with some items which he contends he is not liable for and which the surety company contends it is not liable for as surety. These disputed items are as follows: North Carolina State bonds, $2,600; United States bonds, $4,500; City of Savannah bonds, $4,100; Ocean Steamship Company bond, $1,000; debentures Georgia Central Railroad Company, $9,200; note of W. A. Johnson, $2,000; note of W. A. Johnson, $684.20; cash in some bank, $2,800; dividends and interest. The controversy over the first three of said disputed items is as to their ownership. The controversy over the 4th, 5th, 6th, and

7th of said disputed items is as to their value. The controversy (266) over the 8th of said disputed items is as to its existence. The controversy over the 9th of said disputed items is as to amount thereof, and that depends entirely upon the disposition of the preceding items. It is contended by the defendant, administrator, that the 1st, 2d, and 3d items became his property during the lifetime of his intestate, and that he is not properly chargeable with them as administrator.

The defendants tendered a specific issue as to the ownership of these bonds, and excepted because his Honor did not submit it. We think it might have been better to have submitted the specific issue, but we also think the controversy was fully presented and cognizable under the seventh issue.

The learned counsel for the defendants earnestly contend that there is no evidence whatever upon which the administrator can properly be charged with the value of such bonds. In the view we take, there is a presumption of law which puts the burden of proof upon Johnson that he acquired title to these bonds fairly during the life of his intestate, and which requires him to show that such acquisition was not fraudulent. If he failed to so satisfy the jury, the verdict was properly rendered against him.

There is abundant evidence tending to prove that when James A. Peden died, Johnson accompanied W. N. Peden to Florida as his confidential agent and friend; that all the securities were turned over to Johnson for W. N. Peden; that W. N. Peden resided in Clinton, N. C., and William A. Johnson lived in Wilmington, N. C., and that all the stocks, bonds, and securities hereinbefore enumerated were kept by William A. Johnson in his private safety deposit boxes in Wilmington, N. C., and Savannah, Ga., none of which ever went into the hands of W. N. Peden after 16 November, 1894.

It further appears in evidence that Johnson sold the Savannah and North Carolina bonds through J. V. Grainger prior to 1 November, 1895, and had the proceeds credited in the Murchison Bank (267) to his individual account.

The evidence tends strongly to prove that during the year 1895 W. N. Peden was in feeble health, and for several weeks prior to his death on 21 November, 1895, was confined to his bed, during which time William A. Johnson had the management of his entire property. It further appears that Peden did not owe any debts except the few credited to the administrator, and that even his funeral expenses were paid by two of his daughters.

W. N. Peden lived only thirteen months after he received the large bequest his brother made him, and during that time the evidence tends

strongly to prove that Johnson was in custody thereof as the general, confidential, and trusted agent of his father-in-law, who was an old and feeble man. The evidence tends to prove, furthermore, that Johnson was rapidly converting a large part of the securities to his own use, although Mr. Peden had a large number of children and grandchildren whom he doubtless wished to become sharers in his estate.

That the jury has not been in the least prejudiced against the defendants is plainly manifested by their finding on the twelfth issue relating to the $14,000 worth of valuable railway bonds. They might well have found, and probably ought to have found, against the defendants upon that issue, as the evidence shows no such consideration as a court of equity requires to support such a transaction under the circumstances of this case. The sum of $100 is scarcely sufficient to support a sale of $14,000 in gilt-edged securities from a feeble old man to his confidential agent, who had them in custody. As this point was not raised on the trial, and is not embraced in the plaintiff's appeal, the defendants cannot now be charged with that item. We only mention it to show the character of one of the transactions disclosed by the evidence
(268) and to emphasize the patent fact that the jury were not prejudiced against the defendants by the intemperate zeal of counsel.

There are certain known and definite fiduciary relations by which one person is put in the power of another which are sufficient to raise a presumption of fraud in respect to dealings between the two when it is shown that one has acquired the property of the other. In his oft quoted opinion in *Lee v. Pearce,* 68 N. C., 87, *Judge Pearson* specifies four such relations, and among the four is that of general agent, viz., "where one is the agent of another and has entire management of his property." 1 Bigelow on Fraud (1890), p. 295; *Timmons v. Westmoreland,* 72 N. C., 587. "When a party complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary relation between himself and the defendant, and that the defendant occupied the position of trust and confidence therein, the law raises a suspicion, or, as it is often said, a presumption of fraud—a suspicion or presumption arising as a matter of law that the transaction was effected through fraud." *Smith v. Moore,* 142 N. C., 296; 1 Bigelow, 261.

Inasmuch as Johnson occupied such relation to Peden, and had special facilities for committing fraud upon him in respect to the securities which Johnson had control of, the law, "looking to the frailty of human nature," requires him to show that his action has been honest and honorable. If he claims the securities by purchase, he must show a full and sufficient consideration, and if he claims them as a gift, he must show that Peden fully understood what he was doing, had capacity to under-

stand it, and that no undue influence was exercised by Johnson to acquire them, and that it was Peden's full and voluntary act. Applying this just and well settled rule of law, we are bound to conclude that no error was committed by his Honor, the referee, or the (269) jury in charging the defendant with the three items named.

The controversy over the 4th, 5th, 6th, and 7th items relates to their value only, as defendants admit liability for them. It is contended that there is no issue under which the value of these securities could be determined, and that, therefore, the court erred in not submitting the issue tendered by the defendants. These securities were returned by the administrator in his inventory, filed 8 February, 1898, and his liability for their value admitted. We think that it was competent to determine their value under the sixth issue, which is in express terms confined to the actual value of the assets inventoried by the administrator.

As to item 5, Georgia Central debentures, the referees charged defendant Johnson with $1,081 as the value of these securities. The plaintiffs, and not the defendants, excepted to this finding. As the plaintiffs consented to the reference, and are not as a matter of legal right entitled to a jury trial upon the issues arising upon the exceptions, it is contended his Honor erred in submitting the value of these securities to a jury. Assuming, for the argument's sake, that plaintiffs were not entitled *as of right* to a jury trial, yet they were entitled to have the judge review the findings of fact of the referees. While he could not accord plaintiffs a jury trial as a matter of legal right, he could for his own information, and in his sound discretion, submit the question of the value of the securities to a jury. In *Maxwell v. Maxwell,* 67 N. C., 383, this subject is discussed by *Mr. Justice Rodman,* and it is held: "In passing on exceptions to the report, the judge may cause issues to be framed and submitted to a jury, if the facts depend upon doubtful and conflicting testimony." See, also, *Rowland v. Thompson,* 64 N. C., 714; *Green v. Green,* 69 N. C., 294; *Gold Co. v. Ore Co.,* 79 N. C., 48. We think that in ascertaining the value of these (270) securities it was well within his Honor's discretion to submit the matter to the jury, and under the circumstances it was a natural and proper thing to do.

In this connection it is contended that his Honor erred in permitting quotations from the market reports of the *Morning News,* a daily newspaper published in Georgia, showing quotations for these debentures and also of the Ocean Steamship Company bonds, under date of 1 June, 1904. These were Georgia corporate securities, and had a market value in that State. In addition to newspaper quotations, we find also in the record evidence of witnesses as to the value of such securities. The competency of such evidence is settled. In this State it is held that

market reports of such newspapers as the commercial world rely on are admissible as evidence of market values. *Fairley v. Smith,* 87 N. C., 367; *Sisson v. R. R.,* 14 Mich., 496; 3 Wigmore on Evidence, sec. 1704; 1 Elliott on Evidence, sec. 419. The plaintiffs were not compelled to take the sale, alleged to have been made by the administrator, at the time he made it as conclusive evidence of value. They were entitled to prove the market quotations of value at different times, so as to enable the jury to arrive at a just estimate as to the real value of these securities. *Smith v. R. R.,* 68 N. C., 107.

This brings us to item 6, the notes the administrator owed to his intestate, and to the consideration of the solvency of the administrator at the time he qualified as such. The liability of the surety company for the notes Johnson owed Peden, as well as for the securities which Johnson is charged with appropriating before his qualification as administrator, depends upon the fact as to whether, at the time Johnson qualified, he was solvent and able to make good his personal obligations to his intestate's estate. If an administrator seeks to be dis-
(271) charged from his official liability for an antecedent obligation to his intestate on account of insolvency and total inability to pay the same, the burden is upon him to establish that fact. *Howell v. Anderson,* 61 L. R. A., 315. In the exhaustive note to this case all the authorities are collected. The administrator is charged with his own personal obligation as a cash asset in hand, and he and his surety can be relieved only by establishing the fact that the administrator at the time of his appointment was hopelessly insolvent, was so during all the time of his administration, and remained in that condition up to and including the time of his final settlement. *Howell v. Anderson, supra.* Inasmuch as one who is administrator cannot sue himself, it is but just that he should be required to account to the estate for his individual obligation as so much cash, unless he can establish the fact of his inability to pay. This is a salutary rule and one which meets our full approval, and is the only practical way of solving an otherwise difficult problem.

Upon the question of the solvency of Johnson, embraced in the fifteenth and sixteenth issues, the plaintiffs offered the statement of Johnson, dated 21 September, 1897, made to defendant surety company, when he applied to it to become surety on the administration bond, to which defendants except. In it Johnson sets out the character and value of his estate over and above all liabilities as follows: Real estate, $10,000; personalty, $15,000, and $10,000 notes and securities, all of which he states are unencumbered. This application was accepted by the defendant company and acted upon favorably. The fact that after the investigation of the facts contained in the application the company

became his surety is evidence that its officials regarded Johnson as perfectly solvent; and as to Johnson, it is elementary that the statement is evidence against him. The number of docketed judgments in Johnson's favor offered by plaintiffs was competent along with (272) evidence of the extent and value of his estate. The fact that some of them were worthless goes to the value of the evidence and not to its competency. As these issues relating to insolvency have a most important bearing upon the liability of defendant company for a considerable part of the judgment rendered, we have examined the evidence and exceptions relating thereto with care. There are so many of them that we will confine ourselves to saying that we find in the ruling of his Honor on them no reversible error—nothing which would justify us in ordering a new trial. The evidence fully warrants the finding of the referees and of the jury that Johnson was amply solvent when he qualified as administrator.

The 9th item of dispute relates to dividends and interest received by Johnson. It is admitted that its disposition depends upon the disposition of "said items" in dispute. We hold that Johnson has been properly charged with all the disputed items except the 8th, being itemized as "Cash in some bank, $2,800." We are unable to find any definite evidence to support this charge, and we therefore sustain that exception.

In regard to the contention that the penalty of the administration bond does not bear interest, we fail to see that any such ruling has been made by his Honor. The amount of the recovery against the administrator personally exceeds the penalty, and therefore the judgment against the defendant company is for the full penal sum of the bond, and for no more. This penalty bond is then merged in the judgment, and it is the latter which bears interest from the date of its rendition until paid.

The defendants except because his Honor neglected to consider their prayers for instruction—ten in number. The judge made the following indorsement on them: "Prayer of defendants for spe- (273) cial instructions. The evidence in this case closed one evening about 5:30; the jury was excused from the courtroom until morning. The defendant in apt time requested the court to put its charge in writing and read same to the jury. An argument of one-half hour was made to the court upon the issues. Court adjourned till morning and, when convened, defendants handed up the inclosed special instructions. The court reduced its charge to writing and has not had time to examine the special instructions, and therefore does not give them except as they appear given in the written charge, which consumed court's entire time allotted for work and sleep." The requests for instructions were handed up in apt time, and it was error in his Honor not to consider them.

*Craddock v. Barnes,* 142 N. C., 89. If necessary, the judge should adjourn court in order to weigh and consider the prayers for instruction. We have carefully examined the charge, however, and find that his Honor gave very full and clear instructions upon almost every phase of the case, and gave defendants all they were entitled to. We find no error in the charge of which either party has just cause to complain.

The demurrer interposed by defendant Johnson, individually, to the complaint does not seem to have been passed upon at any time by the court. If it were meritorious, which we fail to see, it was waived by both defendants filing an answer before the demurrer had been acted upon. *Ranson v. McClees,* 64 N. C., 17; Clark's Code (3 Ed.), sec. 242.

Upon consideration of the whole case, we are of opinion that it has been ably and fairly tried, and that there is no error except as to the 8th item of dispute, $2,800. This should be deducted from the judgment of $36,768.74 rendered against defendant Johnson, and, (274) with that deduction, the judgment against him is affirmed. The judgment for $30,000 against the defendant the United States Fidelity and Guaranty Company is not affected by such error, and that judgment is affirmed. We direct that all the cost of this Court on the defendants' appeal be taxed against defendants Johnson and the United States Fidelity and Guaranty Company.

Affirmed.

*Cited: Aden v. Doub,* 146 N. C., 13; *Green v. Dunn,* 162 N. C., 342; *Marcom v. R. R.,* 165 N. C., 260; *Ferebee v. Berry,* 168 N. C., 282; *Rosenbacher v. Martin,* 170 N. C., 237; *Hall v. R. R.,* 172 N. C., 348.

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SAME CASE—PLAINTIFFS' APPEAL.

1. **Administrator's Bond—Sureties—Interest.**
   Under Revisal, sec. 1954, interest cannot be charged sureties on the penalty of an administrator's bond.

2. **Assignment of Interest in Suit—Attorney of Adverse Party of Record.**
   Certain parties to a suit cannot be heard to attack the assignment of other parties to the suit of their interest therein to an attorney of record of the opposing parties, when it does not appear that their interests are in any way affected.

BROWN, J. This is the plaintiffs' appeal in the cause above entitled and disposed of at this term. The opinion of the Court in the defendants' appeal is referred to for the facts of the case.

The plaintiffs except and appeal:

1. Because the court below refused to charge the defendant the Fidelity and Guaranty Company with interest on the $30,000 penalty of the administration bond from 7 January, 1902, the date of the original sum-

mons in this action. We have touched briefly on this matter in considering the defendants' appeal, and held that the Superior Court properly allowed interest on the $30,000 from the date of the rendition of the judgment against the surety, not because interest is ever allowable upon a mere penal obligation, but because when judgment is rendered for the full amount of the penalty, as in this case, the penalty becomes merged in the judgment and the latter bears interest from the (275) date it is rendered. If the judgment had been given, as is frequently the case, for the full sum of the bond, to be discharged upon the payment of a smaller sum, the latter would bear interest from the date of the judgment, and there would be no interest accruing on the penalty. The plaintiffs, however, contend that the penal obligation itself bears interest from date of summons, at least, if not from date of the first defalcation. The learned counsel for plaintiffs cite authorities from other States for the purpose of sustaining their contention. We think the law is held otherwise in this State. The statute law of North Carolina expressly excepts "money due on penal bonds" from the list of interest-bearing contracts. Revisal, sec. 1954. It has been expressly held by this Court that penal obligations do not bear interest, the Court saying: "But there is error in charging interest on the penalty, for as such it cannot be enlarged beyond its full amount." *Davenport v. McKee,* 98 N. C., 508. "Stipulated damages" are likened somewhat to penal obligations, and therefore this Court has held that "the party who sues to recover the stipulated damages is not entitled to claim interest, even from the date of his writ." *Devereux v. Burgwyn,* 33 N. C., 490. The penal sum in official bonds is intended to fix the ultimate liability of the sureties, beyond which it cannot be increased. To permit it to bear interest would be to increase the hazard beyond their contract and the sum "nominated in the bond." We think his Honor was correct in declining to sign the judgment tendered by plaintiffs.

2. It is contended by plaintiffs that the Superior Court erred: "For that his Honor signed the judgment giving to A. C. Davis the recovery of W. M. Peden and Howard Peden, two of the distributees, out of the defendant the United States Fidelity and Guaranty Company, when the record shows that said A. C. Davis is attorney for said (276) company." It appears that, pending this suit, Davis purchased from W. M. Peden and Howard Peden their distributive shares in W. N. Peden's estate, paid them therefor a price satisfactory to themselves and took a formal legal assignment of their entire interests. Davis moved before the referees to be permitted to come in and be made a party to the action. This was refused by the referees and allowed by his Honor in the Superior Court. While such proceeding may be regarded as unusual upon the part of an attorney of record, yet we see in

it nothing of which the plaintiffs, appellants, can justly complain. They are not entitled to any part of the distributive shares of W. M. and Howard Peden, and their shares are not in the least diminished by such assignments. If the two Pedens chose to sell their distributive shares to the defendant company's attorney for "cash in hand" rather than await the rather doubtful result of a lawsuit, we cannot see that it is any of appellants' concern. Davis was not the attorney for the Pedens, nor did he hold any relation of trust or confidence to them which legally forbade such purchase, so far as the record discloses. We do not think, and it is not even suggested, that upon settlement Davis expects to charge his client for such distributive shares any greater sum than he actually paid for the same. Doubtless, in making the purchase, he thought he was acting in the interest of his clients. Should he attempt to collect from his own clients more than he paid (an altogether unlikely supposition), they have their remedy. It appears that W. M. Peden was a plaintiff in the action and represented, in common with other plaintiffs, by counsel of record; and it is contended that, therefore, Davis could not properly acquire W. M. Peden's interest pending the suit. Such conduct may raise a question of "professional etiquette," over
(277) which we have no jurisdiction, but we fail to see how it invalidates the legality of the assignment.

Plaintiffs, appellants, will be taxed with the costs of their appeal.

Affirmed.

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SAME CASE—MOTION.

**Supreme Court—Motion to be Made Party—Judgment—Reformation.**

After an appeal from the judgment of the Superior Court has been heard and determined by the Supreme Court, a party to the cause cannot maintain a motion in the latter court to correct the judgment of the court below, so as to make it declare that an assignment of his interest therein to an attorney of record was subject to the payment of a sum of money, and had not passed from him, when it is admitted of record in the appeal that such assignment had been made, and no exception was taken in the Superior Court.

MOTION to make additional party defendant and to reform the judgment of the Superior Court, heard in the Supreme Court.

*M. L. John for the motion, with Stevens, Beasley & Weeks.*

*F. R. Cooper and A. C. Davis, contra.*

BROWN, J. Since the opinion of this Court was handed down in these appeals, Howard Peden moves the Court to permit him to be made a party defendant and to reform the judgment of the Superior Court, which has been affirmed, so that the judgment will declare that the distributive share of Howard Peden, as set down in the record, is subject to

a payment of $1,000 by A. C. Davis, attorney for the United States Fidelity and Guaranty Company, and that said distributive share is the property of said Peden, and not of said Davis.

We see no merit in this motion. Howard Peden is a defendant (278) in this action and W. M. Peden a plaintiff. It is stated in the record that "It is admitted that A. C. Davis is the owner by assignment of the claims and demands of Howard Peden and W. M. Peden against W. A. Johnson, administrator in this action; and the defendants move that said A. C. Davis be made a party defendant and allowed to file an answer setting up his rights."

The referees undertook to allow a nonsuit as to W. M. Peden and a *nol. pros.* as to the defendant Howard Peden, and refused to allow Davis to be made a party. As it is an action for the settlement of an estate, the action of the referees was erroneous, and his Honor very properly reversed their ruling. Davis was brought in and set up and established his claim to the ownership of the distributive shares of the two above named Pedens. Howard Peden admitted in his testimony that the assignment was made to Davis individually. If he desired to contest the assignment of it to Davis, he should have done so before the referees or the Superior Court, when he had an opportunity. He took no exception to the ruling or judgment of the Superior Court, and he is now bound by its action. He voluntarily assigned his share to Davis and permitted him to come in and take his place. It is now too late for either of the two Pedens to complain.

Motion denied.

*Cited: Aden v. Doub,* 146 N. C., 13; *Green v. Dunn,* 162 N. C., 342.

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## S. HAMILTON v. R. V. HIGHLANDS.

(Filed 3 April, 1907.)

**1. Contracts—Character—Question of Law—Lease—Conditional Sale.**

The purpose determines the real character of a contract as a question of law, and a written contract, called a lease by the parties, is construed as a conditional sale which provides: That the defendant agrees to "hire to the use" of plaintiff certain instruments at a fixed rental in specified installments, with plaintiff's right to the possession without previous notice or demand in the event of defendant's default in payment of the installments, called rent, when due, and in such event the amount of "rental" previously paid to be retained by plaintiff as damages for the breach of the contract; upon complying with the terms of the contract

the defendant to have the right of purchase at a price equaling the sum total of the stipulated rental price, the payments theretofore made being deducted.

**2. Same—Redemption.**

Under a contract purporting to be a lease, but construed as a conditional sale, the defendant may redeem by paying the amount due, with interest and costs; or, in default, the court will order the property sold and the proceeds of sale applied to the payment of the debt, interest and costs, and the surplus, if any, paid to defendant.

**3. Same—Election—Time.**

The defendant may elect to regard the contract as a lease and to terminate it, or to avail himself of the provisions in the clause of forfeiture by surrendering the property at any time before the full time for payment has expired, and he may be bound by such election thereafter; but he is not bound by a motion made during the trial to that effect when it was disallowed or by an offer when it was not accepted.

**4. Pleadings—Admitted Facts—Issues—Verdict Unconflicting.**

Facts admitted by the pleadings are not issuable, and, when the verdict of the jury finds there has been no damage to the property on account of detention without otherwise varying the admitted facts, such finding does not stand in the way of the relief to be administered herein, and should be considered with the admitted facts.

ACTION, tried befofre *Councill, J.*, and a jury, at January Term, 1907, of MOORE.

(280) The plaintiff alleges in his complaint that on 5 June, 1901, he entered into a written contract with the defendant, marked "Exhibit A," which is called a lease, and by which the defendant agreed to "hire to the use" of the plaintiff for nineteen months a piano, with stool and scarf, and to pay, as security for the performance of the contract, $50 down, and, as rent, $15 on the 15th day of each month, except the last, for which it was $10, the payments to begin with 15 July, 1901; and, further, to return the piano at the end of the time in as good condition as reasonable wear and use will permit. If the defendant failed to pay any installment of rent, the same to bear interest from maturity; and upon said failure, or upon the removal of the property from the defendant's residence, the security money to be retained as damages for the breach of the contract, and the plaintiff, in addition, to have the right to take possession of the piano without demand or notice. It was further agreed that, if the defendant paid the installments of rent as they fell due, he should have the right to purchase the piano for $330 (the total amount of the security money and installments), in which case all sums paid as security or as rent should be deducted from that amount. A similar contract was made, on 15 July, 1901, in regard to an angelus, and described as "Exhibit B," the security money being the same and the installments of rent $10 per month for twenty-two months

from 15 August, 1901, and $5 for the twenty-third month, making $275 in all. The plaintiff further alleges that he "leased and delivered, conditionally," to the defendant the said instruments, and the latter promised to pay for the same $605 in security money and installments, as aforesaid, and that the piano and angelus were reasonably worth said amounts. That the contracts as contained in Exhibits A and B were taken as security for the payment of the several amounts agreed to be paid by the defendant, the plaintiff retaining the title "until (281) the entire purchase price should be paid," with the right to take possession of the property in case of default. That defendants has paid in security money and installments on the piano $155 and on the angelus $140, and that there is now due "on the purchase price of the said instruments the sum of $346.17." The plaintiff then demands judgment, first, for $346.17 and interest; second, for the possession of the property, and, third, for a sale of the same, the proceeds to be applied to the payment of the debt due to him and the costs and expense, and the surplus to be paid to the defendant.

The defendant answered and admitted all of the material allegations of the complaint except as to the balance due on the contracts. He then prayed that he be permitted to deliver the property to the plaintiff and be discharged from further liability, forfeiting, of course, the amount he had paid. Before the jury was impaneled the defendant moved for judgment as prayed in his answer, and the court reserved decision on the motion until after verdict, when it was overruled, though the court held, at the time the motion was made, that the contracts as contained in Exhibits A and B were leases and not conditional sales or mortgages.

The jury found, in response to the first three issues submitted, that the contracts had been executed and the amounts paid thereon as stated in the complaint; to the fourth and sixth, that the piano, at the time of seizure by the sheriff, was worth $275, and the angelus $200; to the fifth and seventh, that there had been no damage to the property by deterioration or detention; and to the eighth issue, that the plaintiff is the owner and entitled to the possession of the property.

The evidence in the case was not different in substance from the allegations of the complaint, except one witness testified that the piano at the date of the contracts was worth $375 and the angelus $275, or a total of $650, and that at the time of the seizure they were (282) worth the amounts stated in the verdict. After the verdict was returned, and his motion that he be allowed to surrender the property and be discharged had been overruled, the defendant moved that judgment be rendered according to the prayer of the complaint, treating the contracts as conditional sales or mortgages. The court held that it was too late for the defendant to make that election, and overruled the mo-

tion, holding again that the contracts were leases. It was thereupon adjudged that the plaintiff recover of the defendant the sum of $1,299.37, of which $1,135 (the total of all overdue installments) is principal and $164.37 is interest, with interest on the principal until paid, and, further, that he recover the possession of the property (the piano and angelus); and if, for any reason, it cannot be had, then the sum of $475, the assessed value of the property, with interest on the same, and also the costs.

At the time of bringing this action the plaintiff caused the piano and angelus to be seized under claim and delivery proceedings. The defendant replevied and now has possession of the property.

From the judgment the defendant, having duly excepted to the rulings of the court, appealed.

*U. L. Spence and John W. Hinsdale, Jr., for plaintiff.*
*R. L. Burns for defendant.*

WALKER, J., after stating the case: This case has some peculiar features. The plaintiff has recovered a sum of money greatly in excess of the value of the property involved, and, in the second place, the judgment is directly contrary to his own theory of his rights, as stated in the complaint. A demand so extortionate as the one he now makes (283) should not receive any favor from the court, nor should the judgment recognizing and enforcing it be permitted to stand for one moment, unless the law most clearly sanctions it and imperatively requires that it should be upheld. We are fully convinced that it does not, for it looks to the real intention of the parties and construes their contract accordingly, without much, if any, regard to the name by which it is designated or to the particular language employed. It seeks to do equity and avoid oppression. Its motive is justice, and not generosity. It follows that the courts, in determining whether or not a contract is one of bailment or one of sale with an attempt to retain a lien for the price, in effect a mortgage, do not consider what description the parties have given to it, but what is its essential character. It was a mere subterfuge to call this transaction a lease, and the application of that term to it in the written agreement of the parties does not in law change its real meaning. A contract like the one upon which this suit was brought has been held by a very large majority of the courts of this country to be, in substance, a conditional sale, although in the form of a lease (and so called) or of a bailment for use, with an option to purchase. 6 A. & E. (2 Ed.), 447, and note 6. Special reference is made to the following cases as being directly in point: *Baldwin v. Wagner,* 33 W. Va., 293; *Kimball v. Post,* 44 Wis., 471; *Murch v. Wright,* 46 Ill., 487; *Ott v. Sweatman,* 166 Pa. St., 217.

This Court has steadily adhered to this just and equitable construction of such contracts. *Puffer v. Lucas,* 112 N. C., 377; *Crinkley v. Egerton,* 113 N. C., 444; *Clark v. Hill,* 117 N. C., 11; *Barrington v. Skinner, ibid.,* 47; *Manufacturing Co. v. Gray,* 121 N. C., 168; *Thomas v. Cooksey,* 130 N. C., 148; *Wilcox v. Cherry,* 123 N. C., 79. In the case last cited, at pp. 82 and 83, it is said: "We are satisfied from a bare inspection of the paper itself that it was intended (284) to be a conditional sale, and was put in the form of a lease to avoid the registration laws, or possibly to work an unjust forfeiture, neither of which can meet our approval. Both are frauds in law. The common intent was evidently a sale of the machinery in such a way as to secure the purchase money. This seems evident to us from the face of the instrument itself, even if we exclude all testimony. We cannot imagine that a business man of common sense would rent property upon exactly the same terms upon which he could buy it, and we do not find any rule of interpretation which requires us to place upon a contract a construction which would indicate that at least one of the contracting parties was mentally incapable of contracting." And in *Henry v. Locomotive Works,* 93 U. S., 664, the principle is thus stated: "The transaction (is not) changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties." A similar contract was held in *Thomas v. Cooksey, supra,* to be a conditional sale, although it did not expressly confer any right to purchase. If the contract between the parties, as expressed in the writing, be substantially one of conditional sale, the fact that the purchase money is denominated as "hire" or as "rent," and divided into sums payable at various periods throughout the term of credit, will not render the transaction one of bailment for hire, so as to subject it to the law of bailments instead of the law of conditional sales or mortgages. *Cottrell v. Bank,* 89 Ga., 508.

The contract described in the pleadings is substantially like the one which was construed in *Wilcox v. Cherry,* and we hold now, as was held then, that it was clearly intended to be a conditional sale. This being so, the case of *Puffer v. Lucas* is direct authority for holding that the defendant has the right to redeem the property by paying the amount due, with interest and costs, and in default of such pay- (285) ment to have the property sold and the proceeds applied to the payment of the debt and interest thereon and the costs, and the surplus, if any, paid to him, thus treating the contract as, in equity, a mortgage. Whether it be considered as a contract of sale with a clause of forfeiture or defeasance, a mortgage or a conditional sale, the proper relief is that

demanded by the plaintiff upon the allegations of his complaint, by which it is properly construed as giving the defendant the right to redeem.

But it is contended by the plaintiff's counsel that the defendant had the right to elect to treat the contract as a lease and to terminate it or to avail himself of the forfeiture at any time by surrendering the property and refusing to pay the installments (*Puffer v. Baker,* 104 N. C., 148; *Puffer v. Lucas,* 112 N. C., 377); that he had elected to do so in this case and was bound by that election, so that he could not now ask to redeem. The answer to this contention is that the election had to be made before the full time for payment of the installments had expired (*Puffer v. Baker, supra*), and it was not, in fact, made until after the expiration of that time, nor until the answer in this case was filed. Besides, the court did not grant the motion by which the election is said to have been made, nor did the plaintiff accept the proposition contained therein, that the defendant be permitted to surrender the property and lose what he had paid and then be discharged from any further liability. On the contrary, the court submitted issues which were framed upon a theory of liability quite different from that by which the defendant proposed to settle the case and which went far beyond it. It cannot fairly be argued that he should be estopped by his election to treat the contract as a lease, without considering the other branch of his offer, namely, that he be released from further liability upon sur-
(286) rendering the property and giving up to the plaintiff what he had already paid. The two must be coupled and taken together. But neither the plaintiff nor the court accepted his offer, and therefore there was no binding election. It would indeed be hard measure to hold him estopped by a rejected offer.

The verdict of the jury in its essential features is not unlike that in *Puffer v. Lucas,* and the same relief should be awarded in this as was awarded in that case. There is this difference between the cases, which is in favor of the defendant, that in *Puffer v. Lucas* the plaintiff sued for the possession of the property, treating the contract as a lease, while in this case the plaintiff asks for a foreclosure, treating the contract as a mortgage. We are, therefore, giving him precisely the relief he has demanded and according to his own construction of the contract, as will appear from the allegations and prayer of his complaint.

We find, in considering this case and the authorities bearing upon it, that *Foreman v. Drake,* 98 N. C., 311, has been overruled, so far as it is in conflict with the cases we have cited. *Wilcox v. Cherry,* 123 N. C., 79; *Thomas v. Cooksey,* 130 N. C., 148. In connection with the citation of that case, it may be well to add that we do not mean to imply by what we have said that parties, when acting in good faith, cannot make

a valid lease with an option reserved by the lessee to purchase. *Wilcox v. Cherry, supra.* The form of the contract must not, though, be used merely as a cloak or cover to conceal the real nature of the transaction, which will always be determined by the court according to the intent of the parties, to be gathered from their language or from what they really meant.

The jury have found that there has been "no damage to the property by detention or deterioration"—that is, that there has been none for which the defendant is liable. Apart from this finding, there is no material fact found by the jury which is not admitted in the (287) pleadings. The admitted facts of a case are, of course, not issuable. The value of the property at the time of the seizure by the sheriff, in the view we take of the case, becomes immaterial. The eighth issue embodied a question of law, or rather a conclusion of law, from the admitted facts. The verdict does not, therefore, stand in the way of the relief to be administered, but may be considered with the facts admitted.

Our conclusion is that the property be sold by order of the court below, and out of the proceeds there be paid the costs and expenses and the balance of the debt due by the defendant—that is, the purchase money specified in the contracts ($605), less the payments thereon. The surplus will be paid to the defendant. If there is any deficiency, judgment will be entered against the defendant for it. *Puffer v. Lucas, supra.* Whatever damage the plaintiff may have suffered from the detention or deterioration of the property since the time to which the verdict relates, and for which the defendant is liable, may be recovered by him upon the bond given by the defendant. The plaintiff may have process issued to put him in possession of the property, if he desires it and thinks it will avail him anything, as he is entitled to the possession whether the contracts are conditional sales or mortgages, the term of credit having expired. *Moore v. Hurt,* 124 N. C., 27; *Hinson v. Smith,* 118 N. C., 503; *Kiser v. Blanton,* 123 N. C., 400. But whether he or the defendant has the possession, the property must be delivered, on demand, to the commissioner appointed by the court to sell it.

Let the judgment of the Superior Court be modified so as to conform to this opinion. The plaintiff will pay the costs of this Court.

Error.

*Cited: Whitlock v. Lumber Co.,* 145 N. C., 124, 127; *Hauser v. Morrison,* 146 N. C., 252; *Hicks v. King,* 150 N. C., 371; *Piano Co. v. Kennedy,* 152 N. C., 200; *Lancaster v. Insurance Co.,* 153 N. C., 291.

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J. H. ALLEN ET AL. v. DURHAM TRACTION COMPANY.

(Filed 9 April, 1907.)

1. **Trial Judge—Findings—Expert—Conclusive Evidence—Weight.**

The findings of the court below, supported by evidence that the witness is an expert, is not reviewable, and it is for the jury to decide the weight to be given the testimony.

2. **Damages — Evidence — Osteopath—Services Paid for—Statute of Limitations.**

In an action to recover damages for physical injury, evidence of the amount plaintiff paid to an osteopath for services, nursing and attention reasonably given and rendered, is competent to be considered by the jury, but not conclusive, even if the osteopath could not recover for such services in an action at law under Revisal, sec. 4502, or if such recovery by him were barred by the statute of limitations.

3. **Judge's Charge — Special Instruction — Conclusions of Law Upon Facts Found.**

It is error in the court below to refuse to give a prayer for special instruction, tendered in apt time and supported by evidence bearing upon the legal effect of the facts, if found by the jury that "plaintiff was guilty of contributory negligence"; and a charge modifying the prayer to the extent that "the jury will consider the facts as bearing upon the issue of contributory negligence" is insufficient.

TWO ACTIONS, by consent consolidated, and tried before *Justice, J.*, and a jury, at January Term, 1907, of DURHAM.

*Winston & Bryant and Kitchin & Carlton for plaintiff.*
*Manning & Foushee and A. L. Brooks for defendant.*

CLARK, C. J. Action for personal injuries sustained by *feme* plaintiff in alighting from a car of the defendant street railway company. A separate action was brought by her husband for his loss and expenditures caused by such injuries. By consent, the two causes of action were consolidated and tried together. The defendant's first three exceptions are on the ground that the court permitted Dr. A. R. Tucker, an
(289) osteopath, to testify as an expert in regard to the nature of the fractures of the bones of the *feme* plaintiff and to testify as to the amount paid him for his services to her, in considering the *quantum* of damages. The court found upon the evidence that Dr. Tucker was an expert. This conclusion is not reviewable. *S. v. Wilcox,* 132 N. C., 1131; *Geer v. Water Co.,* 127 N. C., 355, and cases there cited. The court decides as to the admissibility of the witness as an expert; the jury decides as to the weight to be given to his testimony. *Flynt v. Bodenhamer,* 80 N. C., 207. The amount paid him for his services is,

of course, not binding on the jury, but they can take into consideration the reasonable worth of the attention and nursing rendered by him, in passing upon the measure of damages. Even if it had been true that Dr. Tucker could not, under Revisal, sec. 4502, have recovered for his services to the *feme* plaintiff in an action at law, this is not an action by him to recover compensation. His services were not criminal. *S. v. Biggs,* 133 N. C., 729. And the plaintiff having paid him for his services, if they were reasonably proper attention under the circumstances, the jury could take their value into consideration. Laws 1907, ch. 764, has incorporated the "North Carolina Society of Osteopaths" as a recognized branch of healing; but aside from that, if Dr. Tucker's services had been availed of to alleviate pain, or in nursing, the reasonable amount paid for such services was a matter for consideration by the jury, for if a bill for medical services, even, were barred by the statute of limitations, while its payment could not be enforced at law, yet, if paid, it would be a proper item for consideration by the jury in assessing the damages.

The defendant asked the court to charge as follows: "If the jury shall find from the evidence that the *feme* plaintiff was, at the time of her injury, in feeble health, and that she undertook to (290) alight from the car while it was moving slowly, and in attempting to alight stepped from the car at right angles to the direction in which the car was moving, or with her back in the direction in which the car was moving, and she was thrown to the ground and injured, then she was guilty of contributory negligence, and the jury will answer the second issue 'Yes.'" The court gave the prayer, modified, however, by striking out the concluding part and inserting instead that "the jury will consider the facts as bearing on the issue of contributory negligence." In this there was error. There was evidence from which, if believed, the jury might have found the state of facts recited in this prayer. There was evidence to the contrary, that the car had stopped. But the defendant had the right to have its phase of the evidence submitted to the jury, with the instruction that, if they so found the facts, the jury should answer the issue as to contributory negligence "Yes," and not merely that those facts would be evidence which the jury could consider as bearing upon that issue; for the prayer must be taken in connection with the uncontroverted evidence, which was that the conductor had gone forward to change the switch, that the stopping place was beyond the switch, that the conductor had not given any invitation to passengers to alight at that point, which was not a regular stopping place (though passengers sometimes got off there), and that he did not see the *feme* plaintiff when attempting to get off. Under these circumstances the prayer should have been given as asked. *Calderwood v.*

*Street R. R.*, 96 Ala., 318. In *Nance v. R. R.*, 94 N. C., 622, notice had been given by whistle that the train would stop at a regular station, and the train had come "nearly, almost, to a full stop." Here, there was no notice, and it was not the regular stopping place. There was, it (291) is true, contradictory evidence that the car had come to a full stop, and that the car started forward again without notice as the plaintiff was stepping off. If that phase of fact was found by the jury, the prayer would not be applicable, but the defendant was entitled to an instruction to the jury as to the legal effect of the facts, if found as his evidence tended to prove them. There are other exceptions, but they may not occur upon another trial and need not be discussed.

Error.

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A. M. CARPENTER v. B. L. DUKE ET AL.

(Filed 9 April, 1907.)

**Lands—Note Under Seal—Registration—Purchase Price—Subsequent Mortgage.**

A note under seal, reciting that it was given for the balance of the purchase price of certain land, executed and registered, does not attach to the legal title a trust for its payment or constitute a lien thereon. A judgment on the note, rendered after the execution and registration of a second mortgage by the same person to secure a different debt, cannot constitute a lien prior to that of the second mortgage.

CONTROVERSY WITHOUT ACTION, submitted to *Justice, J.*, at March Term, 1907, of DURHAM.

This is a controversy without action, submitted to the court for decision upon the following agreed statement of facts:

The plaintiff Carpenter, on 27 April, 1906, sold his farm to defendant Edwards for $3,500, of which amount said Edwards paid $800 cash and executed a deed in trust to H. A. Foushee to secure the sum of $2,400.

For the balance of $300 Edwards executed his bond under seal (292) in the following words and figures, to wit:

$300. DURHAM, N. C., 27 April, 1906.

On or before 6 November, 1906, with interest from 1 May, 1906, I promise to pay to the order of A. M. Carpenter $300, for balance of purchase money of the tract of land this day purchased by me of him, containing 95 acres, less 3.58 A. See deed from J. W. Barbee and wife in Deed Book 23, page 271, for description of same.

Witness: J. E. OWENS. C. M. EDWARDS. [SEAL]

Said instrument was on 30 April, 1906, probated and recorded in the office of the register of deeds of Durham County. The tract of land conveyed by Carpenter to Edwards is accurately described in the deed recorded in the office of said register of deeds. On 14 June, 1906, said Edwards, being indebted to B. L. Duke in the sum of $1,786.12 executed to him a deed in trust for the purpose of securing the payment thereof, conveying the same tract of land described in the deed from Carpenter to him. Said deed in trust was duly recorded in the office of the register of deeds of Durham County. Thereafter, the said H. A. Foushee, trustee, pursuant to the power conferred upon him by the aforesaid deed, sold the said land for the sum of $3,250, and, after paying the debt of $2,400 secured thereby, has in his hands or to his credit in bank, from the proceeds of said sale, $647.03, which he is ready to pay to the parties who may be adjudged entitled thereto. The whole amount of the note of $300 is due and unpaid and no part of the debt to B. L. Duke, secured in the deed in trust to him, has been paid. Plaintiff claims that he is entitled to be paid, out of the amount in the hands of Mr. Foushee, the amount due on his note, while defendants, Duke and his trustee, J. A. Giles, claim said sum by virtue of the deed in trust of (293) 14 June, 1906. His Honor adjudged that defendant Foushee pay the plaintiff the note of $300, with interest, and the balance to J. A. Giles, trustee. Defendants Duke and Giles, trustee, appealed.

*Winston & Bryant for plaintiff.*
*Giles & Sykes for defendant.*

CONNOR, J., after stating the case: Plaintiff's counsel, in a well considered and interesting argument before us, conceded that the equitable vendor's lien which prevails in England, unless changed by statute, and in several of the States of the Union, does not obtain in this State. *Womble v. Battle,* 38 N. C., 182. He contends, however, that the judgment rendered by his Honor is correct, "first, because Duke, so far as this transaction is concerned, stands in the shoes of the vendee Edwards, and takes subject to any equity, or other right, of the vendor in the land." We concur with the learned counsel that this Court has uniformly held, since the decision of *Potts v. Blackwell,* 56 N. C., 449, and 57 N. C., 58, that a grantee in a deed in trust, made to secure an existing debt, is a purchaser for a valuable consideration, within the provisions of 13th and 27th Eliz. (Revisal 1905, secs. 960 and 961), but takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. It will be noted that in the opinion of *Pearson, J.,* in *Potts v. Blackwell,* 56 N. C., 449, the words "or other rights" are not found, nor do they appear in the opinions in *Small v.*

*Small,* 74 N. C., 16; *Day v. Day,* 84 N. C., 408; *Brem v. Lockhart,* 93 N. C., 191, or *Southerland v. Fremont,* 107 N. C., 565. These last named cases quote the exact language used in *Potts v. Blackwell, supra.*

Our attention is directed to the language of *Shepherd, J.,* in
(294) *Wallace v. Cohen,* 111 N. C., 103 (p. 107), "that such purchaser takes the property subject to any *equity or other right* that attached to the same in the hands of the debtor." It will be noted that in the case cited the learned justice was discussing the question upon the facts appearing in the record. The plaintiffs, vendors of personal property, were asserting the legal right to rescind the sale by reason of fraud practiced upon them by the vendee in procuring the property. The right to recover the property was not dependent upon the establishment of any equity, or equitable lien, but upon a well-defined *legal* right to treat the sale as void and sue in a possessory action for the property, by the plaintiffs, upon the theory that, by reason of the fraud, no title passed. *Wilson v. White,* 80 N. C., 281; *Des Farges v. Pugh,* 93 N. C., 35. In view of the facts before him, the learned and accurate justice correctly used the words "equity or other right." See, also, *Walton v. Davis,* 114 N. C., 104. In *Brem v. Lockhart, supra,* the controversy was between the vendor in an unregistered, conditional sale, and the assignee. In neither of these cases was there an assertion of any "equity," as that term is understood in equity jurisprudence. We do not perceive, however, that the plaintiff takes any benefit from enlarging the scope of the language used in *Potts v. Blackwell, supra.* Whether the vendor asserts an equity or right, such equity or right, to avail him as against the trustee or creditor secured, must "attach to the property in the hands of the debtor." It must be a right, either legal or equitable, to subject the property, as distinguished from a mere right *in personam* to reach the property through the process of a judgment and execution.

In the view which we take of the record, the plaintiff has no equity in, or other right to, the land. Assuming, as contended by coun-
(295) sel, that judgment be rendered in this controversy against Edwards on the note, we fail to see how he would have any other remedy than a right to enforce a judgment lien then attaching to the fund which, for this purpose, stands in the place of the land. Of course, such lien would be subject to the right which Duke acquired by the trust deed, because, as said by *Ashe, J.,* in *Dail v. Freeman,* 92 N. C., 356, "a judgment lien on land constitutes no property or right in the land itself. A judgment creditor has no *jus in re* nor *jus ad rem* in the defendant's land, but a mere right to make his general lien effectual by following up the steps of the law, and consummating his judgment by

an execution and sale of the land." We do not, therefore, perceive how, for the purpose of disposing of this controversy, rendering a judgment herein against Edwards on the note would avail the plaintiff. Counsel cite *Blevins v. Barker,* 75 N. C., 436, as sustaining his contention. There the note given for the purchase money contained the words: "The land I have sold to W. E. Senter is bound for this note." The Court said that if the note had been registered "at the same time with and as a part of the deed," such a construction might have been given to the whole transaction. That is, that the words used in the note would have been construed as an agreement to attach to the legal title a trust for the payment of the note which, between the parties, would have been effectuated in equity by treating the deed and the note as one paper, thereby giving effect to the intention of the parties, and that, as against a purchaser at execution sale, as in that case, or the grantee in a trust deed, would be binding as an equity attaching to the legal title. This, when registered, would have been equally effective against any purchaser for value, upon the familiar principle that he who takes with notice of an equity takes subject to such equity. While the courts, to effectuate the intention of the parties and protect (296) rights, have given a liberal construction to language indicating an intention to make property security for the payment of the purchase money, sometimes called equitable mortgages, we find no case in which the mere recital of the fact that the consideration of the note was the purchase money of the property is given such effect. A. & E., 123. To give the language used here such effect would be to do violence to the evident intention of the parties, because the vendee, at the time of his purchase, executed a mortgage or trust deed to Mr. Foushee for $2,400 of the deferred payment of the purchase money, and, manifestly, for some reason not appearing, the vendor was willing to take chances on the balance of $300. The evident purpose of reciting the consideration was to fix the fact that the vendee was not entitled to claim a homestead as against the note. Const., Art. X; Revisal, sec. 468.

We conclude, therefore, that the plaintiff has no equity in, or right to, the land which can be asserted, either against the vendee Edwards or his grantee Duke or his assignee Giles. The interesting discussion, therefore, of plaintiff's counsel in regard to conflicting equities and their priorities, growing out of the fact that Edwards transferred to Duke only an equitable title, the legal title being in Foushee, cannot avail the plaintiff, because he has no equities or rights to be adjusted. Much of the learning in this branch of equity jurisprudence has become of little practical value because of our registration laws. A mortgage of an equitable interest, right or title, when recorded, is entitled to the same priority as a legal title.

In the view which we have taken of the case, the registration of the note did not affect the rights of the parties. There was no contract to convey land entitled to registration. Judges have frequently ex-
(297) pressed a regret that the vendor of land who has, under a misapprehension of his rights, been unable to collect the purchase money, especially when creditors, whose debts preëxisted the acquisition of the title by the debtor, have taken precedence; but, as said by *Ruffin, C. J.*, in *Womble v. Battle, supra,* the doctrine of the vendor's lien was unsuited to conditions in this State and produced much litigation and uncertainty. A sound public policy, adopted by the Legislature and enforced by the courts, demands that, for certainty of title and easy alienation of property, secret trusts, obscure equities, and uncertain liens shall not prevail against titles acquired by deeds and perfected by public registration.

For the reasons set forth, we hold that there is error in the judgment. The defendant Duke is entitled to the amount in the hands of Foushee, trustee, less the cost of this controversy, which he will pay out of the fund.

Reversed.

*Cited: Sykes v. Everett,* 167 N. C., 607.

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LELIA R. DAVIS v. JOHN W. SMITH.

(Filed 9 April, 1907.)

1. **Overflow Water from Higher Building—Damage—Better Construction.**
   In an action for damages occasioned plaintiff by water falling from defendant's wall upon her roof, it is incompetent to show that had plaintiff's building been better constructed the damages would have been lessened.

2. **Same—Proper Judgment.**
   A judgment containing a mandate that the defendant shall "provide sufficient gutters or pipes or drains for his large wall adjoining plaintiff's, to prevent the water falling from the roof thereof from flowing against plaintiff's building and lot," is proper if it is an appropriate relief and in accordance with the allegations, and the verdict of the jury, though not named in the relief prayed for in the complaint.

(298) CIVIL ACTION, tried before *Moore, J.,* and a jury, at October Term, 1906, of DURHAM.

*Manning & Foushee for plaintiff.*
*Giles & Sykes for defendant.*

CLARK, J. The questions which were presented on the former appeal, 141 N. C., 108, need not again be considered. There was evidence

in support of the plaintiff's contentions, and the rulings and instructions of the trial court conformed to what was said by us on the former hearing. The plaintiff is not complaining of the diversion of surface water, and his Honor confined the jury to the damage done the plaintiff's wall by water falling from the defendant's roof. *Davis v. Power Co.*, 171 N. Y., 336; 89 Am. St., 817. If the defendant caused or permitted this, it was not competent to show that if the plaintiff's building had been better constructed the damage would have been lessened. *Fitzpatrick v. Wellor* (Mass.), 48 L. R. A. 278; *Gould v. McKenna*, 86 Pa. St., 297; 27 Am. St., 705. The other exceptions of the defendant do not require discussion.

The judgment contains, besides the adjudication for the recovery of the damages assessed, a mandate that the defendant shall "provide sufficient gutters or pipes or drains for his large building on his said lot, adjoining the plaintiff's, to prevent the water falling from the roof thereof from flowing against the plaintiff's building and lot." This was a proper order upon the allegations and issues found, and was prayed for in the complaint. If it had not been specifically prayed for, the judgment should contain any appropriate relief justified by the allegations of the complaint, and the verdict. *Williams v. Commissioners*, 132 N. C., 301; *Reade v. Street*, 122 N. C., 302, and cases cited.

PER CURIAM. No error.

(299)

CAUSEY JARRETT v. HIGH POINT TRUNK AND BAG COMPANY.

(Filed 9 April, 1907.)

**1. Jury—Verdict—Set Aside Upon One Issue—Appeal—Premature—Deciding Case Upon Request—No Precedent.**

Upon excepting to and appealing from the order of the court below, setting aside the verdict of the jury upon one issue and awarding a new trial upon that alone, no judgment signed, the appeal is premature; but in this case, both parties having requested the Supreme Court to consider the cause, an opinion was given without permitting it to become a precedent.

**2. Judge's Charge—One Phase—Error—Contentions of Each Party.**

As a general rule, a party without a proper prayer for special instruction cannot sustain an exception to the omission of the judge below to charge the jury in a particular way; when the judge assumes to charge, and correctly charges the law upon one phase of the evidence, the charge is incomplete unless embracing the law as applicable to the respective contentions of each party, and such is, in itself, reversible error.

3. Issues—New Trial on One Issue—Caution to Superior Court Judges.

The judges of the Superior Court are cautioned that, in awarding a new trial upon one issue alone, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, can be had without danger of complication, and that no possible injustice can be done either party.

ACTION to recover for personal injuries, alleged to have been caused by negligence of defendant, tried before *Justice, J.*, at January Term, 1907, of GUILFORD.

The court submitted these issues:

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

2. Did the plaintiff, by his own negligence, contribute to the injury complained of, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $1,600.

(300) Upon the rendition of the verdict, upon motion of plaintiff, the court set aside the verdict on the third issue and awarded a new trial as to that issue only. The defendant excepted to such order, as well as to numerous rulings on the first and second issues, and appealed to this Court.

*E. J. Justice, W. P. Bynum, Jr., and G. S. Ferguson, Jr., for plaintiff.*
*King & Kimball for defendant.*

BROWN, J. No final judgment having been rendered in this case, we might well dismiss the appeal as premature, but in our discretion, and at the solicitation of both parties, we have thought best to consider the cause, but without permitting it to become an established precedent.

1. It appears from the evidence that at the time of the injury the plaintiff was about 14 years of age and employed by the defendant in connection with its manufactory at High Point, N. C. On 21 September, 1904, the plaintiff contends that he was directed to work at a ripsaw, without any previous instruction or experience, and that in repairing a belt of a pulley his arm was caught in the machinery and he was seriously injured. Upon the second issue the court instructed the jury: "If you find that the plaintiff was commanded by the defendant to do what he was doing at the time he was hurt, and showed no greater lack of caution, prudence, foresight, and realization of his danger than an ordinary boy of his age would ordinarily show under like circumstances, but acted with the degree of caution that boys of his age ordinarily show under such circumstances, then he would not be guilty of contributory negligence; then you will answer the second issue 'No.'" The defendant contends that his Honor erred in failing to state in behalf of the defend-

ant the converse of that proposition, to wit: That even if the (301) plaintiff were ordered by the defendant to go into the basement to participate in the lacing of a belt, nevertheless, if on account of the failure to exercise that degree of care and prudence ordinarily exercised under similar circumstances by one of his years and discretion, and if on account of this failure on the part of the plaintiff he exposed himself in an unguarded moment to contact with the revolving machinery, and such failure resulted proximately in contributing to bringing about his injury, that then the jury should answer the second issue "Yes." We think the exception to the charge for such omission is well taken. Having told the jury how the law required them to answer the second issue upon a given state of facts, if found for plaintiff, the judge should have also instructed them, without any prayer for instruction, how to answer such issue if they should find such facts to be as contended by the defendant. We assume this was an inadvertence on the part of the able and careful judge who tried the cause, but that it is an error has been repeatedly held by this Court. Although it be not error generally to refrain from giving instructions unless asked to do so, yet care must be taken when the judge thinks proper to instruct the jury upon a phase of the evidence and to expound the law in relation thereto, not only to state it correctly, but to state the law as applicable to the respective contentions of each party upon such phase of the evidence. *S. v. Austin,* 79 N. C., 626; *Burton v. R. R.,* 84 N. C., 197; *Bynum v. Bynum,* 33 N. C., 636; *S. v. Wolf,* 122 N. C., 1081. Having undertaken to tell the jury how they should answer that issue if they found such facts according to plaintiff's contention, it was manifestly incumbent upon the court to state the defendant's contentions in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention.

It is unnecessary to consider the other exceptions, as we award a new trial upon all the issues.

The defendant excepted to the ruling of his Honor in direct- (302) ing, at the instance of the plaintiff, that a new trial be had on the third issue, as to damages. It must be confessed that the defendant has advanced some very strong reasons tending to show that such practice upon the part of the Superior Court judges is calculated sometimes, especially, in this class of cases, to work great injustice to one and sometimes to both parties, and the defendant has earnestly contended that such practice should not be allowed, and that we should not follow *Benton v. Collins,* 125 N. C., 83, and similar cases, so far as they authorize such practice in the Superior Courts. As we have awarded a new trial generally, it is not necessary now to determine that question, and we will leave it open for future consideration, should it be presented again.

We will, however, caution the judges of the Superior Courts in respect to such practice, and invite their attention to what is said in *Benton v. Collins,* at page 91: "Before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters"; and we will add, that before such partial new trial is ordered it should clearly appear that no possible injustice can be done to either party. In cases of this character we do not know that the practice is generally to be commended. In the case at bar an examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of "splitting it up" between different judges and different juries.

New trial.

*Cited: Billings v. Observer,* 150 N. C., 543; *Penny v. R. R.,* 153 N. C., 305; *Jones v. Insurance Co., ib.,* 392; *Gregg v. Wilmington,* 155 N. C., 30; *Ward v. R. R.,* 161 N. C., 185.

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(303)

## TOWN OF LUMBERTON v. JOHN NUVEEN & CO.

(Filed 9 April, 1907.)

**1. Towns—Bond Issues—Certain Interest Rate—Commissioners—Discretion.**

An issue of bonds by a town in pursuance of a private act, 1905, chapter 334, authorizing the issue, "to bear interest at a rate not exceeding 6 per cent per annum," is valid as to the certainty of the interest rate when, under the act itself and under the notice of sale, the town commissioners were vested with full power to fix the rate of interest, not exceeding the rate aforesaid, and the records show that the rate was fixed at 5½ per cent, in the discretion of the commissioners.

**2. Same—Maturity.**

When it appears from the act under which the bonds are issued, and the notice of sale sent in pursuance thereof, that the date of the maturity of the bonds to be issued by the town was to be fixed by the town commissioners not longer than thirty years, and redeemable at the option of the town at the end of twenty years, a discretion is given to the commissioners to fix the date of maturity, subject to the limit of thirty years.

3. Towns—Bond Issue—Provision for Interest and Sinking Fund—Tax Rate—Limitation—Special Tax—Validity.

When it appears that the tax rate of a town has not reached the limitation contained in the provision of the act under which the bonds are issued, and, subject to such limitation, the commissioners shall levy a special tax sufficient to provide for the interest and a sinking fund, and that, if the tax levied during any one year should prove insufficient, an additional tax shall be levied, the issue will not be held invalid for a failure to provide for payment of interest and for a sinking fund.

4. Towns—Bond Issue—One or Two Boxes—Commissioners—Discretion.

When it appears that the provisions relating to the issuance of bonds by a town for the purposes of waterworks and sewerage "may be voted on in separate boxes," and qualifying words, "but in such case," immediately follow, indicating that the proposition could be voted on in one box, making certain requirements as to ballots in the event of two boxes, it is left to the discretion of the commissioners as to whether one or two boxes shall be used.

5. Towns—Bond Issue—Act—Purchasers Bound with Notice.

Purchasers of bonds issued under the provisions of a legislative act are fixed with knowledge of its terms and conditions.

CONTROVERSY without action, heard by *Webb, J.*, at April (304) Term, 1907, of ROBESON. From judgment rendered the defendant appealed.

*McIntyre & Lawrence for plaintiff.*
*McLean, McLean & McCormick for defendant.*

BROWN, J. This proceeding is brought to determine the legality of an issue of bonds to the amount of $25,000, issued by the town of Lumberton, N. C., and which the defendants contracted to purchase. The defendants contest the validity of the bond issue upon the following grounds, as appears from briefs of counsel for both parties to the controversy:

1. For that the petition and notice of election do not set forth with certainty the rate of interest nor the time of maturity, as is provided by sections 1 and 2 of chapter 334, Private Laws of 1905, under which the bonds have been issued.

2. For that the rate of tax to be levied and collected to pay interest and to provide a sinking fund for the redemption of the bonds at maturity, as set forth in the petition and notice of election, and as levied by the board of commissioners of the town, is insufficient, not enough funds being provided wherewith to pay interest and principal at maturity.

3. For that waterworks and sewerage are two distinct and separate objects, and bonds for the extension of waterworks and sewerage could not be voted upon on one form of ballot and in one ballot-box, as was

done, where the act provides that each object must be voted for separately upon different ballots and in different boxes.

As to the first objection, we find that the notice required by the act of 1905, referred to, contains these words: "The said bonds, if issued, to bear interest at a rate not exceeding 6 per cent per annum, payable annually." A majority of the qualified voters, under the terms of (305) said act, enacted in strict conformity to the Constitution, authorized the issue of the bonds upon a 6 per cent interest basis. The commissioners are vested with full power to fix the rate of interest, provided it does not exceed 6 per cent. This is not only true under the terms of the notice, but section 1 of the act expressly confers such discretion. The record shows that the bonds are to bear interest at 5½ per cent.

As to the time of maturity, both the notice and the act authorize the issue of bonds maturing at a date not longer than thirty years, and redeemable at the option of the town at the end of twenty years. The language of section 1 of the act gives to the commissioners a discretion as to the time of payment, subject to the thirty-year limit. *Bank v. Ayer,* 24 Ind. App., 212; *Catron v. County,* 106 Mo., 659; *Baker v. Seattle,* 2 Wash., 576; *Turpin v. County,* 105 Ky., 226; *Cullen v. Water Co.,* 113 Cal., 503; *Manufacturing Co. v. Elizabeth,* 42 N. J. Law, 249.

It is contended that the rate of taxation levied by the plaintiff's commissioners in their order will be insufficient to pay the annual interest and to provide a sinking fund. This cannot invalidate the legality of the bond issue. The act provides that the commissioners shall levy a special tax sufficient to provide for the interest and sinking fund, and, if the tax levied during any one year should prove to be insufficient, they can be compelled to levy an additional tax, subject, of course, to the limitations contained in the proviso to section 4 of the act. The defendants are, of course, held to have had knowledge of the terms of the act when they contracted to purchase bonds issued under its authority. It appears that the rate levied is not up to the limit yet, and we are led to believe that there is a probability that in the future it may be safely lowered, judging from the glowing terms in which the learned counsel for the plaintiff, in their brief, refer to their prosperous town, (306) viz.: "The Court will take judicial notice of the fact that our towns and cities are growing rapidly—especially the town of Lumberton, that great center of trade and industry." We cannot take judicial notice that Lumberton is "that great center of trade and industry," to the extent of basing our judgment as to the sufficiency of the tax levy upon what the future may hold in store for its thrifty population. What we do hold is that, if it is insufficient, the holder can compel an increased levy within the terms and limitations of the act.

It is also contended that the propositions relating to waterworks and sewerage should have been voted on in separate boxes, in order to comply with the terms of the act. We do not deem it necessary to determine the question, so elaborately presented in the briefs, as to whether waterworks and sewerage are one and the same thing, as understood in the town of Lumberton, or are two distinct objects and kinds of municipal improvement.

We hold that the language of the act is not mandatory, and whether one or two boxes were used is immaterial so far as it affects the validity of the bonds. The words "may be voted on in separate boxes" are shown by the context to leave the manner of voting to the sound discretion of the commissioners. The qualifying words, "but in such case," immediately following, indicate plainly that the propositions could be voted on in one box; but, in case two boxes were used, certain requirements are made as to ballots. In fact, the whole of section 2 plainly imports that it was within the discretion of the commissioners to provide only one box for the vote upon water and sewerage.

Upon a review of the whole record, we are of opinion that the bonds constitute a valid obligation of the town of Lumberton, and that, under the terms of their contract, the defendants are compellable to accept and pay for the same.

The judgment of the Superior Court is

Affirmed.

*Cited: Smith v. Belhaven,* 150 N. C., 158; *Hotel Co. v. Red Springs,* 157 N. C., 140; *Winston v. Bank,* 158 N. C., 520; *Gastonia v. Bank,* 165 N. C., 512.

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(307)

W. F. MAIN COMPANY v. W. L. FIELD ET AL.

(Filed 9 April, 1907.)

**1. Pleading—Answer—Issues Sufficient.**

While the material matter of fact, alleged on one side and denied on the other, applying as well to such as are raised by the answer and not alleged in the complaint, should be submitted to the jury as issues, yet when each party had the opportunity to offer evidence bearing upon every phase of the controversy under the issues submitted, it is not reversible error for the trial judge to refuse to submit an issue tendered upon a particular phase.

**2. Contract—Notice—Warranty—Repudiation—Reasonable Time.**

While a defendant must comply with the warranty under his contract to notify plaintiff of defects in jewelry and give him an opportunity to remedy them before he can repudiate the entire contract, and while, under said contract, all right of claim that goods were not up to sample, or in

accordance with order, was deemed as waived unless such claim was sent by registered mail within two days of receipt of goods; when the defects are latent and not readily discoverable by inspection, the buyer's right of inspection includes a reasonable time, to be determined by the jury under the evidence, and registered mail notification is not essential when it appears that written notification was given and received by plaintiff without avail.

3. **Contract—Sample—Implied—Warranty—Bulk—Vitiation—Fraud.**
In sales by sample there is an implied warranty that the bulk shall be of equal quality to the sample, or at least merchantable; therefore, in an action to rescind a contract for fraud, evidence is sufficient to sustain an affirmative finding of the jury which tends to show that the plaintiff was the manufacturer of the jewelry, the subject of the contract; that it had been sold by sample, apparently all right and up to sample when received, and its appearance was calculated to deceive; that in reality it was cheap and worthless as jewelry, and the plaintiff was seasonably notified without avail.

ACTION, heard by *Justice*, J., and a jury, at October Term, 1906, of SCOTLAND.

This action was commenced before a justice of the peace to recover on an account $150 for goods sold and delivered. The following issues were submitted:

(308) 1. Was the contract set out in the complaint obtained from defendants by the false and fraudulent representation of plaintiff? Answer: Yes.

2. What was the value of the goods sold and delivered by plaintiff to defendants? Answer: Nothing over freight.

3. Did defendants notify plaintiff of defects in the goods and give him opportunity to remedy any defects? Answer: Yes.

4. What amount, if any, is plaintiff entitled to recover of defendants? Answer: Nothing.

From a judgment that plaintiff take nothing by this writ, plaintiff appealed.

*McLean, McLean & McCormick for plaintiff.*
*Maxey L. John for defendant.*

BROWN, J. 1. The plaintiff tendered the following issue: "What is the amount due under the contract?" and excepted to the issues submitted. We think the issues passed upon by the jury are entirely responsive to the allegations of the pleadings, and that under them each party had the opportunity to offer evidence bearing upon every phase of the controversy. Those material matters which are alleged on the one side and denied on the other should be submitted in the form of issues to the jury, and this applies to new matter alleged in the answer and not mentioned in the complaint. *Shaw v. McNeill,* 95 N. C., 535;

*Owen v. Phelps,* 95 N. C., 286. An examination of the answer discloses that the matters embodied in the issues submitted are all pleaded with particularity in the answer of the defendants.

2. It is contended that the defendants did not comply with the stipulations of the written contract under which they purchased. A contract almost identical in its terms with the one sued on here was before the Court in *Main v. Griffin-Bynum Co.,* 141 N. C., 43, in which it was held that the defendants must comply with the warranty (309) and exchange plan, and that plaintiff was entitled to notice of alleged defects and an opportunity to remedy them before the defendants could repudiate the entire contract. In reference to the provisions of said contract, this Court said: "According to the terms of this obligation, the plaintiff was entitled to notice of any alleged defect in the goods as to the quality, and to be given an opportunity to remedy any deficiency before defendants could repudiate the entire contract." The facts of that case were materially different from this. It appeared there that the defendant received the goods promptly and made no complaint, the Court saying in reference thereto: "But defendants' own evidence shows that no complaint whatever of any defects in the jewelry was ever made by defendant from the date of the receipt of it to the time of the trial. On the contrary, on 16 June, 1902, defendant notified plaintiff that 'Goods just received and found all O. K.'" In respect to these defendants' conduct after receipt of the jewelry, J. T. Field testified as follows: "We sold some of it, and it was brought back in a short time, brassy—no gold about it. We took it back and refunded the money. As soon as we found out what it was, we notified them that it was worthless, and asked them to take it back. They refused to take it back. It was not worth anything; I would not have it. To sell this stuff would ruin a man's business."

It is true that the contract contains a provision that all right to make claim that goods are not like sample, or not according to order, are waived unless such claim is sent by registered mail within two days of receipt of goods; and it is likewise true that there is no evidence that the defendants made claim within two days after receipt of the goods. The courts have very generally recognized the right of parties to a contract for the purchase and future delivery of merchandise to contract in reference to the time and place of inspection, and such (310) stipulation is generally enforced. It is probable that a limit of two days for inspection would be held reasonable where the defects are of a character that may be disclosed by an ordinary inspection, but where, as in this case, the defects are claimed to be latent, and such as are not readily discoverable by inspection, no such limitation will protect the seller. Under such circumstances the buyer's right of inspec-

tion includes a reasonable time within which to ascertain the quality of his purchase. What is a reasonable time here is a question of fact dependent upon the circumstances of each case and to be determined by the jury. 2 Mechem on Sales, secs. 1377-1381, and cases cited. We are of opinion that, if the evidence is to be believed, the defendants acted with due diligence in making inspection and notifying plaintiff. It does not appear whether they did so by registered letter, but that is immaterial here, as it appears in evidence that plaintiff received defendants' communication and refused to take the goods back or remedy the trouble.

3. It is contended that there is no evidence sufficient to warrant the finding upon the first issue, that the contract was obtained by the false and fraudulent representation of plaintiff. There is evidence tending to prove that the goods were apparently all right and up to sample, and that their appearance was such as was calculated to deceive. One witness testified that the goods were "cheap made-up stuff for fake purposes, and worth nothing as jewelry." It may be that there is no evidence that the contract was secured by false representation by plaintiff's agent, or that he was inspired by a fraudulent purpose when he obtained the execution of the contract. We are willing to admit that there is no evidence of such antecedent fraudulent purpose at the time the
(311) contract was signed, and that plaintiff's agent purposed that the order should be filled in good faith. Yet the jury have found that the goods were worth nothing; that plaintiff was duly notified, and refused to remedy the defects. Such findings in response to the second and third issues are amply sufficient to support the judgment of the court. The goods were purchased by sample, and the findings of the jury establish the fact that the goods when delivered not only did not come up to sample, but were unmerchantable and worthless, and that plaintiff refused to remedy the defects.

In all sales by sample there is an implied warranty that the bulk shall be of equal quality to the sample. Benjamin on Sales, 683. It is also held that where goods are sold without an opportunity for inspection, there is also an implied warranty that they shall be at least "merchantable"—not that they are of the first quality, or even of the second, but that they are not so inferior as to be unsalable among dealers in the article. This is especially true where, as in this case, the vendor is the manufacturer of the articles sold. Benjamin on Sales, 686, and cases cited. "If a man sells an article," says *Best, C. J.,* in *Jones v. Bright,* 5 Bing., 544, "he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose." *Lord Ellenborough* said in *Gardiner v. Gray,* 4 Camp., 144: "Under such circumstances the

purchaser had a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." In *McClung v. Kelly,* 21 Iowa, it is said: "The contract always carries with it an obligation that the article shall be merchantable; at least not to have any remarkable defect." In *Manufacturing Co. v. Allen,* 53 N. Y., 518, it is said: "A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchant- (312) able." See, also, *Rogers v. Niles,* 11 Ohio St., 55.

Upon the findings of the jury in response to the second and third issues, we have no hesitation in holding that under such conditions the right of defendants to rescind the contract and to lawfully refuse payment is undeniable. 24 A. & E., 1161.

We have examined the exceptions in the record, and find
No error.

*Cited: Aden v. Doub,* 146 N. C., 13; *Manufacturing Co. v. Lumber Co.,* 159 N. C., 511; *Medicine Co. v. Davenport,* 163 N. C., 297; *Hodges v. Wilson,* 165 N. C., 328; *Ashford v. Shrader,* 167 N. C., 49; *Ottman v. Williams, ib.,* 314; *Grocery Co. v. Vernoy, ib.,* 428; *Trick v. Boles,* 168 N. C., 657.

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G. W. COOK ET AL. v. JOSEPH VICKERS ET AL.

(Filed 9 April, 1907.)

**County Commissioners—Cartway—Private Act—"Sufficient Reasons"—Jury.**

When under a private act providing that the commissioners shall order a cartway to be laid out over the lands of another by a jury of view, upon "sufficient reason" shown, a petition is made to the commissioners to lay out a cartway over the defendants' lands, it is error in the court below to sustain a demurrer to the complaint alleging that the petitioners have a way of reaching the road in question by going a "long distance" and a "roundabout way," not so convenient to them as the cartway they seek to have established; that the outlet they were then using was not theirs of right, was held by a precarious tenure, was very bad and rough and increased the distance of travel by two and a half or three miles; the question of "sufficient reason" being one for the jury under proper instructions from the court, and the reasons assigned not being *per se* insufficient.

ACTION, heard upon demurrer by *Justice, J.,* at January Term, 1907, of DURHAM.

*Winston & Bryant for plaintiffs.*
*Guthrie & Guthrie for defendants.*

(313) WALKER, J. When this case was here before, we held that the defendants had the right of appeal, and consequently the right to a trial *de novo* in the Superior Court, 141 N. C., 101. The case was called for trial at the last term in the court below and the defendants demurred *ore tenus* to the petition for the cartway, upon the ground that the petitioners were not entitled to the relief demanded, "as it is alleged in their petition that they already have a way of reaching the Chapel Hill Road by going a 'longer distance' and a roundabout way, not so convenient to them as the cartway they seek to establish, but, nevertheless, a way out to Durham without having a cartway laid out upon the lands of the defendants." The court sustained the demurrer, and the plaintiffs appealed. The act of 1901, ch. 729, sec. 13, under which this proceeding was brought, provides that any party desiring a cartway from his premises over the lands of his neighbor, and leading to a public road, may file his petition before the county commissioners as therein directed, and, after due notice to those interested, the board shall hear the matter, and, "if sufficient reasons be shown," shall order the cartway to be laid out by a jury of view. Provision is then made for the protection of the lands over which the cartway runs by the erection of gates and bars across the same. It is further alleged by the plaintiffs in the petition that the way out from their premises to the Chapel Hill Road, which is not theirs of right, but held by a precarious tenure, is "a very rough and bad roadway," and the necessity of using it, which was created by Joseph Vickers, who closed a way they had formerly used, has increased the distance of travel by 2½ to 3 miles.

(314) We were referred by the defendants' counsel to *Warlick v. Lowman,* 103 N. C., 122, and *Burwell v. Sneed,* 104 N. C., 118, as authorities sustaining the ruling of the court, but we do not think they do. They construed section 2056 of The Code (Revisal, sec. 2686), the language of which is quite different from that of the special act of 1901 applying to Durham County. All the latter act requires is that "sufficient reason" be shown for laying out the cartway, and we think the allegations of the petition are definite enough to entitle the petitioners to a trial by jury upon the issue raised by the answer, and that the objection urged is untenable. Whether there is sufficient reason, under all the facts and circumstances of the case, for establishing the cartway is clearly a question for the jury to determine under proper instructions from the court. *Mayo v. Thigpen,* 107 N. C., 63; *Burgwyn v. Lockhart,* 60 N. C., 265. His Honor erred in deciding it as a question of law upon the allegations of the complaint. The judgment will be set aside and the issue joined will be submitted to a jury.

Error.

A. CRENSHAW AND WIFE v. ASHEVILLE AND BILTMORE STREET RAILWAY AND TRANSPORTATION COMPANY.

(Filed 9 April, 1907.)

1. **Evidence—Nonsuit—Burden of Proof—Demurrer.**

On motion for nonsuit upon the evidence, under the statute, the burden of proof was upon the plaintiff to show that the injury was caused by the negligent act of the defendant, though the evidence will be construed most favorably for her; when the evidence of the plaintiff disclosed that she had presence of mind sufficient to avoid the injury at the apparent point of danger, and owing to fright, not inferable from her former conduct, again approached the track and was injured in a manner not reasonably to be seen or anticipated by the motorman of the street car, to whom the negligence was imputed, the motion should be allowed, there being insufficient evidence that the injury was caused by defendant's negligence.

2. **Same—Negligence—"Sudden Peril"—Proximate Cause.**

It is error in the court below to refuse a motion to nonsuit upon the close of the evidence, under the statute, in an action against a street car company on account of negligence imputed to the motorman, when it appears, without material conflict of evidence, that the motorman slowed down the car before reaching the point of apparent danger and was otherwise not negligent; that the plaintiff had presence of mind to escape the danger and thereafter approached the track in a manner not reasonably to be seen or anticipated by the motorman, and that she did not look, when she could easily have done so and avoided the injury to herself, and that she was struck by the car to the rear of the motorman, and thereby injured; the cause of the injury being the negligent and unforeseen act of the plaintiff, upon which the doctrine of "sudden peril" can have no application. In any view, the injury was the result of the plaintiff's negligence, which was its proximate cause.

ACTION, tried before *Allen, J.*, and a jury, at May Term, 1906, (315) of BUNCOMBE.

The plaintiff, Susan Crenshaw, brought this action to recover damages for injuries she received and which were caused, as she alleges, by the negligence of the defendant. At the time of the occurrence she lived on the east side of Bailey Street, in the city of Asheville. The track of the defendant's railway is laid on that street, which at and for some distance on either side of the place of the accident runs north and south. The *feme* plaintiff, on 7 August, 1901, and late in the afternoon of that day, had gone from her home, across the track of the defendant, and to the opposite, or west, side of Bailey Street to buy apples from one Bryson, who was selling them from a wagon drawn by a mule which was headed toward the north. While Mrs. Crenshaw was standing at the rear of the wagon, making her purchase, one of the defendant's cars, proceeding south, came in sight. The mule was frightened and became unruly. He backed the wagon against the plaintiff, who retreated down

(316) the street. She then turned and signaled the motorman by throwing up her hand, but did not pay any attention to the car after that time. The evidence tended to show that the car was running at a moderate rate of speed. The motorman had slackened the speed by applying the brakes, and when Bryson had taken hold the reins and started up the street with the mule, and just before the car passed the plaintiff, he released the brakes. The plaintiff was then about 12 feet from the track, directly out, and the car was from 14 to 18 feet north of a point on the track immediately opposite where the plaintiff was at the time. The mule was then under the control of its driver. If the brakes had not been released the car could have been stopped within 6 or 8 feet. The car was running slowly all the time at that place, about as fast as a man can walk. The plaintiffs' witness, Bryson, testified, in substance, that the *feme* plaintiff was on the west side of the street, at the rear end of his wagon; the car came down the street and the mule began to back as if it would run the wagon into the car, and the lady ran down the street; that she had gone from 16 to 20 feet, when he got the mule straightened back and started up the street. The mule had backed the wagon from the west side toward the east side of the street, and close to the car as it was passing, something like 2 feet, or 18 inches from the car as it passed the wagon; and at this time, when the car was closest to the wagon, he was between the wagon and the car, and the plaintiff was from 16 to 20 feet from the wagon and down the street near the west sidewalk, on the west side of the passing car; and that she was in that position the last time he saw her.

The plaintiff's witness, Kosky, testified that when the mule began to back the wagon the plaintiff ran down the street on the west side, and then across the street toward the east, and struck the car near the front right-hand corner.

(317) The evidence further tended to show that the collision with the car caused the *feme* plaintiff to fall, and the wheels on one side passed over her feet. The injury was received on the west rail of the track, 36 to 40 feet from the point where the plaintiff was at the wagon when the mule began to move.

The defendant's testimony was to the effect that, as the car approached, the mule showed signs of restiveness, and turned somewhat toward the west sidewalk; the motorman then had his car under control, and the plaintiff was 12 or 15 feet from the car track and near the rear end of the wagon; about the time the car was passing the mule and wagon, the plaintiff started down the street on the west side, near the curbing, and after having gone some distance she stopped a moment and then turned and ran diagonally across the street toward the car track, where she collided with the side of the car, just back of the front steps, was

knocked down and injured. The motorman testified that he did not see the plaintiff after he passed the wagon until after she ran into the side of the car and was falling. When he passed her she was standing 12 feet from the car, and, seeing that everything was all right, he looked ahead and did not see the plaintiff again until a lady screamed and attracted his attention. He then looked around and saw her falling. He also stated that it was 4 or 5 feet from where he was standing on the front platform to the point where she struck the car. The evidence further tended to show that the street at the place where the accident occurred was 26 feet wide between the curbs; the railway track, which was laid on the east side of the street, about 1½ feet from the east curbing, was about 5 feet wide, and the car projected over the track about 1 foot at the widest point. The evidence also tended to show that the plaintiff was in no actual danger after she moved away from the wagon and started to run, either diagonally across or straight down on the west side and then diagonally across the street toward the (318) car, where she was injured.

Mrs. Fisher testified: "I saw the car coming down the street, about Mr. Heston's house; as it got a very little closer, the mule began to shy at something or to throw up his head and shy a little. The man stepped around the side of the wagon and took hold of the bridle. By that time the car was very close to them. He had slowed up some, was not running fast, and Mrs. Crenshaw started to leave the wagon. She turned from the wagon and went down the street almost opposite to my father's gate. I thought she was coming into my lot, and when I saw she turned toward the car I screamed, but before I could attract her attention she had reached the car, and the handle on the body of the car, back of the platform, struck her left shoulder and threw her back from the car, and she struck on her right side." She further stated, in substance, that the plaintiff was running with her head down, and just as she reached the car she slowed up and threw up her hands and said, "Oh, God!" and at that moment the car struck her and she fell on the ground. When she turned, near the gate, she went rather diagonally toward the car, or southeast. At the time she turned suddenly she was the width of the street from the car (about 15 feet), and the car was then about opposite to her. The witness screamed when the plaintiff turned and started toward the car, but she reached the car before the witness could attract her attention. The evidence tended to show that the plaintiff was very much frightened as she left the wagon and went down the street.

The defendant, in apt time, moved, under the statute, to dismiss the action. The motion was overruled, and the defendant excepted. The jury returned a verdict for the plaintiff, and judgment having been entered thereon, the defendant appealed.

(319) *Frank Carter and Moore & Rollins for plaintiff.*
*Julius C. Martin and Charles A. Webb for defendant.*

WALKER, J., after stating the case: The counsel for the defendant abandoned all assignments of error except those which raised the question whether, upon the evidence construed most favorably for her, the plaintiff is entitled to recover. The testimony is voluminous, and we have held the case over from the last term in order that we might give it a most careful examination. There are few conflicts in it, and they are slight and not very material. When every disputed question of fact is resolved in favor of the plaintiff, it does not seem to us that she has made out a case. Indeed, it is clear to us that she has not, whether we consider the facts with reference to any omission of duty on the part of the defendant or with regard to her own negligence as the efficient and proximate cause of the injuries received. No fault is imputed to the motorman in the management of his car up to the time that the plaintiff left the wagon and was apparently out of danger from any apprehended conduct of the mule. Indeed, all of the evidence shows, and the case was argued upon that theory here, that the motorman had slowed down by shutting off the power and applying the brakes, so that he had the car completely under his control, and the speed had been so reduced that it was moving very slowly as the point of danger, from the backing of the mule, was being passed. He acted promptly, and showed every disposition to avoid an accident. Nor do we find any evidence in the case which tends to show that he relaxed his efforts in this respect at any time before the plaintiff was injured. We are not permitted to decide upon mere conjecture or to guess how or by what combination of circumstances an injury may have been caused by the defendant's negligence. The burden is always on the plaintiff to show by a pre-
(320) ponderance of the evidence that the defendant committed a negligent act and that it was the proximate cause of the injury. The two facts must coexist and be established by the clear weight of the evidence before a case of actionable negligence is made out. *Brewster v. Elizabeth City,* 137 N. C., 392. The kind of proof which must be forthcoming, in order to establish the issues in favor of the plaintiff, was considered recently by us in *Byrd v. Express Co.,* 139 N. C., 273, where we said: "There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success." The rule upon this subject is stated in another form by *Justice Douglas,*

for the Court, in *Spruill v. Insurance Co.,* 120 N. C., at p. 147, as follows: "The action of the judge (in directing a verdict) can be sustained only under the doctrine, firmly established in this State, that where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests." *Judge Gaston* thus stated it in *Cobb v. Fogalman,* 23 N. C., 440: "Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture (as to the existence) of a fact never can amount to evidence of it." *S. v. Vinson,* 63 N. C., 335. The rule as laid down in *Spruill v. Insurance Co.* is the one stated in *Wittkowsky v. Wasson,* wherein *Justice Rodman* says: "There must be evidence from which (the jury) might reasonably and properly conclude that there was (321) negligence." To the same effect are *S. v. Powell,* 94 N. C., 968, and *S. v. Satterfield,* 121 N. C., 558. All the cases cited approve the rule as formulated by *Justice Maule* in *Jewell v. Parr,* 13 C. B. (76 E. C. L.), 916, as follows: "The question for the judge is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." *Ryder v. Wombwell,* L. R., 4 Exch., 32. This rule is not intended, as said by *Justice Douglas* in *Spruill v. Insurance Co.,* to interfere with the rightful province of the jury to pass upon the weight of the evidence, but it assumes that the determination of its "character and legal effect" belongs to the court, and requires that this preliminary question be first decided before the evidence is submitted to the jury. The matter is discussed by *Justice Connor* for the Court, with a full citation of the authorities, in *Lewis v. Steamship Co.,* 132 N. C., 904. In whatever form the rule may be expressed, we do not think the plaintiff has satisfied its requirement in this case. We may well assert that there is no evidence at all, not even a scintilla, and certainly none when the testimony is considered "in any just and reasonable view of it," to warrant an inference of negligence on the part of the defendant. All of the evidence, on the contrary, tends to show that the danger to the plaintiff from the backing of the mule had passed when the motorman released the brakes, and nothing, we think, occurred after that time which required that he should keep an eye on the plaintiff to prevent any harm coming to her from a collision with the car. She was proceeding down the street, whether straight down or diagonally makes no difference. As her position was, in fact, a safe one; as she was in possession of her faculties and of her senses of sight and hearing

(322) and in full view of the car, which she knew was passing; as it was daytime and her vision was unobstructed; as there were places of safety on the opposite side of the street from the railway track, or the west side, if there *was,* in fact, any danger, and she was seeking a place of safety, and as there was no conceivable reason why she should have crossed the track just at that time, the conductor had the right to assume that she would keep in the safe way and not deliberately walk into the car, as she did, or even attempt to cross the track in front of it, if such had been the case. Every reason appears in this case why he should have been thus impressed by the then situation. There is no evidence, within the rule we have already stated, that he saw her at the time she attempted to cross the track and walked against the car. He was standing on the front platform, about 4 feet in front of her, when she walked against the car. Just as the plaintiff was stricken, either by the side of the car or by the handhold which is fastened to the side, he heard a lady scream, when he looked back and saw the plaintiff falling. The car was then stopped in a brief space of time and distance. The motorman knew, or must have known, that the plaintiff was fully aware of the presence of the car, because she had hailed him when danger first appeared and an accident seemed to be imminent; but knowing also that the danger had passed, and that the apple vender had left with his mule, leading him up the street in an opposite direction from the plaintiff, he had a right to suppose that the plaintiff, being apparently and really able to do so, would take care of herself, and, having successfully escaped from one danger, would not walk into another so easily discernible by a mere glance of the eye. This Court has so treated the question in passing upon a similar state of facts. *Mathews v. R. R.,* 117 N. C., 640; *Markham v. R. R.,* 119 N. C., 715; *Pharr v. R. R.,* 133 N. C., 610; *Meredith v. R. R.,* 108 N. C., 616; *Syme v. R. R.,*
(323) 113 N. C., 558; *High v. R. R.,* 112 N. C., 385; *Parker v. R. R.,* 86 N. C., 222; *Doster v. R. R.,* 117 N. C., 651. See, also, *Hall v. Street R. R.,* 168 Mass., at p. 463. The fright of the plaintiff at the time the mule shied, if it continued to the time of the accident, was not caused by any negligence of the defendant, and is in no way attributable to any wrong committed by it. It is something for which the defendant cannot be held responsible. *Dummer v. R. R.,* 108 Wis., 589. His Honor was therefore right in charging the jury that the "doctrine of sudden peril" has no application to this case, and that the motorman was not bound to anticipate that the plaintiff, whether frightened or not, would leave a place of safety or, having left it, would go into a place of danger, when she might just as well have gone in another direction. And further, the motorman was not bound to presume that the plaintiff, whether frightened or not, would run into the car, when she could easily

see and hear it. He had the right to presume, even to the last moment, when it was too late to save her, that she would not do so reckless an act. *High v. R. R., supra; Russell v. Street R. R.*, 83 Minn., 304; *Parker v. R. R., supra.* If she had sufficient presence of mind to escape from the danger caused by the shying of the mule, why not enough to avoid the greater danger of a collision with the car?.

There is no evidence, therefore, from which any inference can fairly or reasonably be drawn—not even a scintilla of proof—that the plaintiff was so situated and circumstanced that she could not have heard and seen the car, or that she could not have looked or listened. We make an extract from her own testimony in this connection, so as to see what is her version of the facts:

"Q. I believe, on your previous examination, you said something like this, did you not? You stated that when the man first mentioned the car, you looked up and saw it was coming about halfway be- (324) tween the Heston house and Redwood's house? A. Yes.

"Q. You answered that, 'Yes'; is that the way you recollect it now? A. Yes.

"Q. Listen to this: 'About how near was that from you?' You answered, 'I don't know. I cannot estimate the distance. I failed to say that when I got out and threw up my hand and the car was coming along about Mr. Redwood's place, it came just over me in a flash that this mule was going to act badly; I must get away before the car gets there.' Do you remember that? A. Yes.

"Q. Do you remember this? 'So I got out of the way of the wagon, and the first thing I did was to throw up my hands.' A. Yes.

"Q. Is that correct? A. What did you say?

"Q. 'So I got out of the way of the wagon, and the first thing I did was to throw up my hands.' Do you remember that? A. Yes.

"Q. Is that the way you remember it now? A. Yes.

"Q. You were out of the way of the wagon at that time? A. I was out after I moved on, but I wouldn't have been had I stayed still, for it was backing toward me. That is what caused me to move—because it was coming."

And again:

"Q. You do not mean to say that you were crossing the track at the time the car struck you? A. Of course, I did not mean that.

"Q. The complaint is inaccurate when it purports to give your statement that you were crossing the track? A. Yes."

But if it be conceded that there was any negligence in running the car, it cannot be successfully denied that the plaintiff was plainly guilty of such concurring negligence on her part, up to the very moment

(325) of the accident, as to bar her recovery. Indeed, she had the last clear chance for saving herself from harm, and failed to avail herself of it, and she thus became, in the eye of the law, the responsible author of her injury, her negligent act being regarded as its proximate cause. This case is much stronger in favor of the defendant than those we have cited above from our own reports, as in them it appeared that the plaintiff, who was injured, was at the time on the track, while here the plaintiff was not on the track, but walked into the side of the car.

Speaking of the rights of foot passengers on streets, and the duty to use their powers of observation when approaching vehicles or street railways, the Court, in *R. R. v. Block,* 55 N. J. L., 612, said: "The degree of care required in approaching and crossing street railways exceeds that required in approaching and passing foot passengers, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed—it cannot be so quickly stopped or diverted from its course; a street car cannot deviate from its track, while a passenger on foot may quickly turn aside, or even retrace his steps." On this part of the case the decision in *Parker v. R. R.,* 86 N. C., 222, and *Bessent v. R. R.,* 132 N. C., 934, are very much in point. A rational being should not needlessly venture into places of peril, and if he does, he should use proper precautions to guard against injury. If he fails to do either, and suffers damage in consequence thereof, it must be referred to his rash act and gross inattention to his own security as the true and efficient cause. *Express Co. v. Nichols,* 3 N. J. L., 439. But numerous courts have stated this principle with substantial uniformity, and we find that it has been applied to facts not unlike those now presented to us, and to the extent of denying the plaintiff's (326) right of recovery. *Canedo v. Street R. R.,* 52 La. Ann., 2149; *Russell v. Street R. R.,* 83 Minn., 304; *Doherty v. Street R. R.,* 118 Mich., 209; *McQuade v. Street R. R.,* 39 N. Y. Supp., 335; *Moser v. Traction Co.,* 205 Pa. St., 481; *McGrath v. Street R. R.,* 66 N. J. L., 312; *Hall v. Street R. R.,* 168 Mass., 461; *Murray v. Transit Co.,* 176 Mo., 183; *Itzkowitz v. R. R.,* 186 Mass., 142; *Dummer v. Electric R. R.,* 108 Wis., 122; *Stowers v. Street R. R.,* 21 Ind. App., 434; *Fritz v. Street R. R.,* 105 Mich., 50. See, also, *Doster v. Street R. R.,* 117 N. C., 651. To use the language of the Court in *R. R. v. Freeman,* 174 U. S., at p. 383: "She was (under the circumstances) bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negli-

gence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." But it appears that the plaintiff was aware of the passing of the car, and if she held her head down as she attempted to cross the track, her inattention to her surroundings and her negligence were the more culpable, there being nothing, as we view the evidence, to prevent her from taking proper care of herself. We do not decide that it is negligence in all cases, as matter of law, not to look and listen when about to cross a street railway track, as that question is not before us, and will depend for its correct (327) solution upon the particular circumstances under review at the time. We hold, though, that upon the undisputed facts of this case, reasonable minds, guided by a sense of fairness, can reach but the one conclusion, which is that the defendant's own negligence was the immediate and proximate and, we think, the only cause of her injury.

As much as we deplore the unfortunate accident which has befallen the plaintiff, we are not permitted to relax those rules of the law which must be applied inflexibly and impartially to all cases coming within the principles they have established. "It is impossible," said a learned and a just judge, "to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and the actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it the basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed, and anarchy result. Hence, every proper consideration requires us to disregard our sympathy and decide the questions of law presented according to the well-settled rules governing them." *Laidlaw v. Sage,* 158 N. Y., at p. 104. The true function of judge and jury could not be better stated.

Street railway companies should be held to a strict accountability for the management of their cars and for the performance of their duty to the public which they serve. The care and vigilance required of them should be proportioned to the increased danger and hazard which the nature of their business creates; but while they are, and properly should be, thus answerable, under the law, for any breach of duty, we should not forget that they are also equally under its protection, and should not be made to pay when nothing is due. (328)

The court erred in refusing to nonsuit the plaintiff. We must therefore reverse its judgment and direct, in accordance with the statute, that the action be dismissed.

Reversed.

*Cited: Boney v. R. R.*, 145 N. C., 252; *Beach v. R. R.*, 148 N. C., 168; *Aderholt v. R. R.*, 152 N. C., 416; *Maguire v. R. R.*, 154 N. C., 386; *Exum v. R. R., ib.*, 441; *Patterson v. Power Co.*, 160 N. C., 580; *Ward v. R. R.*, 167 N. C., 158; *Finch v. Michael, ib.*, 325; *McNeill v. R. R., ib.*, 395; *Ridge v. R. R., ib.*, 517.

F. D. PERRY v. W. PERRY, EXECUTOR.

(Filed 16 April, 1907.)

**Trial Judge—Improper Remarks—Error.**

It is reversible error in the judge below in his charge to the jury to say that the authorities argued by counsel to the jury, under the statute, were directly against his position, and this he knew, or should have known, being an impeachment, though unintentional, of the attorney's character, and tending to weaken, in a measure, the client's cause.

ACTION to recover on a *quantum meruit* for labor performed in helping to make a crop, tried before *Peebles, J.*, at October Term, 1906, of WAKE.

The court submitted these issues:

1. Is the defendant, as executor of S. D. Perry, indebted to the plaintiff? Answer: No.

2. If so, in what sum? Answer: None.

The court dismissed the action, and plaintiff excepted and appealed.

*B. C. Beckwith for plaintiff.*

*Peele & Maynard for defendant.*

(329) PER CURIAM. There are several exceptions set out in the record, but we deem it necessary to notice one only, which is taken to a portion of his Honor's charge. The court told the jury that "the case on trial furnished a clear illustration of the importance of taking the law from the court and not from counsel; that the case cited by counsel for plaintiff and relied upon to establish the position that where a party proved a special contract he could recover what his services were worth, although he failed to show that he performed his part of the contract, or had an excuse for not performing it, was an authority directly against that position. That counsel knew, or ought to have known, that that was so." To the last sentence plaintiff excepted.

We think the exception well taken. We cannot think that the able judge who tried the case intended to reflect upon the professional integrity of counsel for the plaintiff; but, however inadvertently used, the language was well calculated to prejudice the jury against him and thereby tend unmistakably to weaken his client's cause. A lawyer's character and reputation for fairness, candor, and honorable dealing are as much a part of his professional worth as is his reputation for ability and learning. For the court to impeach it before the jury is to weaken in a measure the client's cause. We fully approve of the admonition of the court that the jury must take the law from him, and not from counsel. Nevertheless, under our system of practice, arguments to the jury precede the charge, as well as under our statute attorneys have the right to argue both law and fact to the jury. The attorney cannot tell what his Honor will charge, and therefore he has a right to present his side of the case to the best of his ability according to the lights before him. No honorable attorney will willfully deceive either court or jury, and to charge him with attempting to do so, or with ignorance of what he was discussing, is calculated to prejudice his case unduly. Mr. Thompson, in his work on Trials, sec. 218, says: "Any remarks of the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, (330) will afford ground for a reversal of the judgment."

New trial.

*Cited: Bank v. McArthur,* 168 N. C., 53.

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GAINES LEATHERS v. BLACKWELL DURHAM TOBACCO COMPANY.

(Filed 16 April, 1907.)

**1. Damages—Injury—Children Under Twelve—Statute—Evidence.**

In an action for damages for injury sustained by a boy under 12 years of age while working for defendant manufacturer at a certain machine, evidence is competent tending to show the dangerous character of the machine, under the circumstances, and knowledge on the part of the defendant that persons at or near plaintiff's age had been injured before, and one since the injury complained of, in operating machines of the same kind and pattern and under the same conditions.

**2. Same—Admitted Facts.**

It is unnecessary to submit to the jury an issue in regard to, or offer evidence on, an admitted fact under the pleading, which would have been issuable if denied; when it can be seen from such facts that the plaintiff was under the age of 12 years when injured, it is not error for the trial judge to give instructions to the jury based upon the assumption that they should find the plaintiff was then under such age, leaving the question of age to them under proper instructions.

3. **Negligence—Laws of 1903, Ch. 473—Prohibited Age of Employment.**
Under the Laws of 1903, ch. 473, prohibiting employment of children under 12 years of age in factories or manufacturing establishments, it is negligence *per se* upon the part of the employer violating the statute.

4. **Same—Proximate Cause.**
When the facts are not capable of more than one inference, the question of proximate cause is one of law; therefore, when the injury which was occasioned to a child under 12 years of age, employed in violation of a statute, is negligence *per se* on the part of the defendant, and there is no evidence from which it can be inferred that the child was negligent, the question of proximate cause should not be submitted to the jury.

5. **Same—Safe Appliances—Prudence—Experience.**
It was not error in the trial judge to instruct the jury that it was the duty of the defendant to furnish the plaintiff, a child whose employment was prohibited by statute, with safe machinery and instruct him in its use when dangerous, and that the plaintiff was only required to exercise such care and prudence as one of his years and experience may be expected to possess.

6. **Same—Contributory Negligence—Presumption.**
Under the age prohibited by statute, the presumption is that the child injured while working in a factory or manufacturing establishment is incapable of contributory negligence, subject to be overcome by evidence in rebuttal under proper instructions from the court.

7. **Same—Age—Language of Charge.**
When sustained by the evidence, it is not reversible error in the trial judge to speak of the plaintiff as "a boy only 12 or 13 years of age."

8. **Damages—Statute—Sufficient Evidence.**
It is not necessary for the plaintiff to declare upon the statute prohibiting his employment under a certain age, when he sets out facts which bring his cause of action within its meaning.

(331) ACTION, tried before *Moore, J.*, and a jury, at October Term, 1906, of DURHAM.

This action is prosecuted by plaintiff, appearing by his next friend, for the purpose of recovering damages for injuries sustained while in the employment of defendant. In his complaint he alleges:

1. That the Blackwell Durham Tobacco Company is a corporation duly organized under the laws of New Jersey, but having an office and its factory in the city of Durham.

2. That the plaintiff is a minor, now about the age of 14 years.

3. That some time in the year 1905 plaintiff went to work at defendant's factory, in the city of Durham, as a packer of small
(332) sacks of tobacco in boxes for shipment, a work attendant with no danger. That on or about 1 May, 1905, defendant's overseer directed plaintiff to go to work as a tier of tobacco sacks in the automatic packing room. That there are a number of automatic packing machines

in this room. That these machines are very complicated in their structure. That the machine is a dangerous machine, and if the sack is not tied on the second and removed, the boy's fingers are liable to get caught and crushed. That there are now and have been for the past six or eight years a large number of these automatic packing machines in use at defendant's factory, and also at the Duke factory in the city of Durham. That during this time a number of boys and young men working at said automatic packing machines have been seriously injured and maimed for life. That defendant well knew, or ought to have known, the dangerous character of said automatic packing machine and the danger to which plaintiff was exposed when he was put to work by its overseer at tying tobacco sacks at said machine; but defendant carelessly and negligently allowed, permitted, and required plaintiff to work thereat, thereby exposing him to the danger of being maimed for life, and although defendant knew, or ought to have known, that by reason of his youth and inexperience, and small strength due to his size and age, that plaintiff could not appreciate the danger of said machine and could not properly guard against the same, yet it negligently failed to warn him of said danger and give him the necessary instruction in order to avoid same.

4. That on the fourth day after plaintiff was put to work by defendant's overseer, as aforesaid, as tier at said automatic packing machine, the plaintiff was busily engaged tying at said machine and doing his best to perform his work in a proper manner and to keep pace with said machine, when, without any default or negligence on his part, the plaintiff's middle finger on his right hand was caught be- (333) tween the block and the sides of said machine and his said finger was cut off at the second joint. That plaintiff suffered great pain and mental anguish therefrom, and was kept from his work for several weeks.

Defendant, answering the complaint, admitting its corporate capacity and that "plaintiff is now about the age of 14 years," says: "The defendant admits that the plaintiff worked for defendant in the early part of 1905, and that the first work done by the plaintiff was as a packer of small sacks of tobacco in boxes for shipment, and some time about the last of April or the first of May plaintiff changed his employment and was tying tobacco sacks at an automatic packing machine. It also admits there are several machines in the room where plaintiff worked, and that they are delicate machines and complex, in the sense that they have various parts; but the defendant denies that the description of this machine, as contained in article three, is correct; it also denies that they are dangerous machines. It admits that some boys and young men, working in its factories just as other boys and young men working in

other factories, have been hurt; but it denies that during the past three or four years, or at any other time, any number of boys or young men have been hurt through any negligence on its part, or by reason of the dangerous character of the machine described, or that it knew or ought to have known of any dangers in said machines to those who were properly using them, or any danger to which plaintiff was exposed about which he was not fully aware. It denies that it requested the plaintiff to work at any machine, but, on the other hand, alleges that the plaintiff, desiring to do labor at which he could earn more pay, was changed at his own request, and was working under a competent foreman, (334) who had explained to him (the plaintiff) the character of the machine and the work he was to do, and also cautioned him that he must do his work in a particular way, and not place his hands on any part of the machine where they were liable to be caught. The defendant also denies that the plaintiff, by reason of youth, inexperience, small strength, size, age, or for want of caution, was not aware of or did not fully appreciate the danger incident to his work. The defendant denies that it carelessly and negligently allowed, permitted, or required the plaintiff to work at the machine referred to, and thereby exposed him to the danger of being maimed for life. And it further denies that it negligently failed to warn plaintiff of any danger to which he was subjected or exposed, and to give him the necessary instruction to avoid the same, and, except as herein admitted, the allegations of article three of the complaint are denied.

"The defendant admits that the plaintiff was at work tying sacks on an automatic packing machine at the time he was injured, but denies that plaintiff was doing the work under compulsion or without his own consent, and denies that plaintiff was properly attending to his duties at the time of his injury, and that the injury occurred without any default or negligence on the part of the plaintiff. The defendant admits that part of one of his fingers on the right hand was caught between the block and slides of said machine and was cut off, and that plaintiff suffered some pain and lost two weeks time by reason of said injury. That the said machine was a standard machine in general use, and was in good and safe condition, and was equipped with all safety devices known. That the plaintiff well knew of the dangers attending the work of the machine in question, and he voluntarily assumed the risk of said work, well knowing at the time every element of danger incident to the work; and the plaintiff was not ignorant of the danger of his em- (335) ployment, but on the contrary, not only had had experience in the working of the machine and its operation, but was fully aware of all dangers incident to its use, and alleges these had been thoroughly explained to the plaintiff by the defendant. That the defendant further

avers that the plaintiff by his own negligence and want of care contributed to his injury, in that, contrary to the warning and instruction given him by the defendant, he attempted to tie tobacco sacks after the chain carrying said sack had revolved over the plate, where it was proper for the plaintiff to tie them, and had moved down below the plate, and in that way the injury was caused; that the plaintiff was not attentive to his duties at the time of the injury, and by reason of his lack of attention and care he did not tie the sacks at the proper time, though he had ample opportunity to do so had he given attention to his work."

The following issues were, without objection, submitted to the jury:

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

2. Did the plaintiff voluntarily assume the risk involved in operating the automatic packing machine, as alleged in the answer? Answer: No.

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

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

The plaintiff testified regarding the time, manner, and circumstances of his employment, use of the machine and his injury. No exception is taken to any portion of his testimony, save wherein he says that "the boys were sometimes docked for letting sacks go under there untied." The exception is not noted or pressed in the brief.

Plaintiff introduced his mother, who testified that he was born (336) on 12 May, 1893. That he went home with his hand in a sling; his finger was cut off, etc. That it was the day on which Mr. Washington Duke died. Plaintiff introduced several witnesses who testified that they had worked at the machine at different times; some of them were injured in same way as plaintiff. To the admission of all this testimony defendant excepted.

To the testimony of witness Cothrane defendant excepted for the further reason that his injury occurred after plaintiff was injured.

His Honor instructed the jury: "If you find from the evidence, by the preponderance or greater weight thereof, the burden of proof being upon the plaintiff, that the plaintiff was less than 12 years of age at the time he was injured; if you find that he was injured, and believe the evidence relating to the employment of the plaintiff by defendant, the work which he was required to do, the character of the machine at which he was required to work, and the injury which the plaintiff alleges that he sustained; and further find from the evidence that the plaintiff was injured by the machine while engaged in the work which he was employed to do, you should answer the first issue 'Yes.'" Defendant excepted. His Honor instructed the jury respecting the defendant's lia-

bility, if they found plaintiff to be over 12 years of age, to which no exception was taken. At the request of defendant the jury was instructed:

"The plaintiff cannot recover in this action unless there was negligence on the part of the defendant.

"If you believe the evidence of the plaintiff, he knew the danger of getting his finger cut or injured by the machinery below the iron table or plate.

"The law does not make the employer guarantee the absolute safety of the employee, nor is the employer required to furnish the newest, safest, and best machine for the employee's use; but is only re-
(337) quired to furnish such a machine as is reasonably fit and safe, and such as is in general use."

Defendant requested his Honor to instruct the jury:

"If the jury believe the evidence in this case, there was a safe way for plaintiff to do the work in which he was engaged, and the plaintiff knew this, and if you find the plaintiff undertook to do the work in some other way than the usual way, and this was the cause of the injury, you will answer the first issue 'No.'"

To the refusal to so instruct the jury, defendant excepted.

His Honor instructed the jury:

"It was the duty of the defendant company to provide a reasonably safe place for plaintiff to work and to supply appliances and machinery reasonably safe and suitable for the work in which he was engaged, and such as are approved and in general use in plants of like kind. An employee will not be deemed to have assumed a risk from the fact that he works on in the presence of a known danger, unless the danger be obvious and so imminent that no man of ordinary prudence and acting with such prudence would incur the risk which the condition discloses. Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age in similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed."

To each of said instructions defendant duly excepted.

Upon the third issue his Honor charged the jury that "it was their duty to take into consideration the age, intelligence, and knowledge of the plaintiff in regard to the machine and his capacity to know
(338) and appreciate the danger. That the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributing fault is the measure of his responsibility. If he has not the ability to foresee and avoid the

danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to danger. For the exercise of such measure of capacity and discretion as he possesses he is responsible, and that contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. Defendant excepted.

At the request of the plaintiff, his Honor charged the jury as follows: "If the jury shall find from the evidence that the immaturity and inexperience of plaintiff, a boy only 12 or 13 years of age, was the cause of his exposing himself to danger, then the plaintiff would not be guilty of contributory negligence." His Honor, at the request of the defendant, gave other instructions in regard to contributory negligence, which are not necessary to set out.

Judgment was rendered upon the verdict for the plaintiff. The defendant appealed, assigning as errors the several rulings of his Honor hereinbefore set forth.

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

CONNOR, J., after stating the case: The defendant's exceptions, numbered 2 to 7, inclusive, are directed to the admission of evidence tending to show that boys, other than and near the age of the plaintiff, were injured while working at the same machines, it appearing that there were quite a number of exactly the same construction operated in (339) the same room. The purpose of this evidence was not to show any defect in the machine. The basis of plaintiff's action is that, being a child under 12 years of age, the defendant put him to work at a machine the operation of which was dangerous, and that this was known, or ought to have been known, to defendant. For the purpose of showing the dangerous character of the machine and tending to show knowledge thereof on the part of the defendant, the testimony was competent. The machines were all made by the same pattern and operated in the same way and in the same manner. The defendant denies that the operation of the machine was dangerous. What better way to ascertain the truth than by showing that persons at or near plaintiff's age were injured in operating them; that is, machines of the same kind and pattern, under same conditions? If the jury found, as alleged, that they were dangerous, then a higher degree of care was imposed upon the defendant in selecting boys to work at them to give them explicit instructions in regard to the manner of using and operating them. The ruling of his Honor is sustained by *Dorsett v. Manufacturing Co.*, 131 N. C.,

263, and is correct upon principle. The fact that Cothrane worked at the same machine, under exactly similar conditions, *after plaintiff was injured,* does not affect the admissibility of his testimony.

Defendant insists that his Honor was in error in giving an instruction based upon the assumption that the jury should find that plaintiff was under 12 years of age, for that there was no evidence to sustain such finding. The complaint alleges that the plaintiff was at the time the complaint was filed "about the age of 14 years." The complaint was filed at January Term, 1906. "That on or about 1 May, 1905,
(340) the defendant's overseer directed the plaintiff to go to work as a tier of tobacco sacks in the automatic packing-room." The defendant, answering, says: "The defendant admits that the plaintiff worked for the defendant in the early part of 1905, . . . and some time about the last of April or the first of May the plaintiff changed his employment, and was tying tobacco sacks at an automatic packing machine." Here is a clear averment in respect to the time at which the plaintiff began the work in which he was injured, 1 May, 1905, with an equally clear admission that the plaintiff began work "about the last of April or the first of May, 1905." It is true that for the purpose of availing himself of admissions not responsible to nor called for by the specific allegations in the former pleadings, but made by way of recital, the party relying upon them must put them in evidence, the reason given in *Smith v. Nimock,* 94 N. C., 243, and cases in which it is cited, being that it is but fair to give the party making such admissions an opportunity to explain them. See Munroe's citations. When, however, the plaintiff, in making a "plain and concise statement of facts constituting a cause of action," sets out a date or other material fact, and the defendant, being thus fully informed of the allegation by the plaintiff, expressly admits such material fact so alleged, we can see no good reason why the Court may not take such admission as settling such fact for all purposes connected with the trial. It must be conceded that the decisions heretofore made in respect to admissions which come within the rule announced in *Smith v. Nimock* do not so clearly mark the line of distinction as might be desired. The difficulty experienced in doing so is manifest, but we think it safe to say that when a material fact is alleged in the complaint and admitted in the answer—a fact the denial of which would have presented an issuable controversy in the cause—it
(341) may for the purpose of the trial be taken as true. *Cui bono* submit to the jury an issue or offer proof of something solemnly admitted to be true? Certainly the reason upon which the rule requiring the introduction of the pleadings is based—that the admission may have inadvertently been made—does not obtain in this case. The complaint

puts the defendant upon notice that the time of the injury was material, and the age of the plaintiff would constitute a material factor in the litigation. The fact must have been known to the defendant's superintendent by his pay-rolls. To send this case to another jury to ascertain a fact so clearly admitted in the pleadings would be extremely technical. We concur with the learned counsel that there is no evidence in the record showing the day of the injury. The authorities cited and the reason of the thing sustain his contention that where it is incumbent upon a party to show that an event occurred on a particular day of the month, it is not sufficient for him to show that it occurred during the month, the presumption being, as against him, that it occurred on the last day of the month.

Being of the opinion that the answer admits that the plaintiff went to work at the machine "about the last of April or first of May," the jury might have properly inferred that it was prior to 12 May. The testimony shows that the plaintiff was injured on the fourth day of his employment, and that he was born on 12 May, 1893. From these facts, in respect to which there is no controversy, the court below properly left the question to the jury to say whether the plaintiff was, at the time of the injury, under 12 years of age. Counsel call attention to the affidavit, made by the plaintiff's father, for the purpose of obtaining permission to sue as his next friend, that the plaintiff is "a boy 13 years old." This affidavit was made 12 January, 1906. He was on that day, according to the evidence, 12 years and 8 months old. As- (342) suming, for the purpose of the defendant's argument, that the affidavit was, as a part of the record, before the jury, and that it was competent as a declaration against the plaintiff, we do not perceive any conflict with the plaintiff's contention. To say on 12 January, 1906, that a boy is 13 years of age does not necessarily contradict the mother's statement that he was born 12 May, 1893. The nearest birthday is usually designated as fixing the age of a person, in common parlance. It was entirely immaterial, for the purpose of the affidavit, to fix the age more definitely.

The defendant earnestly contends that, passing the criticism of his Honor's charge in this respect, he committed error in saying to the jury that if they believed the evidence relative to the employment of the plaintiff by the defendant, the work which he was required to do, the character of the machine at which he was required to work, and the injury which he received, and that he was injured by the machine while at work, they should answer the first issue "Yes." The issue involved the proposition that the plaintiff was injured by the defendant's negligence as alleged. This involved a breach of duty which the defendant

owed to the plaintiff, and which was the proximate cause of the injury. The correctness, therefore, of his Honor's instruction depends upon whether there was evidence which, if true, established as a legal conclusion breach of duty, injury, and proximate cause. There was unquestionably evidence tending to show that the plaintiff was employed to work in the defendant's factory at a machine the use or operation of which by him was dangerous; that he was at the time under 12 years of age, and that four days after being put to work he was injured by
(343) the machine while employed in operating it, or tying the sacks—that being the thing which he was employed to do.

Assuming these facts to be found by the jury, do they constitute a cause of action, as a matter of law? They undoubtedly would not if the plaintiff were over 12 years of age. At the time of the employment and of the injury, the statute laws, 1903, ch. 473, declared: "That no child under 12 years of age shall be employed or work in any factory or manufacturing establishment within this State." It is not denied that the plaintiff was injured in a "factory or manufacturing establishment" within the meaning of the statute. We thus have presented for decision the question whether the employment of a child in a factory within the prohibited age is negligence *per se,* entitling it to recover for an injury sustained—such employment being the proximate cause thereof—or whether such employment is only evidence of negligence to be submitted to the jury.

His Honor evidently construed the language used by us in *Rolin v. Tobacco Co.,* 141 N. C., 300, as answering the first branch of the question affirmatively. In that case, being the first which came to this Court after the passage of the statute, the court below *nonsuited* the plaintiff, and we held that in any aspect of the testimony the case should have gone to the jury.

The question which gave us more difficulty in the case was whether, upon the plaintiff's testimony, he was engaged in performing the work for which he was employed, and, therefore, whether there was any evidence that such employment was, in any aspect of the testimony, the proximate cause of his injury. This Court has held in a series of cases, affirming the instructions given by the Superior Court judges, that a failure to obey town ordinances regulating the rate of speed was at least evidence of negligence. *Edwards v. R. R.,* 129 N. C., 78.
(344) The language of *Justice Douglas* indicates that in some cases such violation of a town ordinance would be negligence *per se.* The judge in *Edwards' case* instructed the jury that if the injury to the plaintiff's intestate was caused by the violation of the ordinance, they should give to the first issue an affirmative answer. This the Court said

was correct. In other cases we have approved the instruction that violation of speed ordinances was evidence of negligence. In *Rolin's case, supra,* we followed this rule, saying that the employment of a child within the prohibited age was strong evidence of negligence. In neither of those cases was it necessary to decide the question presented by his Honor's instruction. The defendant insists that the instruction, by treating this employment, assuming the plaintiff to be under 12 years of age, as negligence *per se,* does violence to the decision in *Rolin's case.*

We have given to the question most careful consideration, and reëxamined both the basis of the rule and the authorities in which it is discussed. Mr. Bishop says: "Whenever the common law, a statute or municipal by-law, or any other law imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom." . . . "The civil action is maintainable when, and only when, the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court." Noncontract Law, secs. 132-141. *Lord Holt* ruled that "When a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted to his advantage, or for the recompense of a wrong done to him contrary to the said law." Mod. Cases, 26-27. Judge (345) Thompson, 1 Negligence, sec. 10, says: "When the Legislature of a State or the council of a municipal corporation, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, otherwise called negligence *per se;* and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill. So that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages."

The author expresses regret that "two or three authoritative courts" have held that the violation of a statute is only "evidence of negligence." He proceeds to criticise the doctrine in vigorous terms, sec. 11: "If a specific duty is imposed upon any person by law or by a legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty." Shearman and Red. Neg., 54. The authors say that the action is in tort for negligence. "The

violation of an imposed statutory duty is a sort of negligence *per se.* Thus, where a railroad operates its trains at a higher rate of speed than the law allows, the question whether it is guilty of negligence is not debatable. This preliminary matter the law conclusively determines against the company, and the sole question to be settled in cases of this kind is whether that delinquency can be considered a proximate cause of the damage of which complaint is made." 1 Street Founda-
(346) tion Legal Liability, 172. A number of illustrative cases are cited. The several views are stated in 21 A. & E. Enc., 478, and the cases illustrating them cited. We have carefully examined a number of cases, and find that a large number of the courts have adopted the opinion of the text-writers. It is so held in *Perry v. Tozer,* 20 Minn., 431; *Car Co. v. Armentrual,* 214 Ill., 509; *Billings v. Breinig,* 45 Mich., 65. In *R. R. v. Stebbing,* 62 Md., 505, *Alvey, C. J.,* speaking of a speed ordinance, says: "This ordinance is general, and is for the protection of the public generally; but the neglect or disregard of the general duty imposed for the protection of every one can never become the foundation of a mere personal right of action until the individual complaining is shown to have been placed in position that gave him particular occasion and right to insist upon the performance of the duty to him personally. The duty being due to the public, composed of individual persons, each person specially injured by the breach of duty thus imposed becomes entitled to compensation for such injury." In *R. R. v. Voelker,* 129 Ill., 540, it is said (p. 555): "A statute commanding an act to be done creates an absolute duty to perform such act, and the duty of performance does not depend upon and is not controlled by surrounding circumstances. Nonperformance of such statutory duty, resulting in injury to another, may therefore be pronounced to be negligence as a conclusion of law." *R. R. v. Horton,* 132 Ind., 189; *R. R. v. Carr,* 73 Ga., 557; *R. R. v. Young,* 81 Ga., 397; *Messenger v. Pate,* 42 Iowa, 443; *Muller v. Street R. R.,* 86 Wis., 340; *Hayes v. R. R.,* 70 Tex., 602; *Tucker v. R. R.,* 42 La. Ann., 114; *Queen v. Coal Co.,* 95 Tenn., 459; 49 Am. St., 935. In *Salisbury v. Horchenroder,* 161 Mass.,
458, the evidence showed that defendant hung a sign over the
(347) sidewalk in front of his store, in violation of an ordinance of the town. It was blown down by a gale of wind, injuring plaintiff's property. *Chapman, C. J.,* said: "If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind, etc. . . . But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. He placed

and kept it there illegally, and this illegal act of his has contributed to the plaintiff's injury." The defendant was held liable because in placing the sign over the sidewalk he violated the city ordinance, and this illegal act was held to be the proximate cause of the injury to plaintiff. In *Toby v. R. R.*, 33 L. R. A., 496 (94 Iowa, 256), it is said: "It is a general rule that the doing of a prohibited act, or the failure to perform a duty enjoined by statute or ordinance, constitutes negligence for which the party guilty of such act or omission is liable, unless excused by the contributory negligence of the one to whose person or property it is done," citing many authorities. To the same effect is 2 Labatt Master and Servant, 2177. He says: "By many courts it is held that a violation of such a statute constitutes negligence *per se.*" After stating the other theories, he says: "That the former of these theories is the correct one can scarcely be doubted. A doctrine, the essential effect of which is that the quality of an act which the Legislature has prescribed or forbidden becomes an open question upon which juries are entitled to express an opinion, would seem to be highly anomalous. The command or prohibition of a permanent body, which represents an entire community, ought, in any reasonable view, to be regarded (348) as a final judgment upon the subject-matter, which renders it both unnecessary and improper that this question should be submitted to a jury." The latest expression of judicial thought in England corresponds with the authorities cited. In *Groves v. Wimborne,* 2 L. R., 1898, Q. B. Div., 402, *Rigby, L. J.,* at p. 412, says: "When an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for the breach of that duty, to show negligence. Whether there be negligence or not, he is responsible *quacunque via* for the nonperformance of the duty." In New York the Court held in the *Marino case,* 173 N. Y., 530, upon an appeal from a judgment of nonsuit, in an action by a child employed within the prohibited age for an injury sustained, that the violation of the statute was at least evidence of negligence. In *Lee v. Manufacturing Co.,* 93 N. Y. Supp., 560, *Gaynor, J.,* in a very strong and satisfactory opinion, held that in such an action the employment in violation of the statute was negligence *per se.* He reviews the *Marino case* and shows that to say that such violation is "some evidence" is illogical. This case was appealed to the General Term, and reversed upon the authority of the *Marino case.* 101 N. Y. Supp., 78. While it may not be strictly accurate to speak of the breach of duty arising out of a violation of a statutory duty as negligence, as we have seen, it is so generally treated, as entitling the injured person to an action on the case for negligence. For practical purposes, it is a convenient mode of administering the right, because it involves the question of proximate cause and contributory negligence.

Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted, and sustained by the best considered decided cases. The defendant insists that
(349) if this be true his Honor committed error when he withdrew from the jury the question of proximate cause. While it is true that if there be any dispute regarding the manner in which the injury was sustained, or if, upon the conceded facts, more than one inference may be fairly drawn, the question should be left to the jury, yet it is equally well settled that when there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as matter of law, whether the injury was the proximate cause of the negligence of the defendant.

In this case the plaintiff is the only witness as to the manner in which he was injured. After describing the construction of the machine and the method of operating it, he says: "I worked four days as a tier; had to tie 25 or 30 sacks a minute on the fast machine. As the blocks move, the tags are on the left-hand side of the blocks. You cross your hand and catch the double string on the sack and draw it up and tie it in a bowknot. You sit on the stool. . . . As I went to tie the sack, the string got around my finger and, as the blocks moved, it pulled my finger into the blocks. There is a little slide by these blocks, and the string pulled my finger under the blocks, and it was caught between slide and block." His finger was cut off. From this testimony we do not perceive how any question can arise in regard to the proximate cause. The illegal act of the defendant placed the plaintiff at the machine. While operating the machine as he was employed to do, he was injured in the manner described by him. What other inference or conclusion can be drawn than that the employment, in violation of the statute, was the proximate cause of the injury? There is no suggestion of any intervening cause, as in *Rolin's case*. We are not, in this aspect of the case, considering the dangerous character of the machine or
(350) the duty to warn and instruct plaintiff. These matters would be pertinent if plaintiff was over the prohibited age. These duties are imposed by the common law, independent of any statute. This is elementary and illustrated in many cases. The statute is made, in pursuance of a wise, humane public policy, to prohibit the parents of children under 12 years of age from hiring them out, or owners of factories from employing them to work in the places named, the Legislature taking notice of the character of work, etc.

In the exercise of her power and in the discharge of her duty to protect her young children from being crippled, maimed, and growing up in ignorance, rendering them unfit to discharge the duties of citizenship, the State positively, and without regard to the character of the machine

used, prohibits children under 12 years of age from being employed or worked in "factories or manufacturing establishments." The law is made for their protection, and where, by its violation, one of them suffers an injury, a right of action accrues to him for damages. In the language of *Judge Gaynor, supra:* "This is a statute which marks an epoch in the progress of humanity, and the courts should not get in its way or whittle it down." This Court has, in no uncertain way, discharged its duty to so construe the statute as to advance the remedy and suppress the evil. *Fitzgerald v. Furniture Co.,* 131 N. C., 636.

For the first time we have before us the question presented by his Honor's instruction. We are of the opinion that, although possibly somewhat in advance of what was said in *Rolin's case,* he correctly interpreted the law, and we sustain his ruling. From the viewpoint that the plaintiff was not under 12 years of age, his Honor correctly instructed the jury regarding the defendant's duty to furnish safe machinery and instruct the plaintiff in its use. There can be no just criticism in this respect. It is uniformly held that a child within (351) the prohibited age does not assume any risk of the employment to which he is put. Some of the courts deny that a recovery for injuries can be prevented by contributory negligence. We had occasion to examine this question in *Rolin's case,* and upon a reëxamination of it find no reason to change our opinion as therein expressed. The presumption is that a child under 12 years of age is incapable of contributory negligence, but this presumption may be overcome, and, if there be evidence tending to do so, it should be submitted to the jury with proper instructions. This his Honor did, and we find no error of which defendant can complain in this respect. The only other exception urged in the brief is that in speaking of the age of the plaintiff's alleged contributory negligence he used the expression, "a boy only 12 or 13 years of age," etc. The instruction was free from error, and we do not think the words criticised are open to the exception.

We have examined with care the entire charge, and think that the case, in all of its phases, was fairly submitted to the jury. The defendant argues that because plaintiff did not declare upon the statute, or make any reference to it, he cannot avail himself of its provisions. While it is true that where one sues for a penalty it is usual and proper to refer to the statute, it is not necessary if he set out facts bringing his case within the statute. Plaintiff sues for a breach of duty, and may rely on the statute to maintain his action. We note that the General Assembly, at its late session, restored the statute as enacted in 1903 and changed in the Revisal, with some further protective features requiring certificate as to age and school attendance. It is the settled policy of the State of North Carolina that her children, under the age

(352) of 12, at least, shall be in her public schools, and not in her factories and manufacturing establishments. In giving the construction which we have to the statute we but advance this wise, humane, and settled policy of the State.

The judgment must be

Affirmed.

*Cited: S. v. R. R.*, 145 N. C., 546; *McGhee v. R. R.*, 147 N. C., 155; *McCaskill v. Walker, ib.*, 200; *Starnes v. Manufacturing Co., ib.*, 558, 561; *Smith v. Alpin*, 150 N. C., 427; *Rich v. Electric Co.*, 152 N. C., 693, 695; *Pettit v. R. R.*, 156 N. C., 127; *Robinson v. Mfg. Co.*, 165 N. C., 498; *Holton v. Moore, ib.*, 552; *Ensley v. Lumber Co., ib.*, 692; *Ledbetter v. English*, 166 N. C., 128; *McGowan v. Mfg. Co.*, 167 N. C., 194; *Deligny v. Furniture Co.*, 170 N. C., 204.

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BLACKWELL'S DURHAM TOBACCO COMPANY v. THE AMERICAN TOBACCO COMPANY.

(Filed 16 April, 1907.)

1. **Removal of Cause—Foreign Defendant—Diversity of Citizenship—Officers—Tort—Resident Defendants—Single Action.**

While upon a petition to remove a cause to the Federal court on the ground of diversity of citizenship, by virtue of the statute resident officers and directors of a foreign corporation, as such, may not be made codefendants for the purpose of preventing the operation of the statute; yet when the complaint alleges that they are joint *tort feasors*, and the plaintiff therein elects to unite them in a single action, the controversy is not separable at the election of the defendants; when a cause of action sounding in tort is alleged against the corporation, with the further allegation that the resident defendants "are actively engaged and personally aiding, assisting, and coöperating with their codefendant in carrying on the business in violation of the plaintiff's right," a cause of action is alleged against the resident defendants, and the prayer of the petition for removal should not be granted.

2. **Same—Matters of Record at Time—Allegations of Petition.**

When a cause is sought to be removed to the Federal court by reason of diversity of citizenship under the statute, an allegation of the petition that defendants believe the joinder of resident defendants was for the purpose of defeating Federal jurisdiction, and not in good faith, will not, in the absence of any finding of the fact, be considered.

PETITION AND MOTION of the defendants, The American Tobacco Company and Blackwell's Durham Tobacco Company, for the removal of this cause to the Circuit Court of the United States for the Eastern District of North Carolina, heard before *Moore, J.*, at August Term, (353) 1906, of DURHAM.

Plaintiff, Blackwell's Durham Tobacco Company, a domestic corporation, sues the defendants, the American Tobacco Company (of New Jersey), the Blackwell's Durham Tobacco Company (of New Jersey), both foreign corporations, and G. W. Watts, a resident and citizen of Durham, N. C. (one of the directors of the American Tobacco Company, and a stockholder therein), C. W. Toms, W. W. Flowers, and D. W. Andrews; residents and citizens of Durham, N. C., local managers, managing agents, and business supervisors of said corporations. The complaint sets forth:

1. That the plaintiff, Blackwell's Durham Tobacco Company, is a corporation, duly created, organized, and existing under and by virtue of the laws of the State of North Carolina, with its principal office at Durham, in the county of Durham, State of North Carolina, and was so chartered and organized for the purpose of buying, manufacturing, and selling tobacco in its various forms, including smoking tobacco, at Durham, within the county of Durham, in said State of North Carolina.

2. That the defendant the American Tobacco Company is a corporation, created, organized, and existing under and by virtue of the laws of the State of New Jersey, and is engaged in the business of buying, manufacturing, and selling tobacco in various forms, including smoking tobacco and cigarettes, at Durham, in the county of Durham, in said State of North Carolina.

3. That the defendant Blackwell's Durham Tobacco Company (of New Jersey) is a corporation, created, organized, and existing under and by virtue of the laws of the State of New Jersey, as the plaintiff is informed and believes, and the plaintiff alleges that the said Blackwell's Durham Tobacco Company (of New Jersey) is engaged in the manufacture of smoking tobacco, under said alleged corporate (354) name, at Durham, in the county of Durham, in the State of North Carolina, and in the sale thereof in the manufactured condition under the aforesaid alleged corporate name of Blackwell's Durham Tobacco Company.

4. That the defendant Blackwell's Durham Tobacco Company (of New Jersey) is not a copartnership and is not a corporation of the State of North Carolina, and there is no other existing corporation of this State, except the plaintiff, which has the corporate name of Blackwell's Durham Tobacco Company; and if said defendant is a legal corporation at all, created and organized under any other State or government, the plaintiff is informed, and is advised by counsel learned in the law, and believes and so alleges, that the defendant Blackwell's Durham Tobacco Company (of New Jersey) has never complied with the corporation laws of the State of North Carolina in that behalf made and pro-

vided, nor become domesticated as a North Carolina corporation, and it is not, therefore, authorized, but is expressly forbidden by the laws of the State of North Carolina, to do the business aforesaid, or any other business at Durham, in the county of Durham, or elsewhere in the State of North Carolina, under the aforesaid corporate name of Blackwell's Durham Tobacco Company; and the said defendant Blackwell's Durham Tobacco Company (of New Jersey) has been and is now unlawfully doing the aforesaid business of manufacturing and selling smoking tobacco at Durham, in the county of Durham, in said State of North Carolina, under the identical name of the plaintiff, in violation of the laws of this State, and in violation of the plaintiff's corporate rights in the premises, to the plaintiff's irreparable injury and damage.

5. That, as plaintiff is informed and believes, and so alleges, the defendant the American Tobacco Company, under and pursuant to
(355) some business arrangement, contractual agreement, combination of business interests, or trust understanding, between it and its codefendant, said Blackwell's Durham Tobacco Company (of New Jersey), the terms of which said business arrangement, contractual agreement, combination of business interests, or trust understanding are unknown to the plaintiff, has been, and still is, aiding and assisting and coöperating with the defendant Blackwell's Durham Tobacco Company (of New Jersey) in the aforesaid unlawful and unauthorized business of manufacturing and selling smoking tobacco at Durham, in the county of Durham, and in the said State of North Carolina, in violation of the laws of this State and in violation of the plaintiff's corporate rights in the premises, and to plaintiff's irreparable injury and damage.

6. That the defendant George W. Watts, for a long time prior to the commencement of this action, was, and still is, one of the directors of the defendant the American Tobacco Company, and also a stockholder therein, and was, before and at the commencement of this action, and still is, a citizen and resident of Durham, in the State of North Carolina, and is, as such director and stockholder, directly connected with and interested in the aforesaid business and business connections between the defendant, Blackwell's Durham Tobacco Company (of New Jersey) and the American Tobacco Company, and directly connected with, actively and personally aiding, assisting, and coöperating in the tortious acts of his codefendants hereinbefore set forth.

7. That the defendants C. W. Toms, W. W. Flowers, and D. W. Andrews are natural persons, who, before and at the commencement of this action, were, and still are, citizens and residents of Durham, in the county of Durham, in said State of North Carolina, and were, before and at the commencement of this action, and still are, the local
(356) managers, managing agents and business supervisors, by what-

ever name and title they may be respectively called, and are parties directly interested in carrying on the aforesaid unlawful business, and are actively and personally aiding and assisting and cöoperating with their codefendants in carryi-g on the aforesaid unlawful business of manufacturing and selling tobacco as aforesaid, at Durham, in said State of North Carolina, under the name of Blackwell's Durham Tobacco Company, in violation of the corporation laws of the State of North Carolina, and in violation of the plaintiff's aforesaid chartered corporate rights under plaintiff's aforesaid corporate name of Blackwell's Durham Tobacco Company.

8. That the defendant C. W. Toms is the agent who has been designated by both of the defendants, Blackwell's Durham Tobacco Company (of New Jersey) and the American Tobacco Company, respectively, upon whom legal process may be served, and said C. W. Toms is the general business manager and superintendent of both of said defendant corporations in the carrying on of their joint and several businesses aforesaid at and in Durham, in the county of Durham, in the State of North Carolina.

The plaintiff prayed that defendants and each of them be enjoined from using plaintiff's corporate name, etc., and for general relief.

Before the time for filing the answer expired, defendants, the American Tobacco Company and the Blackwell's Durham Tobacco Company, filed their petition, accompanied with the bond as required by the statute, for the removal of the cause into the Circuit Court of the United States for the Eastern District of North Carolina, setting out their residence, and further: "That the so-called defendants in this suit other than your petitioner, Blackwell's Durham Tobacco Company, including your petitioner, the American Tobacco Company itself, are merely nominal defendants; that the said C. W. Toms, W. W. (357) Flowers, and D. W. Andrews sustain only the relation of employees to your petitioner, Blackwell's Durham Tobacco Company; they are not, as alleged in the complaint, directly interested in the business of said Blackwell's Durham Tobacco Company, your petitioner, conducted in Durham, N. C., or elsewhere; they are neither officers, directors, nor stockholders in said company, and have no voice in the conduct of its affairs, but are its mere servants, employed by it to render service under the control and immediate direction of its officers and board of directors; that their only interest in or conduct of any business conducted in Durham, N. C., or elsewhere, under the name of Blackwell's Durham Tobacco Company, is as such employees of your petitioner, Blackwell's Durham Tobacco Company, under the control, management, and direction of its board of directors and officers. That this suit is to try the title as between the plaintiff corporation and your petitioner,

Blackwell's Durham Tobacco Company, to the trade name, 'Blackwell's Durham Tobacco Company,' as shown and set forth in the complaint, and that the whole controversy is between the said plaintiff corporation, on the one hand, and your petitioner, Blackwell's Durham Tobacco Company, on the other; that petitioners are advised and verily believe that the action of the plaintiff in making nominal parties defendant the said three natural persons, employees of petitioner, Blackwell's Durham Tobacco Company, and citizens of North Carolina, and the said George W. Watts, would not operate to prevent this removal, even if such action had been taken in good faith; but, as petitioner further believes, such joinder of said four natural persons was not in good faith, but was for the express and fraudulent purpose of defeating the jurisdiction (358) of the said Circuit Court of the United States. Defendant George W. Watts is not a necessary or proper party to this controversy, and does not bear nor has he ever borne any relation whatsoever to the said Blackwell's Durham Tobacco Company, whether as director, officer, employee, agent, or stockholder, and has not in any way been directly or indirectly connected with or interested in the business carried on by the said Blackwell's Durham Tobacco Company, your petitioner, or in aiding, assisting, or coöperating therein. That your petitioner, the American Tobacco Company, bears no relation to your petitioner, Blackwell's Durham Tobacco Company, contractual or otherwise, except that it is a stockholder in said Blackwell's Durham Tobacco Company; and the said George W. Watts bears no relation to your petitioner, the American Tobacco Company, except that he is a director and stockholder therein."

His Honor, *Judge Moore,* upon hearing the petition, refused to order the removal of the cause. Defendants, the American Tobacco Company and Blackwell's Durham Tobacco Company, excepted and appealed.

*Guthrie & Guthrie for plaintiff.*
*Fuller & Fuller and Junius Parker for defendants.*

CONNOR, J., after stating the case: It appeared in the record that, upon the original complaint, a petition for removal was filed, and in some way, without any order to that effect, a transcript of the record was docketed in the Circuit Court. Thereafter an order was made by his Honor, *Judge Pritchard,* remanding the record because of the irregular manner in which it was docketed. Thereafter, the plaintiff made defendant Watts a party defendant and filed an amended complaint. The present petition for removal was thereupon filed, and it is conceded by all parties that it is upon the amended complaint and (359) petition the motion for removal is to be disposed of, without

regard to the former orders, etc. It is further conceded that upon the record before us we are not permitted to consider the question whether if upon demurrer to the complaint any cause of action is set forth. The nonresident corporation defendants insist that, conceding for the purpose of this motion for removal a cause of action against them is stated entitling plaintiff to the relief demanded, the other defendants are neither necessary nor proper parties. They contend that any judgment in the nature of an injunction which might be rendered against them would bind the other defendants, who have no other relation to the parties or the cause of action than agents, officers, or employees, and that, as such, they would be bound to the same extent and in the same manner as if named in the summons, complaint, and judgment. From this proposition they conclude and insist that we should conclude that the resident defendants are not only not necessary but not proper parties; that, for the purpose of disposing of this appeal, they should be treated as nominal or formal parties, against whom no relief may be demanded. That, upon the allegations of the complaint, taken to be true, the resident defendants are doing nothing affecting the plaintiff which does not pertain to their relation to the corporation defendants as their officers, servants, or employees. The question is not free from difficulty, and the labors of learned and industrious counsel do not direct to our attention any case directly in point.

Defendants insist that because the resident defendants are not necessary parties, they are entitled to remove the cause; that to show that they are proper parties is not sufficient to defeat such right. If in no aspect of the complaint could any judgment be rendered against the resident defendants, it would seem clear that they are neither (360) necessary nor proper parties, and their presence cannot affect the right of the nonresident defendants to a removal. Such was the conclusion reached in *Wecker v. E. and S. Co.*, 204 U. S., 176, relied upon by defendants.

In that case an employee of the corporation was joined as defendant. The cause was removed, and upon a motion to remand, made in the Circuit Court, it was found, as a fact, that he could not in any aspect of the case be held liable as a joint *tort feasor* with his codefendant. The learned justice who wrote for the Court cited *R. R. v. Thompson,* 200 U. S., 206, written by himself, and distinguished it from the case then before the Court. The defendants insist that the decision in *Wecker's case* is controlling in the one before us. While it bears upon the question, we think that the same distinction is found between the two, as pointed out by *Mr. Justice Day.* If counsel are correct in their contention, that unless the resident defendants are necessary parties the order of removal must be made, it is useless to further consider the case, be-

cause we do not think that they are such; that is to say, that no final judgment can be rendered without their presence, or that their presence is "necessary to a complete determination or settlement of the questions involved." Revisal, sec. 410. It is true that expressions are to be found in opinions of the Supreme Court of the United States sustaining the defendants' contention in this respect. *Barney v. Latham,* 103 U. S., 205. It is equally true that in a large number of cases that Court has held that where two or more persons, either natural or corporate, are charged with a joint tort, they may be joined in one action, and that when so joined the nonresident defendant is not entitled to remove the cause into the Federal court. The causes of action are not sepa-
(361) rable, although the defendants may interpose separate defenses, and the plaintiff may not upon the trial recover against the resident defendant.

This principle has been frequently applied to cases wherein the resident defendant is an agent, servant, or employee of the nonresident corporation. In the latest case to which our attention is called, *R. R. v. Thompson, supra, Mr. Justice Day* reviews the decisions and quotes with approval the following language, used in *Powell v. R. R.,* 169 U. S., 92: "It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them and that their own controversy with the plaintiff is a separate one; for, as this Court has often said, a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in its pleadings." The learned justice proceeds to hold, upon the authority of many decided cases, that "the question of removability depends upon the state of the pleadings and the record at the time of the application for removal," saying that "It has been too frequently decided to be now questioned" that the plaintiff may elect his own mode of attack, and the case which he makes in his
(362) complaint determines the separable character of the controversy for the purpose of deciding the right of removal.

In concluding the discussion, the question is put: Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to

prosecute the defendants jointly? We think, in the light of the adjudication above cited from this Court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the State court will hold it not to be so. It may be, which we are not called upon to decide now, that this Court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. See, also, *R. R. v. Bohon, ib.*, 221. It may be, and probably is, true that expressions may be found in opinions filed by Circuit Court judges, which either do or appear to conflict with the language used by the Court. Moon on Removal, sec. 132. Assuming, for the purpose of this discussion, that plaintiff has set out in his complaint a remediable tort committed by defendant corporations, the question is presented whether it has also set out a cause of action on account of the same tort against the other defendants. Plaintiff says that it has, by virtue of its charter, the right to its corporate name, with all of the advantages incident thereto. That defendant Blackwell's Durham Tobacco Company, a foreign corporation, having the same name, by virtue of some contract or trust agreement entered into with the defendant the American Tobacco Company, is conducting the same business which plaintiff by its charter is entitled to conduct and prosecute, and that, by adopting its (363) corporate name and conducting the business as set forth, said defendants are acting in violation of its corporate rights. This is its cause of action. We do not attach any importance to the allegation that the defendant the Blackwell's Durham Tobacco Company has not complied with the statutes of the State in regard to filing its charter, etc., in the office of the Secretary of State. Revisal, sec. 1194. For a failure to comply with the statute a penalty is given the State. No cause of action accrues to the plaintiff.

Assuming that the act set out in the complaint constitutes an actionable tort against the defendants, the question arises, What are the rights of plaintiff against the resident defendants who "are actively and personally aiding and assisting and coöperating with their codefendants in carrying on the aforesaid business, etc., in violation of plaintiff's aforesaid charter rights," etc? We are not expressing any opinion respecting the legal liability of either of defendants to plaintiff. It would seem, if the defendant corporations are liable to an action, that the other defendants could claim no immunity for their coöperation with them because they bear the alleged relationship to the corporations. In what respect, for the purpose of this discussion, does their status differ from the engineer and conductor who, aiding the railroad to operate its

train of cars, tortiously injures the plaintiff? It is too well settled to admit of controversy that they are jointly and severally liable, and may be sued either separately or jointly, as the plaintiff may elect; and although upon the hearing they may successfully defend the action, leaving the company alone liable, no right of removal is conferred. Certainly it cannot be said that the engineer is a necessary party to such action. The plaintiff may sue and recover of the company the
(364) damage sustained, without calling in the engineer. It would seem that if, pending the litigation, the plaintiff entered a *nol. pros.* as to the engineer, leaving the company the sole defendant, the right of removal would at once arise. *R. R. v. Thompson, supra.* If, therefore, the plaintiff has a joint and several cause of action against the defendant corporations as joint *tort feasors,* which it could prosecute in separate actions, it may, if it so elect, sue them jointly. When it so elects, the defendant must try the cause in the forum selected by plaintiff. This seems to be the conclusion reached by the Supreme Court of the United States in a large number of cases cited in *R. R. v. Thompson, supra.* This Court has uniformly so held. *Hussey v. R. R.,* 98 N. C., 34.

We do not perceive how this case can be distinguished from those cited if the plaintiff is entitled to maintain its action against the nonresident corporation; that is to say, if the conduct of the corporations is an actionable tort. Certainly all who actively aid, abet, and coöperate with them in committing the tort, whether as officers, servants, agents, or employees, are jointly liable with them. "Joint *tort feasors* are held responsible, not because of any relationship existing between them, but because of concerted action toward a common end." 2 Jaggard Torts, 210. If this were an action against all of the defendants for damages, it would seem that, in the light of the authorities, there would be no question that his Honor properly refused to remove. Does the fact that plaintiff seeks to enjoin defendants from continuing their wrongful and harmful conduct affect the right of the petitioners to remove the cause? Assuming that plaintiff is entitled to the relief demanded against the nonresident corporations, why is it not also entitled to the same relief against all who are actively aiding, abetting, and coöperating
(365) with them? Defendants say because such relief is not necessary; that the injunction against the nonresident corporations will effectually and completely protect plaintiff's corporate rights. To this plaintiff responds that, if it so elected, it could sue all of the wrongdoers jointly for damages; it may upon the same principle maintain an action for any other relief to which it may be entitled. Thus the real question in controversy is presented.

It must be conceded that the authorities uniformly hold that an injunction against a corporation is binding, not only upon its managing officers, but upon its agents, employees, and servants who have notice thereof. *People v. Sturtevant,* 9 N. C., 263; 59 Am. Dec., 530. While this is true, we can see no good reason why, if as in this case the corporations are nonresidents, and beyond the power of the court to punish by fine for disobedience of the order, or, possibly, because of the large interests involved, a fine might not secure obedience, the plaintiff may not, if it so elects, make his injunctive remedy more effectual by bringing in the officers, employees, etc., who are subject to the jurisdiction of the court and amenable to such orders as may be made to protect plaintiff's rights. It is not difficult to see how foreign corporations could, if so inclined, evade the injunction of the courts unless resident officers or employees are made parties and brought personally within the jurisdiction of the court.

Defendants cite several cases which it is claimed sustain their contention. In *Pond v. Sibley,* 7 Fed., 192, the plaintiffs sought to enjoin a corporation from executing a lease, claiming that it was *ultra vires.* They joined several of the officers and directors, residents of the State in which the suit was brought, in a suit against the corporations resident of other States. The suit being removed, the corporations made a motion to remand for that the resident directors were not necessary, but only nominal or formal parties. The contention was (366) sustained, *Blatchford, Circuit Judge,* holding that the only real parties to the suit were the nonresident corporations; that they could not make the lease except by and through their officers and directors. "The individual defendants must, therefore, be considered as not parties to the controversy set forth in the complaint between the plaintiffs and the two corporations."

In *Hatch v. R. R.,* 6 Blatch., 105, Fed. Cases, 6204, cited by the Court, the suit was also brought to restrain the corporation from executing a contract. In the other cases relied upon by defendant the purpose of the suit was to restrain the corporation from doing some specific corporate act which could only be done by the managing officers of the corporation. In none of them do we find, as in this case, the charge that the foreign corporation is carrying on business in violation of defendant's rights, and that the individual resident defendants are aiding and coöperating with the wrongdoer in the wrongful conduct. If the plaintiff is entitled to the relief demanded, it would seem that its rights should extend to all persons, either natural or corporate, who are jointly engaged in the wrongful conduct complained of. It may well be that, if an injunction issue against the corporations, the plaintiff would be entitled to attach for contempt any employee or agent who disobeyed it

by showing that he had notice thereof; but we do not perceive why, in the first instance, it may not make such agent or employee a party and have the injunction directed against him as a joint *tort feasor.*

Fully conceding the force of the decisions made by the Federal Circuit Court, we do not find that the question presented upon this record has been directly decided, nor do we find that the Supreme Court
(367) of the United States has ever passed upon it. We are thus left to reach a conclusion amidst the maze of the numerous opinions of Circuit Court judges found in the Federal Reporter and such decisions as have been made by the Supreme Court of the United States. We have endeavored to follow what seems to be the principles announced in *R. R. v. Thompson, supra.* Defendants insist that, upon the motion for removal, the facts set forth in the petition must be taken as true. The only fact alleged in the petition which does not appear upon the face of the complaint is that defendant "believes that such joinder of the said four natural persons was not in good faith, but was for the express and fraudulent purpose of defeating the jurisdiction of the said Circuit Court of the United States." Of course, if by making this averment, based upon petitioner's belief, the State courts must, notwithstanding the facts set out in the complaint showing a joint cause of action, take it to be true, that is the end of the controversy. We do not so understand the decisions. In *R. R. v. Thompson, supra,* the following language used by the Court in *Thorn Co. v. Fuller,* 122 U. S., 535, is quoted with approval: "It is equally well settled that, in any case, the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time for filing the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court."

It has been said in several cases that if the plaintiff could legally sue the corporation and its agent or employee jointly, the fact that his election to do so was for the purpose of preventing a removal was immaterial. If the plaintiff chooses his mode of attack that way, his
(368) motive for doing so cannot be said to be wrongful or fraudulent.

In *Wecker v. E. and S. Co., supra,* the Court cites, with approval, the language used in *Thompson's case,* saying: "But in this case both parties filed affidavits, upon the motion to remand, for and against the right to remove." It seems that upon the motion to remand, the defendant filed affidavits for the purpose of showing that, in fact, the defendant employer had no connection whatever with the commission of the tort complained of, and upon a hearing, the Court so found. We do

not find any case in which upon a petition for removal filed in the State court the question of practice raised by defendants is decided. It would seem, however, upon the reason of the thing, that, assuming the plaintiff's complaint shows a joint cause of action, the party who alleges fraud should be required to prove it. We find that the Circuit Court of Appeals, Seventh Circuit, has so decided in *Offner v. R. R.*, 149 Fed., 201. *Baker, Circuit Judge,* says that a petition for removal which simply avers that the resident defendants "were fraudulently joined is bad as pleading; it is worse as proof." That the facts showing bad faith should be set out, and that these "the petitioner assumes the burden of establishing." Any other rule would enable a nonresident defendant to remove every case in which he was willing to swear that in his opinion the joinder was for the purpose of preventing a removal. As no proof was offered to sustain the charge of fraud, it is not to be considered.

The entire question of the removability of causes is involved in difficulty and doubt. The author of Moon on Removal of Causes seems to be impressed with this opinion; he frequently cites a line of cases only to conclude that it is doubtful whether they are correct. It seems well settled that where the right to remove is doubtful, the Court will refuse to do so, and the Circuit Court will remand. Moon on (369) Removal, sec. 39.

Whether the plaintiff, in its complaint, has set forth any actionable wrong is not open to us at this time, and we express no opinion thereof. *Ib.*, 44. It is very doubtful whether, upon the authority of the well considered case of *Bingham v. Gray,* 122 N. C., 699, any cause of action is set out. The plaintiff insisted that, conceding defendant's contention in other respects, the resident defendants were properly joined for the purpose of enabling it to have discovery. The authorities sustain the position of plaintiff that where, under the practice prevailing with us, prior to the adoption of our Code of Civil Procedure, discovery was sought from a corporation, it was proper and necessary to join such of its officers as were supposed to have personal knowledge of the facts in regard to which discovery was sought. The Bill of Discovery is, by The Code, abolished, and the provisions of sections 864 and 865 substituted therefor. Whether for the purpose of examining the defendant's officers or employees, as provided in those sections, it is necessary to make them parties to the record, we do not now express any opinion, because we find no suggestion in the complaint of any such purpose, or that there are any facts pertinent to the cause of action of which plaintiff desires to have discovery. The order of his Honor is

Affirmed.

*Cited: Hough v. R. R., post,* 702; *Davis v. Rexford,* 146 N. C., 424; *McCulloch v. R. R.,* 149 N. C., 311; *Rea v. Mirror Co.,* 158 N. C., 27;

*Ober v. Katzenstein,* 160 N. C., 441; *Pfeifer v. Israel,* 161 N. C., 429; *Lloyd v. R. R.,* 162 N. C., 494; *Blount v. Fraternal Assn.,* 163 N. C., 171; *Smith v. Quarries Co.,* 164 N. C., 351, 352; *Hollifield v. Telephone Co.,* 172 N. C., 720.

(370)

SOUTHERN IMMIGRATION, IMPROVEMENT, AND MANUFACTURING COMPANY v. JOSEPH ROSEY ET AL.

(Filed 16 April, 1907.)

1. **Tax Deed—Maker—Ex-Sheriff—Revisal 1905, Sec. 950.**
A tax deed, signed and executed by one who was the sheriff of the county at the time of the sale of land for taxes, after the expiration of his term of office, as "ex-sheriff," is authorized by Revisal 1905, sec. 950, and is to that extent valid.

2. **Same—After Two Years from Sale Day—Statute—Void.**
Under Laws 1901, ch. 588, and Revisal 1905, sec. 2905, a tax deed made by a sheriff more than "two years from the day of sale of the real estate for taxes," etc., is void, the authority of the sheriff to make the deed being solely derived from the statute, the statute being capable of a strict construction only, the time limitation must be observed.

3. **Same—Purchaser—Money Paid—Lien.**
A purchaser of land at a tax sale under the statute, subsequently acquiring an invalid title by reason of insufficient description, or void for not having been made within the statutory time, is entitled to have the amount he has paid therefor declared a lien on the land in his favor.

CIVIL ACTION to recover land, tried before *Justice, J.,* and a jury, at September Term, 1906, of MOORE.

Plaintiff claimed title under a deed conveying the land to plaintiff from J. R. Chamberlain, dated 9 June, 1891, and offered said deed in evidence. Plaintiff also introduced oral evidence tending to show occupation and claim of ownership under said deed.

Defendant claimed title under a tax deed from S. M. Jones, ex-sheriff and former tax collector of Moore County, to one Joseph Rosey, bearing date 15 May, 1905, purporting to be made by virtue of a sale for taxes of the land in dispute, which took place on 6 May, 1901, while said S. M. Jones was sheriff and tax collector of Moore County,
(371) such land having been listed and sold as the property of said J. R. Chamberlain, plaintiff's grantor, and his brother. Defendant further set up a claim for the amount of taxes paid by the purchaser, Joseph Rosey, whom defendants here represent, both as administratrix and heirs at law.

There were issues submitted as to plaintiff's ownership of the land and wrongful possession thereof by defendants, and also as to the

amounts paid by Joseph Rosey for the purchase of said land and for payment of the tax thereon for the years 1900 and 1901.

The issues as to the amount paid by Joseph Rosey having been answered by consent of parties, the court charged the jury that on the evidence, if believed, they would answer the issue as to the ownership of the land and wrongful possession thereof in favor of plaintiff.

There was judgment on the verdict for plaintiff for the land, and also declaring the amounts paid by Joseph Rosey a lien thereon in favor of defendant administratrix, and from this judgment defendants excepted and appealed.

*W. J. Adams and J. H. Pou for plaintiff.*
*U. L. Spence for defendant.*

HOKE, J. The plaintiff having offered in evidence a deed from J. R. Chamberlain for the land in controversy, which antedates the sale for taxes and deed made pursuant thereto, in which the land was sold for taxes and conveyed as the property of J. R. Chamberlain, plaintiff's grantor, the rights of the parties litigant as to the ownership and possession of the land was properly made to depend on the validity of the said tax deed. *Edwards v. Lyman,* 122 N. C., 741.

According to the testimony, this sale took place on 6 May, 1901, and S. M. Jones, who was then sheriff and tax collector, gave to Joseph Rosey, the purchaser, a certificate; and on 19 May, 1902, (372) the said tax collector undertook to execute a deed for the land to Joseph Rosey, which was void because it contained no sufficient description of the property and no data from which a description could be established or permitted by the aid of parol testimony (*Grier v. Allen,* 69 N. C., 346; *Tremaine v. Williams, ante,* 114), and perhaps for other defects which could be suggested.

Recognizing that this attempted conveyance was not sufficient to pass the property, the defendants procured from S. M. Jones the deed under which they now claim the property, sufficient in form for the purpose desired, and which was executed by S. M. Jones on 15 May, 1905, after he had gone out of office, and which is signed by him as ex-sheriff.

No objection can be made to this deed from the mere fact that the grantor therein was not in office at the time the same was executed. Our statute expressly provides to the contrary, both as to sheriffs and tax collectors. Revisal 1905, sec. 950. But the objection urged, and which we think is available to defeat the claim of defendants under this deed, is that the same was executed more than two years after the date of the sale.

The statute applicable to this question, Laws 1901, ch. 558, sec. 18, provides that "at any time within one year after the expiration of one

year from the date of sale of any real estate for taxes, if the same shall not have been redeemed, the sheriff, on request and on production of the certificate of purchase, shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance for the property," etc.

The same provision will be found, somewhat differently expressed in Revisal, sec. 2905:

(373) *"Deed, when and by whom made.* At any time after one year, and within two years from the day of sale of any real estate for taxes, and upon demand of the purchaser, etc., the sheriff shall execute a conveyance."

While these revenue laws should, in their general features, receive a reasonable and just construction, so as to promote and make efficient the evident purpose of the Legislature, it is also an accepted principle that in those features which may operate to deprive a citizen of his property by *quasi* summary proceedings or imposes forfeitures upon him, their requirements should be strictly complied with.

Black on Interpretation of Laws, p. 328, where we find the doctrine stated as follows: "Again, those provisions of the revenue laws which authorize the officers of the revenue to make public sale of the lands on which the taxes remain delinquent are to be construed with strictness, so far as to require an exact compliance with all those provisions which are designed for the security and protection of the taxpayer, though less stress may be laid upon such provisions as are merely directions to the officers. The reason is that laws of this character operate to deprive the citizen of his estate, not, indeed, without due process of law, but by the agency of ministerial officers and in a summary manner, which may result in injustice, or even oppression, if his rights are not carefully guarded."

And further:

"When the statute under which land is sold for taxes directs an act to be done, or prescribes the form, time, and manner of doing any act, such act must be done and in the form, time, and manner prescribed, or the title is invalid, and in this respect the statute must be strictly, if not literally, complied with."

In making a sale of this character and conveying the delinquent's property to the purchaser, the sheriff or tax collector acts solely

(374) by virtue of the authority given in the statute; and the statute having only conferred authority to make such a deed after one year, and within two years from date of sale, the officer's deed made after that date is invalid and conveys no title to the purchaser.

We have so held at the present term in *Lumber Co. v Price, ante,* 50.

No authority for such a deed is found in the statute, and there is no

principle or rule of construction which would permit or justify the Court in ignoring the express limitation fixed by the law itself.

The deed, therefore, under which defendants claim, having been made more than four years after the tax collector's sale, conveyed no title to the purchaser, and the court below was correct in holding that on the evidence, if believed, the issues as to title and possession should be answered in favor of plaintiff.

The plaintiff not having appealed, the question of whether the claim for taxes paid by Joseph Rosey was asserted within the time required by the statute, Revisal 1905, secs. 2911 and 2912, is not presented.

No error.

*Cited:* *Jones v. Schull,* 153 N. C., 522.

(375)

MELVIN HORNE v. CONSOLIDATED RAILWAY, LIGHT AND POWER COMPANY.

(Filed 16 April, 1907.)

1. **Pleadings—Issues Submitted—Issues Tendered.**

When upon the complaint and answer, specifying upon the one side and denying upon the other, there are different phases of negligence claimed by the plaintiff as arising on the facts, it is not error of the court below to refuse to submit separate issues addressed to the different allegations, if those submitted are germane and give to each party a fair opportunity to present his version on the facts and his view of the law, so that the case may be tried on its merits.

2. **Evidence—Expert Witness—Facts—Opinion.**

An expert witness may testify to pertinent facts at issue in the case, coming under his own observation, as well as to such expert opinion thereon as is proper and within his peculiar knowledge and training.

3. **Same—Finding of Court Below.**

The finding of the court below, upon proper evidence, that a witness is an expert, is conclusive.

4. **Electricity—Deadly Wires—Duty of Owners.**

It is the duty of those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged, to exercise the utmost care, so far as human foresight can reach, in their construction and maintenance.

5. **Negligence—Evidence—Nonsuit.**

There is no error in the court below refusing to dismiss the action, as on motion to nonsuit under the statute, it appearing that there was competent evidence of a clear breach of duty on the part of the defendant company in the conditions under which the plaintiff, employee, was re-

quired to do his work; in placing a primary wire, charged with a high and dangerous voltage of electricity, under dead wires holding and controlling an electric lamp, by which, while in the discharge of his duties, the plaintiff was injured, being necessarily in such position that in raising and lowering the lamp the wires would come in contact, making it probable that the insulation would wear or burn away at a point where, in case the insulation should be worn or burned off, the wires would become charged, and plaintiff, in doing his work in the ordinary and usual way, would likely come in contact with an iron awning and ground the current, making serious or fatal injuries almost certain; it further appearing that it was in this manner the injury was caused.

**6. Same—Proximate Cause—Excusable Accident.**

There was no error in the court below refusing to dismiss an action as on judgment of nonsuit upon the ground that the proximate cause of the injury received was the unexpected sagging of a telephone wire of another company at a different point, which had been left in place above defendant's system, and by means of which defendant's opposite primary wire was grounded, thereby causing the shock and thus rendering the occurrence an excusable accident, when there is evidence tending to show that such result was likely to occur at any time and in various ways.

(376) ACTION to recover damages for personal injuries caused by the alleged negligence of defendant, and tried before *Jones, J.*, and a jury, at September Term, 1906, of NEW HANOVER.

The three ordinary issues in actions of this character were responded to by the jury:

1. As to negligence on part of defendant causing the injury.
2. Contributory negligence on part of plaintiff.
3. Damages.

Verdict and judgment for plaintiff, and defendant excepted and appealed.

*Rountree & Carr, H. McClammy, and W. Kellum for plaintiff.*
*Meares & Ruark for defendant.*

HOKE, J. This cause was before us on a former appeal, and will be found reported in 141 N. C., 50. In that appeal, the facts having been sufficiently stated, the principles of the law were fully declared. On careful examination of this record, we think that the present trial has been conducted in accordance with the former opinion; and the facts being substantially similar, we find no occasion for elaborate statement or discussion.

(377) The plaintiff having, by leave of court, amended his complaint so as to specify different phases of negligence claimed as arising on the facts, and the answer having been filed making denial, the defendant alleges for error that the court refused to submit separate issues addressed to the different allegations.

It is well established with us that the form and number of the issues are not material, if those submitted are "germane and give each party a fair opportunity to present his version of the facts and his view of the law, so that the case may be tried on the merits." *Deaver v. Deaver,* 137 N. C., 240; *Cunningham v. R. R.,* 139 N. C., 427; *Wilson v Cotton Mills,* 140 N. C., 52.

While the amended complaint makes separate, specific allegations of negligence as arising on the facts, we see no reason in the present case why these allegations should not be considered as evidential on the general charge of negligence; and we agree with his Honor below in holding that every phase of the controversy and every relevant fact and circumstance could be fully presented on the general issues addressed to that question.

Defendant assigns for error further, that the witness Horton was permitted to testify as an expert. The trial judge, after hearing the evidence, found that the witness was an expert, and the authorities are to the effect that this action of the trial judge is conclusive when there is evidence which tends to support such finding; and the evidence, we think, fully supports the conclusion reached by his Honor. *S. v. Cole,* 94 N. C., 964; *S. v. Wilcox,* 132 N. C., 1120.

Again, it is objected that the witness was permitted to testify that the pole where the injury occurred might have been given a different placing, so as to have enabled plaintiff, in performing his duties, (378) to have avoided contact with the iron awning, the present placing of the pole near the iron awning being one of the features of negligence imputed to defendant, the objection being that this was not in the domain of expert testimony. But this position, we think, is not well taken. The witness was here speaking mainly of objective facts coming under his own observation; and in giving his statement to the jury that this pole could have been placed differently and this source of danger eliminated, he was simply giving to the jury a description of the attendant physical conditions. He was, in effect, describing the place. And, while expressed in the form of opinion, it was really, in this respect, the statement of a fact. *Gilleland v. Board of Education,* 141 N. C., 482.

Apart from this, the position of the pole in question and the placing of the drum upon it by means of which the electric lamp was raised and lowered involved to some extent the structure and operation of the appliance and method by which the electricity was to be conveyed to these lamps, and in that way was within his peculiar knowledge and training as an expert witness.

The principal objection urged for error by defendant was to the refusal of the court below to dismiss the action as on judgment of nonsuit. And here, too, we think the ruling of his Honor was clearly correct.

It was proved that on 22 February, 1904, plaintiff, an employee of defendant company, while engaged in the performance of his duty in trimming the arc-light lamp at the corner of Front and Dock streets, in the city of Wilmington, received a severe electrical shock, causing serious bodily injuries.

There was also evidence tending to show that at this place a primary wire, "heavily charged with electricity for the purpose of fur-
(379) nishing power to run a motor in the industrial plant of P. Cummings, was strung from poles under the arm from which was suspended the wires holding the arc-light lamp, and in such a way that in lowering and raising said lamp it would rub against this primary wire, by means of which the insulation upon said wires was rubbed off or burned off, or their condition and placing were such that contact between the electrical current on the primary wire and the wire controlling the said electric lamp was probable and very likely to occur; that the pole by means of which this arc-light was supported was placed so near an iron railing, which at the time supported an awning in front of Mr. Penny's store, and connected with the ground, and the drum or ratchet by which the said lamp was lowered and raised was so placed upon said pole that a right-handed person, in going up said pole for the purpose of raising and lowering said lamp, necessary for its trimming, would, in performing his duty in the usual and customary manner, naturally come in contact with said iron railing." That plaintiff had gone up the pole at the usual and proper place and was engaged in lowering the lamp by the revolving drum at the time he received the injury.

It was admitted, and there was also expert testimony on part of plaintiff to this effect, that the shock was received because the insulation of the primary wire and the wires which controlled the lamp having burned or rubbed off, and the wires having come in contact in lowering the lamp, the current from the primary wire was conveyed down a small cable wire connecting the wires controlling the lamp with the drum where plaintiff was working, and through plaintiff's body to the ground by way of the iron awning. And further, that without the awning the plaintiff would have received a shock, but not so severe as that which occurred.

(380) If these facts are established (and they must be accepted as true on a motion to nonsuit) they make out a case of negligence on the part of defendant company.

"It is well established with us that an employer of labor is required, in the exercise of proper care, to provide for his employees a reasonably safe place to work and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in works of like

kind and character; and an employer is also required to keep such machinery and appliances in such a condition, as far as this can be done in the exercise of proper care and diligence." *Hicks v. Manufacturing Co.*, 138 N. C., 319.

It is further an accepted principle that in the application and control of a dangerous agency like electricity the term "ordinary care" means the utmost degree of care in the construction, inspection, and repair of their appliances, poles, and wires.

As said by *Burwell, J.*, in *Haynes v. Gas Co.*, 114 N. C., 203: "The danger is great and the care and watchfulness must be commensurate with it."

Quoting further from that well considered opinion: "Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such cases is likely to result in great bodily harm and sometimes death to those who are compelled to use that means of conveyance. 'As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents.' Ray on Neg., p. 53.

"All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city (381) wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden."

Applying this standard of care to the facts indicated, we hold there was a clear breach of duty on the part of the defendant company in the conditions under which the plaintiff was required to do his work at the corner of Front and Dock streets in placing a primary wire, charged with a high and dangerous voltage, under the wires which held and controlled the electric lamp, in such a position that in raising and lowering the lamp the wires would come in contact, making it probable that the insulation would wear or burn away, and this, too, at a point where, in case the insulation should be worn or burned off, the plaintiff, in doing his work in the ordinary and natural way, would likely come in contact with the iron awning, thus grounding the current and making serious or fatal injuries almost certain.

As heretofore stated, there was testimony on the part of plaintiff to the effect that the injury occurred just in the way that was probable from the conditions complained of.

It is most earnestly contended on part of defendant that the sole proximate cause of the injury was the unexpected sagging of a telephone wire

at another point on the line at Front and Red Cross streets, which had been left in place above the defendant's system, and by which defendant's opposite primary wire was grounded, thus causing the shock; and that this was under circumstances which would render the occurrence an excusable accident. But the jury, under a proper charge, have rejected this theory and the evidence which tends to support it as the sole proximate cause of plaintiff's injury. They have accepted the theory that plaintiff's injury would not have occurred but for the run-
(382) ning of the heavily charged primary wire under the wires which controlled the electric lamp, in such a manner as to cause them to come in contact, and in placing the pole, where plaintiff was required to do his work, so near an iron awning that in doing this work in the ordinary and natural way he was very likely to come in contact with the iron awning, thus making a serious injury well-nigh certain in case the insulation of the wires should be destroyed. This condition was fraught with imminent and unnecessary peril, for there was evidence on part of plaintiff tending to show that the opposite primary wire was liable to ground at any time and in various ways. And this negligence having been established as the proximate cause of the injury, or one of them, it would not excuse the defendant, plaintiff himself being free from fault, that the opposing wire had, as a matter of fact, been grounded in a way that the company did not expect, or that it produced a greater injury than it had reason to anticipate. *Hudson v. R. R.*, 142 N. C., 198; *Drum v. Miller,* 135 N. C., 204.

The question of plaintiff's conduct was submitted to the jury on the issue as to contributory negligence and according to the principles expressed in the former opinion, and the plaintiff has been found free from blame. There was no error, therefore, in denying defendant's motion to nonsuit.

We have given the case and all the exceptions presented most careful consideration, and find no error which entitles defendant to a new trial.

Under a fair and comprehensive charge, the jury have accepted the plaintiff's version of the occurrence; and taking this to be true, the plaintiff has a clear right to recover. *Haynes v. Gas Co., supra; Houston v. Brush,* 66 Vt., 331; *Chenall v. Brick Co.,* 117 Ga., 107; *Graham v. Badger,* 164 Mass., 42; *Electric Co. v. Sweet,* 57 N. J., 324.

No error.

*Cited: Sawyer v. R. R.,* 145 N. C., 28; *Brittingham v. Stadiem,* 151 N. C., 302; *Hicks v. Telephone Co.,* 157 N. C., 526; *Turner v. Power Co.,* 167 N. C., 631.

(383)

MARIA A. FAUST v. JOHN C. FAUST ET AL.

(Filed 16 April, 1907.)

1. **Lands—Parol Trust—Definite Terms—Judgment in Personam.**
A gift of land by deed to the children of a son upon his parol promise to pay the daughter of the donor a certain sum of money is not sufficiently definite in its terms to attach to the legal title a trust for its payment, but is a valid consideration to support the promise upon which a judgment *in personam* can be rendered.

2. **Judgment—Nonsuit—Entire Record—Relief.**
On an appeal from a judgment of nonsuit, upon the evidence, under the statute, the Supreme Court will examine the entire record in order to see whether a cause of action is alleged or proven sufficient to entitle the plaintiff to any relief.

3. **Evidence—Deed—Consideration—Prima Facie.**
The consideration expressed in a deed is *prima facie* evidence of the actual consideration, and not conclusive.

4. **Recovery—Party in Interest.**
The real party in interest may sue and recover in his own name upon a contract made in his behalf, under our Code system.

ACTION, tried before *Ferguson, J.*, and a jury, at December Term, 1906, of RANDOLPH.

The plaintiff alleged that her father, the late George A. Faust, died intestate 6 May, 1902, leaving surviving his four children, the defendants John C. Faust, George M. Faust, Elvira Saunders, and herself. That prior to his death the said George A. Faust owned four tracts of land, one of them known as the "Stinson Place," containing 247 acres and worth $2,000. That prior to 29 May, 1901, he had given to each of his said children, except plaintiff, a tract of land, including a tract to John C. Faust, known as the "Craven Place." That it was the intention of her said father to give to plaintiff the "Stinson Place." That defendant John C. Faust represented to his father that it would be best for him to give to plaintiff money instead of land, and promised (384) that if he would convey to him, the said John C., the "Stinson Place," that he would pay the plaintiff the sum of $500 in lieu of said land. That in pursuance of said promise, the said George A. Faust, on 29 May, 1901, conveyed to the other defendants, the children of said John C., the said tract of land, the deed reciting a consideration of $500, no part of which was paid. That thereafter, 1 November, 1902, the said children conveyed to their father the same land, the deed reciting a consideration of $1,500, no part of which was paid. That defendant, in violation of his said promise and agreement, made to and with the said George A. Faust, fraudulently refuses to pay to plaintiff

the said sum of $500, though requested so to do, etc. The defendants deny that John C. Faust made the promise to pay plaintiff as alleged, or that the land was conveyed in consideration of any such agreement. They admit that both the Craven and Stinson places were conveyed to defendant John C., but say that the land given to him was worth $500 less than that given to some of the other children. They also allege that George A. Faust had given to plaintiff other property of the value of $4,000. They plead the statute of limitations. The issue submitted to the jury, in accordance with the prayer in the complaint, is directed to the inquiry whether at the time of the conveyance any trust was declared or attached to the title for the benefit of plaintiff for the payment of the sum of $500. An issue was also submitted in regard to the statute of limitations. The plaintiff testified to the number, etc., of her father's children and the several tracts of land owned by him; that her father gave her a slave, etc.; that he did not give her $1,750; that she had been married a number of years.

(385) W. W. Saunders, a witness introduced by plaintiff, testified that he married one of the daughters of George A. Faust. That during the year 1901 said George A. Faust and defendant John C. Faust came to his house, when the said George A. said that he wanted witness to witness an agreement between John C. Faust and himself. "George A. Faust said: 'I have decided it is not best to give my daughter Maria any real estate, and have decided it is best for her to have $500 in money instead, and have given the balance of my real estate to John, the "Craven Place" and the "Stinson Place," and John is to pay Maria $500.' He asked John if that was not the agreement between them, and John nodded his head and said it was. John said: 'I have to pay the money as I make it out of the land.' I never told any one about this transaction until the former case was in court here last March. I think the first time my sister-in-law found out about it was in March, 1906. John told me the title was not made to him, but was made to his children."

There was evidence tending to show that the land was worth about $2,000 and was listed for taxes at $1,200 after house was put on it. That about 200 barrels of corn and 180 bushels of wheat were made on it. At the conclusion of plaintiff's testimony, defendant moved for judgment of nonsuit. Motion was granted. Plaintiff appealed.

*R. C. Strudwick and O. L. Sapp for plaintiff.*
*J. T. Morehead, Hammer & Spence and W. D. Siler for defendants.*

CONNOR, J., after stating the case: We concur with his Honor in the opinion that the testimony, taken to be true, does not establish any declaration of trust in favor of the plaintiff. This is true, for several

reasons. Passing the question of its competency to establish a (386) trust by parol declarations made subsequent to the execution of the deed, we do not think that the language used by George A. Faust shows a purpose to declare a trust attaching to the legal title. He simply conveyed the land to the children of John C. Faust in consideration of the promise of the son to pay his sister, the plaintiff, $500. We do not perceive any intention to make the children grantees trustees for the purpose of securing the performance of the promise made by their father. The declarations, when competent for that purpose, must clearly indicate an intention to attach the legal title, at the time it passes to the grantee, a trust, the terms of which should be sufficiently definite to enable the court to enforce its execution. To this effect are all of the cases. *Smiley v. Pearce,* 98 N. C., 185; *Pittman v. Pittman,* 107 N. C., 159; *Sykes v. Boone,* 132 N. C., 199; *Avery v. Stewart,* 136 N. C., 426. In these cases the authorities are so fully and exhaustively discussed and the doctrine of parol trusts, in all of its phases, so clearly defined, that we would be but repeating what is there so well said to do more than refer to them. As the judgment of nonsuit is based upon the conclusion that in no aspect of the allegations and proof is the plaintiff entitled to any relief, we have deemed it our duty to examine the entire record, to the end that we might say whether any cause of action is alleged or proven entitling the plaintiff to any relief. While, for the reasons stated, we do not think she is entitled to have the specific relief demanded or the issue answered in her favor, we are of the opinion that, upon her allegations and the testimony of the witness Saunders, she is entitled to judgment against the defendant John C. Faust for the sum of $500 unless her action is barred by the statute of limitations. The testimony shows that the deed was made to the children of John C. Faust, without any consideration moving from them, but in (387) consideration of the promise of their father to pay to the plaintiff the sum of $500. While the recital of a consideration paid by the grantee in a deed of conveyance is evidence of its truth, it is not conclusive. "It was formerly held, although there was much conflict of opinion, that the clause stating the consideration in a deed or other instrument under seal must be held conclusive on the parties like other parts of the instruments and was not open to contradiction or explanation, but the more modern decisions settle the rule that although the consideration expressed in a sealed instrument is *prima facie* the sum paid, or to be paid, it may still be shown by the parties that the real consideration is different from that expressed in the written instrument. Accordingly, it is held, by an uncounted multitude of authorities, that the true consideration of a deed of conveyance may always be inquired into and shown by parol evidence." 16 Cyc., 653. The course of the decisions of

this Court is set forth with care and ability by *Shepherd, J.*, in *Barbee v. Barbee,* 108 N. C., 581; *Kendrick v. Insurance Co.,* 124 N. C., 315; *Deaver v. Deaver,* 137 N. C., 240.

It was, therefore, competent for the plaintiff to show that, in truth, the sum of $500 recited in the deed was not paid to George A. Faust, but was to be paid to the plaintiff. It was held in *Sprague v. Bond,* 108 N. C., 382, that while such an agreement constitutes no trust nor passes any interest in the land itself, it entitles the party who is to receive the purchase money to sue for the amount. Formerly the suit would have been in the name of the grantor to the use of the party who was to receive the purchase money, but under our Code system the real party in interest may sue on a contract made for his benefit. If the fact be found as testified by the witness Saunders, we can see no valid
(388) reason why the plaintiff has not a right of action *in personam* against her brother for the amount which he promised his father to pay in consideration of his children receiving the title to the land. It is immaterial that the deed was made to the children instead of directly to him. The conveyance of the land to them was a sufficient consideration to support his promise to his father. The conveyance by the children of the same land to the defendant John C. Faust within a short time strongly tends to support the plaintiff's view of the transaction. Is the plaintiff barred by the statute of limitations? The transaction being subsequent to the act of 1899, removing the disability from married women, her coverture does not prevent the operation of the statute. Her ignorance of her rights does not protect them. There is no evidence of fraud or mistake. When did her right to sue accrue? Defendant said that he was to pay the amount as he made it out of the land. It may be that while her right to the money arose out of the contract, that her right to demand it was postponed until her brother made it out of the land—until, either by cultivation or rents, he realized the amount. Again, it may be suggested that her right to sue accrued when she became a party to the contract by demanding the amount. The question is not free from difficulty, and we forbear expressing any opinion in the present state of the record. We are of the opinion, as the motion to nonsuit admitted the truth of the testimony, with inferences most favorable to plaintiff, it developed, against defendant John C. Faust, a cause of action for the sum of $500. Other interesting questions, which may arise if she obtains a judgment, suggest themselves. We simply order a new trial, to the end that the parties may proceed as they may be advised.

New trial.

*Cited: Institute v. Mebane,* 165 N. C., 650.

(389)

## W. E. THOMPSON v. SOUTHERN EXPRESS COMPANY.

(Filed 16 April, 1907.)

**1. Pleadings—Demurrer—Cause of Action—Damage Incident.**

It is not error in the court below to overrule a demurrer to a complaint demanding damages for mental suffering caused plaintiff by defendant's alleged negligence, not as a separate cause of action, but as incident to a cause of action for failure on defendant's part to deliver certain whiskey which defendant, upon demand, wrongfully refused to deliver, and which was alleged to be for the purpose of relieving from pain and suffering plaintiff's dying mother.

**2. Same—Jurisdiction—Pleadings.**

When from the allegations of a complaint, to which a demurrer had been interposed, it appears that the action may be sustained as a demand in tort in the Superior Court in a sum sufficient to give jurisdiction, and it is contended by the defendant that the action is for a breach of contract, involving a breach of public duty, and that therein it appeared that the only sum recoverable would be but a few dollars, and could only originate in the court of a justice of the peace, it is the amount demanded in good faith, and on facts alleged in the complaint as a whole which reasonably tend to support it, that fixes the jurisdiction of the court; and such cannot be restricted by defendant to his own point of view by irregular and defective pleading.

ACTION, tried on demurrer, before *Moore, J.*, at October Term, 1906, of ORANGE.

The complaint alleged, in substance, that plaintiff having bought and paid for $2 worth of whiskey at Wilmington, N. C., where it was lawful to make and sell whiskey, defendant company agreed to transmit and deliver said whiskey to plaintiff at Mebane, N. C.

That on or about 1 June, 1906, the whiskey having arrived at Mebane in good order and properly addressed to plaintiff, plaintiff applied to agent of defendant company for same, offering to pay the express charges; and defendant refused, and still refuses to deliver the (390) package, as it had contracted and undertaken to do.

That the whiskey had been ordered, pursuant to medical prescription, for plaintiff's mother, who was desperately ill with a fatal malady, and was desired and necessary to relieve her suffering and prolong her life.

That the agent of defendant company was fully informed of the conditions and of the purpose for which the whiskey was to be used, and, notwithstanding this knowledge, said agent unlawfully and willfully refused to deliver said whiskey to plaintiff, or any part thereof.

That by reason of this misconduct and breach of duty on part of defendant company the plaintiff's mother was compelled to endure great increased and unnecessary suffering for a week or more; and that

"meantime, while attending at the bedside of his dying mother, he witnessed her agonizing pains which he could not relieve on account of the wanton default of defendant, whereby he was damaged to the amount of $1,999"; and prays judgment for said amount and costs of action.

To this complaint defendant demurs, as follows:

"The defendant, the Southern Express Company, comes into court and demurs to the complaint of the plaintiff in that it does not state facts sufficient to constitute a cause of action:

"1. That the plaintiff is not entitled to recover, as alleged in the complaint, for mental anguish in an action of this character, when there is no bodily harm done to him.

"2. That the damages sought to be recovered, as alleged in the complaint to have been suffered by the plaintiff, are too remote.

"3. That there is no allegation that physical injury or bodily injury was done to the plaintiff, and he cannot recover for mental dis-
(391) tress or anxiety caused by sympathy for his mother's suffering."

There was judgment overruling the demurrer and allowing defendant to answer, and defendant excepted and appealed.

*John W. Graham and Frank Nash for plaintiff.*
*John A. Barringer for defendant.*

HOKE, J. Without comment on the merits or legal bearings of this controversy as they shall appear when the facts are established, we are of opinion that the demurrer of defendant was properly overruled.

The mental suffering for which plaintiff demands compensation is not set forth as a separate cause of action at all, but is stated and claimed as damages incident to a cause of action for a wrongful failure on the part of defendant company to deliver the whiskey. This being true, it is not open to defendant by demurrer to eliminate the element of damage from plaintiff's demand; and such a demurrer, therefore, was properly overruled.

The case is controlled by the decision in *Hall v. Telegraph Co.*, 139 N. C., 369-373 In that opinion, on facts very similar to those appearing in the present appeal, the Court said: "Here is a plain and concise statement of a cause of action for breach of contract, in the negligent failure of the defendant company to deliver a telegram. It would seem that the character and urgency of the message were such as to notify the defendant that unless a satisfactory answer was received in regular course of transmission the plaintiff would go to Fayetteville, which in fact he did, according to the allegations of the complaint. If this be the correct and reasonable interpretation of the message, the cost of the trip to Fayetteville would be an element of damage. There is an
(392) additional allegation, addressed to the question of mental an-

guish. This is not stated as a separate cause of action at all, but only as a further element of damage. Its consideration may or may not arise on the further hearing, and in any event the demurrer which seeks to eliminate this feature of the plaintiff's demand at the present stage of his case is irregular and defective. Giving such defect its technical term, we should say the demurrer is too broad. It goes to the entire complaint, and this, as we have seen, contains a good cause of action well pleaded, and, if the facts can be proved as alleged, the plaintiff can recover some damage." See, also, *S. v. Young,* 65 N. C., 579; *Coward v. Meyers,* 99 N. C., 198.

It is urged on the part of defendant that if this demand for mental suffering is eliminated the facts would only tend to support an action for breach of contract, in which the damages could not be more than $2, the alleged value of the whiskey, and perhaps some interest; and that such a demand could only originate in the court of a justice of the peace. But this position cannot be maintained.

In the first place, the facts would seem to permit that the action be sustained as a demand in tort if plaintiff should elect. But even if he should proceed as for breach of contract involving a breach of a public duty, the defendant is not permitted, by this irregular and defective pleading, to restrict the complaint to his own point of view. Plaintiff is entitled to have his complaint considered as a whole; and considering it as a whole, it is the amount demanded, if made in good faith and on facts which reasonably tend to support it, that fixes the jurisdiction of the court. *Boyd v. Lumber Co.,* 132 N. C., 185; *Sloan v. R. R.,* 126 N. C., 487. (393)

This is certainly the general rule, and as now advised we see no reason to except this case from the rule which generally obtains.

Affirmed.

*Cited: White v. Eley,* 145 N. C., 37; *Brock v. Scott,* 159 N. C., 516; *Fields v. Brown,* 160 N. C., 300; *Faircloth v. Kenlaw,* 165 N. C., 233; *Byers v. Express Co., ib.,* 545.

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LEE C. WOOD v. J. J. KINCAID ET AL. AND THE FIDELITY AND CASUALTY COMPANY.

(Filed 16 April, 1907.)

**1. Pleading—Demurrer—Cause of Action.**

A demurrer can never be aided by separate averments of facts therein, but must be addressed solely to those alleged in the pleading attacked.

2. **Complaint—Demurrer.**
When it can be seen by liberal construction that a complaint states a good cause of action, a demurrer will not be sustained.

3. **Same—Contract—Admission.**
When the complaint substantially alleges a contract, based upon a sufficient consideration and showing the liability of the defendant to the plaintiff upon an employee's indemnity bond executed for the plaintiff's benefit, and a demurrer is made thereto, it is an admission that the contract is correctly set out in the complaint, though the contract may not be fully stated.

4. **Same—Procedure.**
When the complaint substantially alleges facts showing that the defendant is liable under a contract, without clearly or definitely setting out the terms of the contract, the proper remedy is a motion to make the pleadings more definite and certain, or, where permissible, a demurrer to its form and not to its substance.

ACTION, heard before *Moore, J.*, and a jury, at January Term, 1907, of IREDELL.

This action was brought by the plaintiff to recover of the defendant, the Cleveland Manufacturing Company, damages for injuries which it is alleged were sustained while in its employ, through its negligence, and against the other defendant, the Fidelity and Casualty Company, (394) upon the allegation that by the terms of a written contract between the said defendants, which was supported by a sufficient consideration, the Fidelity and Casualty Company became equally liable with its codefendant, the Cleveland Manufacturing Company, for the negligence and omission of duty of the latter in respect to its servants and employees and for all injuries to them resulting therefrom, the Fidelity and Casualty Company, by the said contract, having expressly covenanted and agreed to become responsible for and with its codefendant for any and all injuries received by the latter's employees and servants, which are caused by its negligence. The Fidelity and Casualty Company demurred upon the following grounds: First, the plaintiff does not allege that it was connected in any manner with the negligence of its codefendant which caused the injury to the plaintiff; and, second, that the allegations of the complaint, if true, show a contract between the Fidelity Company and its codefendant whereby, upon certain terms and conditions, it agreed to indemnify and save harmless the latter against losses, and it is not alleged that the plaintiff was a party to said contract, or privy thereto in any way, or that the same was for his benefit. The demurrer was overruled, and the Fidelity and Casualty Company appealed.

*H. P. Grier, W. G. Lewis, and L. C. Caldwell for plaintiff.*
*Armfield & Turner for defendant.*

WALKER, J., after stating the case: A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead. It is not its office to set out facts, but it must stand or fall by the facts as alleged in the opposing pleading, and it can raise only questions of law as to their sufficiency. It is a fundamental rule of law that a demurrer will (395) only lie for defects which appear upon the face of the alleged defective pleading, and extraneous or collateral facts stated in the demurrer cannot be considered in deciding upon its validity. A demurrer averring any fact not stated in the pleading which is attacked, commonly called a "speaking demurrer," is never allowable. 6 Pl. and Pr., 296, *et seq.; Von Glahn v. DeRosset,* 76 N. C., 292. It seems from the excellent brief of counsel for defendants, and certain allegations of fact in the demurrer not appearing in the complaint, that it was intended by the Fidelity Company to raise the question, whether an indemnity company can be held liable to an employee who is injured by his employer's negligence, where it has contracted to be liable only when the employer has been damnified, or suffered actual loss, by reason of the negligence, and whether even in such a case it can be joined, as a defendant, with the employer in an action to recover damages for the negligence. This is a very grave question and will require serious consideration whenever it is presented, but it is not before us, unless we are at liberty to insert in the complaint something that is not now there. It does not, therefore, call for any discussion or the examination of cases cited by counsel and other authorities bearing upon it. 11 A. & E., 15 *et seq.;* 16 *ibid.,* 176; *Reynolds v. Magness,* 24 N. C., 26; *Morehead v. Wriston,* 73 N. C., 398; *Parker v. Shuford,* 76 N. C., 219; *Peacock v. Williams,* 98 N. C., 324; *Woodcock v. Bostic,* 118 N. C., 822; *Gorrell v. Water Co.,* 124 N. C., 328; *Shoaf v. Insurance Co.,* 127 N. C., 308; *Lacy v. Webb,* 130 N. C., 545; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Voorhees v. Porter,* 134 N. C., 591; *Aiken v. Manufacturing Co.,* 141 N. C., 339.

The plaintiff has alleged explicitly that this defendant, for (396) a sufficient consideration, had "expressly contracted and agreed to become responsible for and with its codefendant for any and all injuries sustained by its servants and employees and caused by its negligence," and that, by the terms of said contract, this defendant is equally liable with its codefendant for the injury of which the plaintiff complains. The contract is not set out by copy in the complaint. The plaintiff states only its substance in his own way. The demurrer is an admission that the contract is truly and correctly set forth, and this being so, we must assume at this stage of the case that the Fidelity Com-

pany did agree to become jointly responsible with its codefendant for the injury which the plaintiff suffered by reason of the employer's negligence. It is stated, as one ground of demurrer, that it is not alleged in the complaint that the contract of indemnity was made for the plaintiff's benefit; but if we accept the allegations of the complaint as true, and this we are imperatively required to do, the plaintiff does distinctly allege that the contract was made for his benefit. The complaint may be defective in form, and we think it is, in that the terms of the contract are not fully and clearly stated, but, as evidently appears, only the plaintiff's version of them. Any defects of this kind, however, should be remedied by a motion to make the pleading more definite and certain, or, at least, in cases where permissible, by a demurrer to the form of the pleadings and not to its substance. Revisal, sec. 496; Clark's Code (3 Ed.), sec. 261, and notes. While the complaint as against this defendant is imperfectly constructed, for that it lacks fullness and clearness of statement, we cannot say that the plaintiff has entirely failed to state a good cause of action. The proof may show that the demurrant sustains no such relation to the plaintiff as entitles the latter to sue upon
(397) the contract with his employer, and then, again, it may disclose facts which are not materially variant from the allegations of the complaint and which may establish its liability to him.

We must overrule the demurrer and await the proof, which should give us a better and more definite understanding of the precise terms of the contract, before expressing any opinion as to the merits. The defendants will be allowed to answer the complaint. The provision seems to have been omitted in the judgment of the court.

No error.

*Cited: Brewer v. Wynne,* 154 N. C., 471; *Menefee v. Cotton Mills,* 161 N. C., 167; *Hensley v. Furniture Co.,* 164 N. C., 152; *Kendall v. Highway Commission,* 165 N. C., 602; *Morton v. Water Co.,* 168 N. C., 585, 591.

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MYERS MEDLIN ET AL. v. ELMIRA SIMPSON ET AL.

(Filed 16 April, 1907.)

1. **Parties—Plaintiff and Defendant in Same Action—Harmless Error.**
While it is irregular for one to be both a plaintiff and a defendant in the action, and as defendant challenge a juror passed by the plaintiffs over the objection of his codefendants, it is harmless error when it does not appear that defendants' peremptory challenges were exhausted.

2. **Evidence—Declarations of Deceased—Withdrawn—Harmless Error.**
Error in the admission of evidence is cured by the trial judge withdrawing such evidence from the jury and instructing them not to consider it.

3. **Evidence—Executors—Declarations of Deceased—Transactions and Communications—Revisal, Sec. 1631.**
Revisal, sec. 1631, concerning transactions and communications with dead persons, does not prohibit testimony of the executor in favor of the deceased legatee of his testator; witness may testify to declarations made by the deceased legatee in her own favor in the presence of the devisor.

4. **Same.**
An executor is not prohibited by the statute, Revisal, sec. 1631, from testifying that perishable property was sold as that of a legatee and improperly credited to the estate of his testator by him in his annual account.

5. **Personal Property—Perishable—Bequest for Life.**
That part of the personal property bequeathed to legatee for life which is perishable in the using becomes hers absolutely.

6. **Executors—Annual Account—Error—Final Account—Correction.**
In a petition by executors for final settlement of testator's estate, it is competent for them to correct their annual account to show that items appearing of credit therein were erroneous.

SPECIAL PROCEEDINGS for the settlement of the estate of Erwin (398) Medlin, heard before *Moore, J.*, and a jury, at February Term, 1906, of UNION.

Erwin Medlin died in 1901, leaving a will in which he appointed his sons, Myers Medlin and John D. Medlin, executors. His widow, Lydia P. Medlin, died in 1904, and Myers Medlin qualified as her administrator. Under the will of Erwin Medlin all his personal property went to his widow, Lydia P. Medlin, during her life or widowhood, and at her death it was to be sold and the shares of the daughters first made equal to the shares advanced to Myers and John D. Medlin, and the balance equally divided among the children, except Ellis and LeQueen.

The executors of Erwin Medlin filed several annual accounts, and on 20 December, 1904, filed their final account, and at the same time filed before the clerk their petition for a final settlement of the estate. In their first petition for a settlement they allege that the balance on hand for distribution belonging to the estate of Erwin Medlin is $3,365.93; but later they filed an amended petition alleging that a mistake had been made in the first petition, and alleging that certain personal property of the value of $131.67, which was bequeathed to the said Lydia P. Medlin for life or widowhood, was such property as could only be used in its consumption, and for that reason it belonged absolutely to the said Lydia P. Medlin; and also alleging that the next of kin of Lydia P. Medlin claimed the sum of $1,209.45 as belonging to her estate, and that this item had been incorrectly placed in the estate of (399) Erwin Medlin. Upon issues raised by the petitions and answers thereto the cause was transferred to the Superior Court at term-time for trial. From a judgment for plaintiffs, defendants appealed.

*Lorenzo Medlin for plaintiffs.*
*Adams, Jerome & Armfield for defendants.*

CLARK, C. J. It was certainly irregular for Myers Medlin, as administrator of Lydia, to be one of the defendants in an action brought by Myers Medlin and J. D. Medlin, executors of Erwin Medlin. Myers Medlin, in both capacities, should have been placed on the same side. It was certainly still more unusual for Myers Medlin, administrator, as one of the defendants, to challenge a juror who had been passed by the plaintiffs, and over the objection of the other defendants, who were content with the juror. Still it does not appear that their peremptory challenges were exhausted by the other defendants nor that any one sat upon the jury to whom the defendants, appellants, made any objection. It has been often held that the right of challenge is a "right to reject, not a right to select." *S. v. Gooch,* 94 N. C., 1007; *S. v. Register,* 133 N. C., 750; *Ives v. R. R.,* 142 N. C., 137, and cases there cited. Both these errors are harmless. If instead of moving to strike out Myers Medlin, administrator of Lydia P. Medlin, as a party defendant, the motion had been to transfer and make him a plaintiff, this should have been granted.

There were exceptions to the admission of testimony as to declarations of Lydia P. Medlin, but the error, if any, was cured by the judge, who, in his charge, withdrew the testimony excepted to and instructed the jury not to consider it in any way. *Wilson v. Manufacturing*
(400) *Co.,* 120 N. C., 95, and numerous cases there cited; *S. v. Ellsworth,* 130 N. C., 691; *Moore v. Palmer,* 132 N. C., 976; *S. v. Holder,* 133 N. C., 712.

As to the other exceptions: It was competent for J. D. Medlin to testify that the perishable property was sold as the property of Lydia P. Medlin, and that the $1,209.45 belonged to her. Nor was she prohibited by Revisal, 1631 (Code, 590), from testifying as to personal transactions and communications between her and himself and brother, the executors of Erwin Medlin, for he was not testifying against her interest. Nor was Myers Medlin incompetent to testify to above because he was also administrator of Lydia P. Medlin, for under the last clause of that section this would merely have rendered it competent for any person claiming adversely to prove personal transactions or communications of Lydia P. Medlin concerning the same matter of a contrary nature. *Bunn v. Todd,* 107 N. C., 266. There was no error in permitting witnesses not parties to the action to testify as to declarations of Lydia P. Medlin, in the presence of her husband, to show her accumulation and ownership of the $1,209.45. There is no error in the charge of which the defendants can complain. The special prayer asked was good in part, but properly refused because it asked an instruction that the perish-

able part of the personal property did not become the absolute property of the wife, as devisee, for life, of all the personalty, nor is there any error in adjudging the costs against the defendants.

The fact that the plaintiffs, executors of Erwin Medlin, had in their annual accounts returned as part of the assets of the estate the two items, $131.67 and $1,209.45, did not estop them in filing their petition for a final settlement to allege that they had unadvisedly included these sums and that they were not, in fact, any part of the assets of their testator, but were the property of his widow, which had come to the (401) hands of Myers Medlin as her agent, and not as one of the executors of his father's estate. That Myers Medlin had a greater interest as next of kin of his mother did not affect the legal right to make the correction if the allegation was proven.

Issues were submitted to the jury as to both items, who found that both items were the property of Lydia P. Medlin, and judgment sustaining the petition was properly entered in accordance with such findings.

No error.

*Cited: Bedsole v. R. R.*, 151 N. C., 153; *Huffines v. Machine Co.*, 152 N. C., 523.

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W. T. SPRINKLE v. S. G. BRIMM.

(Filed 24 April, 1907.)

**Contract—Consideration.**

Defendant retaining possession of kegs of brandy sold by him to plaintiff and paid for, together with the price of necessary revenue stamps, under promise to ship in accordance with certain directions, is liable upon the loss of the brandy, through his negligence, to the plaintiff for the value of the brandy and stamps.

ACTION, tried before *Ward, J.*, and a jury, at August Term, 1906, of SURRY, upon appeal from a justice of the peace. Pertinent facts stated in the opinion. From a judgment for plaintiff, defendant appealed.

*Lindsay Patterson for plaintiff.*
*Watson, Buxton & Watson for defendant.*

CLARK, C. J. The defendant, as United States Collector, sold three kegs of brandy under warrant of distraint. The plaintiff purchased it. The brandy could not be shipped that day, as the defendant had no revenue stamps, but he said he would get them, and promised the plaintiff

(402) he would ship the brandy to a party in Kentucky and would send the plaintiff bill of lading. The plaintiff paid the defendant for the brandy and stamps, and left the brandy in possession of the defendant, who some days thereafter had it put on a dray to be carried to the railroad station, but did not see that it got to the railroad and did not send plaintiff bill of lading, as agreed. The brandy was lost, and this action is to recover value, including the stamps.

This case is settled by that of *Coggs v. Bernard,* Lord Raymond, 909, 1 Smith L. C. (9 Am. Ed.), 354, which was one of the most celebrated cases ever decided in Westminster Hall, and is remarkable for the analytical exposition by *Lord Holt* of the doctrine of bailment. The point in that case is that for breach of an agreement to ship goods, the party in whose custody the goods are is responsible for damages, though he is not a common carrier and was not to receive any payment, my *Lord Holt* saying that the "being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession." It would be a work of supererogation to attempt to add anything to what is said in *Coggs v. Bernard, supra,* and to the elaborate notes thereto in 1 Smith L. C., 354. The defendant was guilty of gross negligence, and, besides, is liable in this case because he agreed to ship the brandy and send the plaintiff a bill of lading, neither of which he did. *Robinson v. Threadgill,* 35 N. C., 39.

No error.

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(403)

F. E. SHOBER ET AL. v. W. H. WHEELER ET AL.

(Filed 24 April, 1907.)

**1. Administration—Production of Will—Acts—Validity—Statute.**

When, after letters of administration have been granted, a will is produced and admitted to probate, the clerk should revoke such letters and notify the administrator thereof. Until such notice is served, his acts, done in good faith, are valid. Revisal, sec. 37.

**2. Same—Courts—Jurisdiction—Statute—Land—Priorities.**

Laws of 1876-77, ch. 241, and Revisal, sec. 129, give the Superior Court, in civil actions, concurrent jurisdiction with the probate court in the settlement of estates and their subjection to the payment of debts. Upon the death of a party to a suit against whom judgment has been rendered, her administrator or executor having been made a party without objection, all parties in interest being before the court, and a motion is granted to subject her land to the payment of the judgment, the action will not be dismissed for want of jurisdiction of the Superior Court.

SHOBER *v.* WHEELER.

APPEAL from *Ward, J.*, at December Term, 1906, of FORSYTH.

This was a motion in the cause by C. S. Hutter. His Honor, upon the pleadings and the record, found the following facts. That an action was brought in the Superior Court of Forsyth County in the name of F. E. Shober and others against W. H. Wheeler, Addie M. Wheeler, Ann J. Wheeler, and E. H. Jennings, for the purpose of collecting debts which the plaintiffs held against W. H. Wheeler, to March Term, 1889; and by an order in the cause, signed at December Term, 1903, C. S. Hutter, who was assignee of a bond in the sum of $2,500, dated 20 September, 1887, due twelve months after date and payable to J. P. Pettyjohn, president of the Lynchburg Young Men's Christian Association, and signed by E. H. Jennings, W. H. Wheeler, and Ann J. Wheeler, was made a party plaintiff. That this debt of $2,500 was secured by a deed of trust upon certain real estate in the (404) county of Forsyth, and was executed by E. H. Jennings and wife, W. H. Wheeler and wife, and by Ann J. Wheeler, the mother of W. H. Wheeler, and was duly recorded in Forsyth County. That the judgment signed at December Term, 1893, set forth that there were various liens in the way of deeds of trust upon the property of W. H. Wheeler, which were prior to the judgment of F. E. Shober, and other judgment creditors; the mortgage creditors were ordered to be made parties to the action, and, among others, C. S. Hutter, who was assignee of the debt due the Lynchburg Young Men's Christian Association, was brought into court, and an order was made appointing W. B. Stafford commissioner to sell the lands of W. H. Wheeler and pay the proceeds to the creditors, observing the priority of the several mortgage liens.

The court further finds that during the year 1889 or 1890, and pending this action, Ann J. Wheeler, who was a surety upon the note now owned by C. S. Hutter, died seized of a tract of land in the county of Forsyth and described in the pleadings, and containing 30 acres, more or less, which was then and is now occupied by W. H. Wheeler. And after the death of Ann J. Wheeler, E. H. Jennings, who was a son-in-law of W. H. Wheeler, applied for letters of administration upon the estate of Ann J. Wheeler, alleging that she died intestate, and he was made a party defendant as administrator of Ann J. Wheeler. That W. B. Stafford, commissioner, sold the lands conveyed in the several deeds of trust, and after paying off the prior liens there remained due C. S. Hutter the sum of $3,639.42, due at May Term, 1899, Forsyth Superior Court, for which amount judgment was rendered in favor of C. S. Hutter against W. H. Wheeler and E. H. Jennings, and E. H. Jennings as administrator of Ann J. Wheeler, by his Honor, *O. H. Allen,* in this cause, with interest on $2,500 from 8 July, 1898, at 8 per cent (405)

until paid, which judgment the court adjudges to be a valid and binding judgment against the estate of Ann J. Wheeler.

That after C. S. Hutter obtained judgment against the estate of Ann J. Wheeler, E. H. Jennings, her administrator, left the State and has ever since been a nonresident, and made no effort to subject the land of Ann J. Wheeler to the payment of plaintiffs' judgment; and proceedings were instituted before the clerk of the Superior Court of Forsyth County to remove Jennings as administrator, when W. H. Wheeler for the first time produced a paper-writing purporting to be the last will and testament of Ann J. Wheeler, dated 24 December, 1887, in which she devised the land sought to be subjected to the payment of C. S. Hutter's judgment to the female defendant, Addie M. Wheeler, and her heirs. That W. H. Wheeler qualified as executor of Ann J. Wheeler before the clerk of the court of Forsyth County, and by an order in this cause he as executor was brought into court and made a party defendant, together with Addie M. Wheeler and her heirs, who are minor children of Jennings' wife, who is now dead, and are represented by a guardian *ad litem,* and a son, William Wheeler, who is of age and has been served with process and made a party defendant.

The court further finds as a fact that at May Term, 1905, C. S. Hutter filed a petition in this cause in which he prays that an order may be granted for the sale of the lands of Ann J. Wheeler to pay off the balance of his debt, which the lands contained in his deed of trust failed to pay.

The court finds as a fact that the devisees of Ann J. Wheeler have been made parties defendant, and all parties interested in the land or estate of Ann J. Wheeler are properly before the court. It also
(406) finds as a fact, from statements contained in the petition and admissions of defendants' counsel in open court, that C. S. Hutter is the only creditor of Ann J. Wheeler's estate; that there are no personal assets belonging to her estate, and there is no other property belonging to her estate and no other debt due her estate, and that E. H. Jennings and the sureties upon his administration bond are insolvent and that W. H. Wheeler is also insolvent.

The court made an order directing the sale of lands for the payment of the judgment, etc. Defendants excepted to the order and appealed, for that:

1. The judgment rendered herein against E. H. Jennings, administrator of Ann J. Wheeler, was void.

2. That the court had no jurisdiction to hear the motion or make the order.

*Watson, Buxton & Watson for plaintiffs.*

*Lindsay Patterson and J. S. Grogan for defendants.*

CONNOR, J., after stating the case: Reversing the order in which the exceptions appear in the record, we consider first the one attacking the validity of the judgment rendered by the court against Jennings, administrator of Mrs. Wheeler, fixing the amount of the debt held by Hutter. The learned counsel for defendants insist that the letters issued to Jennings were void, for all purposes, because the court had no jurisdiction to issue them. It must be conceded that the older authorities, at least some of them, held that intestacy was as essentially jurisdictional as death and domicile or *bona notabilia*. That the production of a will after letters of administration were granted showing the absence of such jurisdictional fact rendered the person so appointed an officious intermeddler. The theory upon which the courts so held was that the executor took title to the personalty under the will, and that no act of the court could deprive him of such title. It is insisted that the law is so held by this Court in *Springs v. Irwin,* 28 N. C., 27. The (407) facts there were not the same as here. In that case the record showed, and the letters of administration recited, that there was a will, and did not show that the executor named in it had either refused to offer it for probate or renounced his right to qualify. *Nash, J.,* said: "If, therefore, the letters show that there is a will and the existence of the executor be unknown, or before his renunciation, the court cannot grant letters of administration with the will annexed. If they do, the letters are void and confer no authority or power on the administrator." It may be that language is to be found in the opinion capable of the conclusion drawn by counsel. For the reason stated, the exact point was not decided. It is probable that at that time the law was considered to be as claimed. The case is not cited until *London v. R. R.,* 88 N. C., 584. The question now before us was not involved, but *Smith, C. J.,* noticing the several cases in which this Court had held the grant of letters of administration void, refers to *Irwin's case.* In his conclusion, however, he says: "If the person on whose estate the court undertakes to grant letters testamentary or of administration be dead, and, at the time of his decease, have his domicile or have *bona notabilia* to be administered, the jurisdiction exists." Such seems to be the law in other States, and we think consonant with reason and policy. If there be irregularities in the proceedings in which letters were granted, the court has ample power, upon proper application, to review its action and revoke them. In an exhaustive note to *Dobler v. Strobel,* 81 Am. St., 530 (p. 555), Mr. Freeman says that formerly it was held that when letters of administration were granted and a will was afterwards produced, the letters were void for all purposes, citing authority. He further says: "At the present day the rule seems to be firmly established to the contrary"— that such letters are only voidable, and that the acts performed (408)

by the administrator are binding in a collateral proceeding. In *Schluter v. Bank,* 117 N. Y., 125, *East, J.,* considers the law as settled; see also, *Broughton v. Bradley,* 34 Ala., 694 (73 Am. Dec., 474).

While we think the authorities cited fully sustain the plaintiff's contention and his Honor's judgment, it would seem to be settled in this State by statute. Revisal, sec. 37, makes it the duty of the probate court, upon the production of a will, to make an order revoking the letters and cause it to be served on the administrator, and providing that all of his acts done in good faith until the service of the order of revocation shall be valid. We do not think that *Springer v. Shavender,* 116 N. C., 12, is in point.

The defendant's next exception is directed to the jurisdiction of the court to entertain the motion and make the order to sell Mrs. Wheeler's land to pay plaintiff's debt. It appears from the record and his Honor's findings of fact that the action was originally brought by plaintiff Shober against W. H. Wheeler and wife, Mrs. Ann J. Wheeler, and Jennings for the purpose of vacating certain conveyances made by Wheeler to his wife. Plaintiff Hutter, who had acquired by assignment a note executed by Wheeler and the other defendant to Pettyjohn, was made a party plaintiff. The cause was brought to trial and the deeds set aside (113 N. C., 370), judgment rendered adjusting the priorities of the several creditors, and the land sold. Afterwards, upon the death of Mrs. Wheeler, Jennings was appointed her administrator and made a party in his representative capacity and judgment rendered, as we have seen, upon the Hutter debt. Thereafter Wheeler, having produced the will and qualified, was brought in as executor. No
(409) action being taken to subject the land of which Mrs. Wheeler was possessed at the time of her death to the payment of the judgment, the motion in the cause was made as appears in the record. His Honor finding that the devisees of Mrs. Wheeler were properly before the court; that there was no personal estate, and that the Hutter judgment was the only debt outstanding against Mrs. Wheeler, directed the land sold, etc. It may be that if when the order making the new parties was made, objection had been taken, the cause should have gone off the docket by a final judgment. It does not appear that any exception was taken or motion to that effect made. At any time after the death of Mrs. Wheeler and the rendition of his judgment Hutter could have proceeded in the Superior Court to compel a sale of the land to pay his debt. This is expressly authorized by section 129, Revisal, being Laws 1876-77, ch. 241. This statute was construed in *Haywood v. Haywood,* 79 N. C., 42, and other cases, the last being *Fisher v. Trust Co.,* 138 N. C., 90. In all these cases it is held that concurrent jurisdic-

tion with the probate court is conferred on the Superior Court in a civil action to settle estates and subject real estate to the payment of debts.

The parties all being before the court having jurisdiction to administer the relief, we can see no good reason why they should be sent out of court and compelled to begin a new proceeding, which must have resulted in precisely the same way. In creditors' suits courts of equity always took charge of all of the property, subject to the debts, and brought all creditors in, to the end that all rights should be administered and complete relief given. It is the policy of the law to do so and to prevent a multiplicity of suits, expensive litigation, and conflicting claims upon property. Courts usually refuse to entertain separate actions, compelling all of the creditors to come in and be bound by the final judgment. *Dobson v. Simonton,* 93 N. C., 268; *Han-* (410) *cock v. Wooten,* 107 N. C., 9.

His Honor finds that there are no other creditors; that Mrs. Wheeler has no personal estate, and that the amount due Hutter on his judgment is ascertained. Upon these facts he is entitled to have his judgment paid out of Mrs. Wheeler's lands. This is all that is awarded him. The judgment must be

Affirmed.

*Cited: Yarborough v. Moore,* 151 N. C., 119.

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E. C. JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 April, 1907.)

**1. Telegraph Companies—Stare Decisis.**

Under the doctrine of *stare decisis,* the Supreme Court should adhere to its own decisions, unless it clearly appears that they are wrong.

**2. Same—Damages—Place of Contract—Conflict of Laws.**

The liability of a telegraph company for damages for mental anguish, for negligence in transmitting telegraphic messages from its office in one State to that of another for delivery, is determined by the laws of the State in which the message was received for transmission.

ACTION, tried before *Moore, J.,* and a jury, at October Term, 1906, of DURHAM.

Action to recover damages for mental anguish arising from failure to deliver a telegram sent from Danville, Va., to Durham, N. C., as follows: "To E. C. Johnson, Durham, N. C.: Sidney died last night, 25

minutes after 9." The charges for transmitting said message were prepaid by plaintiff. The Sidney referred to was plaintiff's son.

(411) The court submitted the usual issues and the following additional issue:

"3. Under the law of the State of Virginia, can damages for mental suffering, independent of any injury to person or estate, be recovered against a telegraph company for negligent failure to deliver a message or for negligent delay in the delivery of a message, although the telegraph company is advised of the character of the message? Answer: No."

The jury answered the other issues for plaintiff and assessed damages at $300. It is admitted that there is no other evidence of damage than mental suffering. The defendant moved for judgment upon the admissions and the finding of the jury upon the third issue. The court overruled the motion, and the defendant excepted and appealed.

*Winston & Bryant for plaintiff.*
*Fuller & Fuller for defendant.*

BROWN, J. The exact question presented for decision has been considered and decided in this State adverse to plaintiff's contention, and following such decision the court below should have granted the defendant's motion, it being admitted that there is no other evidence of damage except that arising from mental suffering alone. *Bryan v. Telegraph Co.*, 133 N. C., 607. In that case a telegram of similar character was sent to the plaintiff at Wedgefield, S. C., from Mooresville, N. C. The message was promptly transmitted to Wedgefield, but was never delivered, the operator there wiring back, "Party unknown." The plaintiff came over to North Carolina and brought suit against the telegraph company for damages for mental anguish. It was admitted that at that time she could not recover such damages in South Carolina. This Court held that the contract having been made in North Carolina, damages must be assessed according to the law of North Carolina, and the plaintiff was permitted to recover in our courts for her mental suffer-

(412) ing. The case was first decided at August Term, 1902, upon appeal from a judgment of nonsuit in the Superior Court. A *per curiam* judgment was rendered affirming the judgment of the Superior Court. At August Term, 1903, the cause was reheard, and after mature deliberation the former judgment was reversed in an elaborate and forceful opinion by *Chief Justice Clark*. In referring to the question involved in the case at bar, the learned judge says:

"The last objection is that the wrong, if any, occurred in South Carolina and is to be tried by the laws of that State, which it is alleged did

not at that time allow the recovery of damages for mental anguish. A case exactly in point is *Reed v. Telegraph Co.,* 58 Am. St. (Missouri), 609, 34 L. R. A., 492, which holds that 'If a telegraph message is delivered to the company in one State to be by it transmitted to a place in another State, the validity and interpretation of the contract, as well as its liability thereunder, is to be determined by the laws of the former State.' The contract was made at Mooresville in this State; it is a North Carolina contract, and damages for its breach are to be assessed according to the liability attaching to such contract under our laws. The Code, sec. 194 (2), authorizes an action against a foreign corporation 'by a plaintiff, not a resident of this State, when the cause of action shall have arisen . . . within this State.'"

It is manifest that the fact that the plaintiff, a nonresident, came to this State and brought suit, makes no difference between that case and the case at bar. The principles of law governing the case are the same, whether the suit is brought in our courts by a resident of this State or a nonresident who comes here and institutes his action under our Code. *Cannaday v. R. R.,* 143 N. C., 439.

The learned counsel for the plaintiff was evidently inadvertent (413) to *Bryan v. Telegraph Co.* when he stated that this question is now presented here for the first time. In that case it is distinctly held that it is a North Carolina contract, and damages must be assessed under our laws and not under the laws of South Carolina, where the breach occurred. This doctrine was reaffirmed and *Bryan v. Telegraph Co.,* cited and approved by this Court, as at present constituted, in *Hancock v. Telegraph Co.,* 137 N. C., 499, in the following language: "If a telegraphic message is delivered to the company in one State, to be transmitted by it to a place in another State, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former State, where the contract originated." It is true that the telegram in that case originated in Maryland and was sent into Virginia, both of which we now know do not recognize the mental anguish doctrine. But it is to be noted that in *Hancock's case* there was no evidence that Virginia did not recognize such doctrine, and the case was decided solely upon the law of Maryland. This further appears on the second hearing of the case (142 N. C., 163).

Thus we see that the principle laid down in *Bryan's case* was settled upon after mature consideration upon a rehearing, and has been reaffirmed subsequently by a unanimous Court in *Hancock's case* and later in an elaborate opinion by *Justice Hoke* in *Hall v. Telegraph Co.,* 139 N. C., 373. The weightiest considerations should move the Court to adhere to its decisions, unless it clearly appears that they are wrong. As

is well said by *Mr. Justice Walker* in *Hill v.* R. R., 143 N. C., 539, "The doctrine of *stare decisis,* commonly called the 'doctrine of precedents,' has been firmly established in the law. It means that we should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination."

(414) The opinion of the *Chief Justice* in *Bryan's case* is supported by abundant authority, although we admit the cases and text-writers are not in accord. The contract entered into at Danville for the benefit of this plaintiff may be regarded as a continuous and indivisible contract, the performance of which may run through several States. It was entered into in Virginia and partially performed in that State. The case of *Reed v. Telegraph Co.,* 135 Mo., 661, cited by the *Chief Justice* in *Bryan's case,* is a direct authority for his position and is a case where the telegram was sent from Iowa to Missouri. In the opinion it is said: "The contract was made in Iowa, and according to the terms was to be partially performed in that State." Again: "Does the circumstance that it was to be partially performed in Missouri exempt it from the laws of Iowa? We think most clearly not." In *Faulkner v Hart,* 82 N. Y., 413, goods were shipped under contract from New York to Boston. They were burned in Boston under circumstances which freed the carrier from liability under the laws of Massachusetts. The New York Court applied the laws of New York, where the contract was made, and held defendant liable. To the same effect is *Hartman v. R. R.,* 39 Mo. App., 89. Mr. Paige, in his work on Contracts, recognizes the doctrine laid down in the *Reed case,* for, after stating that it has been held that the law of each place of partial performance governs, he says: "On the other hand, it has been said that if a contract is to be performed in part where made and in part elsewhere, the law of the place where it is made and performed in part will control," etc.

Where the contract is made in one State to be fully performed in another, the law of the latter governs. "This rule is founded," says the Supreme Court of Wisconsin, "on the idea that in making a per-

(415) sonal contract to be *fully* performed in another State, the parties must have had the law of that State in view. But if the contract is to be partly performed where made and partly in other countries or States, the law of the place where it is made will still govern, unless a clear *mutual* intention is manifested that it shall be governed by the law of some other country." *Bartlett v. Collins,* 109 Wis., 477. To same effect are *Liverpool Co. v. Insurance Co.,* 129 U. S., 397; *Morgan v. R. R.,* 2 Wood, 244, Fed. Cases, No. 9804; *Hudson v. R. R.,* 92 Iowa, 231; 54 Am. St., 550; *R. R. v. Bebee,* 174 Ill., 13; *Cochran v. Ward,* 5 Ind. App., 89, 51 Am. St., 229, and note; *Schultz v. Howard,* 63 Minn., 196.

The principle declared in *Bryan's case,* and reaffirmed in *Hancock's case* and in *Hall's case,* is expressly maintained by the Supreme Court of Texas in *Telegraph Co. v. Waler,* 74 S. W., 751, wherein it is held: "Where a telegraph message is delivered to the company at a point in Texas for transmission to a point in Indian Territory, the damages for mental anguish suffered by the addressee, owing to delay in the delivery of the message in the Indian Territory, may be recovered in Texas, though such damages are not recoverable in the Indian Territory." In a later case the same Court held that "where a message was given to a telegraph company in Arkansas and transmitted to its destination in Texas, where the agent negligently failed to deliver the same to the addressee, a recovery is governed by the laws of Arkansas, and damages for mental anguish, not being recoverable there, cannot be recovered in a suit in Texas." Telegraph Co. v. Buchanan, 55 Tex. Civ. App., 437. Both of these cases refer to antecedent cases in the same Court, holding the same doctrine, and they also refer to and rely upon the leading case of *Reed v. Telegraph Co.,* cited by the *Chief Justice* in (416) his opinion in the *Bryan case,* and are based upon the doctrine that "contracts are to be governed by the law of the State where entered into, unless a different intention is expressed or implied by the contract." *Telegraph Co. v. Christensen,* 78 S. W., 744.

It will be observed that the decisions of this Court are on all-fours with the above quoted Texas cases. In the *Bryan case* the telegram originated in North Carolina and was sent to South Carolina, where the breach occurred. The law of North Carolina was applied. In the *Hall case,* which is in every respect identical with the case at bar, the telegram originated in Virginia and was sent to North Carolina, where the breach occurred and where the suit was brought. The law of Virginia was applied by *Mr. Justice Hoke,* who, speaking for a unanimous Court, said: "The complaint averring that the contract was made in Virginia, the rights of the parties will be determined by the laws of Virginia so far as the same apply." The learned justice cites and approves both the *Bryan* and the *Hancock cases.*

The *lex loci solutionis* seems to apply to those contracts made in one country and to be wholly performed in another, indicating thereby two distinct places of contract, one where it is entered into, and the other where it is to be entirely performed. *Locus, ubi contractus celebratus est; locus, ubi destinata solutio est.* It may be said that the law of the place governs only as to the validity and interpretation of the contract, and not as to the means of enforcing it or compensating for its breach. The *lex loci* seems to embrace more than that. It is said in 9 Cyc., 668: "This law (of the place) governs not only as to its execution, authentication, and construction, but also as to the legal obligations arising

(417) from it, and as to what is to be deemed a performance, satisfaction, or discharge." *Davis v. Morton,* 96 Am. Dec., 345. The Supreme Court of Indiana holds that the law of the place includes the remedy there given for its breach, but does not interfere with a question of legal procedure, which is governed by the *lex fori. Cochran v. Ward, supra,* and 51 Am. St., 229. The Supreme Court of the United States says: "It is also the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement." Again: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence." *Edwards v. Kearsey,* 99 U. S., 595. The Court evidently was governed by these and similar cases when it held in *Bryan's case,* as well as *Hancock's* and *Hall's cases,* that the law of the place included the question of damage as well as the validity and interpretation of the contract. While we recognize that respectable authority may be found militating against the position this Court has heretofore taken, we do not feel that we should depart from the precedents we have already made.

Reversed.

*Cited: Woods v. Telegraph Co.,* 148 N. C., 10.

*Overruled: Penn v. Telegraph Co.,* 159 N. C., 312, 316, 317, 318; *Raiford v. Telegraph Co.,* 160 N. C., 490.

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(418)

CORA NELSON v. R. J. REYNOLDS TOBACCO COMPANY.

(Filed 24 April, 1907.)

**1. Judge's Charge—Evidence—Phase—Omission—Special Instruction.**

The omission of the judge below to charge the jury upon any given phase of the evidence is not error unless especially requested by proper prayers for special instruction.

**2. Damages—Negligence—Ingress and Egress—Safe Place—Employer's Liability.**

In an action for damages against an employer for negligence on account of an injury sustained by the plaintiff, an employee, in a passageway provided for the ingress and egress of employees to and from their work

while blocked with hogsheads of tobacco, it is necessary to show that the employer had knowledge of such condition, or by the exercise of reasonable diligence should have acquired it.

**3. Same—Judge's Charge.**

In an action against an employer for failure to provide for his employees a safe way of ingress and egress to and from their work, it is not error for the judge to charge the jury: "An employer owes the employee a legal duty in the exercise of reasonable care to provide for him not only a reasonably safe place in which to work, but he also owes that employee a duty to provide a way of access and departure from that work that is reasonably safe. That is the test."

ACTION to recover damages for personal injury received while in defendant's employment, tried at December Term, 1906, of FORSYTH, *Ward, J.*, presiding. The following issues were submitted to the jury:

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

2. Did the plaintiff by her own negligence contribute to her injury?

The plaintiff moved for a new trial. Motion denied. From a judgment dismissing the action, plaintiff appealed.

*M. L. Swink for plaintiff.*
*Manly & Hendren for defendant.*

BROWN, J. There is evidence tending to prove that plaintiff, (419) an employee in the factory of defendant, after her day's work was over, on her way out of the factory, was passing along a passageway through the factory building. This passageway was the one usually used by the operatives to reach the street. On the occasion of plaintiff's injury, the evidence tends to prove that the passageway had become blocked to some extent with large hogsheads, which plaintiff was compelled to pass by in order to reach the exit from the building. As she was passing along the passage, John Morgan, another employee of defendant, was rolling a hogshead on a truck, which struck plaintiff and injured her. Plaintiff also offered evidence tending to prove that the passage was dimly lighted, and on this occasion was rendered unsafe by an accumulation of hogsheads of tobacco at a turn in the passage which led to the street entrance. There was evidence introduced by defendant contradicting the averments of plaintiff.

The plaintiff rests her right to recover upon the ground that defendant was negligent in two particulars, viz: First, in that the defendant permitted the passageway to be blocked up with hogsheads while the plaintiff and other employees were leaving their work, thereby rendering the passageway dangerous and unsafe; and, second, in that it permitted the passageway to be dimly lighted, making it dangerous and unsafe for the plaintiff in going out of the building.

The concrete negligence, if any existed, was the failure upon the part of the defendant to provide a reasonably safe place for the ingress and egress of its employees. To establish this alleged negligence the plaintiff offered evidence tending to prove the two specifications above named. The plaintiff assigns error because his Honor presented to the jury only that specification relating to insufficient lights, and failed to pre-
(420) sent that relating to blocking up the passageway with hogsheads.

There are several reasons why the contention cannot be maintained:

1. The plaintiff submitted no request for instruction to present such feature of evidence to the jury. It has been repeatedly held by this Court that the failure of the judge below to instruct upon any given phase of the evidence is not error unless he was specially requested to do so. *Patterson v. Mills,* 121 N. C., 258; *Yow v. Hamilton,* 136 N. C., 357. "An omission to charge on a given point is not error unless there is a prayer to instruct the jury thereon." *Clark, J.,* in *Justice v. Gallert,* 131 N. C., 394.

2. There is no evidence that the passageway was *per se* unsafe, or that it was rendered unsafe by crowding hogsheads in it on any other occasion than the afternoon of the day plaintiff was hurt. The duty to provide a reasonably safe place to work in, as well as of ingress and egress, is like unto the obligation to provide machinery that is not defective. The trouble must be brought to the master's knowledge, or it must be shown that the master by the exercise of reasonable diligence might have acquired such knowledge. *Hudson v. R. R.,* 104 N. C., 491; Shearman and Redfield Negligence, sec. 99; *Greenleaf v. R. R.,* 29 Iowa, 14; *Cotton v. Manufacturing Co.,* 142 N. C., 531. We find no evidence of habitual or continual crowding or any other evidence which would charge defendant's management with knowledge that the passageway was being rendered unsafe.

3. Upon a careful examination of the charge, we think, while his Honor did not specifically point out that part of the evidence relating to crowding the passageway with hogsheads, that he very clearly and correctly instructed the jury upon the law when he said: "An employer owes the employee a legal duty in the exercise of reasonable care
(421) to provide for him not only a reasonably safe place in which to work, but he also owes that employee a duty to provide a way of access and departure from that work that is reasonably safe. That is the test." Other portions of the charge also indicate, we think, that his Honor did not restrict the jury to the consideration solely of the evidence of insufficient lighting. The case seems to have been fairly tried

and properly presented to the jury. They have found against plaintiff upon the issue of negligence, and we see no good reason for disturbing their verdict.

Affirmed.

*Cited: Blevins v. Cotton Mills,* 150 N. C., 499; *Walker v. Walker,* 151 N. C., 167; *Pritchett v. R. R.,* 157 N. C., 100; *Kiger v. Scales Co.,* 162 N. C., 136.

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WINSTON CIGARETTE MACHINE COMPANY v. WELLS-WHITEHEAD TOBACCO COMPANY.

(Filed 24 April, 1907.)

**Contract—Exhibit—Expenses—Recovery.**

While costs and expenses are recoverable upon the breach by defendant of its duty under a contract to exhibit a certain machine of plaintiff for the purpose of advertisement and prospective sales of the same, they are such only as the plaintiff may have actually incurred in making the exhibit which it was the defendant's duty to do; when the plaintiff has made no such exhibit, it has incurred no expense or cost therein, and none, therefore, are recoverable.

ACTION, tried before *Ward, J.,* and a jury, at December Term, 1906, of FORSYTH.

*Manly & Hendren and Watson, Buxton & Watson for plaintiff.*

*F. A. Woodard, Connor & Connor, and Lindsay Patterson for defendant.*

WALKER, J. This case was before us at a former term (141 N. C., 284). We then held that the plaintiff could recover, as it did, its actual outlay for expenses in preparing to have its machine ex- (422) hibited, but not profits which, as it claimed, it would have realized if the machine had been exhibited, as they were speculative and too uncertain. At the last trial the plaintiff tendered two issues, viz:

"1. Did the defendant notify the plaintiff it would not exhibit the machine at St. Louis at a time too late for plaintiff to make an exhibition of said machine at the said St. Louis Exposition?

"2. What would it have cost the plaintiff to have made an exhibition of said machine as defendant contracted to exhibit the same?"

The court rejected those issues and submitted the following issue: "What amount, if any, is plaintiff entitled to recover for failure of defendant to exhibit the machine at the Universal Exposition, as alleged in the complaint," and then instructed the jury to assess the damages,

under this issue, at 5 cents, which the jury did, the plaintiff's counsel having stated that they had no other evidence on this issue than that introduced on the former trial. The plaintiff excepted to the refusal of the court to submit the two issues tendered by it and to the issue submitted, and appealed from the judgment on the verdict.

The only question is, Can the plaintiff recover as damages what it would have cost it to exhibit the machine, it being too late when it was informed of the defendant's default to do so? In other words, Can it be permitted to recover the cost and expense of exhibiting the machine which it never paid and never incurred? If it had been notified in time that the defendant would not exhibit the machine, and had itself done so, it would be entitled to recover the reasonable cost of such exhibition; but when it had been fully repaid what it had paid out, it would neither have gained nor lost anything, and in this respect would be in
(423) precisely the same condition as it is now. The law does not allow damages for money that might have been spent under such circumstances, but which was not spent. It would not be necessary to do so in order to compensate the plaintiff for any loss sustained, because none would or could have been suffered. The cases cited by the plaintiff's counsel do not support his position. In *Sledge v. Reid,* 73 N. C., 440, the expression, "As far as the court could go to that end would be to allow him the cost of the hire of another animal until his crop was made, and then to pay him for the one he had lost," was used with reference to cost or expense actually paid or at least incurred, and not merely to prospective or possible cost which might never be incurred. The other case, *Spencer v. Hamilton,* 113 N. C., 49, would seem to be an authority against the plaintiff's contention. It is there said that the measure of damages is not what it would have cost the defendant to clean out the ditches, which cleaning the plaintiff had agreed to do, but the loss resulting from having to culivate an undrained instead of a drained farm, this being the only damage flowing from the breach. The Court, in that case, says it is true the defendant might have put the ditches and canal in order and have charged the plaintiff with the cost thereof, but he was not legally bound to do so, though it may have been better for his interests if he had done so. As he did not, in fact, clean them out, there was no loss to him on account of any expense of doing so, and he could not recover, upon the clear principle that no one can be allowed for the expense of doing that which he might have done, but has not done or undertaken to do. The privilege which the plaintiff had of paying out money, with the right to recover back the amount so paid, cannot be considered as an element of damages.

There was no error in the ruling of the court.

No error.

(424)

C. G. MORGAN v. HENRY D. STEWART.

(Filed 24 April, 1907.)

1. **Malicious Prosecution — Indictment — Acquittal—Probable Cause—Prima Facie Case.**

A *prima facie* case of want of probable cause is not made out by evidence of an acquittal by a court of competent jurisdiction of the defendant, the plaintiff in an action for malicious prosecution.

2. **Same—Facts Established—Probable Cause—Question of Law.**

In an action for malicious prosecution the question of probable cause arising from facts admitted or established is one of law for the court.

3. **Same—Statute—County Sanitary Board—Regulations—Validity.**

In pursuance of section 4451, Revisal, authorizing the sanitary committee of a county to make regulations and provisions for the vaccination of its inhabitants, and to impose such penalties as they may deem necessary to protect the public health, and of section 4355 thereof, making those violating the rules and regulations of the committee guilty of a misdemeanor and fined or imprisoned, such rules, regulations, or orders, when reasonable and relevant to the purpose, are a valid exercise of authority.

4. **Same—Evidence—Nonsuit.**

It is error in the court below to refuse to dismiss an action as on judgment of nonsuit, for that there was no evidence to sustain a finding for the plaintiff on the issue of the want of probable cause upon testimony, without substantial divergence, showing: That in pursuance of a resolution of the county board of health, the defendant, the county superintendent, having heard there were several cases of smallpox near the plaintiff's school, one within half a mile and in sight, called at the schoolhouse, explained to the plaintiff the law as he understood it, and was refused by the plaintiff the request that he be allowed to vaccinate the plaintiff and his scholars; that for some months prior to this request smallpox had been prevalent in this county, there having been many cases the previous year and many developed in the then current year; that upon being refused, the defendant referred the matter to the Secretary of the State Medical Board, was advised that the plaintiff should be proceeded against, and was shown a letter from the Attorney-General advising that regulations similar to those under which he was acting could be lawfully enforced; that thereupon the plaintiff was indicted and acquitted.

ACTION for malicious prosecution, tried before *Justice, J.*, and (425) a jury, at October Term, 1906, of ANSON.

There was evidence to the effect that in February, 1906, the present defendant, who was at that time superintendent of health for Union County, had caused the arrest and trial before two justices of the peace of said county of the present plaintiff, who was then teaching a public school in Union, on a charge of wrongfully refusing to be vaccinated and to permit the vaccination of the pupils of his school, pursuant to

regulations of the sanitary committee of that county. That on trial had 10 March, 1906, the present plaintiff was acquitted, and thereupon instituted this action against defendant for malicious prosecution.

At the close of plaintiff's testimony, and again at the close of the entire testimony, there was motion on the part of the defendant to dismiss the action as on judgment of nonsuit, in that there was no testimony to sustain or justify a finding for plaintiff on the issue as to want of probable cause for the prosecution complained of.

The motion was denied, and defendant excepted.

Verdict and judgment for plaintiff, and defendant excepted and appealed.

*No counsel for plaintiff.*
*R. B. Redwine for defendant.*

HOKE, J. It is accepted doctrine with us that, on facts admitted or established, the question of probable cause is one of law for the court. *Jones v. R. R.,* 125 N. C., 229; *Bradley v. Morris,* 44 N. C., 395; *Swaim v. Stafford,* 26 N. C., 392.

And it is further held that the acquittal by a court which has jurisdiction to try and determine the question does not make out a (426) *prima facie* case of want of probable cause. *Bell v. Pearcy,* 33 N. C., 233.

Applying these principles, a careful examination of the record leads us to the conclusion that in no aspect of the testimony has plaintiff made out his allegation of a want of probable cause for the prosecution, and there was error in refusing the defendant's motion of nonsuit.

There is no substantial divergence in the testimony presented, and it tends to show that for eighteen months prior to the occurrence smallpox had been prevalent in Union County, there having been as many as 572 cases in the year previous, and 200 cases already developed in the current year; that one case existed within one-half mile of the schoolhouse in question, several others at a distance not much greater, and at Waxhaw, within three miles, there were quite a number of cases. In the presence of these conditions the sanitary committee of Union County met at Monroe, N. C., and having been called to order by the chairman, passed a resolution looking to compulsory vaccination, as follows:

"Any person or persons within a radius of three miles of any schoolhouse who willfully refuses to be vaccinated or to allow any one in his charge to be vaccinated shall be guilty of a misdemeanor."

The committee, having fixed a fee of vaccination, allowed the superintendent of health to call in any doctor of the county to help him; and it was further ordered that the county superintendent of health proceed

to enforce compulsory vaccination to such an extent as he might consider necessary. The substance of these proceedings was duly published in the county paper, and plaintiff testified that he had been made aware of such proceedings, but was not informed of their precise nature.

The defendant, who was then superintendent of health in (427) Union County, having heard that there were several cases of smallpox near the plaintiff's school, one within a half mile and in sight, called at the schoolhouse, explained the conditions, and the law as he understood it, and requested that he be allowed to vaccinate the plaintiff and his scholars, and the request was refused.

The plaintiff and defendant differ somewhat as to the precise terms; but taking either version to be true, there was a refusal both as to plaintiff and the scholars, or certainly as to some of them.

Having referred the matter to the Secretary of the State Medical Board at Raleigh, and having been advised that the teacher was indictable and should be proceeded against; and, furthermore, having been shown a letter from the Attorney-General of the State to the Superintendent of Public Instruction, in which the Attorney-General advised that regulations similar to those of Union County could be lawfully enforced, the superintendent instituted the prosecution complained of and on which the present plaintiff was tried and acquitted.

Our statute law provides, in substance (Revisal, sec. 4451), that on the appearance of smallpox in a neighborhood, the authorities of any city or town, or the sanitary committee of any county, may make such regulations and provisions for the vaccination of its inhabitants and impose such penalties as they may deem necessary to protect the public health. And section 4355 provides that, "If any person shall violate any of the rules and regulations of the sanitary authorities of any county in regard to vaccination, he shall be guilty of a misdemeanor, and fined not exceeding $50 or imprisoned not exceeding thirty days."

We find no precise form in which the resolution of a county sanitary board should be couched, nor any specified or stated (428) order of proceedings where such matters are to be considered or determined; and we see no reason why the order of the sanitary committee should not be upheld as a valid exercise of the authority conferred upon them by the statute. They could not declare the prohibited act a misdemeanor, because its status had already been so fixed by public law; but their resolution could still be received and construed as a regulation requiring parties within the prescribed territory to submit to vaccination; and the statute makes the refusal a misdemeanor within the jurisdiction of a justice of the peace. Legislation of this character has been upheld by well considered decisions in this and other jurisdictions. *Hutchins v. Durham,* 137 N. C., 68; *S. v. Hay,* 126 N. C., 999; *Morris*

*v. Columbus,* 102 Ga., 792. And it is also well established that the Legislature may confer on local boards—certainly those clothed with governmental functions—the power to make reasonable regulations to protect the public health and to fix and establish facts or conditions on which a statute makes its own action depend. *S. v. R. R.,* 141 N. C., 852; 8 Cyc., 830; Freund on Police Power, sec. 34.

And while these local regulations are required to be reasonable, and are, to some extent, subject to judicial control, both as to the existence of an apprehended danger and the reasonableness of the relief (Freund on Police Power, *supra*), we have held that "where a statute of this kind has been passed and the conditions established which call it into operation, it thus becomes a law binding on each and all alike, and it is optional to no one's private judgment whether to render compliance or not. If there are exceptional cases, where, owing to the peculiar state of the health or system, vaccination would be dangerous, that would be a matter of defense, the burden of which would be on the defendant." *S. v. Hay, supra.*

(429) In holding that there was probable cause for prosecuting the plaintiff, we intend to make no comment, certainly no adverse comment, either on the justices who tried and acquitted the plaintiff nor on the plaintiff himself. Both, no doubt, acted according to their best judgment and sense of duty, and there is much to be said in justification of plaintiff's conduct. But the plaintiff's conduct here is not the important or controlling question. We are considering chiefly the conduct of defendant, and how the matter reasonably appeared to him. He was at that time superintendent of health of Union County, whose sworn duty it was to see that laws addressed to the subject involved were enforced, and "to carry out, as far as possible, the work as directed by the sanitary committee of his county and by the State Board of Health." Revisal, sec. 4445. He notes that the county is threatened with an epidemic of smallpox, and the sanitary board has passed a resolution requiring each and every one within a radius of three miles of any case of smallpox to be vaccinated; and on the statute-book is a law which makes it a misdemeanor to refuse to comply with this regulation. That this school is within such a radius and is in great danger of exposure; and under such conditions he applies to the plaintiff for permission to vaccinate both plaintiff and his scholars, and the application is refused.

There is also evidence tending to show that there was a disposition in many localities to obstruct the enforcement of these regulations, and under such circumstances the defendant consults with the Secretary of the State Board of Health as to the proper course to be pursued. That officer, who deservedly holds the confidence of every well-informed and patriotic citizen of the State by reason of his faithful and intelligent

devotion to his duties and to the State's best interests, advises, upon all the facts, that the law has been broken, and that the public good requires that the prosecution should be instituted. The defendant then swears out the warrant and causes plaintiff to be put on trial. (430)

Probable cause, in cases of this kind, has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution. *Cabaniss v. Martin,* 14 N. C., 454; *Bell v. Pearcy, supra.*

It seems clear to us that in no aspect of the testimony, as the same is presented in this record, has there been a want of probable cause shown, and the court below should have dismissed the case as on judgment of nonsuit.

Reversed.

*Cited: Downing v. Stone,* 152 N. C., 530, 531; *Wilkinson v. Wilkinson,* 159 N. C., 271.

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W. R. BARBEE AND WIFE AND M. BANE v. A. S. GREENBERG.

(Filed 24 April, 1907.)

1. **Land—Lease—Renewal—Covenants—Form.**

In a lease of land containing an agreement, or covenant, giving privilege of renewal to lessee upon notice given, the covenant expressed by the agreement is not required to be in a technical form; upon the required notice being given within the proper time, the covenant, when sufficiently definite, and in the absence of any restraining stipulations, will be enforced as incident to the lease, conferring an assignable right and constituting a part of the tenant's interest in the land.

2. **Same—Partnerships—Retiring Partner—Assignee.**

Where there was a lease of a business lot for partnership purposes, containing a covenant of renewal, and one of the partners retired, having sold and transferred his entire interest in the business to his associate, the lease passed by the transfer as a partnership asset, and the right of renewal passed as incidental to the lease, conferring upon the assignee and his successors the privilege of its covenant.

3. **Landlord and Tenant—Lease—Covenants—Renewal—Assignee—Jurisdiction.**

The assignee of a lease, with the right to demand a renewal of the lease for his own benefit, can make such right available as a defense in an action to recover the possession, though the same be instituted before a justice of the peace.

(431) ACTION to recover possession of a storehouse, commenced before a justice of the peace and tried on appeal before *Justice, J.*, at January Term, 1907, of DURHAM.

A jury trial having been formally waived, the facts were found by the court; and judgment was entered thereon for defendant, and plaintiff excepted and appealed.

*Manning & Foushee for plaintiffs.*
*Benjamin Lovenstein for defendant.*

HOKE, J. It appears, from the facts found by the trial judge, that the storehouse in question belonged to *feme* plaintiff, Virginia E. Barbee, and that on 14 August, 1903, she and her husband, W. R. Barbee, executed and delivered to A. S. Greenberg and J. Dean, a mercantile firm doing business under the name and style of A. G. Greenberg & Co., the premises in question for three years, "with the privilege of three years more," from 11 August, 1903, at $55 per month, R. W. Winston, Esq., to collect the first year's rent and W. R. Barbee to collect the balance; that said lease was duly registered, and the lessees entered upon the occupation and possession of the property in the transaction of the firm's business.

That some six or eight months after the lease had been executed, Dean sold his interest in the firm to A. S. Greenberg, and A. S. Greenberg continued the business under the firm name of A. S. Greenberg & Co. That W. R. Barbee knew that J. Dean had sold his interest to A. S. Greenberg about twelve months after the signing of the lease, continued to collect the rents from A. S. Greenberg to the expiration of the lease.

That in May, 1906, before the three years lease expired, A. S. Greenberg gave formal notice that he had determined to avail himself of "the three years additional referred to in the contract, and that he
(432) would continue to occupy the store for the three years beginning 11 August, 1906. (Signed) A. S. Greenberg & Co., successors to Greenberg & Dean."

That in February, 1906, W. R. Barbee and wife leased the store to their coplaintiff, M. Bane, to commence 11 August, 1906, and on that day this suit was instituted in the names of W. R. Barbee and wife and M. Bane against defendant, to recover possession of the property; that after the institution of the action the rent was tendered monthly by defendant, which was at first declined, but afterwards, and pending the proceedings, was received and receipted for by W. R. Barbee.

Upon these facts, the court adjudged that plaintiffs are not entitled to recover possession of the property, and that defendants are entitled to remain in possession of same for three years from 11 August, 1906.

By the terms of the lease the storehouse was granted to Greenberg & Co., for three years, ending 11 August, 1906, "with the privilege of three years more." Whether notice was required to be given during the term of the lessee's election to renew is not material here, for such notice was given; and if the firm of Greenberg & Co., as now constituted, had the right to demand a renewal of this lease for its own benefit, then this right can be made available as a defense to the present action, though the same was instituted before a justice of the peace. *McAdoo v. Callum,* 86 N. C., 419; *Lutz v. Thompson,* 87 N. C., 334; *Levin v. Gladstein,* 142 N. C., 482.

These covenants to renew are not required to be in any technical form (*McAdoo v. Callum, supra,* 18 A. & E. (2 Ed.), 685), and when sufficiently definite will be enforced as incident to the lease; and, as such, conferring a right which constitutes a part of the tenant's interest in the land itself.

This being true, in the absence of any restraining covenant, the right may be assigned as an incident of the lease and the benefit enforced by the assignee; and being a covenant which runs with the (433) land, it will also be enforced against the lessor or his assigns. Taylor Landlord and Tenant (9 Ed.), sec. 332; Wood Landlord and Tenant (2 Ed.), sec. 413; 24 Cyc., 996; *Piggott v. Mason,* 1 Paige, 412; *Betts v. June,* 51 N. Y., 274; *Blackmore v. Boardman,* 28 Mo., 420; *McClintock v. Joyner,* 77 Miss., 678; *Cook v. Jones,* 96 Ky., 273; *Brook v. Bulkey,* 2 Ves., Sr., 497.

In Taylor Landlord and Tenant, sec. 332, it is said: "The right of renewal constitutes a part of the tenant's interest in the land; and, in the absence of a covenant to the contrary, may be sold and assigned by him and the benefits of the right may be enforced by the assignee."

In Wood Landlord and Tenant, sec. 413, it is said: "A covenant for the renewal of the lease on the landlord's part is often inserted in a lease; and when it is, it is binding upon the landlord and his grantees or assigns, as such covenants relate to the land and pass with it." And, on page 944, the author further says: "The right of renewal constitutes a part of the tenant's interest in the land; and, unless restricted, may be sold or assigned by him, and the benefits of the covenant pass to the assignee and may be enforced by him." And in Cyc., *supra,* it is stated: "These covenants to renew are not personal, and the legal successors of the lessee, as well as the lessor, are entitled to the benefits and are burdened with the duties and obligations which such covenants confer on the original parties." See, also, Revisal, sec. 1586.

An application of the principles indicated by these authorities fully sustain the trial judge in holding that, on the facts of the case, the plaintiffs have no present right to recover possession of the premises in question.

There was no stipulation in this lease restraining the lessees from a sale or assignment of their term. True, when the lease was
(434) made, the firm of Greenberg & Co. was composed of A. S. Greenberg and J. Dean. But it is found as a fact that, six or seven months after the execution of the lease, said Dean sold his interest in the firm to A. S. Greenberg, who continued the business under the firm name of A. S. Greenberg & Co. The lease was an asset of the partnership, which passed to the purchaser, and with it the incidental right to demand a renewal. *Betts v. June, supra; Blackmore v. Boardman, supra.*

In this last case it was held: "A covenant for the renewal of the lease is an incident of the lease, and will pass by an assignment of the unexpired term."

We were referred by counsel to *Finch & Underwood,* 2 Ch. Div., 310; *James v. Pope,* 19 N. Y., 324; *Howell v. Behler,* 41 W. Va., 610, as authorities against the view which we have taken of the case; but we do not so understand these decisions.

In *Finch v. Underwood* there was a lease to two, with continuing covenants, joint and several, on the part of the lessees, "and also a clause of forfeiture in case the tenants, or either of them, should become bankrupt or let the premises, or any part thereof without license." After one of the tenants had assigned to the other he became bankrupt, and it was held that assignee could not enforce a renewal to himself. Here, it will be noted, there was an express covenant in restraint of the lessees, or either of them, assigning his interest without license.

In *James v. Pope,* 19 N. Y., a lease to a partnership for three years, with privilege of renewal; two of the parties having sold their interest, retired, and a new firm was organized, which continued to occupy and possess the premises for some time after the expiration of the lease, and without any further contract or understanding with the landlord.
(435) When the new firm gave notice and abandoned the premises, it was sought to hold the original firm responsible as tenants for a second term, and it was held that the new firm had neither elected, nor had it any power to elect, to renew the lease so as to bind the members of the original firm.

It will be noted here that the landlord in that action did not seek any recovery against the new firm, but the old; and so the question of the assignment and the rights or liabilities of the new firm under the same does not seem to have been presented.

Again, in *Howell v. Behler, supra,* there was a joint lease to six for five years, with privilege of renewal on giving sixty days notice prior to expiration of the term. Such a notice was given by a purchaser of the interest of one of the lessees, but not signed or concurred in by the others at or within the time required by the terms of the lease.

In this case it was held that one of said lessees had no power to extend the lease by giving the required notice without the concurrence of the others, and that the defendant could have no higher or greater right than that of the individual lessee whose right she had purchased.

True, in this case, the other lessees seem to have afterwards joined with the purchaser in a bill in equity; or, rather, having been made defendants, they concurred in asking that the contract of renewal should be specifically executed. But this was after the expiration of the lease. They had not, so far as the case discloses, joined in the notice to renew, and the right to join in such notice so as to make same effective had passed by the express terms of the contract. *Product Co. v. Dunn,* 142 N. C., 471.

Both of these last cases seem to have proceeded upon the idea that in a lease to two or more, with privilege of renewal, one of the lessees cannot elect to renew without the concurrence of the others. This for the obvious reason that one shall not be bound by a contract (436) to which he has not consented.

If the cases cited are capable of the interpretation put upon them by counsel, we would not hesitate to hold that they are not well considered in that they contravene the principle we have held as controlling on the facts of the present case; that in the absence of a restraining covenant, the lease, with the incidental right of renewal, is assignable; and the present firm, having taken such assignment during the existence of the former term, and having complied with all the stipulations of the lease, and being the sole owner of the right and interest arising by reason of the covenant to renew, is entitled to remain in possession of the premises, and plaintiffs' demand for present recovery was properly denied.

Affirmed.

*Cited: Greenville v. Gornto,* 161 N. C., 343.

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RALPH PAINTER, BY HIS NEXT FRIEND, JANE PAINTER, v. NORFOLK AND WESTERN RAILROAD COMPANY.

(Filed 24 April, 1907.)

**1. Pleadings—Complaint—Motion to Dismiss.**

An answer filed to the complaint, containing nothing to aid the allegations thereof, does not preclude a motion to dismiss.

**2. Attorney and Client—Compromise—False Representations.**

There is no error in the court below sustaining defendant's motion to dismiss upon the ground that the complaint does not state facts sufficient to constitute a cause of action, in a suit to recover damages, when it ap-

pears in the complaint that a compromise has been entered between the same parties on account of the same injury by the plaintiff's attorney of record, with her approval, in the absence of allegations of fraud sufficient to impeach the judgment. Allegations that the attorney compromised the case with the consent of the plaintiff, obtained by importunity and false representations, without averment of collusion or fraudulent combination with the defendant, are insufficient.

3. **Same—Subsequent Damage.**

Additional damages are not recoverable in a subsequent action after judgment has been entered, on account of the same injury, between the same parties, for further damage resulting from same injury.

(437) ACTION, heard before *Ferguson, J.*, at March Term, 1906, of FORSYTH, upon the complaint, amended complaint, and answer.

The plaintiff, by his next friend, who is his mother, sues to recover damages for personal injury alleged to have been caused by the negligence of the defendant. The defendant filed an answer, but, when the cause came on for trial, moved to dismiss because the complaint does not state a cause of action. His Honor, *Ferguson, J.*, sustained the motion, and plaintiff appealed.

*J. S. Grogan for plaintiff.*

*Watson, Buxton & Watson for defendant.*

BROWN, J. Because the defendant filed an answer to the complaint does not preclude it from moving to dismiss, where the answer, as in this case, contains nothing which aids the allegations of the complaint. In fact, the defense set up by the answer practically appears on the face of the complaint. The plaintiff, by the same *prochein ami*, brought suit against the defendant for the identical injury received by him on 17 November, 1904, while attempting to cross the track of defendant's road. This action was instituted on 8 December, 1904, by the attorney employed by plaintiff. With plaintiff's approval, said attorney compromised the suit for $250, and a consent judgment was duly rendered by the Superior Court and signed by the presiding judge. The defendant paid this judgment and it has been canceled by plaintiff's attorney (438) of record. The complaint contends two averments, which his present counsel, Mr. Grogan, contends, if true, are sufficient to support the present action:

1. That W. O. Cox, an attorney, at the time of the injury, came repeatedly to plaintiff's home and greatly importuned her to intrust her son's case to him, and that in consequence of such importunities she did so; that she consented to the compromise judgment upon the advice and importunity of Cox, who, plaintiff says, falsely and fraudulently represented to her that the doctors would give a written guarantee that no further cutting of her son's hand would be necessary.

2. Plaintiff further avers that at the time of the rendition of the judgment her son had lost only two fingers of his left hand; that since the date of said judgment, and as a consequence of the original injury, her son has lost all the fingers of his left hand, thereby depriving him of its use. The learned counsel contends that plaintiff can now recover for this additional damage accruing since the judgment was rendered.

In respect to the first contention, we observe that the plaintiff does not allege any collusion or fraudulent combination between plaintiff's attorney and defendant. On the contrary, plaintiff acted solely on the representation of her own counsel, and in the belief that the loss of two fingers would be the extent of her son's injuries. If this were an action to impeach the judgment for fraud, there is nothing set out in the complaint to warrant the interference of the Court.

We think there is as little legal support for the plaintiff's second contention as there is for the first. It is admitted that the loss of the remaining fingers is the direct result of the original tort which caused the loss of the other two. The cause of action arose when the injury was sustained. The loss of the remaining fingers is only an aggravation of damage. There is only one tort and one damage flowing therefrom. "The wrong produces one continuous train of conse- (439) quences. The loss is all traceable back to the single origin, and in that case the law awards damages once for all." *Mast v. Sapp,* 140 N. C., 538. In this case the subject is discussed by *Mr. Justice Walker* with such fullness of authority that it is unnecessary to do more than cite the case. When the judgment was rendered awarding damages for the injury done the plaintiff's person, it barred an action for the recovery of further damages to plaintiff's person on account of the same tort.

Affirmed.

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R. S. HARRIS AND ANDREW JACKSON v. J. B. SMITH AND W. V. STONE.

(Filed 24 April, 1907.)

1. **Evidence—Referee—Exceptions.**

Unless excepted to, the findings of a referee are conclusive, and upon exceptions sustained by the court below they are still conclusive unless it appears that there is no evidence to sustain them, or that they are based upon improper evidence.

2. **Same—Witness—Credibility—Supreme Court.**

The credibility of a witness is for the referee to determine, subject to the final review of the judge below, and not by the Supreme Court.

ACTION, heard on exceptions to the report of a referee before *Ward, J.,* at August Term, 1906, of SURRY.

The plaintiffs alleged that W. H. Schaub sold and conveyed a tract of land to J. B. Smith for $1,000. Smith paid $200 and executed a deed of trust with power of sale to W. O. Schaub to secure the balance. The land was sold under the power by the trustee, when $613 was the balance due, and bid in by the defendant Stone at $800 and con-
(440) veyed to him. The plaintiffs alleged that this sale was really made at the request of Smith, with intent to defraud the plaintiffs who had afterwards purchased a one-half interest in the land from him for full value upon the representation that there was no lien or encumbrance on it, and that Stone, in fact, bought from Smith, with notice of Smith's intent. The jury, upon issues submitted to them, so found. The court, at August Term, 1903, referred the case with directions to the referee to find and report what amount was paid by Stone on the purchase money at the trustee's sale, with a view of subrogating him to that extent to the rights of W. H. Schaub, creditor of Smith. The referee reported that Stone had paid $181.50, whereas Stone contended that he should have found that he had paid $613, which was the balance due on the purchase money. The referee held that Stone was not entitled to subrogation, but, if the court should be of a different opinion, he concluded as matter of law that he was so entitled only to the amount of $181.50 paid by him. The court, at August Term, 1906, held that Stone was entitled to subrogation to the amount of $181.50, and ordered a sale of the land by a commissioner and distribution of the proceeds according to the rights of the parties. Defendant excepted and appealed.

*Lindsay Patterson for plaintiff.*
*Virgil E. Holcomb and Watson, Buxton & Watson for defendant.*

WALKER, J., after stating the case: The only question involved in this case is one of fact, the decision of which we are not permitted to review. As held in *Boyle v. Stallings,* 140 N. C., 524, it must appear that there was no evidence to support the findings of the referee, as sustained by the judge, before this Court can reverse his conclusion of fact.

The well settled rule has always been that the findings of a referee
(441) are conclusive unless excepted to by one of the parties. If, upon exceptions, the court sustains them, they are still conclusive, unless it is shown that there is no evidence to support them or that they were based upon improper evidence. The rule has been too long established to be now shaken, and, indeed, it is in itself correct in principle. *Usry v. Suit,* 91 N. C., 406; *Depriest v. Patterson,* 92 N. C., 399; *Cooper v. Middleton,* 94 N. C., 86; *Strauss v. Frederick,* 98 N. C., 60; *Jordan v. Bryan,* 103 N. C., 59.

The defendant Stone does not except because the referee or the court committed any error in respect to the conclusions of law, but only upon the ground that, in the view he takes of the evidence, there was none to warrant the finding of fact that he had paid $181.50 instead of $613. Upon a careful review of the testimony, we think there was at least some evidence to support the finding, though the appellant's counsel has stated in his brief very strong and cogent reasons to show that the finding of fact should have been according to his contention. The question seems to have turned upon whether the $250 payment on the purchase money of $613 was made by Brown for Smith or for Stone, the balance of $363 having been paid equally by Stone and Brown, each paying $181.50. W. H. Schaub testified that the $250 was paid by Brown for Smith, the original owner of the land which was sold. This excluded the idea that it was paid by Stone, and was, of course, some evidence of the fact to be considered by the referee and the court. It may have been fully explained afterwards by other evidence, but the credibility of the witnesses was for the referee, who heard their testimony, to pass upon, subject to final review by the judge, and not by us.

Affirmed.

*Cited: Frey v. Lumber Co., post,* 760; *Williamson v. Bitting,* 159 N. C., 325; *Thompson v. Smith,* 160 N. C., 259; *McCullers v. Cheatham,* 163 N. C., 63; *French v. Richardson,* 167 N. C., 44; *Montcastle v. Wheeler, ib.,* 259; *Lumber Co. v. Lumber Co.,* 169 N. C., 91.

(442)

## PACIFIC MUTUAL LIFE INSURANCE COMPANY v. INSURANCE DEPARTMENT AND INSURANCE COMMISSIONER OF NORTH CAROLINA.

(Filed 24 April, 1907.)

1. **Statute—Revisal, Sec. 4701—Federal Constitution.**

Section 4701, Revisal, is constitutional and valid, requiring the Insurance Commissioner to revoke, under specified conditions, the license of any foreign insurance company to do business in this State which "shall apply to have removed from the Superior Court of any county in this State to the United States Circuit or District Court any action instituted against it."

2. **Same—Action by Agent for Services.**

The statute requiring the Insurance Commissioner to revoke the license of any foreign insurance company to do business in this State which shall apply to have a cause removed to the United States Court "growing out of, or in some way connected with, some policy of insurance issued by the company" has no application to the removal of a cause wherein an agent is suing the company for services rendered.

MANDAMUS to compel defendant to reinstate plaintiff as a company licensed and entitled to transact business in the State, tried before *Jones, J.*, at February Term, 1907, of WAKE.

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

*Shepherd & Shepherd and T. C. Wooten for plaintiff.*
*Assistant Attorney-General Clement for defendant.*

HOKE, J. On the hearing it was established, or admitted, that the present plaintiff was a company duly licensed and entitled to transact business in the State of North Carolina; and, having been sued by one J. J. Rogers, a former agent, to recover on an open account for services rendered by said agent for the company, the plaintiff had procured the removal of said cause to the Circuit Court of the United States for the Eastern District of North Carolina.

(443) Thereupon, the license of plaintiff was revoked by the Insurance Commissioner of the State, claiming the right to do so under Revisal, sec. 4701, for that plaintiff had procured the removal of said suit to the United States Circuit Court, as aforesaid.

Plaintiff then instituted the present action to compel reinstatement, contending:

1. That the statute under which the commissioner had acted was unconstitutional.

2. That, on the facts of the present case, the statute in question did not confer on the commissioner the power to revoke the license.

It was conceded, on the argument before us, that the statute was constitutional. There has heretofore, it seems, been some doubt about it; but, on a statute similar to this, the question was directly presented and fully considered by the Supreme Court of the United States in a recent case, and the validity of the statute was upheld. *Insurance Co. v. Prewitt,* 202 U. S., 246. The position as to the constitutionality of the statute was, therefore, properly abandoned here.

On the second position, we are clearly of opinion that, on the facts presented, the commissioner had no power to revoke the plaintiff's license.

The statute on this subject, after providing that insurance companies doing business in the State shall take out license, etc., enacts further, among other things, as follows (2 Revisal, sec. 4550):

"If any foreign insurance company shall apply to have removed from the Superior Court of any county in this State to the United States Circuit or District Court any action instituted against it, or shall institute any action at law or suit in equity in a United States court against any citizen of this State, growing out of or in any way connected with

any policy of insurance issued by such insurance company, the (444) Insurance Commissioner shall revoke its license, etc., and no new business shall be done by such company while such default or disability continues, or until its authority to do business is restored by the commissioner."

By the express terms of the statute, the power to revoke an insurance license by reason of removal of suits on the part of the company is confined to suits "growing out of or in any way connected with any policy issued by such insurance company."

This language is too plain for construction. It is found in a section of the general insurance law, grouped with other provisions of like tenor, which indicate that the evident and primary purpose of the entire section was the protection of the policyholders; and neither the language of the section nor its spirit or purpose permits or suggests that its meaning should be so extended as to include a suit growing out of an internal quarrel between the company and a former agent as to their accounts.

In Lewis Sutherland Statutory Construction (2 Ed.), sec. 348, we find: "The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts brought into harmony therewith, that intent will prevail without resorting to other aids of construction."

And again:

"It is beyond question the duty of courts, in construing statutes, to give effect to the intent of the lawmaking power and to seek that intent in every legitimate way. But first of all, in the words and language employed; and if the words are free from ambiguity or doubt, and express clearly, plainly, and distinctly the sense of the framer (445) of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation."

And in Black on Interpretation of Laws, p. 35: "The meaning and intention must be sought, first of all, in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate for the purpose and do express that will correctly."

And it is only where the language is ambiguous or lacks precision or is fairly susceptible of two or more interpretations that the intended meaning must be sought by the aid of other pertinent and admissible considerations.

We think it clear, as stated, that this power to revoke plaintiff's license by reason of removal of a suit to the Federal Court, by the express language and plain meaning of the statute, is confined to suits "growing out of or in some way connected with some policy of insurance issued by the

company," and that the language does not extend to or embrace the suit which was removed in the present instance. The plaintiff, therefore, is entitled to the relief demanded, and the judgment of the court below, to that effect, is

Affirmed.

(446)

J. H. GREENWOOD v. SOUTHERN RAILWAY COMPANY.

(Filed 24 April, 1907.)

**Land—Damages—Surface Water—Overflow—Lower Proprietor.**

The lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. In an action for damages to bottom-lands of plaintiff by water flowing down and across defendant's track and ponding plaintiff's land, it is error for the court below to charge the jury that "the defendant owed to the plaintiff the duty to provide side ditches sufficient to collect and carry off all surface water that came down from the land above in its natural flow."

ACTION for damages to land by water, tried before *Ward, J.*, and a jury, at November Term, 1906, of SURRY.

Action for damages to the bottom-lands of the plaintiff by water overflowing the track of the defendant and ponding thereon. The allegations of negligence are that the defendant had negligently permitted and allowed the ditch on its right of way on the north side of the track, where it passed over the plaintiff's land, to remain filled up and unopened, and the ditch was necessary to divert and carry off the water flowing onto the right of way; that by reason of the ditch being so filled up and remaining unopened, water overflowed the track, and ponded itself on his bottom-lands on the south side of the track, cutting washes in the land and leaving a deposit on the land of sand, gravel, and other substances injurious to the soil. There is no allegation that the embankment caused the water to be obstructed in its flow and therefore pond on his upland.

The hill-land lying to the north consists of some 6 or 7 acres that drained into a ravine ending some 75 feet from the track, and the water that had collected in this ravine from the 6 or 7 acres, both cultivated and uncultivated, after following the course of the ravine (447) to its end, then flowed into a ditch or gulley which began at the end of the ravine and continued toward the track, and emptied all the water so collected on the right of way, about halfway between the outer edge of the right of way and the side ditch.

At a point opposite where the water was so emptied onto the right of way the land was practically level and formed a water-shed, and it was

at this point that the water would flow over the track onto plaintiff's bottom-lands to the south. Beginning at this point, the defendant had cut a side ditch, one to the east and one to the west. As originally cut, and when opened, the ditch began at a depth of about 12 inches, and, as it continued along the side of the track, got deeper and deeper, until, at the point where it emptied into a natural water channel, it was some 5 or 6 feet in depth. The evidence disclosed that this side ditch would be filled up with dirt, trash, etc., coming down from plaintiff's land through the ravine and ditch, and when so filled up would remain in that condition for periods of time, long and short. The side ditch was properly and carefully constructed, and, when not filled up by the dirt and trash from plaintiff's land above, provided ample drainage for the right of way, but was not sufficient, even when not filled up, to carry off all the water that came down through the ravine in hard rains. Practically all the water that flowed into this side ditch, or onto plaintiff's land south of the road, came from his lands above.

There was testimony to the effect that to cut a ditch sufficient to carry off all the water that came upon the right of way it would have to be begun so deep at its beginning that when it reached its output it would be so deep as to seriously impair the usefulness and safety of the road-bed. It was also in evidence that a ditch could not be made that would not fill up with the dirt and trash brought down from the (448) land above during a hard rain.

There was also evidence tending to show that the plaintiff could, at a reasonable cost, cut a ditch on the south side of the track, and thus prevent the water that broke over the track from sobbing his bottom-land.

There was a verdict for the plaintiff. Exception and appeal by the defendant.

*J. F. Hendren and W. L. Reece for plaintiff.*
*Manly & Hendren for defendant.*

CLARK, C. J., after stating the case: The exceptions are to the charge only. His Honor erred in instructing the jury that "the defendant owed to the plaintiff the duty to provide side ditches sufficient to collect and carry off all surface water that came down from the land above in its natural flow," and was responsible for any damages the plaintiff sustained by reason of the defendant's ditches being insufficient to carry off the water coming down from above in its natural flow, and refused to charge, as requested, that it did not owe such duty to the plaintiff.

It is settled that the lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. The owner of the upper land may accelerate the flow of the water, but cannot divert it. *Porter v. Durham,* 74 N. C., 767. This is true as be-

tween the defendant and the plaintiff as owners of the land above the railroad track, and it is equally true as between the defendant and the plaintiff as the owner of the land below the railroad.

The defendant, had it so chosen, might by its side ditches have caught the water coming down from the plaintiff's land above its track (449) and led it to be discharged at another point—if the owner of the land at such point did not object. But there is no allegation or proof that the defendant has obstructed or diverted the natural flow of the water coming from above and poured it upon the plaintiff's land. The plaintiff has no legal ground for his complaint, which is that the defendant has not kept open side ditches to divert and carry off the water coming down from above, but, permitting the ditches to fill up, has let the water from the plaintiff's land above sweep across its track, unimpeded, and flow in its natural course upon the plaintiff's land below.

Error.

*Cited:* *Brown v. R. R.*, 165 N. C., 395:

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J. S. HUDSON ET AL. v. W. H. HUDSON.

(Filed 30 April, 1907.)

**Deeds—Cancellation—Mental Capacity—Burden of Proof.**

When in an action to set aside and cancel a deed for want of sufficient mental capacity, there was evidence tending to show that prior and subsequent to the time of its execution the grantor was subject to attacks during which she was mentally deranged, but not continuously so, the burden of proof is upon the plaintiff to show the want of sufficient capacity of the grantor to understand the force and effect of her act at the time of executing the deed.

ACTION, tried before *Ward, J.*, and a jury, at January Term, 1907, of CABARRUS.

Plaintiffs seek to have a deed, executed by Sarah A. Hudson to defendant, canceled for that she did not have, at the time of executing the same, sufficient mental capacity to understand the force and effect of her act. The only issue submitted to the jury was directed to that question.

They introduced a number of witnesses whose testimony tended to (450) show that the grantor was, at the date of the deed, about 85 years of age, in feeble health and subject to "spells" or attacks during which she was mentally deranged. The defendant introduced witnesses whose testimony tended to show that, at the time she executed the deed, she understood what she was doing, what property she was conveying, and her relationship both to her property and her family. The evidence,

in this respect, was conflicting. Among other witnesses introduced by plaintiffs, James Alexander testified: "I knew Sarah A. Hudson. She died last year—9 March. Had been with her two years. When I first moved there her mind was tolerably good, but later on she had bad spells. I went there 15 July, 1903. She was 83 or 84 years old. Her mind was not good, I thought, from her acts. She came in and took some clothing off my beds. She told me herself that her mind was not good. She came and got some of my wearing clothes; said she was moving home; she was in her own house; it was a double house, with partition. She contended with me that she was not at home; that she was at her granddaughter's. It was before the deed was made, her granddaughter living 1½ miles from there. She was in her own house. I went in and tried to convince her that she was at home, calling her attention to the clock and other things in the house; she said her clock and other things always went with her. She was not there when she made the deed; she was living with the defendant. In my opinion, she did not have capacity sufficient to know what property she had or to whom she was giving it, and the effect of it. When she had spells she was out of her head; not so much so when she was in her head—she would know she had a house. She had no mind. I left there just before she died. She said she had no mind. I went out there from town. She did the renting to me; she had a good mind. The defendant came out to get me to go out to stay with her. When the spells were on her, she knew almost (451) nothing."

For the defendant, Dr. S. A. Grier testified: "I was the physician of Mrs. Hudson for twenty-three years up to her death. She was a woman of fine mind till eight years before she died. She had an attack of the grippe. When she had an acute attack her mind would waver, but when she was better of grippe she would recover. Her heart became weak and feeble, and her brain would become weakened, but when her heart would resume, she would recover mentally. Those spells did not last longer than one and one-half days. Saw her on 14 February, 1906; her mind was as clear as ever it was. She said William would pay me for coming, as she had given him all she had. It was daytime that I went there. The chief cause of mind trouble was grippe and heart failure. Grippe may eventuate in absolute insanity, but in this case it did not so result." Witness is asked hypothetical question, based on the evidence as to Mrs. Hudson putting chamber on her feet, bonnet on her feet, etc., and he says: "She was not in her right mind. Middle of December I was there and she was sick; her mind was wandering; those spells were delirium. She was blind in one eye, not in the other. The other eye was very good. She had had advantages, both educationally and socially."

There was other testimony, for both sides, of the same character. The plaintiffs requested his Honor to instruct the jury:

"The burden of proof is upon the plaintiffs, and they must show, by a preponderance of the evidence, that at the time of the execution of the deed in question Mrs. Sarah A. Hudson did not have sufficient mental capacity to execute the same; but should the jury be satisfied from the evidence that at any time prior to the execution of the deed she
(452) was insane or did not have sufficient mental capacity to execute the deed, then the burden of proof shifts and it devolves upon the defendant to satisfy the jury by a preponderance of the evidence that she, at the time of the execution of the deed, was of sound mind."

This request was denied, and plaintiffs excepted. His Honor instructed the jury that the burden was upon the plaintiffs to show, by a preponderance of the evidence, that Mrs. Hudson was mentally incapable of executing the deed, explaining, correctly, the standard of mental capacity required for the execution of a deed. That by the law all persons were presumed to be sane. That, in the light of all the evidence, they would inquire whether, at the time she signed the deed, Mrs. Hudson had mind and intelligence sufficient to enable her to have a reasonable judgment of the kind and value of the property embraced in the deed, and to understand the effect of her act in making the deed, and, if they so found, they would answer the issue "Yes"; but if they found she did not have such mind and intelligence, as stated, they would answer the issue "No."

His Honor further told the jury that the law gave peculiar importance to the testimony of the attending physician and subscribing witness. To this instruction plaintiffs excepted. The defendant introduced the subscribing witness, who testified regarding the condition of the grantor at the time she executed the deed. The jury answered the issue in the affirmative. There was judgment accordingly, and plaintiffs duly excepted and appealed.

*W. G. Means for plaintiff.*
*Montgomery & Crowell for defendant.*

CONNOR, J., after stating the case: This Court, in *Ballew v. Clark*, 24 N. C., 23, said: "The general rule is that sanity is to be presumed until the contrary be proved; and when an act is sought to be
(453) avoided on the ground of mental imbecility, the proof of the fact lies on the person who alleges it. On the other hand, if a general derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown at the time the act was done." Similar language is used in *Wood v. Sawyer (Johnson will case)*,

61 N. C., 251 (p. 277). The general principle embodied in the instruction is conceded by counsel for appellee, but they insist that the testimony does not bring the case within the rule. That the presumption of sanity obtains until it is shown that, prior to the execution of the deed, the grantor was insane, in the sense of being mentally unsound, for some appreciable period of time, excluding the idea of a mere mental aberration or derangement, caused by sickness, accident, or other temporary cause or condition. This, we assume, was the reason upon which his Honor declined to give the instruction. "The rule that when insanity is proved or admitted to have existed at any particular time it is to be presumed to continue applies only to cases of what is called 'general' or 'habitual' insanity. Like all presumptions, it arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts; and when observation and common experience fail to show that the insanity proved, in the particular case, was, in its nature, permanent, the presumption fails. When insanity appears as the result of some special and temporary cause, and experience shows that the cause being removed the effect will probably disappear, the presumption does not prevail." Buswell on Insanity, sec. 195.

"There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity and that which may be only temporary. The existence of the former, once established, would require proof from the other (454) party to show a restoration or recovery; and, in the absence of such evidence, insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself with proof of insanity at an earlier period." *Hix v. Whittlemore,* 45 Mass., 545. The law is well stated in 22 Cyc., 1116: "The presumption arises only in cases where the insanity is continuing and permanent in its nature or where the cause of the disorder is continuing or permanent." The fact that a party has "spells," during which his mind is affected, does not relieve the plaintiff of the burden of showing insanity. *Stewart v. Flint,* 59 Vt., 144; *Brown v. Riggin,* 94 Ill., 560. Occasional flightiness and wandering of intellect during sickness is not sufficient to change the burden of proof. *McMaster v. Blair,* 29 Pa. St., 298. *Delirium tremens,* prior to the homicide, caused by strong drink, does not cast upon the State the burden of showing sanity at the time of the act. *S. v. Sewell,* 48 N. C., 245.

In the light of these and other authorities, sustained by the reason of the thing, we think that his Honor was correct in declining the instruction. While the testimony regarding her acts and language prior to the execution of the deed were competent to be considered, and for that purpose were submitted to the jury, they do not show habitual insanity within the meaning of the rule of law which rebuts the presumption of sanity at the time of the act in question. The exceptions to the charge as given are without merit. While there was strong evidence (455) tending to sustain plaintiff's contention, the case has been fairly submitted to the jury, who doubtless knew the witness and were capable of duly weighing their testimony and opinions. The aged grantor appears to have been content with the disposition of her land, and, in the light of the verdict, we see no reason for disturbing the judgment.

No error.

D. J. SATTERFIELD v. W. R. KINDLEY ET AL.

(Filed 30 April, 1907.)

**1. Contract—Parties—Nonsuit—Practice.**

When it does not appear that one of two defendants was a party to or authorized an agreement, the subject of the suit, made in his name, and a motion as of nonsuit was not made by him upon the evidence as authorized by the statute, an instruction that in no view of the evidence can the plaintiff recover was erroneously refused, and a new trial will be granted as to him, on appeal.

**2. Deeds — Consideration — Parol Contracts — Debt of Another—Statute of Frauds.**

The recitation in a deed of the amount and payment of the consideration is regarded as evidential between the parties, and does not operate as an absolute estoppel. When the land of a corporation is sold by the trustee for the payment of a lien debt under a trust deed, and bid in by a stockholder in the corporation under a parol agreement between himself, the corporation, and other secured creditors, that he is to do so for them at a sum sufficient to pay such secured debts, and when he does so at an insufficient sum and takes title to himself, and the sale is confirmed by the court, an action may be maintained against him for the breach of the promise to pay the price agreed upon by parol, the same being executed, and not falling within the meaning of the statute of frauds.

**3. Contract—Trust Deeds—Sale of Land—Agreement that Land Should Bring Certain Sum.**

An agreement made between the debtor and the secured creditors that, at a sale of lands under a deed of trust, the property should be bid in at a sum not less than that sufficient to pay such creditors is valid, when there is no evidence that the purpose of the parties was to "chill the sale" or to reduce the price below its market value.

**4. Same—Promise to Pay Debt of Another—Statute of Frauds—Consideration.**

Where the purchaser of real property agrees, in payment of its price, to discharge the debt of another, it does not fall within the meaning of the statute of frauds; when a stockholder of a corporation agrees with it and its secured creditors that he will bid in the debtor's lands at a foreclosure sale at a sum sufficient to pay such creditors, there is a sufficient consideration, and it is not necessary that the agreement be in writing.

ACTION tried by *Webb, J.*, and a jury, at October Term, 1906, (456) of CABARRUS, brought to recover the amount of certain debts originally due by the G. W. Patterson Manufacturing Company. The court submitted these issues:

1. Did the defendants, or either of them, agree, previous to the sale of the property described in the complaint, that they would buy the property at the sale and make the same bring the amount of the debts against the property, which amounted to the sum of $11,250, and, whether said property was bid off at said sale for less than that sum or not, they would pay said debts? Answer: Yes.

2. What was the value of said property? Answer: $11,250.

The defendants requested, among others, the following prayer for special instruction:

"2. In no view of the evidence can the plaintiff recover in this action against defendant James, and as to him the jury will answer the first issue 'No.' "

From a judgment in favor of the plaintiff, defendants appealed.

*W. J. Montgomery for plaintiff.*

*W. M. Smith and W. G. Means for defendants.*

BROWN, J. The plaintiff's evidence tends to prove that the plaintiff, with others, were creditors of the G. W. Patterson Manufacturing Company, an insolvent corporation, and that their debts were (457) secured by deed in trust conveying real property to a trustee for their benefit. Suit had been brought and a decree obtained foreclosing their lien, and the property was duly advertised for sale by the commissioner. The two defendants, Kindley and James, the former a stockholder in said corporation, met with several other stockholders for the purpose of arranging the secured indebtedness and to take steps to insure that the property would bring its value at the approaching sale. It was ascertained that the total amount of the secured indebtedness in the deed of trust was $11,250. Plaintiff's evidence tends further to prove that at the conference the defendant Kindley agreed that he would buy the property at said price and pay the indebtedness in full, whether the public bidding reached that figure or not, and it was agreed that

defendant James should bid off the property for Kindley. Relying upon this agreement, the secured creditors did not bid on the property. It was "knocked off" to James for Kindley at $8,000 and the sale confirmed by the court without opposition upon the part of plaintiff or the other creditors, who relied on Kindley's promise. The defendants offered evidence to the contrary, but the jury found for plaintiff.

*In limine,* we find no evidence whatever tending to prove that defendant James was a party to the agreement to pay the secured debts and take the mill. A careful inspection of the record discloses that such agreement, if made at all, was made by defendant Kindley alone. While James bid off the property, and now claims to be a part owner of it, there is no evidence that Kindley was authorized to speak for his co-defendant, or did speak for him, when he agreed to take the property and pay the debts. We are, therefore, of opinion that as to defendant James his Honor erred in refusing the second prayer for instructions. As no motion to nonsuit was made at any stage of the case, a new trial must be had as to defendant James.

(458) In behalf of the defendants, it was most ably contended by their learned counsel, Mr. Means, that the contract is void under the statute of frauds: (1) Because it is a contract to convey and purchase land, and is not in writing; (2) that it is an obligation to "answer the debt, default, or miscarriage of another," which must likewise be in writing.

In respect to the first contention, we will observe that it is common learning that the statute does not apply to executed contracts. And it is likewise generally held that when so much of a contract as would bring it within the statute of frauds has been executed, all the remaining parts become enforcible, and the parties regain all the rights they would have had at common law. Browne on Stat. Frauds, sec. 117. Thus it is conceded that when a conveyance of land is executed and accepted, in pursuance of a prior verbal agreement, an action may be maintained for a breach of the promise to pay the price. Browne, *supra,* where the authorities are collected.

A court of equity will not allow the vendee to hold the land and at the same time refuse to pay for it. *Champion v. Mooday,* 85 Ky., 31. Therefore, in equity, the receipt of the purchase money usually contained in a deed for land is regarded as evidential and not as an absolute estoppel.

As to the second contention, we are likewise of opinion that the contract is not void as an agreement to suppress bidding, and that it also does not come within the tenth section of the statute of frauds. There is no evidence here that the purpose of the parties was to "chill the sale" and to purchase the property at less than its market value. On

the contrary, the agreement was evidently made without design to commit a fraud, but to make the property bring its full value and to enable the defendants to more conveniently acquire the title. An (459) agreement with such purpose in view is valid. 3 A. & E., 506, 507, and cases cited. The agreement is not so much an agreement to pay the debts of the insolvent corporation as it is an agreement to purchase the property at a given price sufficient to pay its secured debts. The agreement, according to plaintiff's evidence, was made not only with the creditors, but also with stockholders, and was reaffirmed at a meeting of the directors the day before the sale, when plaintiff acted as chairman. The sale was the only practical method of carrying this agreement into effect and perfecting title. Having purchased the property and acquired title to it in pursuance of the agreement, the overwhelming weight of authority will hold the defendant to its performance on his part. Clark on Contracts, sec. 40 (d), and notes. One of the earliest cases in the English courts is *Williams v. Leper,* 3 Burrows, p. 1886. Leper had taken possession of the property of one Taylor, a tenant of Williams, in behalf of creditors. Williams distrained for rent. Leper verbally agreed to take the property and pay Williams' debt. The judges all agreed the case was not within the statute as a promise to pay the debt of another. *Lord Mansfield* said: "The goods are the fund; the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods." *Mr. Justice Wilmont* held that the action could be maintained against Leper as money had and received for plaintiff's use.

In our case the defendant was not dealing with a stranger to the property, but with those who practically owned and controlled it, and who were to all intents and purposes vendors of it. This brings it within that class of cases mentioned by Mr. Reed as not within the statute. "A common example . . . is where the purchaser of property agrees, in payment of its price, to discharge a debt due by the (460) seller. This category does not in principle differ much from promises in consideration of a fund." 1 Reed Stat. Frauds, sec. 115. "A deed to the defendants, in consideration of their paying the vendor's debts, is not within the statute of frauds; the promise is not a guaranty, but to pay the guarantor's own debt, and the liability is not confined to the amount of the consideration for the land." Reed, *supra,* and cases cited. A common example is the purchase of a partnership, a business interest or a stock of goods upon an agreement to take the goods and pay the debts. Where the purchaser takes the goods under such agreement he will be compelled to pay the debts. *Lee v. Fountaine,* 10 Ala., 764; *Bracken v. Dillon,* 64 Ga., 251; *Shaver v. Adams,* 32 N. C., 14.

The contract or agreement, as testified to by plaintiff, upon which he sues is an original contract between the parties upon a sufficient legal consideration. *Shaver v. Adams, supra; Cooper v. Chambers,* 15 N. C., 261.

There are one or two cases in our reports which appear to support defendant's contention, one of which is cited by Mr. Reed in his note to section 116. That author, however, says: "The weight is clearly in favor of the right of the creditor to sue when the promisor has funds of the debtor in his hands, or owes the latter under an obligation which by the guaranty he proposes to discharge."

In 29 A. & E., 914, the principle is stated, in line with the text-writers and precedents, as follows: "A promise by the purchaser of property, and, as a part of the consideration for the purchase, to pay a debt of the seller, or a promise to pay a claim of the seller against a third person, is a promise to pay the purchaser's debt, and not within the statute. For the same reason the purchaser's oral promise, (461) as a part of the transaction, to pay and discharge an encumbrance upon the property purchased is valid." The author cites cases from almost every State in support of his text, and several from this Court. A leading case in this country is *Barker v. Bricklin,* 2 Denio (N. Y.), 45, where all the older cases are reviewed.

In *Rice v. Carter,* 33 N. C., 298, the facts were that A. sold land to B. As the price of the land, B. promised verbally to pay $100 to C., to whom A. was indebted. In that case *Pearson, J.,* says: "The case does not fall under the operation of this section, for the promise is to pay the debt, not of another person, but of the very person to whom the promise is made, and it is well settled that such a promise does not fall within the operation of this section of the statute." *Ashford v. Robinson,* 30 N. C., 114; *Rowland v. Rorke,* 49 N. C., 339; *Threadgill v. McLendon,* 76 N. C., 24; *Mason v. Wilson,* 84 N. C., 54. In *Whitehurst v. Hyman,* 90 N. C., 487, it is held that a promise based upon a new and original consideration of benefit or harm, moving between the party to whom the debt is due and the party agreeing to pay the same, is not "a promise to answer the debt or default" of another, and need not be in writing. Many authorities are cited in the opinion in that case by *Mr. Justice Merrimon* which support the conclusion of the Court. *Little v. McCarter,* 89 N. C., 233. Practically the same principle is asserted by this Court as late as 1904, through *Mr. Justice Walker,* in *Voorhees v. Porter,* 134 N. C., 591. In the case at bar, defendants, according to plaintiff's evidence, agreed, not only with the creditors, but with the debtor corporation, represented by its directors and stockholders, to buy its property at the sale for $11,250 and to pay its debts, which were a lien thereon. He purchased the property at

$8,000, acquired title, and now refuses to pay the balance of the (462) indebtedness. In the language of *Lord Mansfield* in *Williams v. Leper, supra,* "This case has nothing to do with the statute of frauds. It is rather a fraud in the defendant to detain the £45 from the plaintiff, who had a lien on the goods." It is contended by defendants that the indebtedness for which judgment was rendered is not admitted by the answer. Section 4 of the complaint sets out the evidences of debt for which plaintiff alleges he is liable as indorser for the Patterson Manufacturing Company, as well as that due him personally. This is specially admitted by the first paragraph of the answer. All of this indebtedness is secured by the trust, and all of it, the plaintiff avers, the defendants agreed to pay as part of the purchase price of the property. No contest was made in the Superior Court in respect to that matter and no appropriate issue tendered. By mutual consent, the cause was tried solely upon the controversy embodied in the issues submitted.

It does, however, appear that the notes set out in paragraph 4 of the complaint should have been credited with their *pro rata* portion of the $8,000 paid by defendant on the purchase money to the commissioner, which credits appear in the account stated by John M. Cook, clerk Superior Court, August Term, 1905. If these credits were given before rendition of the judgment, then the judgment is correct. If they have not been credited at all, then the court below will modify the judgment by allowing them.

We find no error in the record as to defendant Kindley, and as to him the judgment is affirmed, subject to the right of the Superior Court to allow said credits. As to defendant James, there must be a trial *de novo.*

New trial as to defendant James.

Affirmed as to defendant Kindley.

Let all the costs of this Court be taxed against defendant Kindley.

*Cited: Marrow v. White,* 151 N. C., 96; *Peele v. Powell,* 156 N. C., 558; *Handle Co. v. Plumbing Co.,* 171 N. C., 503.

(463)

MELIA J. FITTS v. A. F. MESSICK GROCERY COMPANY.

(Filed 30 April, 1907.)

1. **Principal and Surety—Extension of Credit.**

When a married woman executed her note, secured by mortgage on her separate property, for the purpose of securing a line of credit to a firm of which her husband was a member, and such note was used as collateral by the payee, the original note is not discharged by renewals of the notes given by the payee.

**2. Negotiable Instruments — Extension of Payment — Agreement — Married Women.**

An agreement contained in a note executed by a married woman as surety, and secured by mortgage on her separate real estate, in which there is an agreement to waive defense by reason of extension of time to the principal debtor, is valid and will be enforced in an action to foreclose the mortgage.

**3. Deeds—Insurance—Breach of Covenant—Subrogation.**

A. executed a first mortgage on real estate upon which a building was located, and insured the property for the benefit of the creditor; thereafter she executed a second mortgage, with covenant to insure the property for the benefit of the second mortgagee, but failed to do so; the building was destroyed by fire and the first mortgage paid by sale of the real estate: *Held*, that the second mortgagee was subrogated to the rights of the first mortgagee, and entitled to have proceeds of the policy applied to his debt.

ACTION, tried before *Ward, J.*, and a jury, at September Term, 1906, of FORSYTH.

The plaintiff sues to have cancellation of record of a certain deed in trust, executed by her to defendant D. H. Blair, and for other relief. The facts, in regard to which there is no controversy, are: Plaintiff, the wife of defendant J. S. Fitts, being the owner of the real estate described in the complaint, on 18 April, 1900, for the purpose of securing the payment of a note for $300, payable to W. A. Walker, executor, executed to defendant A. H. Eller, trustee, a deed in trust, conveying said real estate. At the time of executing said deed she took an insurance policy on the building located on said lot, payable, in the
(464) event of fire, to said trustee, for $300. The consideration of said note was a loan of said amount to enable her husband to enter into business with one Lash. On 2 October, 1901, the plaintiff, with her said husband, executed her promissory note for the sum of $300, payable twelve months after date to defendant A. F. Messick Grocery Company, negotiable and payable at the Peoples National Bank of Winston. On the same day the plaintiff, with her said husband, executed a second deed in trust, conveying the same property to defendant D. H. Blair, trustee, for the purpose of securing said note. In said deed in trust the plaintiff and her husband covenanted with the trustee that they would "keep the buildings on said premises insured against loss or damage by fire for the benefit of the said A. F. Messick Grocery Company, loss, if any, to be made payable to D. H. Blair, trustee, as his interest may appear." It was also provided that in case the premiums should be paid by said trustee, or the creditors, the amount so paid should constitute debts secured by the deed, etc. No insurance policy was taken by the plaintiff, or any other person, pursuant to said covenant.

At the time said note and deed were executed the plaintiff did not owe the Messick Grocery Company any sum whatever. The purpose of executing said note, etc., is shown by the testimony of plaintiff's husband, J. S. Fitts, who, after testifying in regard to the execution of the note to Mr. Walker, executor, says: "And I again applied to her to mortgage her real estate to enable me to buy groceries from A. F. Messick Grocery Company, to be used in the business of Fitts & Lash, which she did, and on 2 October, 1901, we executed our note, payable to the A. F. Messick Grocery Company, for $300, due twelve months after date, which was secured by a deed of trust. I took this note and mortgage and delivered it to the A. F. Messick Grocery Company, (465) with the understanding, between the company and myself, that it was to stand good for a line of credit for goods to be bought from time to time, the goods to be furnished from week to week and payments to be made for the goods the week after they were purchased." Witness further testified that the firm of Fitts & Lash purchased goods from the said grocery company for two years and four months, aggregating some $1,700, and paid on account $40 or $50 monthly. That his wife knew nothing about the transactions, except that she mortgaged her land to enable him to buy groceries from defendant grocery company.

There was testimony on the part of defendants, which was not contradicted, that the firm of Fitts & Lash purchased goods from defendant grocery company on the credit of the note of plaintiff, beginning with a purchase of $500; that they paid bills at the end of each month, such payments being applied to the discharge of the last purchases. That at all times since the deposit of said note, and at the date of its maturity, the said firm owed, on account of such purchases, an amount equal to $300.

There was evidence showing the manner of dealing, giving short-time notes by said firm to said grocery company, which were negotiated at the bank and renewed from time to time; that plaintiff's note was deposited by Messick Grocery Company as collateral to such notes. Plaintiff insisted that by this course of dealing her note was paid, or that it operated as an extension of time, which operated to release her property. The jury found, upon an issue submitted under instructions to which no exception was taken, that the note was not paid. The question of the alleged release is presented upon the third issue, to wit: Was the land conveyed in said deed of trust, dated 1 October, 1901, executed by J. S. Fitts, released and discharged from the lien of (466) Messick Grocery Company, as alleged in the complaint?

His Honor directed the jury, upon the entire evidence, to answer the issue in the negative. Prior to the institution of this action the building on the lot conveyed to the trustees was burned. The amount of the in-

surance was paid and, by consent of all parties interested, is held by A. F. Moses to await the determination of this case. Thereafter Mr. Eller sold the lot under the power contained in the trust deed made to him, and of the proceeds, after paying the debt secured and costs of sale, has in hand $144.22, which he holds subject to the judgment rendered in this cause. His Honor, upon the verdict, adjudged that the trustee, Eller, pay the amount in his hands to the defendant grocery company, and that Moses pay out of the amount in his hands, proceeds of the insurance policy, a sum sufficient to discharge the balance of the note of $300 and the costs of this action, and the balance to plaintiff. The balance due defendant grocery company by Fitts & Lash is $321.55.

Plaintiff excepted and appealed, assigning as error that his Honor failed:

1. To hold, as a matter of law, that the plaintiff was entitled to have the third issue answered "Yes."

2. That he held that upon all the evidence, if the jury believed the same, that the plaintiff was still liable on said note and mortgage.

3. He held that, after the exhaustion of the funds in the hands of Eller, trustee, the defendant was subrogated to the rights of the plaintiff in the insurance money held by Moses to the extent of a difference between $141 and $300.

*Watson, Buxton & Watson for plaintiff.*
*Manly & Hendren and D. H. Blair for defendant.*

CONNOR, J., after stating the case: The allegation that plaintiff's note was paid is eliminated by the verdict of the jury. The case then (467) comes to this: Plaintiff, by her husband, whose agency in that respect is not denied, deposits her note with the defendant grocery company to secure a line of credit to be extended to Fitts & Lash to the extent of $300. For goods purchased in excess of that amount they were to make monthly payments, which were to be, and were, applied to the extinguishment of such purchases. Conceding that the time of payment fixed by the note marked the limit of time for which the line of credit was to extend, it is admitted that at that time Fitts & Lash owed, on account of purchases made pursuant to the contract, as much as $300. It would seem clear, therefore, that at that time the defendant grocery company may have required the trustee to sell the property and pay the balance due on the debt for which plaintiff's note was liable.

Has the defendant grocery company, by its dealing with the note since that time, released the property from the lien or right to have it subjected to the payment of the debt? It is not claimed that at any time since the maturity of the note the debt of Fitts & Lash has been reduced

below $300. It seems that Fitts & Lash made several short-time notes to the defendant grocery company, which were negotiated at the bank, with the plaintiff's note attached thereto as collateral. It is not perfectly clear that such use of the note was made after its maturity, although we think the testimony capable of that construction.

These notes have all been paid, and the plaintiff's note is now the property of the Messick Grocery Company. Plaintiff insists that, by taking these short-time notes of Fitts & Lash since the maturity of plaintiff's note, the defendant grocery company entered into a valid and binding contract to extend the time of payment of the debt for which the plaintiff's note was liable. The basic reason upon which a valid contract with the principal, extending the time of payment of the debt, discharges the surety is that it deprives the surety of the (468) right to pay the debt and demand exoneration from the principal and an assignment of securities held by him. It is elementary that "when the engagement of the surety has become absolute by the default of his principal he may pay, without awaiting a suit, and what is thus paid, if it exceed not his legal liability, will be regarded as expended for the use, and at the instance and request, of his principal." *Gray v. Bowls,* 18 N. C., 437. *Shepherd, J.,* in *Scott v. Fisher,* 110 N. C., 311, quoting from *Deal v. Cochran,* 66 N. C., 269, says: "It is well settled that if a creditor enter into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liability of the surety are injuriously affected, such contract discharges the surety. A familiar instance of this is when a creditor binds himself not to sue or collect the debt for a given time, and thereby puts it out of the power of the surety to pay the debt and sue the principal debtor."

It will be noted that the testimony showed that the amount due by Fitts & Lash, at the maturity of the plaintiff's note, remained a charge on the books of the defendant grocery company. It is not claimed that it was ever closed by note, and the jury find that plaintiff's note was not paid by renewals. While the transactions are not set out so clearly as might be desired, it seems that the short-time notes were given as accommodation paper to enable the Messick Grocery Company to borrow money from the bank. We do not perceive how they in any manner affected the plaintiff's right, after maturity of her note, to pay it and immediately sue Fitts & Lash for the amount so paid by her. The fact that it was deposited in the bank by the Messick Grocery Company did not affect her right to do so. It is well settled that if a collateral be deposited in a bank it may be collected at maturity by the bank, although the debt for which it is collateral is not due. The pro- (469) ceeds will be held in lieu of the collateral to await the maturity of the debt. The plaintiff cannot complain that the payments made by

Fitts & Lash on account of the weekly purchases were so applied. She had no equity to compel them to be applied to the $300, for which her note was deposited. This case is distinguished from *Purvis v. Carstaphan,* 73 N. C., 575. There the payments were made from the proceeds of the wife's crops. It was not within the terms of the contract, or the contemplation of the parties, that the first payments made were to extinguish plaintiff's note. It was deposited, not to secure a single bill of groceries to the amount of $300, but a "line of credit" to that amount. To hold that the note was extinguished by the first payments made would do violence to the manifest purpose of the parties. The finding of the jury that the note has not been paid excludes the suggestion that the plaintiff has been released otherwise than by an extension of time upon a valid contract. This we do not think was the effect of the dealings between the parties. His Honor, upon the entire evidence, correctly answered the third issue. Defendants insist that by the agreement, set out in the note, waiving any "defense on ground of any extension of time," etc., the plaintiff is precluded from raising the question. The plaintiff replies to this contention by saying that she is a *feme covert,* and not bound by her contract in this respect. This question has not heretofore been presented for our consideration. An agreement, incorporated in the note, to waive the defense accruing by an extension of time, has been held valid by this Court in *Bank v. Couch,* 118 N. C., 436; 27 A. & E., 528.

In view of the decision in *Ball v. Paquin,* 140 N. C., 83, wherein we held that a contract made by a married woman, charging, either
(470) expressly or by implication, her real estate, with the consent of her husband and by privy examination, was valid, we can see no reason why, treating the note and mortgage as one transaction, the legal effect of her agreement is not the same as if incorporated in the mortgage. It would seem both reasonable and just to treat every provision in the note as within the protection of the mortgage. It is only the property specifically conveyed for the security of the debt which is sought to be subjected. To this extent, at least, she has waived any defense which might otherwise accrue to her from the manner of dealing with the note.

The question which has given us most concern is presented by defendants' claim to have the proceeds of the insurance policy applied to the payment of the note. The policy issued to Eller, trustee, was payable to him as his interest might appear, and, while it is not expressly so stated, the legal effect of the transaction would give to the plaintiff the amount of the policy in excess of such interest; hence, as the matter has turned out, the entire amount of the insurance policy belongs to the plaintiff unless the defendant Messick Grocery Company has a right to it, either by way of an equitable lien or an equitable assignment. It is well settled

that "An agreement between the mortgagor and the mortgagee, by which the mortgagor is charged with the duty of taking out insurance for the benefit of the mortgagee, will charge the proceeds of any insurance taken out by the mortgagor with a lien in favor of the mortgagee." 4 Cooley Ins. Briefs, 3703; 1 Jones on Mortgages, sec. 400.

Where the mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee, and either has effected, or thereafter effects, insurance in his own name, "though this be done without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected (471) under the agreement, and will give the mortgagee his equitable lien accordingly. This is upon the principle by which equity treats that as done which ought to have been done." *Nordyke v. Gerry,* 112 Ind., 535. In *Ice Co. v. Trust Co.,* 186 U. S., 626, it is said: "In *Wheeler v. Insurance Co.,* 101 U. S., 329, it was held that when a mortgagor is bound by his covenant to insure the mortgaged premises for the better security of the mortgagees the latter have, to the extent of his interest in the property destroyed, an equitable lien upon the money due from the policy taken out by him." *Chipman v. Carroll,* 25 L. R. A., 205. The covenant of the mortgagor made it her duty to insure the property and keep it insured for the benefit of the mortgage creditor. As she then had the policy payable to Eller, trustee, with the balance, after paying the Walker note, coming to her, she might well be regarded in equity as having, in discharge of her covenant, assigned the policy, subject to Eller's interest, to Blair, trustee.

Equity, in its effort to make good one of its favorite maxims, that it will regard that as done which ought to have been done, will treat the assignment as in fact made or treat the mortgagor as holding the policy in trust for the mortgagee. "For the purpose of reaching exact justice, equity will frequently consider that property has assumed certain forms with which it ought in justice to be stamped, or that parties have performed certain duties which they ought in justice to fulfill." Bisph. Eq., 44. It is not very material upon which equitable principle we base the right. The justice of this result is manifest, in view of the fact that the building was a part, and evidently a valuable part, of the property mortgaged. When burned, if the company had, as was its privilege, restored it, the new building would have been subject to the mortgage. Why, then, should not the money paid as the (472) price of the building stand in its stead? Any other result would permit the mortgagor to withdraw, in violation of her covenant, the value of the house from the security which she had given for the debt. As the right of the defendant grocery company to hold the proceeds

of the insurance policy arises out of the covenant to insure, and not out of the right to be subrogated to Eller's rights, the question of the plaintiff's exemption as paramount thereto does not arise.

Upon a careful consideration of the entire record, we find no error in his Honor's ruling. The judgment must be

Affirmed.

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ELIZABETH A. VIVIAN v. THOMAS MITCHELL ET AL.

(Filed 30 April, 1907.)

1. **Appeal and Error—Supreme Court Rules—Practice.**
When, under Rule 5 of the Supreme Court, the transcript of the record of the case on appeal from a judgment rendered before the commencement of a term of the Supreme Court is not docketed at such term seven days before entering into the call of the docket of the district to which it belongs and stands for argument, it will be dismissed, under Rule 17, upon motion of the appellee, and his filing the required certificate, seven days before entering into the call of said district, if such motion is made prior to the time of docketing the transcript.

2. **Same—Appeal Bond—Laches.**
When the appeal bond is not filed at or before the time of docketing the appeal (Revisal, sec. 593), the Supreme Court will not reinstate the case and allow an appeal bond to be filed, unless laches is negatived or reasonable excuse shown.

3. **Same—Duty of Appellant, Agent or Attorney—Excusable Neglect.**
It is the duty of the appellant, or his agent or attorney, as a condition precedent, to take the steps prescribed to perfect his appeal. An appeal having been dismissed, under Rule 5 of the Supreme Court, will not be reinstated on the ground of "accident, mistake, or excusable neglect" of the attorney, when it appears that the ground of his motion is a miscalculation of the time required in which the transcript should be docketed, or his mistake in sending it to the printer instead of to the clerk of the Supreme Court.

(473) MOTION to reinstate appeal.

*T. T. Hicks for plaintiff.*
*Thomas M. Pittman for defendants.*

CLARK, C. J. This is a motion, under Rule 18, to reinstate this appeal, which was dismissed 19 February, 1907, upon a motion under Rule 17.

The action was tried at September Term, 1906, of VANCE. The appellants duly served their case on appeal, in reply to which the appellee

served her counter-case on 30 October, which was "accepted" by appellants, but for some unexplained reason it was not filed by them with the clerk till 1 February, 1907. On the afternoon of 18 February—as the clerk testifies, without contradiction—appellant's counsel obtained a copy of the transcript, the delay being caused by the fact that the appeal bond had not been given. The appellants did not offer to docket the appeal till 20 February (after it had been dismissed), and then without an appeal bond, though it should have been docketed by 10 A. M. 19 February, under Rule 5 of this Court, which reads as follows: "The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and the case will stand for argument in its order; if not docketed, it shall be continued or dismissed, under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript." Rule 17 prescribes that the motion, if regularly entered, "shall be allowed at the first session of the Court thereafter." 140 (474) N. C., 659.

The call of the docket of the Fourth District, to which this appeal belonged, began on 26 February. This appeal was not docketed, as required by the above rules, on 19 February, and on that day, on motion upon certificate in conformity to Rule 17, it was regularly dismissed. The appeal bond, which was required to be filed at or before docketing the appeal (Revisal, sec. 593), had not been filed. The Court will not, even if this were the only ground of dismissal, reinstate a case and allow an appeal bond to be filed unless laches is negatived or reasonable excuse shown. *Harrison v. Hoff,* 102 N. C., 25; *Jones v. Asheville,* 114 N. C., 620.

The appellants move to redocket, on the ground that the motion to dismiss was prematurely made; and further, on the ground of "accident, mistake, or excusable neglect." The motion to dismiss was not prematurely made, but was in strict conformity to Rule 5, above set out. *Craddock v. Barnes,* 140 N. C., 427, in which the Court points out that, as the motion to dismiss can be made seven days before the call of the district, it can be so entered as to the First District in vacation, seven days before its call; but since it cannot then be brought to the attention of the Court—because then in vacation—it can be called up on the first day of the term, and, if it is found that the motion to dismiss was entered before the appeal was docketed, the appeal will be dismissed. Of course, as to the other districts there is no reason why the motion should not be brought to the attention of the Court and acted on when entered, and Rule 17 provides that it "shall be allowed at the first session of the Court."

The further ground of the motion, as set out in the affidavit of Mr. Harris, of counsel for appellants, is that "by accident, he mistook (475) and miscalculated the time when, by the rules, the appeal ought to have been docketed, and but for such mistake and miscalculation he would have docketed the same within the time required"; that the transcript was in Raleigh in time to be docketed, but by reason of the aforesaid mistake and miscalculation he sent it to the printer instead of to the clerk of this Court. There would be more force in this, to our apprehension, if counsel, attempting to docket the appeal on 20 February, after its dismissal, had then given the five days notice of a motion to reinstate, returnable on 26 February, the first day of the call of the district, and had then been ready with his printed record and brief and appeal bond, so as to be prepared to argue the case on the regular call of the district, if reinstated. The fact that the case had been dismissed on 19 February was published in the newspapers, and the appellants should at least have shown diligence in repairing their fault so that the case might be argued, in its regular order, without imposing upon the plaintiff the penalty of a further delay of six months for their negligence, when she had been in no default.

In *Paine v. Cureton,* 114 N. C., 606, the Court refused to reinstate because the appellant had not set up his defense in reply to the motion (which defense would have been sufficient if then made) to prevent the dismissal. For a stronger reason the appellants in this case, having a week's notice of the granting, on 19 February, of the motion, should at least have given prompt notice of a motion to reinstate, and have been ready with appeal bond and printed record and brief on the call of the docket of the district, 26 February, to secure reinstatement, and, if obtained, argue the appeal in its regular order. To same purport, *Mortgage Co. v. Long,* 116 N. C., 77, where the motion to reinstate was denied because the defense was not set up when the motion to dismiss was made, and this has been always held by this Court. The appellee has (476) his right to the fruits of the trial, unless the appellant complies with the procedure entitling him to review the action of the court below; and, if there has been an excusable slip on his part, he must show that there was no negligence and that he set up his excuse at the first moment, and did not—as here—repeat his negligence.

It is true that in the above cases the motion to dismiss was made during the call of the district. But the appellant's otherwise valid excuse was held unavailable, because not immediately set up so the case could be argued in its regular order, upon denial of the motion to dismiss. Here, the motion having been made the week before, when counsel was not expected to be here (though he was in law fixed with notice that his appeal, not having been docketed in time, could then be dis-

missed), it is greater laches that he did not give notice to reinstate and call it up when his district was reached, when the case, if reinstated, could be argued in its regular order.

This Court has often and always held that noncompliance with the requirements which entitle an appellant to have his case reviewed cannot be excused because the failure to observe them is due to the negligence of counsel. If this were not so, the more negligent counsel could be the more they would be in demand by appellants desirous of baffling the appellee and adding to the "law's delay," which the great dramatist enumerates among the greatest ills that "flesh is heir to." There is no suggestion that in this case counsel were purposely dilatory or negligent. We feel assured that they were not. But the matter of appeal must be regulated, and, as a condition precedent to obtaining a review of a case on appeal, those requirements must be observed. If the appellant does not himself, or through some agent or attorney, take those necessary steps, and in apt time, the judgment below must stand. It is no excuse for a failure to comply with these requirements, these con- (477) ditions precedent, that the appellant's agent or attorney negligently failed to do what was necessary to entitle him to have his appeal heard. The point is fully discussed in *Edwards v. Henderson,* 109 N. C., 84, and many cases there cited; *Calvert v. Carstaphan,* 133 N. C., 26, 27, and cases cited. Indeed, there is nothing better settled. The orderly rules of procedure are a very necessary—indeed, an indispensable—part of the administration of justice. They must be universally observed to prevent unutterable confusion, and as impartially applied by the Court in all cases as are the principles of law to the merits of a controversy.

So recently as last term, in *Cozart v. Assurance Co.,* 142 N. C., 523, the Court says that compliance with the "regulations as to appeals is a *condition precedent,* without which (unless waived) the right to appeal does not become potential. Hence, it is no defense to say that the negligence is the negligence of counsel and not negligence of the party," and adds that if what is necessary to save the appeal is not done in apt time, there is "no legal appeal." The matter is also fully discussed in *Barber v. Justice,* 138 N. C., 21, with full citations of authorities, the Court holding that the vicarious negligence of counsel cannot restore a right to appeal which the appellant has failed to secure by observing the orderly requirements necessary to that end. The decisions to this effect have been uniform, and so often repeated that of late years the Court has usually contented itself with following the precedents, without opinion, by a *per curiam* order.

Indeed, when there is a failure to observe the requirements as to appeals, under all the authorities, it is immaterial whether the fault is that

(478) of the party himself or of one, whether agent or attorney, to whom he has intrusted that duty. If the inadvertence is without negligence and excusable, and the remedy is sought in apt time, the Court will give the relief in either case; and if these things do not appear, the Court will deny it.

Motion denied.

*Cited: Laney v. Mackey, post,* 631; *Truelove v. Norris,* 152 N. C., 756, 757; *Hewitt v. Beck, ib.,* 759; *Lunsford v. Alexander,* 162 N. C., 531; *Hawkins v. Tel. Co.,* 166 N. C., 213; *S. v. Goodlake, ib.,* 435; *Transporation Co. v. Lumber Co.,* 168 N. C., 61; *Land Co. v. McKay, ib.,* 85; *Lindsey v. Knights of Honor,* 172 N. C., 820.

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D. E. McIVER, RECEIVER, v. YOUNG HARDWARE COMPANY.

(Filed 30 April, 1907.)

**1. Corporation—Sale of Entire Assets—Rights of Creditors.**

All the directors and stockholders of a corporation may not sell practically the entire assets of the corporation for their own benefit and advantage, upon a consideration moving to themselves alone, to the prejudice of the rights of its creditors.

**2. Same—Fraud in Law—Equity Follows Assets—Recovery.**

It is the duty of the directors to preserve the assets of the corporation and administer them for the benefit of the creditors; therefore, when one corporation attempts to buy practically the entire assets of another from all of the directors and stockholders, paying therefor the stock of the purchasing corporation at par, but worth less than par, and subsequently becoming worthless, and reserving for the payment of debts of the selling corporation a certain amount of said stock, the transaction is fraudulent in law, as to the creditors, and void; and equity will follow the assets into the hands of other than *bona fide* creditors of purchasers for value and compel them to be applied to the satisfaction of the debts, or, if not available, their value may be recovered.

**3. Same—Bona Fide Purchaser for Value.**

A corporation purchasing almost the entire assets of another corporation, paying the individual directors and stockholders therefor, and not ascertaining and providing for the debts of the other corporation, is not an innocent purchaser for value, without notice.

**4. Same—Liability of Purchasing Corporation—Of Officers and Directors of Selling Corporation.**

A corporation purchasing from the officers and stockholders of another corporation almost its entire assets, without provision for the creditors, is, with such officers and directors, jointly and severally liable to the receiver of the defunct selling corporation for the amount necessary to pay the claims existing against it, interest and costs.

5. **Same—Amount and Extent of Recovery.**
When the selling corporation is insolvent, and its receiver is required to share ratably in the assets of the purchasing corporation, also insolvent and in a receiver's hands, he can prove against it an amount equaling the full value of the goods purchased, but not more may be recovered than will be enough to pay the amount due the creditors.

6. **Same—Liability—Charter Provisions—Officers—Torts—Statute.**
The charter provisions, that "no stockholder of the corporation shall be individually liable for any debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle, also embodied in Revisal, sec. 1192, holding the stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors.

ACTION, heard by *Justice, J.*, at November Term, 1906, of (479) MOORE.

The Sanford Hardware Company is a corporation chartered by this State in June, 1900, with an authorized capital of $4,500, of which $3,000 has been paid in, and had its place of business at Sanford, N. C. The Young Hardware Company was also chartered by this State and had its place of business at Raleigh, N. C., both having been engaged in the hardware business. The Sanford corporation became insolvent, and, in a judgment creditor's suit against it to subject its assets to the payment of its debts and liabilities, the plaintiff, D. E. McIver, was appointed receiver, and, as such, he brings this action.

The case was tried by consent without a jury, and the court found substantially the following facts: The plaintiff, D. E. McIver, was duly appointed, in April, 1905, receiver of the Sanford Hard- (480) ware Company, with the usual powers; the defendants Bynum and Clark were the president and secretary and treasurer of the company, and they, with Terry, were its only stockholders and directors. Terry, Bynum, and Clark, finding that the company was not making money, sold to the Young Hardware Company the entire stock of goods of the Sanford Hardware Company at the price of $2,000, its then value, taking in payment therefor capital stock of the former company of the par value of $2,000, which was worth at the time 50 cents on the dollar, as they then well knew, and which is now absolutely worthless. Of this stock, according to the agreement between the parties, $500 was issued directly to Terry, $500 to Bynum, and $500 to Clark. The remaining $500 was retained by the Young Hardware Company until the Sanford Hardware Company's debts should be paid, and has never been issued and delivered to the latter. It was thought, at the time, to be sufficient to pay the outstanding debts. The several defendants, after the appointment of McIver as receiver, and after the stock became worthless, tendered the stock of the Young Hardware Company, severally held by

them, to the plaintiff, who declined to receive it. The debts of the Sanford Hardware Company, at the time of the transactions herein mentioned and at the present time, amount to about $620. Some of its debts, not included in the $620, have been settled by it since the transfer of its stock of merchandise. The Sanford Hardware Company retained a safe and typewriter, value not given, and some small articles, and certain book accounts now worth $10 or $15, which articles, with the stock of goods, constituted its entire assets. Creditors have reduced their claims to judgment, have issued executions, and the sheriff has returned
(481) the same "Nothing to be found." All of the foregoing facts were known to all of the defendants at the time of the transaction. The Young Hardware Company is now insolvent, and was so when this action was brought. The Sanford Hardware Company has never received from it, or from any source, any payment of money or other thing of value for the stock of goods delivered to the latter by Bynum, Clark, and Terry. At the time of the said transactions, Bynum was president of the Sanford Hardware Company and manager of the other corporation, but had no other interest in the latter until the $500 of its stock was issued to him. The negotiations and trade with the Young Hardware Company were conducted by Bynum and Clark, by and with the knowledge and consent of Terry. When the offer was made for the stock of goods by the Young Hardware Company, Bynum, Clark, and Terry consulted about it and accepted in writing the proposal to buy. At the time, though, the Sanford Hardware Company was not being pressed in any way by its creditors, and had not been. The transfer of the goods was made in November, 1904, in good faith, without concealment or fraud, and Bynum, Clark, and Terry received nothing in the way of benefit from the transaction except the stock of the Young Hardware Company.

The charter of the Sanford Hardware Company provides as follows:

"With the consent, in writing and pursuant to the vote of the holders of a majority of the stock issued and outstanding, the directors shall have power and authority to sell, assign, transfer, or otherwise dispose of the whole property of this corporation.

"No stockholder of the said corporation shall be individually liable for any debt, liability, contract, tort, omission, or engagement of the said corporation or of any other stockholder herein."

(482) The company also had the general power to buy and sell real and personal property.

Upon the facts thus found by it, the court adjudged that the plaintiff is only entitled to recover from the defendants A. P. Terry, A. J. Bynum, Jr., and A. M. Clark the certificates of stock held by them and issued to them by the Young Hardware Company; that he take nothing

by his suit except the said certificates of stock, and that the defendants go without day and recover of the plaintiff their costs. Plaintiff excepted and appealed.

*John W. Hinsdale and Seawell & McIver for plaintiff.*
*W. J. Adams, Womack, Hayes & Bynum for defendant.*

WALKER, J., after stating the case: If we should concede that the transaction by which the transfer of the property of the Sanford Hardware Company to the Young Hardware Company, as effected by Bynum, Clark, and Terry, was valid as a corporate act and sufficient to pass the title to the latter company, as against creditors of the former company, unless there is some other objection to the transfer, we think it is so lacking in the essential elements of a *bona fide* sale that, however regularly and formally those who were, at the time, stockholders and officers of the Sanford Hardware Company proceeded, no title to the property was ever acquired by the Young Hardware Company, so far as the creditors of the other corporation are concerned. The essence of a sale is the transfer of the property in the thing from the buyer to the seller for a price. Tiffany on Sales, pp. 1 and 2. No price has been paid to the Sanford Hardware Company, which is an entity distinct from its corporators.

It was not competent for the directors of the Sanford Hardware Company, even though they were also stockholders, to sell its property to any one for their own benefit and advantage and to the prejudice of its creditors, or, in other words, to sell practically the entire (483) property of the corporation upon a consideration moving to themselves. It has been held that a director, who is also a creditor of a corporation, cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. *Hill v. Lumber Co.*, 113 N. C., 173; *Bank v. Cotton Mills,* 115 N. C., 507. The assets of a corporation are, in a certain sense, to be regarded as a trust fund, and the officers as occupying the position of fiduciaries, in respect to their duty towards creditors, charged with the preservation and proper distribution of those assets. The corporate debts must be paid before they can appropriate any part of the assets to their own use, though they may also be stockholders. The fund for the payment of dividends and for the redemption of the stock is what is left after the creditors have been satisfied. It is true that, subject to the exception already mentioned, the corporation, through its appointed officers and agents, may dispose of its assets just as an individual may deal with his property until, by reason of its insolvency, they are brought under the control of the court, when they will be distributed among the creditors ratably and upon the prin-

ciple that equality is equity, subject, however, to the recognition and enforcement of any superior equitable rights or liens acquired beforehand, and which may entitle the holders thereof to be preferred with respect to them in the administration of the fund.

It is needless to enter upon any elaborate discussion of what is known as the "trust-fund doctrine" in order to define its true nature and to fix its limitations, for it is quite sufficient, for the purpose of deciding this case, that, as a part of that important doctrine, we find it to be settled that the stockholders and officers of the corporation are liable (484) to it and to its creditors for any acts of malfeasance, misfeasance, or nonfeasance, by which their rights are injuriously affected, and, as a consequence, for any loss arising out of their fraud or negligence. If they have served themselves, directly or indirectly, instead of serving the corporation when their interests and those of the corporation or of its creditors conflict, they must answer for any loss resulting from their faithlessness and cupidity. While there is no direct and express trust attached to the corporate property for the benefit of its creditors, so that its assets cannot be conveyed by it or acquired by another except they be subject, in the hands of the purchaser, to the burden of a trust or lien, and therefore they can properly be called a trust fund only "by way of analogy or metaphor"; and while, as between itself and its creditors, the corporation may be regarded as simply a debtor, still, as between its creditors and its stockholders, its assets are considered, in equity, as a fund for the payment of debts, and cannot be diverted from that purpose for the benefit of the latter, no matter what the form of the transaction may be by which the scheme of diversion is consummated.

The principles we have thus generally stated are well sustained by numerous authorities. *Sawyer v. Hoag,* 17 Wall., 610; *Hollers v. Brierfield,* 150 U. S., 371; *Foundry Co. v. Killian,* 99 N. C., 501; *Clayton v. Ore Knob Co.,* 109 N. C., 385; *Hill v. Lumber Co., supra; Bank v. Cotton Mills, supra; Electric Light Co. v. Electric Light Co.,* 116 N. C., 112; *Cooper v. Security Co.,* 122 N. C., 463; *Graham v. Carr,* 130 N. C., 271; *Wood v. Dummer,* 3 Mason, 311; *Handley v. Stutz,* 139 U. S., 417. In the last cited case the subject is fully discussed and the cases bearing upon it are carefully collated. Speaking of the obligation of directors arising out of this trust relation, *Justice Davis,* for the Court, in (485) *Drury v. Cross,* 7 Wall., 299, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in receiving an advantage to themselves not common to the other creditors they were guilty of a plain breach of duty." Let it be noted that this was said of directors who were also creditors—sustaining the dual relation of trustees and

creditors. We find the same idea thus clearly stated in 10 Cyc., pp. 654-655: "If the capital stock should be divided, leaving any debts unpaid, every shareholder receiving his share of the capital stock would in equity be held liable *pro rata* to contribute to the discharge of such debts out of the funds in his own hand. Accordingly, when the property has been divided among the shareholders, a judgment creditor, after the return of an execution against the corporation unsatisfied, may maintain a creditor's bill against a single shareholder or against as many shareholders as he can find within the jurisdiction, to charge him or them to the extent of the assets thus diverted, and it is immaterial whether he got them by fair agreement with his associates or by an act wrongful as against them. In affording relief to creditors of corporations on this ground, courts of equity proceed on the familiar principle that whoever is found in possession of a trust fund, under circumstances which charge him with knowledge of the trust, is bound to account as trustee to those beneficially interested in such fund. Whenever shareholders have in their possession any of this trust fund they hold it *cum onere,* subject to all the equities which attach to it, and they stand in such a relation of privity with the corporation that their dealings with it will be subjected to close scrutiny where the rights of its creditors are involved."

So in *Townsend v. Williams,* 117 N. C., 330, this Court sub- (486) stantially said that directors are not mere figureheads, but occupy a fiduciary relation toward the corporation, the stockholders, and the creditors; they must exercise care, attention, and circumspection in the management of its affairs, and particularly in the safe-keeping and disbursement of the funds put into their custody and control, and they must see that they are appropriated as intended for the purposes of the trust. If they misappropriate them or allow others to divert them from those purposes, they must account to their *cestuis que trust* for the dereliction of duty. *Shea v. Mabry,* 1 Lea (Tenn.), 342. But more to the point is a statement of the principle of liability involved in this case by *Judge Thompson,* which seems to be peculiarly applicable to the facts as they appear in the record: "It is not necessary to say that the corporation cannot sell or in any way alien its property to the prejudice of its creditors so as to hinder, delay, or defraud them in the collection of debts owing by it; and in general, whenever a conveyance is made by a corporation under such circumstances as would characterize it as a fraud upon creditors if made by an individual, it will be set aside in equity at the suit of such creditors, or other appropriate relief will be accorded them. Hence, a sale by a corporation to another corporation, in consideration of the latter delivering a specified amount of its stock to the individual shareholders of the selling corporation, and guaranteeing the payment of the debts of the selling corporation, is *prima facie* fraudu-

lent as to the creditors of the selling corporation; and, where the rights of a creditor have supervened, it is beyond the power of the corporation, even with the consent of its shareholders, to sell out its plant and retire from business, taking the stock of the purchasing corporation in (487) payment therefor and issuing it to one of its individual shareholders, without any agreement on his part to pay the corporate debts." 10 Cyc., 1266, 1267.

It will be observed that the transaction is said by *Judge Thompson* to be void as being, in contemplation of law, fraudulent in respect to creditors; but, whether technically fraudulent or not, the fact is that assets, which should have gone to the payment of the corporate debts and liabilities, have been unlawfully withdrawn from that purpose and applied to the benefit of the shareholders, who are not entitled to receive them, leaving the debts of the corporation unpaid. Such a conveyance of the assets is practically, and to all intents and purposes, a voluntary one, as no consideration is actually paid to the corporation which can stand as a substitute to creditors for the assets so transferred and be as available and valuable to them as the original trust fund, the place of which it has taken. A transaction that produces this result will not defeat the trust which the law imposes upon the fund, nor impair the remedy of creditors if any debts remain unpaid. *Vance v. Coal Co.,* 92 Tenn., 47; *R. R. v. Howard,* 7 Wall., 410; *Curran v. Arkansas,* 15 Howard, 527; *Fellrath v. School Association,* 66 Ill. App., 77; *R. R. v. Bank,* 134 U. S., 276; *R. R. v. Pettus,* 113 U. S., 124; *Mellen v. Iron Works,* 131 U. S., 356.

As said by the Court in *Hurd v. Laundry Co.,* 167 N. Y., 89, "The stockholders consent (to the transfer), but the creditor objects. When he demands payment of his claim he is referred to the empty shell, which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation." When he seeks to hold the parties who have thus stripped the debtor corporation of practically all its available capital, he is told that (488) the stock of the insolvent defendant, the Young Hardware Company—now, of course, worthless—is his only resort. Can the law permit this, under the circumstances, to be any adequate response to the creditor's reasonable demand for the satisfaction of his claim? We are bound by every principle of equity and fair dealing and by the uniform precedents in such cases to answer this question emphatically in the negative. When there are debts outstanding, "it becomes the duty (of the directors) of the corporation to preserve its assets and administer them for the benefit of the creditors. A court of equity will then treat the assets as a trust fund. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or pur-

chasers (for value), a court of equity will follow them and compel them to be applied to the satisfaction of the debts." *Sidell v. R. R.,* 78 Fed., 724. It was held in *Couse v. Manufacturing Co.,* 33 Atl. Rep. (N. J.), 297, that a transfer by a corporation of all its property to another corporation, in consideration of the assumption by the latter of the former's debts, and the issuance of stock of the grantee to the grantor, which is carried out by the delivery of such stock to individual stockholders of the grantor, so that they could, if they saw fit, divide it among themselves instead of applying it to the payment of debts, is *prima facie* fraudulent as to creditors of the grantor.

The elementary doctrine of equity is that it not only will view gifts and contracts between parties holding a confidential relation with a jealous eye, but it goes further and forbids any person, standing in a fiduciary position, from making a profit in any way at the expense of the party whose interests he is bound to protect, or sacrificing the interests of the latter in order to advance or promote his own. Bishp. Eq. (6 Ed.), pp. 343-347. The principles we have discussed have (489) been stated with great clearness in Womack Pr. Corp., sec. 196, and in Clark Corp., 563. But our statute (Rev., sec. 1192) also forbids any division, withdrawal, or reduction of the capital stock of a corporation except as therein provided, and charges the directors who violate its provisions with responsibility to the creditors in case of insolvency—that is, if it should become necessary for them to resort to such liability in order to collect the debts. It was so held, construing a similar statute, in *Martin v. Zullerbach,* 38 Cal., 360. The directors, Bynum, Clark, and Terry, must therefore answer for the debts of their corporation to its creditors, they having wrongfully disposed of its assets, which were sufficient to pay the same. *Townsend v. Williams, supra; Solomon v. Bates,* 118 N. C., 311. This case is not like *Perry v. Insurance Association,* 139 N. C., 374, as the defendant there was a mutual insurance company, and the plaintiff could, by compelling calls and assessments, obtain satisfaction of his claim; but the Court in that case denied the right of the corporators to dissolve the company for the purpose of preventing assessments, and thereby leave the creditors without a remedy by which to recover their claims.

The Young Hardware Company can hardly claim to be a *bona fide* purchaser, for value and without notice, of the goods it received and which belonged to the other corporation. The transfer to it was not for value paid to the latter corporation (if for value at all), and it had knowledge of the breach of trust on the part of the directors, because the transaction was not in the ordinary and usual course of business, but was, at least, rather exceptional in its nature, and the very circumstances of the case imply full notice to it of all the facts necessary to

(490) charge it with liability. *Bunting v. Ricks,* 22 N. C., 130; *Hulbert v. Douglas,* 94 N. C., 122. It not only knew of the breach of trust by the directors, but actually assisted them in its consummation, itself receiving the fund which had been wrongfully diverted. *Bunting v. Ricks, supra; Fellrath v. School Association, supra.*

We cannot attach any importance to the fact that the Young Hardware Company retained five shares of its stock (which in fact had not even been issued at the time) until the debts of the other company were paid. The officers of the Sanford Hardware Company should, of course, have known the amount of its indebtedness, and the Young Hardware Company should have made proper inquiry to ascertain what it was. The truth is that it bought the goods with its own stock, which was then worth only one-half of its par value, and consequently only one-half of the value of the goods it received, and which must have been the stock of a failing concern, as it is now worthless. The five shares thus retained, if they were intended to be a security for the debts of the Sanford Hardware Company, and were not merely withheld on condition that the debts should be first paid before a delivery of it to the officers or stockholders could be required, was at best but a very precarious indemnity to the creditors of that company. When the Young Hardware Company engaged in the transaction which threatened the rights of creditors of the other company, it took the risk of having to pay their claims in the event of the insolvency of the latter company, and it must abide the consequences of the hazard which has turned against it. The defendant company, therefore, is in no sense a *bona fide* purchaser for value, nor has it any right or equity superior to that of creditors of the company with whom it dealt.

(491) It results, from what has been said, that as all of the defendants participated in the wrongful act by which the creditors of the Sanford Hardware Company have lost the benefit of the assets upon which they relied and to which they had the right to resort for the satisfaction of their claims, and which were adequate for that purpose, they are jointly and severally liable to the receiver who represents that corporation and its creditors (*Craft v. Wilcox,* 102., 378; *Wood v. S. S. B. and F. Co.,* 92 Hun., 22) for the amount necessary to pay the claims existing against it, and interest, together with proper costs and expenses; but they will not be required to pay anything beyond that amount, whatever it is. As the Young Hardware Company is insolvent, if the plaintiff is required to share ratably with its other creditors, he will be permitted to prove his claim against it up to the full value of the goods (admitted to be $2,000) and interest, provided, nevertheless, that he must not be allowed to recover from that corporation, as his *pro rata* share of its assets, more than will be sufficient to

pay the amount due to creditors of the Sanford Hardware Company, with interest and all costs and expenses, as above stated. *Brown v. Bank,* 79 N. C., 244. This is the proper equitable relief to be awarded, owing to the peculiar nature of the case. Under this scheme the directors, being also stockholders, are held liable only to the amount of the debts, as they would themselves be entitled to the surplus of the assets over what is necessary for the payment of the same. The other defendant, who received and converted the assets, is held liable to the full value thereof, nothing else appearing; but, as the stockholders have actually accepted its stock in satisfaction of their interests, it would be inequitable to charge this defendant with more than what is sufficient to pay the debts of the Sanford Hardware Company, the stockholders being virtually estopped by their conduct from claiming any more, even through the corporation or its receiver. Indeed, we do not under- (492) stand that they make any such demand.

It does not appear what has become of the stock of goods transferred to the Young Hardware Company—whether it has been sold or otherwise disposed of by that company or whether that company still has possession of the stock; but we infer from the case agreed that it is not now available to the creditors of the other company, as its value is stated at $2,000, and it is therefore understood that, if the plaintiff is entitled to recover at all, the value of the goods shall stand in the place of the goods themselves. If it has been sold, the defendant corporation is, of course, liable for its value to the extent necessary for the payment of the plaintiff's claim. Wait on Fraud. Con. (3 Ed.), secs. 177, 178; *Fullerton v. Mial,* 42 How. Pr. (N. Y.), 294; *Martha v. Curley,* 90 N. Y., 372; *Valentine v. Pritchardt,* 126 N. Y., 277; *Williamson v. Williams,* 11 Lea (Tenn.), 370; Bump. Fraud. Con. (4 Ed.), sec. 628. We considered and decided a similar question in *Sprinkle v. Welborn,* 140 N. C., 163. The defendant company cannot retain the property or its avails without paying the plaintiff's claim.

No actual fraudulent intent is imputed to the parties. It is agreed that they acted in good faith; but the law will not permit this fact to defeat the creditors of the Sanford Hardware Company, for it characterizes the transfer as wrongful and in violation of their rights, without regard to the specific intent. As to them it is void in law, even though not fraudulent in fact.

In reaching our conclusion, we have paid very little regard to the special provisions of the charter of the Sanford Hardware Company, which are set out in our statement of the case. They are not at all in conflict with the general principles of equity which have controlled our decision. The authority of the directors to sell and dispose of the corporate property is conceded, but it should be exercised (493)

in a proper way, and that is what the Legislature intended in giving the general power of disposition. The clause relating to the non-liability of a stockholder for the debt, default, or tort of any other stockholder does not forbid the application of just and equitable principles to this case; and, besides, we have held the stockholders liable as officers and, too, for a joint tort or misfeasance, and not for a separate tort committed by only one of them. But if the two provisions, or either of them, conflicted with the rule of equity we have applied and which has been embodied in our statute law (Rev., sec. 1192), they, or the one so conflicting, would be abrogated by the general clause of the Revisal, sec. 5458, which repeals all private statutes conflicting with it. *S. v. Cantwell,* 142 N. C., 604.

The judgment of the court will be set aside and a judgment entered for the plaintiff for the amount ascertained by a reference or otherwise to be due him, under the principles herein stated, with further provision for his protection if he is required to share ratably with the creditors of the defendant company.

Error.

*Cited: Crockett v. Bray,* 151 N. C., 619; *Wilson v. Taylor,* 154 N. C., 218; *Pender v. Speight,* 159 N. C., 615; *Whitlock v. Alexander,* 160 N. C., 468, 482; *Wynn v. Grant,* 166 N. C., 45; *Gilmore v. Smathers,* 167 N. C., 444.

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C. CALL AND M. C. CALL v. LOUISA DANCY ET AL.

(Filed 7 May, 1907.)

1. **Deed—Sale Under Mortgage—Fraud—Undue Influence—Notice to Mortgagor—Estoppel.**

   In the absence of a suggestion of fraud, undue influence, or other ground recognized in equity as sufficient to avoid the execution of a mortgage, the mortgagor is estopped from asserting her title as against that of a purchaser under a mortgage sale regularly made, and, in the absence of a stipulation therein requiring it, notice of sale is not required to be given her.

2. **Same—Foreclosure—Statute of Limitations—"Color."**

   The defendant holding adverse possession without color of title for ten years, or for any period of time less than twenty years, after the foreclosure sale of the land described in her mortgage and the commissioner's deed to the plaintiffs therefor, does not toll the entry or defeat the plaintiff's right of recovery. Her former title is not such color as may be ripened into a good title by seven years' adverse possession, it having passed to the purchaser at the sale.

CALL *v.* DANCY.

ACTION, tried before *Bryan, J.*, and a jury, at October Term, 1906, of WILKES.

This is a proceeding for partition of land. Louisa, Noah, and Samuel Dancy, as heirs of J. E. Dancy, were tenants in common of the land in question. Samuel Dancy conveyed his interest to J. C. Wyatt, and in October, 1891, Louisa Dancy executed a mortgage to the State on her one-third interest to secure certain costs due by Noah Dancy in a prosecution for larceny. The costs were not paid, the mortgage was foreclosed in 1893 by sale under the power, and her interest in the land was bought by plaintiffs I. S. Call and Clarence Call and a deed executed to them. There is no point made as to the regularity of the sale except that Louisa Dancy alleges that she was not notified of the time of the sale. She relied on this fact in defense and then pleaded the statute of limitations, alleging that ten years had elapsed from (495) the maturity of the mortgage and that she had been in adverse possession under color, since the sale, for more than seven years before the commencement of this action. No color of title was shown. The defendant Louisa testified that she had been in possession of the land for forty years and for ten years since the mortgage was executed; that plaintiffs have brought no suit to foreclose, nor did they make any demand for possession before this suit was brought. She also testified to the value of her interest.

The court submitted the following issues:

1. Are the plaintiffs the owners of any interest in the lands described in the petition; and if so, what? Answer: None.

2. What interest, if any, has the defendant Louisa Dancy in the lands described in the petition? Answer: One-third.

3. Has the defendant Louisa Dancy been in possession of the lands described in the petition, holding the same adversely to plaintiffs, for ten years next preceding the beginning of this action? Answer: Yes.

And charged the jury that if the defendant Louisa Dancy had been in peaceable, quiet, and open possession of the lands for ten years next preceding the bringing of this action, holding the same under known metes and bounds and under color of title, and adversely to plaintiffs, and without demand or molestation from them, they would answer the first issue "No," the second "One-third," and the last "Yes." Plaintiffs excepted to this instruction. The jury rendered a verdict for the defendant, and, judgment having been entered thereon, the plaintiffs appealed.

*Charles G. Gilreath and O. C. Dancy for plaintiffs.*
*Finley & Hendren for defendants.*

(496) WALKER, J., after stating the case: When the land was sold under the power contained in the mortgage or deed of trust and conveyed to the plaintiffs as purchasers, they thereby acquired the title of Louisa Dancy, the mortgagor, and she is now estopped by her deed of mortgage from asserting that her title did not thus pass to them, there being no equitable element involved in the transaction: that is, no suggestion of fraud, undue influence, or other ground recognized in equity as sufficient to avoid the mortgage or the subsequent sale under the power. The plaintiffs are, therefore, tenants in common with the defendants, and entitled to the relief they demand, unless in some way they have lost the title since the sale was made. The defendants aver that they have, for the reason that Louisa Dancy, whose undivided interest they acquired, has been in adverse possession of the land for ten years since the maturity of the mortgage and for seven years under color of title since the sale and prior to the commencement of this proceeding. The first part of this defense is palpably based upon an erroneous assumption, both as to the law and the facts. The sale was made in August, 1893, within one year after the right to sell under the power accrued, and by the sale the relation of mortgagor and mortgagee was terminated, and the title which was before held upon condition subsequent or mortgage, was converted into an absolute one, which vested in the plaintiffs, as purchasers, by the execution of the power, so that the ten years statute, which is pleaded, does not apply. Nor if ten years had elapsed from the date of the accrual of the right to sell to the date of the sale, would the plea be good. *Menzell v. Hinton,* 132 N. C., 660; *Cone v. Hyatt, ibid.,* 810. But it so happens that less than one year had elapsed.

(497) As to the defense that the said Louisa Dancy has held the land adversely for seven years under color of title, this manifestly does not toll the entry of the plaintiffs or defeat their right to recover.

There is no evidence that Louisa Dancy acquired her interest in the lands by deed or other writing sufficient in law to constitute color of title. Her own testimony tends to show that she and the other defendants asserted title to the land as tenants in common, by virtue of the long continued adverse possession of themselves and those under whom they claim, or by descent from J. E. Dancy, or by descent and mesne conveyances. But whether Louisa claimed her one-third interest by adverse possession, without color, held prior to the date of her mortgage, or by adverse possession, with color, or by a paper title or by descent, that title passed out of her by the sale under the power given by her to the clerk of the court in the mortgage, the fair and voluntary execution of which she admits; and it is not available to her in any way since the sale, so as to vest a good title in her by any adverse possession short of twenty years

duration. Any deed held by her prior to the sale cannot now be used as color. *Johnson v. Farlow,* 35 N. C., 84; *Wilson v. Brown,* 134 N. C., 400. The doctrine is fully explained in the last cited case by *Justice Connor.* Louisa Dancy could reinvest herself with the title to her former interest only by purchase from the owners or by a new *disseisin* or *ouster,* or its equivalent in law, and an adverse possession of twenty years or possession under color for seven years. She has acquired no colorable title since the sale.

The controversy here as to the title is not between tenants in common, but between two of the tenants in common and Louisa Dancy, who is an outsider, as to her former one-third interest in the land. The other tenants cannot claim to have defeated the title or barred the entry of the plaintiffs, who had become their cotenants, for they have not held adversely to them, since their title was vested for a sufficient (498) length of time to produce that result. We have so recently discussed this question that it will be sufficient merely to cite the case. *Dobbins v. Dobbins,* 141 N. C., 210.

The fact that the defendant Louisa Dancy was not notified of the sale under the mortgage is no defense in this action, as the mortgage does not provide for notice and there is no allegation of unfairness or fraud in making the sale. The sale was duly advertised, and the plaintiffs aver in their petition that the defendant Louisa had due notice of it. No issue was tendered as to the validity of the sale, and that question is therefore not presented. The only question which is really involved in the case relates to the statute of limitations, and the charge of the court as to that matter was erroneous. We find in the record no evidence of title in Louisa Dancy. It is clear, we think, that Revisal, sec. 391 (4), and *Ray v. Pearce,* 84 N. C., 485, have no bearing on the case.

A new trial is ordered because of the error in the charge.

New trial.

*Cited: Grimes v. Andrews,* 170 N. C., 524.

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H. S. WILLIAMS ET AL. v. CAROLINA AND NORTHWESTERN RAILROAD COMPANY.

(Filed 7 May, 1907.)

**1. Cases Consolidated on Trial—Separate Appeals.**

Where actions are united and tried together in the court below for the sake of convenience, and not consolidation in the sense that they thereby become one action, nor within Revisal, secs. 469 and 411, and the verdict being substantially different as to each party, separate appeals should be taken.

**2. Railroads—Passengers—Negligence—Damages.**

Compensatory damages may be recovered of the defendant for failure of the engineer to stop a train at a flag station when he should have stopped upon being signaled, he having failed to see the plaintiffs' signals by reason of negligence in not keeping a proper lookout, and plaintiffs being ready to pay their fare and to take the train from that station to another on defendant's road.

**3. Same—Punitive Damages.**

Defendant is liable to plaintiffs for such punitive damages, in addition to compensatory damages, as the jury may see fit to award, upon its engineer wilfully refusing to stop the train at a flag station, where it should have stopped under the circumstances.

**4. Same—Relief Accorded—Negligence—Suit Upon Contract—Tort.**

Relief should be given according to the facts alleged and established in a civil action under Revisal, sec. 354, presenting one form of action for the enforcement of private rights and the redress of private wrongs. It makes no difference whether the plaintiff elects to sue upon contract or in tort, forms of action having been abolished.

**5. Same—Measure of Damages.**

The plaintiffs' measure of damages, arising from the defendant's responsible negligence in failing to transport him from one station on its road to another station thereon, are those arising from personal annoyance, inconvenience, discomfort, and physical effort incident, in this case, to plaintiffs having walked to their destination, a distance of about a mile and a half, and it was error in the court below to instruct the jury that plaintiffs should have waited for the next train passing in the afternoon in order to recover for the delay and inconvenience in doing so, as otherwise they could not show actual damages.

(499) ACTION tried before *Peebles, J.*, and a jury at September Term, 1906, of GASTON.

This action was brought by the plaintiffs to recover damages from the defendant for failing to stop its train and carry them from Harden Mills, a station on the defendant's road, to High Shoals, another station, 1½ miles away. The train was a mixed one, composed of an engine and freight cars, and a caboose in which passengers were carried. Harden Mills was not a regular but a flag station, at which stops were made to take on passengers, upon proper signals. An action was also brought by

L. L. Todd, who was left at Harden Mills at the same time the
(500) plaintiff Williams was, and the two actions, by consent, were tried together. The plaintiffs were in the store of one Costner, at Harden Mills, when the train blew for the station. They and Costner went out and signaled the train to stop. There was evidence tending to show that the signals were those required by the rules of the company. The plaintiffs alleged and offered evidence tending to show that the engineer and fireman actually saw the signals and failed to stop the train for them to get on, and that, if they did not see them, they could, by keeping

a proper lookout, have seen the signals in time to have stopped the train. There was also some evidence that the signals were not given as required. The plaintiffs walked to High Shoals. The next train from Harden Mills to High Shoals passed in the afternoon of that day, some time after the freight train.

The plaintiffs requested the court to charge as follows: "If the jury find from the evidence that the defendant negligently failed to stop its train for the plaintiffs at the time and place in question, then the plaintiffs are entitled to recover nominal damages, even if the plaintiffs sustained no actual damages. And if the jury find that the plaintiffs were, by the negligence of the defendant, put to any inconvenience, the jury should take such inconvenience into consideration in awarding such compensatory damages as the jury should find the plaintiffs have sustained." This instruction was refused, and the plaintiffs excepted.

The court charged the jury as follows:

"1. If the plaintiffs have satisfied you by the greater weight of the evidence that they made a signal to the engineer to stop at the usual place and in the usual manner of making signals, and that the signal was made in time for the engineer to have stopped his train at the station, or the rear end of it, at the place where the passengers usually got on, or, further, that the engineer saw the signal and (501) recognized that it was a signal for him to stop, and he willfully and intentionally failed to stop, and ran by, you will answer the first and third issues 'Yes,'; but if the plaintiff has failed to satisfy you of these facts, it is your duty to answer the first issue and the third issue 'No.' If you answer them 'No,' you need not trouble yourselves about the others at all, as that ends the case.

"2. If the plaintiffs had sued on contract, as I stated before they had a right to do, why, then, the negligent failure on the part of the engineer would have given them the right to recover, because it would have been wrong in the railroad company to have neglected to see the signal. It would have been a breach of the contract which it had with the people generally, and any failure to perform that contract would have entitled the plaintiffs to at least nominal damages. But the plaintiff has elected not to sue on contract. In this case he cannot recover unless he satisfies you that the engineer saw the signal, recognized it, and intentionally and willfully failed to obey it."

The court also charged, upon the measure of damages, that the plaintiffs could not recover any damages for having walked to High Shoals; that they should have waited at Harden Mills for the next train, which passed in the afternoon, and, if they had done so, they could have recovered for the delay and inconvenience in doing so, but that they had shown no actual damages, and the jury, if they found that the engineer

had willfully passed the station and left the plaintiffs at Harden Mills, would give them only nominal damages; and if the engineer did see the signals, but willfully and intentionally disregarded them and passed on, they might award punitive damages in addition to the nominal damages.

The plaintiffs duly excepted to the charge. The jury returned
(502) a verdict against the plaintiffs on the issues, finding thereby that they were not entitled to recover at all. Judgment was entered accordingly, and the plaintiffs appealed.

*A. G. Mangum and S. B. Sparrow for plaintiffs.*
*O. F. Mason, G. W. Wilson and J. H. Marion for defendant.*

WALKER, J., after stating the case: There should have been separate appeals in this case. The actions were tried together merely for convenience, and were not united or consolidated in the sense that they became, by the order of the court, one action. They could not be thus merged under Revisal, sec. 469. The plaintiffs were not united in interest, but alleged separate grievances, and could not, therefore, be joined in the same action under Revisal, sec. 411. *Logan v. Wallis,* 76 N. C., 416; *Syme v. Bunting,* 86 N. C., 175. The verdict was substantially separate as to each plaintiff, and the judgment and appeals should have corresponded, two cases being constituted here. But we will pass by this objection, without intending, though, to make a precedent of the case in this respect, and proceed to consider the case upon its merits.

If the plaintiffs went to the usual place for receiving passengers a reasonable time before the arrival of the train, and were able, ready, and willing to pay their fare, they were entitled to be carried to the next station. *Phillips v. R. R.,* 124 N. C., 123; *R. R. v. Williams,* 140 Ill., 275; 1 Fetter on Carriers, sec. 228. If they gave the requisite signal, it was the duty of the engineer to stop the train so that they might take passage on it. If he did not see the plaintiffs, by reason of mere negligence in not keeping a proper lookout ahead of his train, the
(503) defendant would be liable only for actual damages resulting from the failure to stop the train; but if he did see them, and willfully refused to stop for the purpose of receiving them on the train as passengers, the defendant would be liable to punitive damages, in addition to those which are merely compensatory, if the jury should see fit to award them. This was expressly decided in *Thomas v. R. R.,* 122 N. C., 1005, in which it is said: "When the plaintiff presented himself at the flag station a reasonable time before the arrival of the train, for the purpose of procuring passage, and, by reason of the absence of the agent and the failure of the engineer to see the plaintiff's signal, the train did not stop for him, he was entitled to the actual damages sustained, which were

shown to be 75 cents, and the jury, under the instruction of the court, found a verdict for that sum. If the engineer had seen the plaintiff's signal and had run by without stopping, this would have been a willful and intentional violation of the plaintiff's rights, which would have entitled him to recover exemplary or punitive damages. Against such gross disregard of its duty to the public and to the plaintiff by a common carrier the power of punishment by a verdict for smart money may be invoked," citing Code, sec. 1963; *Hansley v. R. R.,* 117 N. C., 565; *Purcell v. R. R.,* 108 N. C., 414; *Heirn v. McCaughan,* 32 Miss., 1; *R. R. v. Hurst,* 36 Miss., 660; *Wilson v. R. R.,* 63 Miss., 352; *R. R. v. Sellers,* 93 Ala., 13; *Milwaukee v. Arms,* 91 U. S., 489; 2 Sutherland Damages, sec. 937. To these authorities we may well add the recent decisions in *Hutchinson v. R. R.,* 140 N. C., 123 (overruling a contrary decision in *Smith v. R. R.,* 130 N. C., 304), and *Ammons v. R. R.,* 140 N. C., 196. In the case last cited it is substantially said in both opinions that, when a wrong is committed deliberately and in violation of the passenger's rights, in a manner and under circumstances of (504) aggravation or humiliation, showing a reckless and lawless disregard of the carrier's duty to the plaintiff, the law allows damages beyond the strict measure of compensation by way of punishment, and at pages 199 and 200 the principle is thus stated by *Justice Hoke:* "Where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, the physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. Exemplary or punitive damages are not given with a view to compensation, but are, under certain circumstances, awarded in addition to compensation as a punishment to defendant and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights," citing *McNeill v. R. R.,* 135 N. C., 683; *Head v. R. R.,* 79 Ga., 358 (opinion by *Bleckley, J.*); Hale on Damages, sec. 261; 18 A. & E. Enc. (2 Ed.), 1082. *Parrott v. R. R.,* 140 N. C., 546, is also in point.

We might well stop here and rest our decision upon the clear and explicit statement of the law as contained in the cases cited but for the fact that, while the court charged correctly as to punitive damages, it withdrew from the consideration of the jury the question of actual or compensatory damages altogether, and restricted the recovery to nomi-

(505) nal and punitive damages, and then charged that they could be recovered only in case the jury found that the engineer willfully refused to stop the train. This charge was given because, as his Honor stated, the plaintiffs had sued in tort and not in contract, and that mere inattention on the part of the engineer, or a negligent failure to stop the train, would not entitle the plaintiffs to recover, as for a tort; and, further, that they could not recover actual damages, because none had been alleged or proven. We are not aware of any authority distinguishing between tort and contract in respect to the right to recover in an action of this kind. All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs, which is denominated a civil action (Rev., sec. 354), and the court gives relief according to the facts alleged and established. Clark's Code (3 Ed.), sec. 133, and notes; *Sams v. Price,* 119 N. C., 572; *Bowers v. R. R.,* 107 N. C., 721; *Voorhees v. Porter,* 134 N. C., 591.

The complaint in this case is the product of a careful and skillful pleader, knowing his client's cause of action and able to state it with accuracy and precision. Its allegations are abundantly sufficient to cover every phase of the evidence, and it is sufficient in substance and in form. The plaintiffs have alleged not only a willful disregard of their rights, but negligent inattention on the part of the engineer, and whether it is in tort or contract can make no difference. The law does not deal with forms, but with facts. There was error in the charge, so far as it denied to the plaintiffs the right to recovery for mere negligence, and there was also error in the instruction that they were not entitled to recover for having to walk to High Shoals, as they should have stayed at Harden Mills and taken the next train. If the defendant neglected its duty in the premises, it had no right to demand that the plaintiffs remain at the station, where they had been left (506) by its train, and not proceed to the next station, if their business required that they do so. The authorities we have already cited are to the effect that the jury may include in their verdict damages for the personal annoyance, inconvenience, discomfort, and the physical effort incident to their doing so, just as they would have been entitled to recover the expense of a conveyance if they had hired one for the purpose instead of walking. *Thomas v. R. R., supra.* A direct authority is Moore on Carriers, pp. 884 and 886, and to the same effect are *R. R. v. Marshall,* 111 Ky., 560; *Hobbs v. R. R.,* L. R. 10, Q. B., 111; *Walsh v. R. R.,* 42 Wis., 231.

In 3 Hutchison on Carriers (3 Ed.), sec. 1421, it is said to be difficult, in assessing damages, to distinguish between the consequences of the carrier's breach of contract and of his tort, and that the damages must be measured by the principles of compensation. In that and the

sections immediately following will be found a full and intelligent discussion of the question. In section 1424 the law specially applicable to this case is thus stated: "The inconvenience to which a passenger has been put, or the annoyance to which he has been subjected, as the direct and natural consequence of the wrongful act of the carrier, may be taken into consideration in connection with any pecuniary loss he may have sustained thereby, in fixing the amount of damages to which he is entitled; and it has been held that such personal inconvenience, from which the passenger has suffered discomfort as its immediate consequence, may be made the substantive ground of an action for damages, regardless of any expense to which he may have been put and without reference to loss of time or money. This rule has frequently been applied in cases where a passenger has been negligently set down before reaching his station or carried beyond it; also where the carrier has failed to stop the train a sufficient time for the passenger, who has secured the right to ride, to board it. In these cases he is (507) clearly entitled to recover for the trouble, inconvenience, and expense incurred in getting to his destination." Any other damages proximately resulting from the wrong and not too uncertain in their nature may, of course, be included in the assessment. It is established, therefore, by the authorities that when the carrier has wrongfully set the passenger down short of or beyond his destination, or has failed to stop for him, and has thereby imposed upon him the necessity of reaching his destination by other means, the carrier must respond in damages for the wrong, whether the action be brought for the breach of the contract or for the tort, and the rule applies in this case if the plaintiffs presented themselves at the proper place and gave the required signal at such time as enabled the engineer to stop the train for them at the station. 3 Hutchison on Carriers (3 Ed.), sec. 1429.

The error of the court in confining the plaintiffs' right of recovery to the narrow limits stated in the charge entitles them to another trial.

New trial.

*Cited:* *Stewart v. Lumber Co.*, 146 N. C., 69; *Ricks v. Wilson*, 151 N. C., 50; *Peanut Co. v. R. R.*, 155 N. C., 153; *Cheese Co. v. Pipkin, ib.*, 401; *Saunders v. Gilbert*, 156 N. C., 478, 480; *Carmichael v. Telephone Co.*, 157 N. C., 28; *Manufacturing Co. v. Manufacturing Co.*, 161 N. C., 435; *Webb v. Tel. Co.*, 167 N. C., 489; *Bryan v. Canady*, 169 N. C., 583; *Wheeler v. Telephone Co.*, 172 N. C., 11; *Hodges v. Hall, ib.*, 30.

(508)

J. C. TISE v. THE WHITAKER-HARVEY COMPANY.

(Filed 7 May, 1907.)

1. **Restraining Order—Evidence.**

When the main purpose of an action is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for plaintiff's right and are sufficient to establish it, a preliminary restraining order will be continued to the hearing.

2. **Same—Alleyway—Public Highways.**

When there is evidence tending to show that an alleyway has become a public way, the rights of the parties with reference to it must be determined by the rules applicable to highways.

3. **Obstruction—Special Damages.**

An alleyway, having become a highway, being injured by a continuing obstruction which is unlawful and causes special damage to an abutting owner, gives to such owner a peculiar interest in the matter and entitles him to maintain an action in his own name for the wrong, and, in proper cases, to equitable relief by injunction.

4. **Same—Evidence—Permissive Use—Dedication—Prior Registered Deed.**

Evidence that defendant's grantor gave plaintiff, by a paper-writing, the privilege of using an alley cannot be made the basis of a substantive right for or against either party on an issue as to a public highway, and would seem to be restricted to an item of evidence on the question of adverse or permissive user. Such writing is not evidence of a dedication when not purporting to be, and plaintiff cannot claim the use as a private way when defendant's deed thereto has been registered prior to the registration of his grant.

5. **Same—Lessor and Lessee—Estoppel.**

Estoppels must be mutual, and a license in appropriate cases operates as an estoppel while it exists and the right thereunder is being exercised, and the question is at large after the relationship of licensor and licensee has ceased. Plaintiff having conveyed lands by deed, with covenant and warranty, including within its boundaries an alley, and received from his grantee a paper-writing granting him the privilege of the use of the alley, is not estopped by the writing, regarded as a license, from asserting his right to its use as a public way, against a subsequent grantee of the same land.

6. **Same—Rights of Public—Of Adjoining Owner.**

The plaintiff is not estopped by his deed conveying land, including within its boundaries an alley used as a public way, from a claim to its use as a public way belonging to him as a citizen and incident to his ownership of an entirely distinct piece of property.

7. **Same.**

A deed purporting to convey a public alley is void as against those having an interest therein.

**8. Quitclaim Deed—Interest Conveyed.**

A quitclaim deed to land including a public way only purports to release and quitclaim whatever interest the grantor possessed at the time, and does not affirm the possession of any title. The grantor is not precluded from subsequently acquiring a valid title to such alley and attempting to enforce it.

**9. Same—Covenants of Title.**

When the existence of a public right of way over land is fully known at the time of the purchase and acceptance of the deed conveying the land, its continued existence is no breach of covenant of quiet enjoyment, or against encumbrances.

HEARING on preliminary injunction before his Honor, *Ward,* (509) *J.,* at September Term, 1906, of FORSYTH.

There was evidence on the part of plaintiff tending to show that plaintiff owned a tobacco factory abutting on an alley, in the city of Winston, N. C., running from Liberty Street on the north to Seventh Street on the south end; also a number of tenement-houses fronting on Liberty Street; and that this alley was the only present actual or practicable means of access from the other public streets of the town to the said factory and to the rear of said tenement-houses. That this alley, for twenty years and more, had been used by the public adversely and of right as a public highway. And, further, that S. A. Ogburn, under whose deed of conveyance the present defendant claimed and held the property, prior to said deed to defendant, executed and delivered to plaintiff, for valuable consideration, a written paper conferring upon the plaintiff the right to use said alley, in words as follows:

"This is to certify that I agree to give to J. Cicero Tise the privilege of using my alley, or driveway, between Liberty Street and Seventh Street." Dated 10 May, 1888, and signed, "S. A. Ogburn."

That afterwards, to wit, said S. A. Ogburn conveyed his own factory, which also abutted on the alley, to defendant company, a corporation duly organized under the laws of the State, together with a lot of land, the boundaries of which included a lot adjacent to said factory of defendant, and included also the alley in question. And that the existence of this alley as a public street was well known to S. A. Ogburn and to the officers of said corporation at the time they bought (510) and took deeds for their property.

That, soon after taking its deed from S. A. Ogburn, defendant commenced to build a strong, permanent fence across said alley, claiming the right to do so; and would proceed with this purpose and obstruct and prevent all use of said alley as a means of approach to plaintiff's property, unless restrained, etc.

There was much evidence offered by defendant to the effect that there

had never been any dedication of this alley nor any adverse use of same by the public, but that any and all use thereof had been permissive only.

Defendant further claimed that the very paper-writing which plaintiff claimed as one source of his right was, in fact, an acknowledgment of the ownership of S. A. Ogburn, the grantor of defendant, and plaintiff was estopped by this paper from resisting defendant's claim; and offered evidence to show that this paper was only a license without any consideration, and revocable at the will of S. A. Ogburn or his assignee.

Defendant further showed that, in 1888, said S. A. Ogburn, grantor of defendant, had bought from plaintiff a lot of land, the boundaries of which included the alley in question, and plaintiff had conveyed same to said S. A. Ogburn without excepting or reserving any right of way over the alley and without making any reference to it.

The court below adjudged that the preliminary injunction be continued to the hearing, and defendant excepted and appealed.

*Lindsay Patterson and A. H. Eller for plaintiff.*
*Watson, Buxton & Watson for defendant.*

HOKE, J., after stating the facts: It is the rule with us that in actions of this character, the main purpose of which is to obtain a
(511) permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the hearing. *Hyatt v. DeHart,* 140 N. C., 270; *Harrington v. Rawls,* 131 N. C., 39; *Whitaker v. Hill,* 96 N. C., 2; *Marshall v. Commissioners,* 89 N. C., 103.

And it is well to note here that while the subject-matter of dispute is termed an alley, there is evidence tending to show that it has become a public highway; and, if this view should prevail on the final hearing, the right of the parties with reference to it must be determined by the rules applicable to streets and highways. Elliott on Roads and Streets, secs. 23 and 24. In section 24 it is said:

"Whatever may be the dimensions of a way, if it be opened to the free use of the public it is a highway; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way, and not the size of the way or the number of persons who choose to exercise that right, determines its character. An alley of small dimensions, actually used by only a limited number of persons, but which the public have a general right to use, may be regarded as a public way. It is to be understood, of course, that the way cannot be deemed a public one so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or

accepted; but if it is so established or accepted it is to be considered one of the public ways, whatever may be its size or situation, provided it is suitable for any kind of travel by the public."

And in such case, too, it is held that where a highway is injured by an obstruction which is unlawful and continuous, and which causes special damage to an abutting owner, such owner has a peculiar interest in the matter, which entitles him to maintain an action in his own name for the wrong, and may, as a general rule, call on the court to interfere for his relief by injunction. *Pedrick v. R. R.,* 143 (512) N. C., 485; *Manufacturing Co. v. R. R.,* 117 N. C., 579; High on Injunctions (4 Ed.), sec. 816; Elliott on Roads and Streets, sec. 665.

In the section cited, this last author says: "In addition to the right of the public to maintain a suit in equity for an injunction, private citizens who are specially injured by an obstruction and interested in preventing its continuance may, upon a proper showing, maintain a suit in equity for an injunction, but, unless a special injury is shown, the plaintiff will not be entitled to an injunction. It has also been held that the injury must be irreparable, or, at least, not capable of full and complete compensation in damages. This is no doubt a fair statement of the general rule, but the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one. If the nuisance is merely temporary in its nature, and there is no danger that it will affect any substantial rights of the complainant in such a manner that he cannot be compensated therefor in damages, courts of equity will generally refuse to interfere; but if the nuisance is a continuing one, invading substantial rights of the complainant in such a manner that he would thereby lose such rights entirely but for the assistance of a court of equity, he will be entitled to an injunction, upon a proper showing, notwithstanding the fact that he might recover some damages in an action at law."

Applying these principles, we think the judge below made a (513) correct ruling in continuing the injunction to the hearing. True, there is much evidence on the part of the defendant contradicting that of plaintiff, and tending to show that there has never been any dedication of this alley to the public, and that any and all use of the same, either by individuals or the public, has been permissive and never adverse. But the entire evidence shows that serious questions are at issue,

and presents a case which requires that the acts complained of should be restrained until the hearing, when the facts which are relevant and material can be properly and finally determined.

It is nearly always of questionable benefit to make specific suggestions, not absolutely required, when the facts have only been presented on preliminary hearing. Such a course not infrequently tends to mislead and embarrass the parties in the conduct of the trial, and, at best, can, as a rule, only be of a tentative nature. But as the matter now appears, we do not see that the paper-writing put in evidence, by which S. A. Ogburn, defendant's grantor, agreed to give Cicero Tise the privilege of using the alley, of date 10 May, 1888, can be made the basis of a substantive right for or against either party to the controversy; and its use would seem to be restricted to that of an item of evidence on a question of adverse or permissive user on the issue as to a public highway—not as a dedication to the public, for it does not purport to be one; nor as the grant of a private way to plaintiff Tise. Such an effect is shut off by the prior registration of defendant's deed. As now advised, this certainly is the weight of authority. *Cagle v. Parker,* 97 N. C., 271; *Prescott v. Beyer,* 34 Minn., 493.

Nor is it efficient as an estoppel against plaintiff because a license, as contended by defendant. Such a license operates as an estoppel (514) while it exists and the right is being exercised *(Dills v. Hampton,* 92 N. C., 565); but in this respect, like the estoppel arising from the position of landlord and tenant, it is incident to the tenure and the enjoyment of the right. After the relationship has ended and the enjoyment has ceased in the one case, or the possession has been surrendered in the other, the question is then at large, and it is open to the licensee or tenant to show the truth of the matter. Wood on Landlord and Tenant, 488; Cyc., vol. 24, 948.

Nor do we think that the deed by which the plaintiff conveyed to S. A. Ogburn, grantor of plaintiff, a lot, the boundaries of which included the alley in question, can be made effective as estopping the plaintiff from asserting a claim to use a public way belonging to him as a citizen and incident to his ownership of an entirely distinct piece of property.

If the way should be established, on the trial, to be a public way, then the deed in question would be entirely inoperative to convey, or in any manner to affect or impair, such a right. To that extent the deed is void and the right of way is unaffected, so far as the public is concerned. *Moose v. Carson,* 104 N. C., 431.

Nor do we think, in such case, that the plaintiff is precluded, by way of estoppel, from asserting the right he seeks to protect, if the right is otherwise established.

It is not stated, so far as we can discover in the record, what covenants the deed in question contained. As a quitclaim, it would certainly not have the effect contended for by defendant. As said in *San Francisco v. Lawton,* 18 Cal., 465:

"A quitclaim deed only purports to release and quitclaim whatever interest the grantor possessed at the time. He does not thereby affirm the possession of any title, and he is not precluded from subsequently acquiring a valid title and attempting to enforce it. If (515) he does not possess any title, none passes, and he may subsequently deny that any did pass without subjecting himself to any imputation of want of good faith."

And, assuming it to be a deed with the covenants, it is generally held that a deed conveying property on which there existed a right of way in the public, conveys the ultimate property in the soil, and therefore there is no breach of the covenant of seizin; and the weight of authority is to the effect that, when the existence of a public right of way over land is fully known at the time of the purchase and acceptance of a deed for the land, its existence is no breach of the covenant of quiet enjoyment, the ordinary covenant of warranty, and there are well considered decisions to the effect that such an easement is not a breach of the covenant against encumbrances. The parties are taken to have contracted with reference to the existence of a burden of which they were fully aware. *Hymes v. Estes,* 116 N. Y., 501; *Myce v. Kaylon,* 84 Va., 217; *Jordan v. Eve,* 72 Va., 1; *Desverges v. Willis,* 56 Ga., 515.

Without finally deciding at this time the question as to the breach of the covenant against encumbrances, the terms of the deed not being fully known, we incline to the opinion that neither by the operative words of the deed nor by the covenants is plaintiff precluded from showing how the matter stands; and that, in any event, the plaintiff, as grantor, is not barred from asserting that this is a public way; and maintaining his right therein as incident to his ownership of an entirely distinct piece of property. *Flagg v. Flagg,* 82 Mass., 173.

To seek for no other ground, it is familiar learning that estoppels must be mutual, and no one would contend here that defendant is estopped by this deed from maintaining that this alley is a (516) public way. As said in *Flagg v. Flagg, supra:* "It is hardly necessary to add that defendant is not barred from the use of the road by the covenant in his deed to plaintiff. Such a covenant cannot operate by way of estoppel so as to prevent a party from claiming a right to enjoy a public way or easement."

There is no error in continuing the restraining order to the hearing, and the judgment below is

Affirmed.

*Cited: Combes v. Adams,* 150 N. C., 70; *Butler v. Tobacco Co.,* 152 N. C., 420; *Yount v. Setzer,* 155 N. C., 219; *Goodman v. Heilig,* 157 N. C., 9; *Lumber Co. v. Cedar Works,* 158 N. C., 164; *Stancill v. Joyner,* 159 N. C., 617; *Culbreth v. Hall, ib.,* 593; *Foster v. Carrier,* 161 N. C., 475; *Green v. Miller, ib.,* 30; *Guano Co. v. Lumber Co.,* 168 N. C., 339; *Sexton v. Elizabeth City,* 169 N. C., 390; *Little v. Efird,* 170 N. C., 189; *Cobb v. R. R.,* 172 N. C., 61.

GEORGE O. SHAKESPEARE v. CALDWELL LAND AND LUMBER COMPANY.

(Filed 7 May, 1907.)

1. **Judgment—Pleadings—Specific Performance—Estoppel.**

A judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them, and does not embrace any matters which might have been brought into the litigation, or any cause of action which the plaintiff might have joined, but which are neither joined nor embraced in the pleadings; a judgment in proceedings to foreclose a mortgage to secure the purchase price of lands conveyed to the plaintiff under a prior contract to convey, does not estop the plaintiff in enforcing specific performance against the vendor for the conveyance of certain lands omitted by mutual mistake from the deed made in pursuance of the contract to convey, when such matter is neither joined nor embraced in the pleadings in the action of foreclosure.

2. **Same—Judgment Agreed—Parties.**

A party to an action is bound by a judgment regularly entered dismissing it, but not by the terms of an agreement to which he was not a party, and as to the latter it is not *res judicata* and does not operate as an estoppel.

3. **Deeds—Contract to Convey Land—Specific Performance—Appeal—Examination of Record.**

While, in the absence of controlling conditions, equity will direct specific performance of a contract to convey land, such performance will not be decreed if it is apparent, from the examination of the entire record, there are phases of the controversy presented by the pleadings which have not been passed upon, and which might make it harsh, inequitable, and unjust.

(517) ACTION heard by *Guion, J.,* at Special Term, 1907, of CALDWELL. His Honor found the facts under an agreement of the parties.

This is an action for the specific performance of a contract to convey certain lands described in the complaint. Upon the pleadings, admissions, and records in evidence, his Honor found the following facts and conclusions of law:

On 21 August, 1901, the Caldwell Company executed an option contract to plaintiff Shakespeare, wherein it contracted and agreed, upon

the performance by Shakespeare of each and every condition precedent therein named, to sell and convey to said Shakespeare the eighty-six tracts of land particularly described therein, "and together with any other lands in Caldwell County, N. C., in which the said Caldwell Land and Lumber Company has any interest, legal or equitable, whether said lands stand in the name of that company or in the name of any other person as trustee for or representative of that company."

The Caldwell Company, under said contract, on 13 February, 1902, conveyed to plaintiff the eighty-six tracts of land mentioned in the contract, some equitable interests it then had in the county, the stock of the railroad company, but did not convey the "Williams lands," which then stood in the name of J. M. Bernhart as trustee of the Caldwell Company.

Shakespeare, in order to secure the balance of the purchase money, reconveyed the lands that had been conveyed to him, in mortgage, also executed by his wife, to the defendant Caldwell Company; but this mortgage did not include the lands in controversy. (518)

In April, 1902, Shakespeare conveyed to the Penncarden Company the lands that had been conveyed to him, subject to the mortgage he had hitherto executed to the Caldwell Company. This conveyance did not include the lands called the "Williams lands."

On 10 November, 1903, the Caldwell Company instituted an action in the Superior Court of Caldwell County against plaintiff and his wife, the Penncarden Company, and the railroad company, the purpose whereof was the foreclosure of the mortgage that had been executed by plaintiff Shakespeare to secure the balance of the purchase money for said lands therein described and the capital stock of the railroad company. The complaint in that action does not describe the lands in controversy. No answer was filed by the defendants, or any of them, and the time therefor was enlarged, by consent, until 30 April, 1904, "without prejudice."

On 5 April, 1904, the Penncarden Company and the Caldwell Company entered into an agreement for the compromise of said action, in which said agreement it is recited: "Whereas the Caldwell Land and Lumber Company has brought suit for foreclosure upon a mortgage covering the real estate of the Penncarden Lumber and Manufacturing Company, in Caldwell County, North Carolina, and the capital stock of the Caldwell and Northern Railroad Company; and whereas all parties to said suit have agreed to settle the same by the Caldwell Land and Lumber Company taking a conveyance from the Penncarden Lumber and Manufacturing Company of the real estate, mills, machinery, plant, and other property covered by the mortgage upon which foreclosure proceedings have been begun, and also of the capital stock of the Caldwell

(519) and Northern Railroad Company," the Caldwell Company agreeing to pay the Penncarden Company, as a consideration therefor, the sum of $15,000.

Whereupon, the parties to said agreement "covenant to and with each other as follows: (1) That the foreclosure proceedings and the collateral proceedings thereunder shall be marked discontinued by the Caldwell Land and Lumber Company." Plaintiff was not a party to this agreement.

On 12 April, 1904, a judgment was filed in the clerk's office of Caldwell County, rendered upon the foregoing agreement: "That it being made to appear to the satisfaction of the court that all matters of difference between the parties to the said cause have been adjusted and compromised, it is now, on motion of plaintiff, the defendants all consenting thereto, ordered that the orders entered in said cause appointing a receiver, etc., are hereby vacated and dissolved; and, by like consent of all of said parties, it is further ordered, adjudged, and decreed that the said above action be, and the same is hereby, discontinued and dismissed."

The parties went to trial upon the record of the present and former suits, and the court found the facts from said records. To the finding of facts there is no exception, only to the conclusions of law of the court upon such findings.

The findings of the court below are: That the Caldwell Company did contract to sell and convey to plaintiff all lands and interests in lands owned by it in Caldwell County; that under said contract said company did not convey all lands owned by it at the date of said contract; that the lands in controversy belonged to said defendant at the date of said contract, and that the said lands are now the property of said company; that the said lands were omitted from the deed to plaintiff from defendant by mutual mistake; that plaintiff mortgaged to the Caldwell Company all the lands conveyed to him other than the lands in con-

(520) troversy; that said mortgage did not include lands in controversy; that plaintiff conveyed to the Penncarden Company all the lands that had been conveyed to plaintiff; that the Caldwell Company instituted an action in the Superior Court of Caldwell County against plaintiff and the Penncarden Company for the foreclosure of said mortgage, and that the final judgment was as set forth in defendant's answer; that plaintiff is estopped by the said proceeding and the admission of the judgment in this action to maintain this action; that being so estopped, plaintiff, therefore, is not entitled to specific performance.

The plaintiff admitted the rendition of the judgment pleaded, and the court, upon an inspection of the record, was of the opinion that the

plaintiff in this action could have and should have set up his cause of action in this suit as matter of defense in said former action.

The plaintiff excepted to his Honor's conclusions of law, based upon the findings of fact, for that:

1. That plaintiff was estopped by the judgment of 12 April, 1904, to assert any claim to the land in controversy.

2. That he was not entitled to specific performance of the contract with respect to said land.

From a judgment in accordance with these conclusions of fact and of law, plaintiff appealed.

*Mark Squires and Lawrence Wakefield for plaintiff.*
*W. C. Newland and Jones & Whisnant for defendant.*

CONNOR, J., after stating the case: Few questions have given rise to more controversy and conflicting judicial *dicta* than that of estoppel by matter of record, or, more accurately expressed, *res judicata.* We could not hope to do more than endeavor, by a recurrence to the basic principle upon which the doctrine is founded, to decide the ques- (521) tion presented upon this appeal. While the doctrine is based upon a well recognized principle, the application of it is always difficult. Probably no more accurate or workable statement of the principle, with its limitations, can be found than that of the present *Chief Justice,* in *Tyler v. Capeheart,* 125 N. C., 64. Reviewing the language used in *Wagon Co. v. Byrd,* 119 N. C., 460, he says: "The judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them. This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings." It is well settled that a defendant is not required to set up a counterclaim or set-off which he may have to the subject-matter of a cause of action prosecuted against him. *Woody v. Jordan,* 69 N. C., 189; *Gregory v. Hobbs,* 93 N. C., 1; *Cabe v. Vanhook,* 127 N. C., 424; *Mauney v. Hamilton,* 132 N. C., 303; *Bunker v. Bunker,* 140 N. C., 18.

The facts set forth in the complaint in this action could not have been pleaded as a defense to the former action. They do not constitute payment of the debt upon which that action was founded. They may have been set up as the basis of an equitable counterclaim, in which event the present plaintiff would have asserted an equity for correction of the deed by including the land in controversy, whereupon there would have followed, of necessity, the correction of the mortgage. If the court had thus administered the rights of the parties it would have made a

decree foreclosing the mortgage, directing a sale of all of the lands, or so much of them as was necessary, to pay the debt, etc. It is evident that, under the general issue, this relief could not have been administered in that action. It is settled that, under the Code system of plead-
(522) ing, if a defendant has a cause of action against the plaintiff which would entitle him to maintain a civil action in which he could demand equitable relief, or, to speak more accurately, relief which he could have had only in a court of equity, he may set it up by way of equitable counterclaim. If he does so, he must set out the facts upon which his alleged right is based with the same particularity as if made the foundation of an independent action. It may be that an estoppel would arise upon a judgment dismissing the action, if the agreement upon which the judgment is based includes all matters put in issue by the pleadings. In that event the court would refer to the terms of the agreement for the purpose of ascertaining what was included in the settlement, and the judgment would be read in the light of the agreement.

In this case, no answer having been filed, it is impossible to see what was included in the judgment, and the agreement throws no additional light upon the question. It does not even appear that the present plaintiff knew that the "Williams land" was included in the option; that is, that Bernhardt held it in trust for the present defendant. While the present plaintiff is bound by the judgment dismissing the action, because a party thereto, he is not a party to the agreement pursuant to which it was dismissed.

We cannot concur with the opinion of his Honor that the judgment in the former action is an estoppel, or that his cause of action herein is *res judicata*. The plaintiff's exceptions to the conclusion of law in that respect must therefore be sustained. This conclusion would entitle plaintiff to a decree for specific performance but for the fact that by an examination of the entire record, as is our duty to make, it is apparent that there are phases of the controversy presented by the pleadings which have not been passed upon. The defendant tendered several
(523) issues, raised by the answer, which his Honor declined to submit because he was of the opinion that, upon the facts found, plaintiff was not entitled to judgment. Defendant excepted to the refusal to submit the issues, and while it does not appeal, having recovered judgment, it is manifest that we might do injustice by directing judgment upon the facts found. The pleadings and records attached show clearly that the real merits of the controversy have not been adjudged. We do not purpose to express any opinion in respect to them, but simply indicate what questions should be settled before final judgment is rendered.

It appears that the contract of 21 August, 1901, was entire. A large body of land, including that in controversy, was to be conveyed by the

land and lumber company to plaintiff in consideration of $625,000, payable as follows: $125,000 in cash, the balance in accordance with the terms set out in the agreement, the details of which are not material, except that a mortgage was to be executed to secure the deferred payments, "as counsel for the Caldwell Land and Lumber Company may require." The deed was executed according to the option, but, by mutual mistake of the parties, the "Williams land," the title to which was then held by Bernhart in trust for the lumber company, was not included. The mortgage was executed in accordance with the terms of the option, including all of the land conveyed in the deed. Thereafter the plaintiff conveyed the land, subject to the mortgage, to the Penncarden Lumber Company. The transfer of certain stock in the Caldwell and Northern Railroad Company was included in the agreement. It is not material to set out in detail this portion of the transaction. Thereafter, default having been made in the payment of the installments and interest, in accordance with the terms of the mortgage, the lumber company on 10 November, 1903, instituted an action in the Superior Court of Caldwell County against the present plaintiff, the Penncarden (524) Lumber Company and the said railroad company.

In the complaint filed in said action, the sale of the land to plaintiff herein, the conveyance by him by way of mortgage to defendants herein, with full description of the debt, etc., are set out. It is also alleged that plaintiff herein conveyed the lands to the Penncarden Lumber Company, subject to the mortgage; that the mortgagor had made default in the payment of the installments, as provided by the terms of the mortgage. It was also alleged that the value of the land consisted largely of the timber thereon, and that the Penncarden Lumber Company was cutting and removing the said timber therefrom, impairing the value of the security afforded by said mortgage. That the said lumber company, nor the plaintiff, had sufficient property, independent of said lands, to pay the mortgage indebtedness, etc. The Caldwell Lumber Company asked that the Penncarden Lumber Company and the plaintiff herein be enjoined from cutting timber and that a receiver be appointed, etc. Judgment of foreclosure was demanded. It was also alleged that the plaintiff herein was one of the largest stockholders and was the general manager of the Penncarden Lumber Company; that said company was formed for the purpose of enabling the plaintiff herein to more conveniently manage the said lands, and cut and market the timber thereon. The motions for injunction and receiver were continued from time to time by consent, without prejudice, and time given the plaintiff herein and the other defendants therein to file answer.

On 15 April, 1904, the two corporations entered into the agreement, the terms of which are set out herein, by which the Caldwell Land and

Lumber Company took a conveyance from the Penncarden Lumber Company of the real estate, mills, machinery, plant, and other (525) property covered by the said mortgage, and also of the capital stock of the Caldwell and Northern Railroad Company, the Caldwell Land and Lumber Company paying the Penncarden Lumber Company $15,000, less certain costs, etc., "as appears by a letter written by Peter Boyd, president of the Penncarden Lumber Company, dated 14 January, 1904." The plaintiff herein was not a party to this agreement. Pursuant to said agreement, the judgment set out herein was rendered. The defendant, among other issues, tendered one directed to the question of payment of the purchase money for the land in controversy. It may be that, when the whole transaction, with the negotiation leading up to the settlement, is developed, it will appear that the conveyance of the land, etc., by the Penncarden Company and the plaintiff herein was made by way of cancellation of the entire transaction, and that it would be inequitable to compel the defendant herein to convey the "Williams land" to plaintiff. There is nothing in the record to indicate the value of the land, or what relation it bore to the entire purchase money. It is elementary that while equity will, in the absence of any controlling conditions, direct the specific performance of a contract to convey land, it is equally so that such relief is not of absolute right, but rests in the sound judicial discretion of the court.

Where the entire evidence shows that specific performance would be harsh, inequitable, and unjust, the plaintiff will be left to his action for damages. If the parties herein have, in good faith, settled and adjusted all matters between them growing out of the option of August, 1901, and have, in effect, canceled the transaction, while they may not have made the terms of their settlement a matter of record operating as an estoppel, it may be that, in the light of what they have done, it would be unjust and inequitable to compel the defendant herein to con- (526) vey to the plaintiff this land in controversy. *Boles v. Caudle,* 133 N. C., 528.

Without intending to express any opinion affecting the ultimate disposition of the case, we reverse the judgment of his Honor and direct a new trial, to the end that the parties may proceed as they may be advised. The cost in this Court will be divided equally between the parties.

New trial.

*Cited: Cook v. Cook,* 159 N. C., 50.

J. M. BERNHARDT v. J. R. HAGAMON ET AL.

(Filed 7 May, 1907.)

**Deed of Trust—Redemption—Trustee—Accounting—Statute of Limitations.**
The trustor's right of action for redemption, under a deed of trust conveying land as security for a debt, and to an accounting, when it appears that he should retain possession until default made, accrues as soon as the trustee takes possession, and is barred in ten years thereafter, in the absence of any claim or demand.

ACTION tried before *Guion, J.*, and a jury, at January Special Term of CALDWELL. From a judgment in favor of defendant, the plaintiff excepted and appealed. The facts are sufficiently stated in the opinion.

*Mark Squires, Lawrence Wakefield, and Jones & Whisnant for plaintiff.*

*W. C. Newland, Bower & Hufham, and D. B. Lowe for defendant.*

CLARK, C. J. In 1881, F. B. Cottrell executed a deed in trust to John A Boyden to secure certain notes due to Mary L. Boyden. Soon thereafter the trustee entered into possession, which has been held by him and by his codefendant, Hagamon (to whom he conveyed a part of the land in 1899), without any claim or demand from Cottrell. (527) In July, 1906, the plaintiff procured a conveyance from Cottrell and soon thereafter brought this action for an accounting, and asking an injunction against cutting timber.

The ten years statute, Rev., sec. 391 (4), is pleaded and is so complete a defense that no discussion is necessary. *Edwards v. Tipton*, 85 N. C., 479; *Simmons v. Ballard*, 102 N. C., at p. 109. The trust deed provided that Cottrell should retain possession until default made. The trustor's right of action for redemption of the mortgage and an accounting accrued as soon as the trustee took possession, and became barred in ten years.

The evidence of Cottrell, witness for the plaintiff, showed that during the twenty-five years after Boyden took possession, and up to the beginning of this action, Cottrell had made no payment on the debt, nor any demand for possession of the property, nor for an accounting. The court properly sustained the demurrer to the evidence (Rev., sec. 383).

No error.

*Cited: Boyden v. Hagamon*, 169 N. C., 200; *Sanderlin v. Cross*, 172 N. C., 241.

THE CASE MANUFACTURING COMPANY v. GEORGE E. MOORE ET AL.

(Filed 7 May, 1907.)

**Judgment — Matters Embraced — Substantially the Same Counterclaim — Estoppel.**

The cause of action embraced by the pleadings is determined by the judgment thereon, whether every point thereof is actually decided by verdict and judgment or not. Defendants having recovered upon a counterclaim for damages against plaintiff in a former action, upon a note given for machinery purchased, on the ground that the machinery was unsuitable and unskillfully set up, etc., are estopped to again set up substantially the same counterclaim in an action brought by plaintiff upon another note, subsequently maturing, given for the same purpose.

(528) ACTION on note given for purchase of machinery, before *Bryan, J.*, and a jury, at November Term, 1906, of CALDWELL.

Defendant pleaded a counterclaim for damages arising from the inferior character of the machinery and the unskillful and unworkmanlike manner in which plaintiff's agents set it up in defendants' mill. From the judgment rendered, defendants appealed.

*T. M. Hufham, Jones & Whisnant, and W. H. Bower for plaintiff.*
*W. C. Newland and Lawrence Wakefield for defendants.*

BROWN, J. The plaintiff sold certain machinery to defendants and contracted to properly install it in defendants' flour mill. Three notes were given for the unpaid purchase money. The machinery having been duly installed, the note first due was promptly paid. Defendants refused to pay the second note, and plaintiff brought suit on it. The defendants pleaded a counterclaim to the effect that the machinery was deficient, unsuitable, constructed and set up in an unskillful and unworkmanlike manner and not according to contract, on account of which defendants demanded judgment for $1,000 damages. Upon such counterclaim defendants recovered $350, which was set off against the note then sued on, and plaintiff awarded judgment for the balance of $9.14 and costs of the action.

The plaintiff now sues to recover on the last of the three notes, and the defendants for answer plead a counterclaim on account of the inferior quality of the machinery and the unskillful and negligent manner in which it was installed. The court below held that the defendants were estopped to again set up substantially the same counterclaim in the present action, upon which they had recovered in the former, in which ruling we fully concur. An examination of the answers (529) in the two actions discloses that the counterclaim, or the ground

for damage alleged by way of defense, is one and the same in both and based upon the same transaction. The matter is, therefore, *res adjudicata,* and the defendants cannot be permitted to recover twice upon the same cause of action. Upon the former trial, defendants had full opportunity to submit appropriate issues and evidence showing every damage resulting from the alleged breach of contract. If they did not avail themselves of their rights, they cannot now set up substantially the same cause of action. Generally, the plea of *res adjudicata* applies not only to matters actually adjudged, but to every other question which properly belonged to the subject-matter of the issue, and which the litigants by reasonable diligence could have brought forward. *Tuttle v. Harrill,* 85 N. C., 456; *Wagon Co. v. Byrd,* 119 N. C., 460; *Dimmock v. Copper Co.,* 117 U. S., 559; 1 Herman Estoppel, secs. 122 and 123. In *Tyler v. Capeheart,* 125 N. C., 64, it is said: "The cause of action embraced by the pleadings is determined by a judgment thereon, whether every point of such cause of action is actually decided by verdict and judgment or not. The determination of the action is a decision of all the points raised therein, those not submitted to actual issue being deemed abandoned by the losing party, who does not except."

Affirmed.

*Cited: Turnage v. Joyner,* 145 N. C., 84; *Roberts v. Pratt,* 152 N. C., 737; *s. c.,* 158 N. C., 52.

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(530)

HATTIE COOK ET AL. v. MORGAN PITTMAN.

(Filed 7 May, 1907.)

**1. Deed—Certificate—Married Women—"Color."**

A deed made by husband and wife is not "color" of title when the certificate is insufficient in not showing that the husband acknowledged its execution or that the privy examination of the wife had been taken, it not appearing that it was offered as evidence of a common-law deed for purposes of "color."

**2. Same—Correction of Certificate.**

A justice of the peace cannot correct his certificate made to a deed after his term of office has expired, such authority not having been given by statute.

ACTION to recover possession of land, tried at April Special Term, 1906, of MITCHELL, before *Cooke, J.,* and a jury. Verdict and judgment for plaintiffs. Defendant appealed.

*S. J. Ervin and W. C. Newland for plaintiffs.*
*Avery & Avery for defendant.*

BROWN, J. In deraigning her title, the plaintiff offered a deed purporting to have been executed by Elisha Carroway and wife to Isaac Cook, 20 July, 1878. This deed was offered as color of title. The following is the probate to the deed:

I, Samuel W. Blalock, an acting justice of the peace in and for said county, do hereby certify that I have privately examined Elisha Carroway, Nancy Carroway, his wife, grantors of the above deed; and Nancy, his wife, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and she doth still assent thereto. Witness my hand, seal, this 26 July, 1878.

S. W. BLALOCK, J. P.

(531) The introduction of the deed was objected to for insufficiency of the certificate. During the recess of the court, S. W. Blalock attached to the deed a proper certificate, and dated it 26 July, 1878. He attached to the deed at the same time an affidavit dated 11 April, 1906, that on 26 July, 1878, he was a justice of the peace in Mitchell County, and that Elisha Carroway and wife, Nancy, duly acknowledged said deed before him on that date, and that he properly took the privy examination of the wife. Upon this last certificate the deed was registered during the recess, and when the trial was resumed it was offered again in evidence and admitted, over the defendant's objection.

We do not find anywhere in the record that the plaintiffs insisted on proving on the trial the execution of the instrument as a common-law deed for purposes of color. Therefore, the right to introduce it at all must depend upon the sufficiency of the certificate of probate.

The first certificate is insufficient because it does not appear thereon that Elisha Carroway ever acknowledged the execution of the deed, and therefore it does not come within the terms of the curative statute of 1893 (Rev., sec. 1017). Neither is the certificate sufficient as to Nancy Carroway, for the reason that it fails to state that the privy examination was taken separate and apart from her husband. *Fenner v. Jasper,* 18 N. C., 34; *Etheridge v. Ashbee,* 31 N. C., 353; *Hatcher v. Hatcher,* 127 N. C., 201.

We think that the second certificate, dated in 1878, but made in 1906, did not entitle the deed to registration, and was valueless, as Blalock was not in office and had not been for some years, and had actually, it is said, removed from the county. A sheriff or coroner who has gone out of office can make deeds for land sold by him under execution by virtue of the power conferred by the Acts of 1784 and 1899, which gave

the same power to successors. *Harris v. Irwin,* 29 N. C., pp. 433, 434. But we know of no statute, and none has been called to our attention, which authorizes a justice of the peace, whose term has ex- (532) pired, to attach a new certificate of probate to a deed. "One who has certified a married woman's acknowledgment cannot, after going out of office, correct a defect in the certificate." 1 Cyc., 607, where the authorities are cited; 1 A. & E. (2 Ed.), 552; *Fitzgerald v. Milliken,* 83 Ky., 76; *Galbraith v. Gallivan,* 78 Mo., 452.

*Cited:* *Brown v. Hutchinson,* 155 N. C., 209; *Sipe v. Herman,* 161 N. C., 110.

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HARRILL BROTHERS v. SOUTHERN RAILWAY COMPANY.

(Filed 14 May, 1907.)

1. **Railroads—Penal Statutes—Construction—Refusal to Deliver Freight—Excuse—Interstate Commerce.**

   While penal statutes are to be strictly construed, their construction must not defeat the legislative intent. Revisal, sec. 2633, regarding the delivery of freight to the consignee, was intended for his benefit and protection and to recognize and enforce the observance of rates as fixed under the Federal laws, when applicable. It is no defense to an action to recover a penalty, under Revisal, sec. 2633, for refusing to deliver an interstate shipment upon tender of freight charges by the consignee, for the defendant company to show its agent did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates, under the requirement of the interstate commerce act, or that the bill of lading showing such charges had not been received with the goods at their destination, in the usual course of its business.

2. **Same—Delivery of Freight—Common-law Duty—Statutory Requirement—Constitutional Law.**

   A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, Revisal, sec. 2633, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce.

3. **Same—Penalties Not Cumulative.**

   Revisal, sec. 2633, imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense.

ACTION, heard by *Justice, J.,* at chambers in Rutherfordton, (533) on 10 November, 1906.

This action was brought to recover penalties under Revisal, sec. 2633, for failure to deliver goods shipped over the defendant's line of railway from without the State to Rutherfordton, in this State, after tender of the freight charges, and was heard upon a case agreed, which is as follows:

1. The defendant is a corporation, and operates a line of its railroad through Rutherford County, and has a depot at Rutherfordton, in said county, and the plaintiffs are merchants in said town of Rutherfordton.

2. The plaintiffs, on 15 August, 1905, offered to pay the freight charges and take said goods from the depot of defendant, and offered to pay the freight charges, whatever they were, to the agent of defendant at Rutherfordton on each and every day thereafter to and including 20 September, 1905. The defendant, through its agent, refused to accept or receive any money and to deliver the said freight to plaintiffs, assigning as his reason therefor that he had no way-bill and did not know what the freight charges were, the freight having been transferred to defendant at Harriman's Junction, outside the State of North Carolina.

3. The plaintiffs informed the defendant's agent that the goods were shipped from Cincinnati by Wyler, Ackerland & Co. on 14 August, 1905. The boxes containing the goods were marked "Harrill Brothers, Rutherfordton, North Carolina," and remained in the depot till they were levied upon and removed under claim and delivery proceedings (taken out by the plaintiffs) in this case on 21 September, 1905.

(534) 4. It is agreed between counsel for both plaintiffs and defendant that the above entitled action may be heard on the foregoing facts, out of term, by the judge, and that such judgment may be rendered as in law is proper.

The court, upon the case agreed, adjudged that the plaintiffs recover of the defendant a penalty of $50 per day for thirty days, and the costs. To this judgment the defendant excepted and appealed.

*McBrayer, McBrayer & McRorie for plaintiffs.*

*William B. Rodman, George F. Bason, and F. H. Busbee & Son for defendant.*

WALKER, J., after stating the case: The goods, it appears in this case, were shipped from Cincinnati, Ohio, to Rutherfordton, in this State, over connecting lines of railway, the defendant's line being one of them, and having arrived at the latter place and being then in the warehouse of the defendant at Rutherfordton, the plaintiffs, who were the consignees, offered to pay the freight charges, whatever they were, and demanded a delivery of the goods, which was refused by the defendant's agent for the reason that he did not know what the freight

charges were, the goods having been delivered to the defendant at Harriman's Junction, outside of this State. This would seem to make out the plaintiffs' case under the statute and entitle him to the penalty. Revisal, sec. 2633. The defendant, though, resists his recovery upon the following grounds:

"1. That the statute only applies to those shipments where rates have been established by the line or lines, for certain points, and those rates have been filed with the Interstate Commerce Commission in the case of interstate shipments, or with the State Commission in the case of intrastate shipments.

"2. That the statute is in conflict with the Fourteenth Amend- (535) ment to the Constitution of the United States.

"3. That the statute, in so far as it applies to interstate shipments, is in conflict with the Constitution of the United States, Art. I, sec. 8, clause 3 (commerce clause).

"4. That only one penalty of $50 can be collected on any one shipment, and that the penalty is not cumulative."

We do not think that any one of the first three grounds is tenable or sufficient to defeat a recovery by the plaintiff, though we are of opinion that the last ground is well taken.

The first objection made by the defendant's counsel is based upon a misconception of the true meaning of the statute under which the action is brought. It does not provide that the penalty for a refusal to deliver freight shall be recoverable only where rates have been made and filed with the Interstate Commerce Commission, so that the making and filing of the rate becomes a condition precedent to the imposition of the penalty for a refusal to deliver, but the meaning of the section is that, upon a tender of the stipulated charges, as stated in the bill of lading, which shall not exceed the amount fixed in the classification and table of rates published and filed with the Commission, and upon refusal to deliver the freight, the penalty shall accrue. If there has been no classification made or rates fixed, published, and filed with the Commission, Interstate or State, or other compliance with the law, then the rate stated in the bill of lading (if not in itself unreasonable or excessive) applies, subject to any liability of the carrier for having failed to comply with the law; but if such a classification has been made or rates fixed and filed, as provided by law, then the charges must not exceed what the carrier is entitled to receive thereunder. The legislation embodied in section 2633 was intended to recognize and enforce the observance of the (536) rates as fixed under the requirement of the Federal law where it is applicable. The provision was made for the protection of the consignee, so that the carrier cannot exact from him, as a condition of the delivery of freight, the payment of excessive freight charges. We see no possible

objection to the statute, as thus construed, upon the ground of any conflict with Federal laws. If the defendant did not know what the charges were, as fixed by the bill of lading, because it did not have the way-bill, it should have known, and it was not the fault of the plaintiffs that the way-bill did not accompany the goods and was not received with them or in the usual course of business. The point is made that the statute requires the carrier to inform the consignee of the classification and rates as filed with the Commission, and if none have been filed it would be impossible to comply with this provision. Again, we say that this was required for the benefit of the consignees, and they are not complaining of an overcharge or excessive demand on the part of the defendant, but expressed a willingness to pay whatever was due. But whose fault would it be if no schedule is filed? The carrier's, of course. Shall he be permitted to plead his own wrong in excuse for the failure to give the information? Statutes imposing penalties, it is true, should be construed strictly, but this does not mean that they shall be so construed as to defeat the intention of the Legislature. They should receive a reasonable interpretation, so as to effectuate that intention. Any other construction than the one we have given to section 2633 would be contrary to what was plainly intended. The law does not, of course, require the defendant to give information which it does not possess and could not obtain; but that did not excuse it for violating the statute in refusing to deliver the freight when the plaintiff tendered whatever amount was due to it for transporting the goods. The defendant (537) should have known whether or not it had complied with the law by filing the classification and table of rates with the Commission.

The second and third grounds of defense may be considered together. We are unable to see how section 2633 of the Revisal is an interference with interstate commerce. Defendant assigns three reasons why it is and they are these: "It undertakes to regulate: (1) How common carriers shall settle their freight charges on interstate commerce; (2) how common carriers shall tell the consignee what these charges are, and (3) to provide upon what terms the common carrier shall make delivery of interstate freight." There can be no doubt that the shipment in this case was interstate traffic and within the protection of the commerce clause of the Federal Constitution. But can it be that a statutory requirement that carriers shall deliver freight to consignees upon tender or payment of the freight charges due thereon, as fixed by the contract of the parties which is evidenced by the bill of lading, and not exceeding the rate filed with the Commission, is an interference with interstate commerce? It is not obstruction to commerce, nor does it impose any burden upon it, and in no sense is it a regulation of it. It

has been settled that an enactment which may incidentally affect commerce does not necessarily constitute a regulation of it within the meaning of the Federal Constitution. *Sherlock v. Alling,* 93 U. S., 99; *Mobile Co. v. Kimball,* 102 U. S., 691; *R. R. v. Kentucky,* 183 U. S., 503. It is equally well settled that legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect commerce itself. *Mobile Co. v. Kimball, supra; Smith v. Alabama,* 124 U. S., 465. The Code, sec. 1967, provided that goods received by a carrier for transportation should be shipped within five days from their receipt, and the statute was held by this Court to be valid, although it applied to interstate traffic, as it enforced (538) the performance of his duty by the carrier, and was, therefore, not a regulation of commerce, but an aid to and intended to facilitate it. *Bagg v. R. R.,* 109 N. C., 279. The questions here involved are learnedly and exhaustively discussed in that case by *Justice Avery,* with a full citation and consideration of the authorities bearing upon it. Since that decision was rendered, the question of the right of a State Legislature to impose a penalty by statute for the failure of a telegraph company to deliver an interstate message has been before the Supreme Court of the United States, and it was held to be a valid enactment and not any interference with interstate commerce. The Court, in the case referred to, says: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that, in regard to such a message as the one in question, although it (539) comes from a place without the State, it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the State tends

to enforce the performance of duty owed by the company under the general law." *Telegraph Co. v. James,* 162 U. S., 650.

It has been said that the cases in which the State may exercise power over the general subject of commerce may be classified thus: First, those in which the power of the State is exclusive; second, those in which the State may act in the absence of legislation of Congress; and, third, those in which the action of Congress is exclusive and the State cannot interfere at all. *Bridge Co. v. Kentucky,* 154 U. S., 204. Where the subjects in regard to which the laws are enacted, instead of being local in their nature (as are those of the second class in the above enumeration) and affecting interstate commerce but incidentally, are national in their character, then the nonaction of Congress indicates its will that such commerce shall be free and untrammeled; but if, on the contrary, the enactment falls within the second class and affects commerce only locally and not beyond the borders of the State, in such a case the State may legislate, and the mere existence of the power in Congress to act will not oust its jurisdiction, so to speak, but only the exercise of the power of Congress incompatibly with the exercise of the same power by the State. Where the State legislation merely operates as an aid to interstate commerce, it is not amenable to the objection that it is a regulation of or an interference with it. *Telegraph Co. v. James, supra.* There has been no legislation by Congress upon this subject which supersedes the right of the State to pass the statute under consideration. It cannot be successfully argued that such effect (540) should be given to section 6 of the Interstate Commerce Act, requiring common carriers to print and keep open for public inspection their schedules, showing rates and fares for the transportation of property and passengers, the classification of freight, and the terminal charges, and declaring it unlawful to charge or receive a greater or less sum for transportation of property or passengers than is therein specified. This is the only legislation of Congress relied on by the defendant as in conflict with section 2633 of the Revisal and as displacing the power of the State to legislate upon the subject. It must be presumed, against the contention of the defendant, that it has complied with the law by filing its schedule of rates, fares, and charges with the Commission and by publishing the same, and that the charges as contained in its bill of lading conform thereto. Our statute does not permit the carrier to charge more or less than the rates thus fixed by its schedules and the act of Congress, but rather requires the carrier to observe the said rates by expressly providing that the amount stated in the bill of lading shall be the same as that to be found in the schedule of classification and rates. We could not decide that the duty imposed by our statute to inform the consignee as to the amount of the charges

and of delivering the freight upon tender or payment of the amount thus fixed in compliance with the law of Congress militates in the slightest degree against the full exercise of the power by Congress to regulate commerce between the States. It seems to us to have the opposite effect. The cases cited by the learned counsel of the defendant in their brief do not apply, as they refer to cases falling within the third class of the enumeration in respect to the power that may be exercised by Congress and by the State legislatures, respectively, over commerce. The legislation considered in those cases affected interstate commerce directly, and was held to be national instead of local in character. (541) When the proper distinctions are kept in mind, the irrelevancy of the authorities cited is obvious. *Telegraph Co. v. James, supra;* Judson on Interstate Commerce, secs. 24 and 25; *Currie v. R. R.,* 135 N. C., 535. The question we have here for decision has been presented in identically the same form to other courts, and their statutes, which are worded substantially like ours, have received from them the construction which we now give to section 2633 of the Revisal. *R. R. v. Nelson,* 4 Texas Civ. App., 345; *Dillingham v. Fischl,* 1 Texas Civ. App., 546; *R. R. v. Hanniford,* 49 Ark., 291; *R. R. v. Dyer,* 75 Texas, 572.

We cannot so construe the law as to permit the defendant, as a public carrier, to withhold freight merely upon the ground that it has not complied with the law of Congress, and, therefore, cannot know what the proper rate is, nor because it did not have the way-bill or other document furnishing the required information as to the classification and rate, for it was its plain duty to be provided with full knowledge as to all these matters. Any other view of the law would leave the carrier free to successfully plead his own default in defense to an action for a violation of the statute and a recovery of the penalty for the second wrong committed.

We hold that the defendant is liable for the penalty upon the facts agreed, but for only one. The law does not by its terms or by implication make the penalty cumulative upon each succeeding day of default or upon each succeeding demand and refusal, but gives only one penalty of $50 for the refusal, though the consignee still has his action for damages at common law. Any other construction would subject the carrier to a penalty for each refusal upon any number of demands made in the same day or in each day for any number of days. Such an interpretation is wholly inadmissible, even if such a provision (542) clearly expressed would be valid. Section 2631, providing a penalty for the failure to receive freight, expressly declares that it shall accrue on each day of the refusal, and section 2632, as to the failure to transport, has a similar provision in regard to the penalty. The differ-

ence in phraseology of these sections and section 2633 clearly indicates that the Legislature intended there should be but one penalty under the last named section.

In view of what we have said, we need not discuss the remaining question, as to the constitutionality of section 2633 under the Fourteenth Amendment, as the defendant is plainly not within the protection of that provision of the Constitution upon the facts of this case, nor need we refer to the suggestion that the plaintiff did not tender his bill of lading when he made his demand, as no such point is in the case. That was not the ground of the refusal to deliver.

The judgment of the court holding the defendant liable for the penalty is affirmed, but it will be modified so as to confine the recovery to one penalty of $50 and the costs.

Modified and affirmed.

*Cited: Efland v. R. R.*, 146 N. C., 138; *Morris v. Express Co., ib.*, 171; *Marble Co. v. R. R.*, 147 N. C., 56; *Iron Works v. R. R.*, 148 N. C., 470; *Reid v. R. R.*, 149 N. C., 425; *Hockfield v. R. R.*, 150 N. C., 422; *Garrison v. R. R., ib.*, 592; *Reid v. R. R., ib.*, 758, 765; *Lumber Co. v. R. R.*, 152 N. C., 72, 73; *Reid v. R. R.*, 153 N. C., 492, 493, 497; *S. v. Fisher*, 162 N. C., 557; *Jeans v. R. R.*, 164 N. C., 229, 234; *Thurston v. R. R.*, 165 N. C., 599; *Smith v. Express Co.*, 166 N. C., 159; *Hardware Co. v. R. R.*, 170 N. C., 397.

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HARRILL BROTHERS v. SOUTHERN RAILWAY COMPANY.

(Filed 14 May, 1907.)

**Attorney and Client — Authority of Attorney — Judgment — Motion to Set Aside.**

Upon the appearance of record of a reputable attorney for his client, ample authority of the attorney to act as such is assumed by the court, which ordinarily cannot be questioned; therefore, a motion to set aside, a judgment entered upon an agreed statement of facts, on the ground that the attorney who signed the agreement for the defendant misunderstood the extent of his authority, and that the statement should first have been submitted to the division counsel, was properly denied.

(543) ACTION heard before *Guion, J.*, at February Term, 1907, of RUTHERFORD. Judgment for plaintiff, and defendant appealed.

*McBrayer, McBrayer & McRorie for plaintiffs.*

*W. B. Rodman and S. H. Busbee & Son for defendant.*

WALKER, J. This is a motion to set aside the agreed statement of facts and the judgment thereon which was rendered by *Judge Justice* at

a prior term. The motion was made before *Judge Guion* at February Term, 1907, of Rutherford Superior Court. The ground of the motion is that the attorney who consented to the case and agreed to the submission of it to the judge for his decision and judgment, which are set out in the former opinion of this Court at this term, misunderstood his associate counsel as to the extent of his authority, and that the case should have been passed upon by the division counsel of the defendant before being adopted and submitted to the judge. Counsel wished to insert in the case the alleged fact that the defendant's agent, at the time the plaintiffs demanded the delivery of the goods, required the production of the bill of lading, which the plaintiffs refused to produce. The judgment was signed 10 November, 1906, and this motion was made at February Term, 1907.

The counsel who signed the case agreed in behalf of the defendant was actually its attorney at the time, and representing it in this case at the term of the court when the case was settled. He had, apparently, all the authority necessary to act in the premises, and because he failed to observe special private instructions as to the manner of defending the suit is no reason, in our opinion, under the circumstances of this case, why the judgment should be set aside, as he appeared to be clothed with general authority to act for the defendant. *Greenlee v. McDowell,* 39 N. C., 485; *Branch v. Walker,* 92 N. C., 89; *Beck v. Bellamy,* 93 N. C., 129; Weeks on Attorneys, sec. 222; *Rogers v. McKenzie,* 81 N. C., (544) 164. In the last cited case it is said: "If the existence of ample authority to act is assumed from the appearance of the attorney, with the sanction of the court (and ordinarily it could not be questioned), all the results must follow as if actual authority had been conferred, and among them the rightfulness of the defendant's payment." "It is the course of the King's Bench," said *Holt, C. J.* (1 Salk., 86), "when an attorney takes upon himself to appear, to look no further, but to proceed as if the attorney had sufficient authority, and to leave the party to his action against him, if he has suffered by his default." *Jackson v. Stewart,* 6 John., 3. And *Chancellor Walworth* said: "As a general rule, when a suit is commenced or defended, or any other proceeding is had therein, by one of the regularly licensed solicitors, it is not the practice of the court to inquire into his authority to appear for his supposed client (*Insurance Co. v. Oakley,* 9 Paige, 196; Weeks on Attorneys, secs. 198, 199), nor, of course, to stop and ascertain the extent of his authority."

The cases we have just cited were approved by this Court in *Rogers v. McKenzie, supra.* We refer especially to *Morris v. Grier,* 76 N. C., 410, and *Hairston v. Garwood,* 123 N. C., 345. As said by *Kent, C. J.,* in *Denton v. Noyes,* 6 John. (N. Y.), 295: "If the attorney for the de-

fendant be not responsible or perfectly competent to answer to his assumed client, the court will relieve the party against the judgment, for otherwise a party might be undone. I am willing to go still further and, in every such case, let the defendant in to a defense of the suit. To carry the interference further beyond this point would be forgetting that there is another party in the case equally entitled to our protection."

This statement of the law was quoted with approval and applied (545) in the recent case of *Ice Co. v. R. R.*, 125 N. C., 17. In our case it is admitted that the attorney was authorized to represent the defendant, and if he did not act with judgment and in accordance with private instructions as to how he should conduct the suit, the remedy is not by setting aside the judgment, for no such case is shown in the record as entitles the defendant, under the authorities, to that relief.

No error.

*Cited: Smith v. Miller,* 155 N. C., 248; *Mann v. Hall,* 163 N. C., 60; *Gardiner v. May,* 172 N. C., 197.

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JASPER MILLER v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 14 May, 1907.)

**Railroads—Negligence—Contributory Negligence—Rule of the Prudent Man—Burden of Proof.**

When the defense to an action to recover damages of the defendant railway company is that the plaintiff was guilty of contributory negligence in seating himself in the forward compartment of a caboose car of a freight train, not intended for passengers, while the rear and similar compartment of the same car was so intended, and there is evidence that soon thereafter the plaintiff was injured by the car jerking violently forward by the backing of the freight cars against it "with tremendous force," throwing him against a door, which was out of order, wherein his hand was caught, resulting in the injury complained of, the defendant must not only show that the plaintiff knew or should have known that the rear compartment was not for the accommodation of passengers and that he should not have seated himself therein, but that the plaintiff's risks were thereby enhanced, that a man of ordinary prudence would not have acted as he did under the circumstances, and that his conduct proximately caused or concurred in causing the injury.

ACTION tried before *W. R. Allen, J.,* and a jury, at January Term, 1907, of MECKLENBURG.

This case was before us at a former term (143 N. C., 115). (546) The plaintiff entered a caboose car of the defendant, which was

attached to one of its freight trains at Gastonia, as a passenger, intending to go to Charlotte. The jury, upon issues submitted by the court, found that he was a passenger and that he was injured by the negligence of the defendant, but that he was guilty of contributory negligence. The caboose was divided by the partition into two compartments, the rear one for passengers and the front one for the employees and their tools and implements. The two were constructed somewhat alike, each having a seat on the side running lengthwise of the car. The day on which the plaintiff was injured was warm and the rear compartment of the caboose was uncomfortable, not being as well ventilated as the front. The plaintiff went into the front compartment, there being a door in the front of the car and a window on the side, and both being open. He sat on the side seat and commenced to make entries in his notebook. After he had taken his seat, a flagman, apparently in charge of the caboose, asked him if he was going to remain on the car. Plaintiff replied that he was going to Charlotte, whereupon the flagman asked him to look after the caboose while he was away, which he consented to do. When the plaintiff had been seated about twenty minutes the caboose was jerked violently by the backing of the freight cars against it with "tremendous force," and he was thrown against the door, which was out of order; his hand was caught and badly lacerated, torn, and mashed, so that he suffered great pain, the hand being permanently injured.

The plaintiff testified that the conductor consented to his boarding the caboose where it was, though he politely notified the plaintiff that it would be drawn up to the station, and if he waited he could get on it there.

The plaintiff requested the court to give the following in- (547) struction, which was refused, except as given in the charge: "It is not negligence *per se* for a passenger to enter a car at a station in apparent readiness to receive passengers a few minutes ahead of the time fixed by the rules of the company for receiving passengers; nor is it negligence *per se* for the plaintiff, after boarding the caboose where he did, to fail to look to see if cars were being backed against the caboose; nor was it negligence *per se* for the plaintiff to get on the caboose if it was detached from the engine at the time he entered; nor was it negligence *per se* for the plaintiff to get into the apartment of the car he did when he entered the caboose; and if the jury so find, and further find that the plaintiff was in the exercise of ordinary care when he entered the car and when he was injured, then the jury should answer the third issue 'No.'"

The court charged the jury as follows: "On the third issue the burden is upon the defendant to satisfy you, by the greater weight of the evidence, that the plaintiff was negligent, and that that negligence was

the proximate cause of the injury to him. The question of the contributory negligence of the plaintiff is to be determined by his conduct after he got upon the car, and dependent solely on that. It was the duty of the plaintiff to exercise his intelligence and senses and to observe the condition of the car, and if by the exercise of ordinary care he could have discovered the rear part of the car was provided for passengers and the front not, and for his own convenience and comfort he went to the front section and sat down near the door, he was guilty of contributory negligence, and you will answer the third issue 'Yes.' If, however, either end was used for passengers, it would not be negligence for the plaintiff to go into the front end of the car. If, however, he could not discover, by the exercise of ordinary care, that the front end of
(548) the car was not used for passengers, then it would not be negligence to go in there, but it would be his duty then to exercise ordinary care, if, by the use of ordinary care, he could discover that it was dangerous."

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

*Brevard Nixon and Maxwell & Keerans for plaintiff.*
*William B. Rodman for defendant.*

WALKER, J., after stating the case: The only question that requires consideration in this case is whether the instruction of the court, as to contributory negligence, was correct, for the jury found that plaintiff was a passenger and that the defendant had been negligent in the management of the train. The instruction makes the contributory negligence of the plaintiff turn solely upon whether, by the exercise of ordinary care, he could have discovered that the rear compartment was intended for passengers and the forward compartment for employees, and whether, also, he went into the front section for his own comfort and convenience and sat down near the door. A plaintiff cannot be said to have contributed to his own injury by his negligence, unless he has failed to exercise that degree of care which a man of ordinary prudence would use for his own safety in the same or substantially similar circumstances, and, further, unless his want of care has proximately contributed to causing the injury of which he complains. The question upon the second issue was not merely whether the plaintiff knew or should have known that the rear compartment was for the accommodation of passengers, and, for that reason, he should have taken a seat therein, but the inquiry should have been broadened so that the jury should have further ascertained and found whether the front compartment
(549) was more dangerous than the rear one, and whether, by taking

a seat therein, the risk and peril of plaintiff's position in the car was thereby enhanced; whether, also, a man of ordinary prudence would have acted as he did under the circumstances, and finally whether his conduct proximately caused or concurred in causing the injury. 1 Thompson on Negligence, sec. 216. It was not, *per se,* negligence to take a seat in the front compartment, even though it was intended for the employees of the defendant and the storage of their tools. *Creed v. R. R.,* 86 Pa. St., 139; *Burr v. R. R.,* 64 N. J. L., 30. Besides, the instruction of the court ignores the fact, of which there was evidence, that the flagman, who had temporary charge of the car, saw the position occupied by the plaintiff and made no objection to his continuing in it, but, instead, requested him to watch the car during his absence. 6 Cyc., p. 641.

The claim of the defendant is that the plaintiff was guilty of such negligence in going into the front section of the car as to bar his recovery for the injury he there received, however negligent the defendant itself may have been. This same contention was made in *Webster v. R. R.,* 115 N. Y., 112, and in reference to it the Court said: "There would be some basis for this claim if his (plaintiff's) injury could be traced to his presence in that car. But if his presence there did not have any relation to the injury, then it furnishes no defense to the defendant. It does not appear that the baggage car was, on the occasion of the collision, any more dangerous than the passenger coach." In *Creed v. R. R.,* 86 Pa. St., 139, the facts were that the plaintiff's intestate was a passenger on a mixed freight and passenger train of the defendant. He went into the caboose, the hindmost car of the train, in front of which were the passenger coaches, so that there was ready and easy access from the latter to the former. The caboose (550) car was one set apart and especially designed for the use and occupancy of the employees engaged in running the train, and by the rules of the company no other persons were permitted to enter it. The intestate was killed by the caboose being upset, and with reference to these facts the Court said: "Was Creed's position, under ordinary circumstances, which a man of ordinary prudence ought to see and guard against, as safe as a seat in a passenger car? If it was, and, as we have said, there is no evidence to the contrary, then negligence cannot be predicated upon the fact of his being in the caboose." This left the question, as to whether the intestate had been negligent in taking a seat in the caboose, to the jury. It was further held that there was no contributory negligence, because it did not appear that the intestate's position in the caboose had any causal connection with the accident, or, in other words, that his being in the wrong car was the proximate cause of his death. The Court cited, in support of the decision in that case, *O'Don-*

*nell v. R. R.,* 59 Pa. St., 239; *R. R. v. Chenewith,* 52 Pa. St., 382; *Carroll v. R. R.,* 1 Duer (N. Y.), 571; *Washburn v. R. R.,* 3 Head (Tenn.), 638, and *Jacobus v. R. R.,* 20 Minn., 125, which authorities seem strongly to sustain the conclusion therein reached. It is not necessary that we should in this case go so far as the courts did in those we have cited, but it is quite sufficient for our purpose to show that the liability of this defendant for the plaintiff's injury, if it was guilty of negligence, as the jury found, depended upon whether the jury should also find, under the third issue as to contributory negligence, that the plaintiff in going into the front compartment of the caboose exercised the care of an ordinarily prudent man under the circumstances, or that, if he
(551) was negligent in taking a seat in the front instead of the rear part of that car, whether his injury was proximately caused by that negligence or by the negligence of the defendant.

These questions are discussed with singular clearness and force by *Judge Magie,* for the Court, in *R. R. v. Ball,* 53 N. J. L., 283, the fact of which closely resemble those in our case, and in principle we do not see how the two cases can well be distinguished. Indeed, all the cases we have cited, including, of course, the last, while they clearly support the propositions we lay down as applicable to this case, go far beyond what we deem it necessary to declare in order to hold that the instruction of the court upon the issue of contributory negligence was erroneous. For example, in the case last cited it is said: "If such an inference (that an invitation had been given to the plaintiff to ride where he was at the time of the accident) were drawn, I think that negligence could no more be imputed to the act of taking and retaining that place than it could be to the act of taking a seat in a passenger car, so far as concerned danger from cause extraneous to the car. If any invitation called him to a place of obvious danger from such or other causes, apparent to his senses, and to take which could only be done by a failure to exercise care for his safety, negligence might be imputed to him, notwithstanding an invitation. If the place to which he was invited may or may not be prudently taken, a question for the jury would arise. Where a passenger, under similar circumstances, rode on the platform, and was there injured in a wreck of the train, it was held that a question for the jury arose, and a finding that the act was not negligent was supported. As will be seen, I do not think that danger from extraneous causes was at all apparent or obvious to one invited to the baggage compartment. But the case in hand was put to the jury, not as a
(552) question of implied invitation, but upon the assumption that plaintiff occupied the baggage compartment merely with the consent and permission of those in charge of the train. This conclusion was necessary from the evidence, and the trial judge had a right to base

instructions to the jury thereon. The instruction thereon was, that "while plaintiff's act in riding in that compartment would have negligently contributed to any injury received from causes inherent in the construction and use of it as a place for receiving and carrying baggage, there was no contributory negligence to be imputed to that act in respect to injuries received from causes *ab extra,*" citing *R. R. v. Lee,* 21 Vroom, 435, and *Willis v. R. R.,* 34 N. Y., 670.

The Court, in *R. R. v. Ball, supra,* after remarking that whether the plaintiff's position, if wrongful, was a contributing cause, or merely the occasion or opportunity of the injury done by the defendant's wrong, was also a question in the case, made further observations which are pertinent to the facts of the case at bar. "But let us assume (says the Court) that the jury, had the question been submitted to them, might have found that plaintiff's act did contribute to his own injury as a cause thereof. To exonerate defendant from liability for its negligence, which also caused plaintiff's injury, it is not sufficient that plaintiff by his act contributed thereto, but it must further appear that in doing that act he was at fault, and guilty of what the law calls negligence. Negligence is the absence of that care for safety which the law exacts from him who seeks redress for an injury done him by the negligence of another. In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of danger and such care in avoiding it as a prudent man, reasonably careful of his safety, would exercise." *Judge Thompson* substantially states the true doctrine in (553) the same way: "The general rule is that a passenger who, without the consent of the carrier, selects a place on the carrier's vehicle which is obviously not intended to be occupied by passengers, and, while in such position, receives an injury directly traceable to hazards peculiar to that position, cannot recover damages of the carrier, for he is deemed in law to accept the risks incident to the position which he thus voluntarily assumes, but the passenger's conduct, if negligent, will not bar a recovery of damages, unless it was the proximate cause of his injury." 3 Thompson on Negligence, sec. 2942. "However negligent he may have been in placing himself in an improper position upon the carrier's vehicle, if his negligence did not contribute in any degree to the accident which befell him, but if that accident was the result of the negligence of the carrier, he may recover damages." 1 Thompson Neg., sec. 216. Many authorities might be cited in support of the principles thus stated, but a few only will suffice: *Keith v. Pinkham,* 43 Me., 501; *Paquin v. R. R.,* 90 Mo. App., 118; *Burr v. R. R.,* 64 N. J. L., 30; *Wilmott v. R. R.,* 106 Mo., 535; Moore on Carriers, p. 854; *R. R. v. State,* 72 Md., 36.

In this case it appears that the two compartments of the caboose were constructed and arranged substantially alike, each having a seat running lengthwise of the car. It was for the jury to say whether there was anything peculiar to the front compartment which rendered it more dangerous to passengers than the rear one, and if there was, then whether the plaintiff, under all the facts and circumstances of the case, exercised the care of an ordinarily prudent man in taking a seat there, with the knowledge of the flagman and without any warning from him. It certainly was not obviously dangerous to do as the plaintiff did so
(554) as to leave no room for a difference of opinion as to his negligence in the minds of ordinarily prudent and reasonable men, and, this being so, the question of the exercise by him of due care for his own safety was for the jury. If the principal injury to the plaintiff resulted from a defect in the door, did he have such knowledge of the defect as to charge him with negligence for having exposed himself to a known danger which a man of ordinary prudence would have avoided? Lastly, the jury should have been directed, under proper instructions, to inquire whether or not the plaintiff's negligence, if there was any on his part, was the proximate cause of the injury to him. *Graves v. R. R.*, 136 N. C., 4; *Brewster v. Elizabeth City,* 137 N. C., 394. The issue of contributory negligence is properly and generally referable, for its determination, to the rule of the prudent man, and cases which reject this as a rule in the law of negligence are not, therefore, applicable. If no two reasonable minds would differ as to the character of the plaintiff's act, the question of contributory negligence, like that of simple negligence, may become one of law to be decided by the court.

There was evidence from which the jury could have found, under proper direction by the court, that the defendant's negligence was the immediate, efficient, and proximate cause of the plaintiff's injury, and not his own, if he was negligent at all. It was the duty of the defendant to exercise the highest degree of care, prudence, and foresight for the safety of its passengers in the caboose which was reasonably practicable under the circumstances, and if it failed in this duty, and thereby proximately caused the injury to plaintiff, it is liable, if the plaintiff was not negligent; or, although the plaintiff may also have been negligent, if the defendant's negligence was the real and proximate cause of the injury, and not that of the plaintiff.

(555) In attempting, therefore, to define contributory negligence, with special reference to the facts of this case, the court stopped short of a full definition and, indeed, virtually directed a verdict against the plaintiff upon the third issue—if the jury should find the single fact that by the exercise of ordinary care he could have discovered that the rear end of the car was provided for passengers, and not the front, and for

his own comfort and convenience he took a seat in the front compartment. This confined the issue to limits which were too narrow, and necessarily prejudiced the plaintiff. For this error a new trial is ordered. The instruction was not only inherently defective in the respect indicated, but the court refused to give instructions requested by the plaintiff's counsel, which, if given, would have cured the defect and presented the case correctly to the jury.

New trial.

*Cited: Suttle v. R. R.*, 150 N. C., 671.

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CLAUDE BRADLEY v. SOUTH AND WESTERN RAILWAY COMPANY ET AL.

(Filed 14 May, 1907.)

1. **Railroads—Employer and Employee—Safe Place to Work—Negligence—Rule of the Prudent Man.**

An employer of labor, in the exercise of reasonable care under the rule of the prudent man, in regard to the kind and character of the work, shall provide for his employees a safe and suitable place in which the work is to be done. It was error in the court below to sustain a demurrer to the complaint alleging that defendant was constructing a railroad, and at the time of the injury required the plaintiff to drive a wagon over certain team roads on its right of way, made for the use of its teams in its construction work, used almost constantly for that purpose for several weeks in a dangerous condition for the drivers required to use it.

2. **Same—Issues.**

In an action for the recovery of damages on account of alleged negligence of defendant in leaving a stump in a temporary roadway, used for several weeks by its teams in construction work of a railroad, upon which the plaintiff, in the course of his employment, was required to drive a team, the controlling questions are upon an inquiry of a breach of duty of defendant in respect to the proper condition of the roadway. Was the plaintiff's injury caused thereby? and Was it such as the defendant knew or might reasonably have foreseen and expected to occur?

ACTION, heard on demurrer to complaint, before *Guion, J.*, at (556) January Term, 1907, of MCDOWELL. There was judgment sustaining the demurrer, and the plaintiff excepted and appealed.

*J. W. Pless for plaintiff.*

*P. J. Sinclair and Hudgins, Watson & Johnston for defendants.*

HOKE, J. The allegations of the complaint tend to show that defendant companies, engaged in constructing a railroad in McDowell County, established a camp on their right of way for the comfort and convenience of their employees engaged in the work and for the care and placing of their teams; and plaintiff, a driver of one of these teams, while engaged in this work and when driving his team along a roadway established and provided by defendants for entrance to and exit from their camps, was injured by reason of defendants' negligence in not providing a safe roadway at the place indicated. The specific charge of negligence, as stated in the complaint, is as follows:

"5. That on said date the defendants, through their agents and vice-principals, required the plaintiff to drive a four-horse team over certain roads on its right of way, which roads were made by defendants for the use of its wagons and teams in connection with the construction work, and the road upon which plaintiff was injured was a road made for entrance and exit to and from one of its camps, and was built to (557) be and was largely used by plaintiff and other servants of defendants and had been almost constantly used by them for some weeks at the time of said injury; but notwithstanding the said road was built to be and was almost constantly used, the defendants negligently and carelessly left the same, and it was at the time of said injury, in a dangerous and unsafe condition for the drivers of teams who were required to use the same while driving in the manner in which plaintiff and all other drivers of teams constantly drove, the said negligent condition and danger in said roadway being that defendants negligently and carelessly left a large stump in the center of said road, which stump was of such height that it came within two or three inches of the running gear or brake-beam on the wagons in use by defendants' servants who were required to drive said wagons over said road, and at times, when the road was soft, the said stump would touch the brake-beam of wagons such as the plaintiff was using and other wagons used by said defendants, it being fully known to defendant companies that the usual and ordinary custom for all its drivers using said road was to ride sitting on the frame or running gears of its wagons, with their feet hanging down.

"6. That on said date the plaintiff was driving a four-horse team for defendants on said road at their camp, as his duties required, when by reason of negligence and carelessness of the defendants in failing to provide a safe place in which for him to work, and without any fault on his part, the plaintiff was injured as follows: Plaintiff was sitting on the frame of his wagon in the usual way for driving such teams, with his feet hanging down in the usual and only practicable way, when one of the teams he was driving became frightened, very difficult to manage, and required all the attention of plaintiff just before and at the

time the wagon reached the stump above described, and plaintiff (558) thereby failing to observe the stump, had his leg caught between the stump and the brake-beam on his wagon, breaking his leg in two places, crushing and mangling his leg, from which injuries plaintiff suffered great and excruciating pain and anguish. The leg has been shortened and crooked, is weakened, and plaintiff is permanently injured and disfigured, and was caused loss of time and the expenditure of money, all to his great damage."

The demurrrer admits these allegations to be true, each and all of them; and in this view the Court is of opinion that a case is presented which should be submitted to a jury under a proper charge.

It is established with us that an employer of labor, in the exercise of reasonable care and having regard to the kind and character of the work, shall provide for his employees a safe and suitable place in which the work is to be done. Where the employees are engaged in the operation of mills and other plants having machinery more or less complicated and usually driven by mechanical power, in such case an arbitrary standard of duty has been fixed, and the employer is required to provide methods, placing, implements and appliances such as are known, approved, and in general use. *Hicks v. Manufacturing Co.*, 138 N. C., 319; *Horne v. Power Co.*, 141 N. C., 50; *Fearington v. Tobacco Co.*, 141 N. C., 80.

Where, however, as in this case, these conditions do not exist, and no arbitrary standard is established, then, in case two men of fair minds could come to different conclusions, the question of negligence should be referred to the jury to be determined by the standard of a prudent man acting under like conditions and circumstances. And in making this decision, the character of the work, its placing, the usual and ordinary methods, with any directions given as to these methods, (559) should all be taken into consideration. It would not be reasonable, as suggested in behalf of the plaintiff, to hold defendants to the duty of making their roads as smooth and free from obstructions as a street or public highway is required to be kept. These construction companies are frequently compelled to clear an entirely new way through woods and undergrowth for considerable distances and over rough sections of country, and it would be impracticable and unreasonable to hold them to any such requirements as this. We are of opinion, however, that if there is evidence tending to support the allegations as made, the issue should be submitted to the jury whether, having regard to the character of the work, the placing of the road, the frequency of its use by plaintiff in performance of his work, its condition, etc., the defendants had constructed such a road for the use of their hands as should be required of a prudent man engaged in such work and charged with a like duty. And

if there was such a breach of duty in this respect, was plaintiff's injury caused thereby, and was it one that defendants might reasonably have foreseen and expected to occur?

The demurrer will be overruled and defendants required to answer.

Reversed.

*Cited: Phillips v. Iron Works,* 146 N. C., 216; *Walker v. Manufacturing Co.,* 157 N. C., 135.

(560)

## LAND AND LUMBER COMPANY v. D. C. COFFEY.

(Filed 14 May, 1907.)

**1. Grants—Vacant Lands—Notice—Alias Notice—Practice.**

The purpose of Revisal, sec. 1709, is to bring the claimant into court to show cause, if any he has, why his entry upon "vacant and unappropriated lands" should not be vacated. Upon an insufficient notice given thereunder it is proper for the court to order the issuance of alias notice.

**2. Same—Evidence—Prior Grant—Action Dismissed.**

When it is shown by uncontradicted evidence that the lands claimed by the claimant had, prior thereto, been granted to the grantor of the protestant, under Revisal, sec. 1709, it is not error in the court below to refuse to dismiss the action on motion, under the Hinsdale Act, or to charge the jury to answer in favor of the protestant if they believed the evidence, the right of entry being on "vacant and unappropriated lands"; and it is not required that the protestant make out a perfect chain of title, with no link unbroken, as in an action of ejectment.

ACTION tried before *Bryan, J.,* and a jury, at November Term, 1906, of CALDWELL.

From a judgment for plaintiff, defendant appealed.

*W. C. Newland and Jones & Whisnant for plaintiff.*
*Lawrence Wakefield for defendant.*

BROWN, J. On 11 August, 1904, D. C. Coffey filed an entry in the entry taker's office of Caldwell County, describing and entering certain lands. On 6 September following, the Caldwell Land and Lumber Company filed its protest according to the statute, Revisal, sec. 1709. The entry and protest being certified to the Superior Court, the clerk docketed the same for trial under the above title, and issued notice to the claimant Coffey to show cause at the ensuing November term why his entry should not be declared inoperative and void. At that term the respondent entered a special appearance and moved to dismiss the pro-

ceeding because no proper notice had issued. His motion was re- (561) fused, and by order of the court an alias notice in due form was issued and served. To the refusal of the court to dismiss the proceeding, the claimant excepted. We find no error in this action of the court. The former notice having been declared insufficient, it was the duty of the court, upon motion, to direct an alias to issue. The purpose of the statute is to bring the claimant into court to show cause, if he has any, why his entry should not be vacated. Because the notice is insufficient is no reason the proceedings should be dismissed. As in the case of a summons which has not been properly served, the court will direct an alias to issue. *Battle v. Baird,* 118 N. C., 861.

His Honor submitted the following issue, to which there is no exception: "Is the land embraced in Coffey's entry, or any part thereof, covered by the grants to G. N. Folk, under whom protestant claims? If so, what part of said entry? Answer: Yes; all of it."

At the conclusion of the evidence, the claimant, who offered no evidence, moved to dismiss the proceedings, under the Hinsdale Act. His Honor overruled the motion, and charged the jury that if they believed the evidence they should answer the issue "Yes." We find no error in giving such instruction.

The three grants to George N. Folk, under whom the protestant claims, according to the surveyor, Kirby, who was the only witness examined, cover the land entered by claimant. The surveyor's testimony will not admit of any other construction. That being so, his Honor's charge was correct. It being shown that the State had already granted this land to George N. Folk, under whom protestant claims, it was not open to entry. In the terms of the statute, only "vacant and unappropriated" lands are the subject of entry. The title having been granted to Folk, under whom the protestant discloses a *bona fide* claim of title, the claimant cannot be heard in his endeavor to "pick flaws" (562) in every point of the chain of title which connects the protestants with Folk. This proceeding is not an action of ejectment with the laboring oar on the protestant to make out a perfect chain of title with no link unbroken.

No error.

*Cited: Cain v. Downing,* 161 N. C., 598; *Walker v. Parker,* 169 N. C., 154.

IN RE J. P. PROPST, GUARDIAN.

(Filed 14 May, 1907.)

1. **Courts—Jurisdiction—Final Judgment—Guardian and Ward—Land—Order of Sale.**

The court has jurisdiction until the final disposition of the cause to make or set aside orders, and to do all things coming within the scope of the pleadings necessary to protect the interests of the parties. It is proper for the court, before intervening rights have accrued, upon affidavit of one who has been adjudged an idiot in proceedings before the clerk, and guardian appointed, to grant a temporary restraining order, with notice to show cause, and at the hearing thereof to continue the order to the final hearing, when it appears that the guardian has sold the interest in lands of his ward and made title thereto, without having received the purchase price, contrary to the provisions of the order of sale.

2. **Guardian and Ward—Sale of Land—Evidence—Duty of Clerk—Procedure.**

Under Revisal, sec. 1798, the clerk should require satisfactory proof of the necessity to sell land of the ward, in addition to the verified petition thereto of the guardian.

MOTION to enjoin the sale of the ward's land by the guardian, heard by *Guion, J.*, at March Term, 1907, of BURKE.

Mrs. Laura Carswell was adjudged by the clerk of the Superior Court, in a proceeding instituted before him, to be an idiot, unable to attend to her affairs. The petitioner J. P. Propst was appointed her guardian.

(563) In a few days after his appointment he filed his petition in the Superior Court, setting forth that his ward was the owner of an undivided one-fifth interest in a tract of land covered by a dower; that she had no other property, and derived no income from said land; that her cotenants had offered to sell their interest in the land for some $800 for each share; that a sale of the interest of his ward would promote her interest, and that Mrs. Gertrude Propst, who is the wife of petitioner and daughter of his ward, had offered $1,050 for said interest, which sum was a full and fair price therefor. The petition was in due form and, upon the facts set forth, a sale of the land was proper. The clerk, finding the facts to be true, made an order on 18 February, 1907, directing a sale to Mrs. Gertrude Propst for the said sum of $1,050. This order was approved by the judge presiding in the Fourteenth Judicial District. On the same day the guardian reported to the court that he had made sale of the land to Mrs. Gertrude Propst for the said sum of $1,050, and that the same was a fair price, etc. On the same day the clerk made an order confirming said sale, the order of confirmation, con-

cluding as follows: "And the said guardian is hereby directed and authorized to execute a deed therefor, upon payment of the purchase money." This order was also approved by the judge.

On 6 March, 1907, Mrs. Laura Carswell filed an affidavit in the cause, setting forth that she is a widow with two children; that for the past sixteen years, since the death of her husband, she has managed her own affairs; that about the last of January, 1907, she joined with her brothers and sisters in the sale of the land to the State Hospital. That afterwards, to wit, 2 February, 1907, a notice was served on her at about 11 o'clock to appear at 12 o'clock, on the same day, at Morganton, for some purpose she did not understand; that she was in the country, and did not and could not attend; that she is informed that (564) some proceeding was had in which she was adjudged to be an idiot, and that petitioner had been appointed her guardian; that she has been informed that her said guardian, on or about 25 February, 1907, sold her interest in her father's estate, which she had, prior to his appointment, sold and conveyed to the State Hospital. She asked that the sale be set aside and that her guardian be removed.

His Honor, *Judge Guion,* who had approved the orders in the cause, upon this affidavit made an order reciting the facts set out, and further reciting that no money had been paid by Mrs. Propst for the land, directing the guardian to show cause, before him, at Morganton on 21 March, 1907, why the sale should not be set aside. That pending the hearing of the motion, the said guardian and purchaser be enjoined from interfering with or disposing of the lands, etc. Upon the return day the guardian and Mrs. Gertrude Propst appeared and moved the court to dismiss the motion, etc., for that:

1. The court had no jurisdiction to set aside the sale and the deed made pursuant thereto, etc.

2. That no motion could be made in the cause because no cause was then pending; that a final decree had been made therein, etc.

3. That Laura Carswell, having been declared a lunatic and having a guardian, cannot make any motion or maintain any action in the premises.

4. That it appears upon the face of the affidavit that Laura Carswell had conveyed her interest in the land to the State Hospital and has no interest therein.

5. For a misjoinder of motions, the removal of her guardian, and setting aside the sale, etc.

Respondents filed an answer to the motion, setting forth at (565) length the status of Mrs. Carswell and her property. That she had executed a deed to the State Hospital for her interest in the land for some $300 less than the amount for which it was sold by the guard-

ian; that she was not competent to make the sale or execute the deed; that the proceeding to have a guardian appointed for her was instituted by her two children, for the purpose of protecting her interest and having her estate preserved; that she was dependent upon her family and friends for support, etc. It is not stated that any money had been paid by Mrs. Propst for the land. His Honor, upon hearing the affidavit, made an order continuing the injunction to the hearing of the motion, from which Mrs. Propst appealed to this Court, assigning as error the refusal of his Honor to dismiss the motion, upon each and every one of the grounds assigned, etc.

*John M. Mull for plaintiff.*
*No counsel for defendant.*

CONNOR, J., after stating the case: While we are of the opinion that his Honor properly refused to dismiss the motion of Mrs. Carswell and continued the restraining order, we do not intend to suggest that either the guardian or Mrs. Propst have been prompted in the action by any purpose to take any unfair advantage of Mrs. Carswell or deprive her of her property. We think that his Honor had jurisdiction to make the order and either to hear himself, or direct the clerk to hear, the evidence upon the motion made by Mrs. Carswell and make such orders as were proper. It is evident that, in the opinion of the children of Mrs. Carswell, she was not competent to dispose of her interest in the land and take charge of the proceeds. The record of the proceeding before the clerk to have her adjudged an idiot and have a guardian ap-
(566) pointed is not before us. It does not appear that she was brought before the clerk, or the jury, in person.

While it is not so required by the statute (Rev., sec. 1890), and in many cases would be inconvenient or impracticable to do so, where there is no such reason it would be prudent to have the person whose status and rights are to be so vitally affected personally before the court, or, at least, to give such notice as will give information of the proposed action in ample time to be present. If the fact be as set out in the affidavit, such notice was not given nor such time allowed. This is all the more important in view of the fact that the verdict of the jury and proceedings thereunder are conclusive until set aside in some proceeding instituted for that purpose. So frequently persons falling within the class called idiots are so nearly on the shadowy border line that nothing but personal examination will enable the jury or court to pass intelligently upon their capacity to attend to their business. *Arrington v. Short,* 10 N. C., 71; *Sprinkle v. Wellborn,* 140 N. C., 163 (p. 180).

The court having acquired jurisdiction until a final disposition of the cause and direction of the disposition of the fund, it is competent to

make or set aside orders and do all things, coming within the scope of the pleadings, necessary to protect the interests of the parties. In the decree herein the guardian was directed to make title upon the payment of the purchase money. It seems that he has made title without having collected the purchase money. The attention of the court being called to this unauthorized action, it is its manifest duty, before any intervening rights have accrued, to arrest further action until the rights of the ward were protected. It is sometimes difficult to define a decree which deprives the court of taking further action and compels the parties to resort to a new action. In *Council v. Rivers,* 65 N. C., 54, *Pearson, C. J.,* citing *Mason v. Miles,* 63 N. C., 564, and other (567) cases, says: "These cases assert the power of the court of equity, upon petition for the sale of lands for the benefit of infants, to compel the purchaser *by orders made in the cause,* to perform specifically his contract." *Lord v. Beard,* 79 N. C., 5; *Hoff v. Crafton,* 79 N. C., 592; *Murrill v. Murrill,* 84 N. C., 182; *Settle v. Settle,* 141 N. C., 553. Certainly it was proper to stay further encumbrance of the title until the purchase money was paid. It may be that upon the final hearing it will appear that the rights of the ward have been fully protected; if so, such orders may be made in the premises as are proper. The order of his Honor simply holds the matter in *statu quo* until the final hearing, and in that respect we think it was wisely and properly made.

It is manifest that no inquiry can be made in this proceeding regarding the validity of any deed made by Mrs. Carswell prior to the appointment of petitioner as guardian. We note that no affidavits are filed by disinterested persons regarding the necessity for the sale of the land. This is unusual. The statute (Rev., sec. 1798) contemplates that, in addition to the verified petition of the guardian, the clerk shall require other satisfactory proof of the truth of the matter alleged. The judge, exercising the functions of a chancellor, where sales of this character were made pursuant to proceedings in courts of equity, always referred the petition to the clerk and master, who took evidence and reported his conclusions to the court. It is usual, since these large and important equitable functions are conferred upon the clerk, to accompany the petition with affidavits showing the necessity for the sale. The practice is to be commended, and should not, without good cause, be departed from. We note also that the petition was verified on 16 February, the order made on the 18th, and the report of sale and order of confirmation made on the same day, indicating a degree (568) of haste not consistent with that investigation and consideration usual and proper to be had in such proceedings. The sale is made privately to the wife of the petitioner, without any proof that the price is full and fair, other than the statement of the guardian of the ward and

husband of the purchaser. It may be that the rights of the ward have been protected, but the safety of titles and prevention of future attacks would have been secured by more circumspection. The records of our courts admonish us that much litigation, frequently involving property interests and character of men after death of the actors, comes from a disregard of rules of procedure based upon experience.

In the present condition of the record we forbear making any observations upon the merits of the case. His Honor correctly refused to dismiss the motion. While it is true that one for whom a guardian is appointed must be represented, in all judicial proceedings, by the guardian, it is entirely proper, either in his own person or through any friend, for him to call attention to any matter then pending and under the control of the court, to the end that it may be investigated and his rights protected. The judgment of his Honor must be affirmed, to the end that other and further proceedings may be had in the cause.

Affirmed.

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(569)

E. G. GOFORTH v. SOUTHERN RAILWAY COMPANY.

(Filed 14 May, 1907.)

**Railroads—Crossings—Neighborhood Roads—Negligence—Damages.**

Under Revisal, secs. 2567 (5) and 2569, and independently as of common right, it was error in the court below to sustain a motion as of nonsuit, under the statute, on competent evidence from which the jury could have found that, if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding.

ACTION tried before *Guion, J.*, and a jury at January Term, 1907, of MCDOWELL. From a judgment for the defendant, plaintiff appealed.

*J. W. Pless and Hudgins, Watson & Johnston for plaintiff.*
*S. J. Ervin for defendant.*

CLARK, C. J. The plaintiff was thrown and injured by his mule slipping and falling while plaintiff was driving him across the defendant's track at Gardner's Crossing, a flag station on defendant's road. The defendant had always kept up this crossing from the time the road was built by having planks nailed down between the rails and a plank on the outside of each rail. But a few weeks before this injury the defendant, in working its track, had torn up these planks and had not put them

back. There was evidence from which the jury could have found that if the crossing had been restored to its former condition the slipping of the mule would not have happened, and that the plaintiff would not have been thrown and injured but for the dangerous condition in which the crossing was left after this working of the defendant's road, by reason of the fresh dirt thrown up and the absence of planks. This being a nonsuit, the evidence must be taken in the most (570) favorable light for the plaintiff.

The road the plaintiff was traveling was not a public highway, but a neighborhood road, traveled by the people of that neighborhood as a mill and church road, and had been so used for "probably one hundred years." It was also used by them in going to Marion, the county-seat, and connected two public roads which were three miles apart. The crossing was, as has been said, a flag station. The chief contention of the defendant is that this was not a public road, and hence it was not the duty of the railroad company to keep the crossing in a safe condition. Revisal, sec. 2567 (5), requires railroads to keep the crossing of "any street, highway, plank road, and turnpike" in such condition "as not unnecessarily to impair its usefulness." Section 2569 requires railroads in crossing "established roads or ways" to so construct its works as "not to impede the passage or transportation of persons or property along the same."

In *Roper v. R. R.*, 126 N. C., 563, it is held that railroad companies must maintain crossings "as safe and convenient to the public as they would have been had the railroad not been built." It is true that in that case the crossing was over a public highway. But Revisal, sec. 2567 (5), does not restrict the defendant's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town, as was this road. Revisal, sec. 2659, is still more explicit by placing on the railroad company the duty of not impeding the passage of persons and property by the construction of the road over "established roads or ways"—that is, as we understand it, recognized and customarily used roads and ways, less than highways. Indeed, we think this would be so, as of common right, independent of any statute, under the maxim *sic utere tuo ut alienum non lædas.* (571) The General Assembly, in conferring the right of eminent domain upon railroad companies, does not give them the right to interfere with the free passage of the people along their neighborhood roads. It does not authorize the railroads to block them up or make them unsafe. The right of condemnation does not include the taking away of such neighborhood facilities as the people may be able to have in going to worship God, to grind their bread, or visit their county town, when the sparse-

ness of population, or the condition of the county treasury, or economy of its officials has prevented their having roads of the dignity of public highways. We are confirmed in this view by the fact that Revisal, sec. 3753, makes it an indictable offense for any railroad to "fail to make and keep in constant repair crossings to any plantation road thereupon." Certainly, then, a mill and church road must be within the terms "highways, established roads and ways."

It is just that the crossings necessitated by the construction and operation of a railroad should be kept in a safe condition by it. The power of the Legislature to impose upon the railroad company the duty of making and keeping in repair all crossings is unquestionable. In Massachusetts, Connecticut, and to some extent in other States, railroads are now required by statute to change their grades so as to pass under or over all crossings and to make the change entirely at their own expense. These statutes have been held constitutional both by the courts of their own State (see cases cited, *Cooper v. R. R.*, 140 N. C., 229) and in the Federal Supreme court. *R. R. v. Bristol,* 151 U. S., 556; *R. R. v. Kentucky,* 161 U. S., 696; *R. R. v. Defiance,* 167 U. S., 99; *Wheeler v. R. R.,* 178 U. S., 324; *R. R. v. McKeon,* 189 U. S., 509.

(572) Indeed, the crossing being upon the defendant's right of way, neither the plaintiff nor any one else could enter there to keep it in condition. That might have been unsafe for passing trains. Only the defendant could be expected or permitted to work on the crossing. The defendant itself had recognized that it was its duty to keep this crossing in repair, and had done so till but a few weeks before this, when the company had torn it up in repairing its own road and had failed to again put the crossing in its former state. Whether this new condition was negligence, and was the proximate cause of the injury, and whether the plaintiff's negligence contributed to the injury or whether the injury was purely accidental, without fault of any one, are matters which should have been submitted to the jury. The burden of proving contributory negligence is upon the defendant, who has pleaded it in his answer. Revisal, sec. 483. The nonsuit is set aside and

Reversed.

*Cited: Herndon v. R. R.,* 161 N. C., 660; *Tate v. R. R.,* 168 N. C., 526, 529; *Penninger v. R. R.,* 170 N. C., 476.

H. J. OVERCASH v. CHARLOTTE ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

(Filed 14 May, 1907.)

1. **Street Railways—Evidence—Negligence.**

In an action for damages arising from the alleged negligence of the defendant in the derailment of its street car, causing injury to the plaintiff, evidence that other cars had run off at the same place is incompetent when it is not shown that the condition at or near the time it was alleged other cars ran off was the same as at the time the plaintiff was injured, and that the accident was "the most usual" result of the existing conditions.

2. **Same — Duty of Railway Company — Track — Negligence — Prima Facie Case—Burden of Proof.**

It was the duty of the defendant railway company to keep its track properly constructed and in proper condition, also its car and motive power, and to have it operated by competent persons in a proper manner. When a derailment is shown, a *prima facie* case is made out, and the burden is upon the defendant to show that the injury was occasioned by an accident.

3. **Same—Contributory Negligence—Issues—Prayers for Instruction.**

When the questions of negligence and contributory negligence arise in an action for the recovery of damages, an issue as to each should be submitted, and the prayers for special instruction should be appropriately addressed to each, so as to avoid confusion.

(The doctrines of "burden of proof," "burden of the issue," and "*prima facie* case" discussed and distinguished.)

ACTION, tried before *W. R. Allen, J.*, and a jury, at January (573) Term, 1907, of MECKLENBURG.

The plaintiff sues for the recovery of damages alleged to have been sustained by reason of a derailment of defendant's car while a passenger thereon. He alleges that the derailment was caused by defendant's negligence, in that the car was overloaded with passengers, was running at an unlawful rate of speed, the track, the car, and its appliances were in defective condition, and that it was negligently operated; that one or more of these several conditions were the proximate cause of his injury. The defendant admitted that the car was derailed, but denied that it was guilty of negligence in any of the several respects set forth, or in any other respect. It also alleged that plaintiff was guilty of negligence and that such negligence was the proximate cause of the injury sustained by him. The finding of the jury upon the issue directed to defendant's negligence renders it unnecessary to set out the portions of the evidence, or the instructions, relating exclusively to plaintiff's alleged negligence. Plaintiff testified in regard to the time, place, etc., of his

entry upon the car and the reason why he rode upon the platform. He also described the place, manner of the derailment, and of his in-
(574) jury. There was testimony tending to show that, at the time of the derailment, the car was running at a speed in excess of that prescribed by the city ordinance. There was also testimony in regard to the construction, condition, etc., of the track.

There was no direct evidence of any defect in the construction or condition of the car or its appliances, or the mode of operation, other than the rate of speed. The defendant introduced several of its employees—track foreman, master mechanic, conductor, etc.—who testified in regard to the condition of the track, car appliances, and mode of operation; it also introduced passengers on the car and others who witnessed the derailment, etc. In view of the exceptions in the record, it is not necessary to set out the testimony, except where applicable to the specific exception under discussion. The jury answered the first issue "No," rendering it unnecessary to pass upon the others. From a judgment upon the verdict, plaintiff, duly excepting, appealed.

*Maxwell & Keerans for plaintiff.*
*Burwell & Cansler for defendant.*

CONNOR, J., after stating the case: The first five exceptions are directed to the exclusion of testimony offered to show that other cars, at other times, ran off the track at the same place. The plaintiff alleged that there was a "dip," or depression, in the track at the place of the derailment. The witness Coleman was asked whether he had ever seen other cars run off at the same place, running at about the same rate of speed. In answer to questions asked by the court, he said that he did not know how long the depression had been there, or whether it was there when other cars ran off. Several other witnesses were asked the same question. His Honor excluded the testimony. It is undoubtedly true, as contended by plaintiff's counsel, that, within certain limi-
(575) tations, this class of testimony is competent to show both the condition of the track and knowledge of defendant. The general principle controlling its competency is well settled; the difficulty in applying it arises from the varied forms in which it is presented. The question to be decided, when this class of testimony is offered, is whether it is relevant—that is, whether it reasonably tends to prove the fact in issue, is so related to it as to form a reasonably safe basis for a conclusion in regard to the fact in issue.

We had occasion, recently, in *Johnson v. R. R.*, 140 N. C., 581, to consider the principle and the authorities bearing upon it. The difficulty with which the plaintiff is confronted is the absence of like or

similar conditions existing on the occasions upon which he sought to show that other cars ran off and those at the time when the plaintiff was injured. It is suggested that the same car ran off the track on the two occasions. The witnesses say that they do not know whether at such times there was any depression in the track. Without repeating what we have said, in *Johnson's case, supra,* we think that his Honor's ruling was in accordance with that decision and the authorities cited. The testimony offered was calculated to introduce collateral matter not so related to the fact in issue as to aid the jury in passing upon it. The vital question here was whether the condition of the track, at the time of the derailment, was defective. This was a matter of observation. If it had been shown that the condition at or near the time it was alleged other cars ran off was the same as at the time the plaintiff was injured, and that the cars and appliances and the mode of operation on both occasions were approximately of the same character and in the same condition, the proposed testimony would have been competent, because common experience teaches that similar conditions usually pro- duce similar results. It is not necessary to show that they always (576) do, but for practical purposes it is sufficient that they "most usually do." *S. v. Brantly,* 84 N. C., 766. It seems, however, that plaintiff, by another witness, was permitted to show that other cars ran off the track at the place of the derailment.

Plaintiff requested the court to instruct the jury: "That if they find as a fact, from the evidence, that the plaintiff got aboard defendant's car and paid his transportation therefor, then he was a passenger on same; and if they further find as a fact, from the evidence, that the said car on which he was riding ran off the track and plaintiff was injured thereby, as alleged in the complaint, and that said derailment was the proximate cause of the injury, then the law presumes that the defendant was negligent in allowing said car to become derailed, and the burden is upon it to satisfy the jury that said derailment was not caused by its negligence; and unless it has so satisfied the jury they should answer the first issue 'Yes.'" His Honor declined to give the instruction. Plaintiff excepted. The defendant requested the following instruction: "That while proof or admission of the derailment of the car raised what the law terms a presumption that such derailment was the result of the defendant's negligence, and casts upon it the burden of disproving negligence, yet the court charges you that, notwithstanding the fact that the car was derailed, if you shall find by the greater weight of the evidence that the track at the place of derailment was in good condition, the car properly equipped and in good repair, and being carefully run at a proper rate of speed, then the court instructs you that the defendant was not guilty of negligence, and you will answer the first

issue 'No.'" His Honor gave all of this prayer except the following words, to wit: "and casts upon it the burden of disproving negli-
(577) gence, yet the court charges you that, notwithstanding the fact that the car was derailed."

In his general charge to the jury, his Honor, among other things, said: "If you believe the evidence in this case, that there was a derailment of the defendant's car at the time of the injury complained of, and if there was a derailment, there would arise from this fact alone a presumption of negligence upon the part of the defendant, and this presumption of negligence, if not rebutted, is evidence of negligence for consideration of the jury, and if it satisfies you that the defendant was negligent and that this negligence was the real and proximate cause of the injury, then it would be the duty of the jury to answer the first issue 'Yes.' This presumption of negligence may be rebutted by showing that the track of the defendant company was in a reasonably safe condition; that the car was equipped in a reasonably safe manner, and that it was being operated in a reasonably prudent way; and, if rebutted, then the presumption of negligence arising from the derailment is no longer evidence of negligence."

There is no substantial difference between counsel as to where the burden of proof lies when it is shown, or admitted, that a railroad train has been derailed, and that the same rule applies when the action is against a street surface railway company. This Court has uniformly held, and in that respect it is in harmony with other courts and approved text-writers, that a derailment of a railway train raises a presumption or makes a *prima facie* case of negligence—that is, a presumption that there is a defective construction or condition of the car, or the track, or the mode of operation. *Marcom v. R. R.*, 126 N. C., 200; *Wright v. R. R.*, 127 N. C., 229; *Stewart v. R. R.*, 137 N. C., 687; *s. c.*, 141 N. C., 266; *Haynes v. R. R.*, 143 N. C., 154. This may be regarded as settled.

Did his Honor so instruct the jury? In the defendant's prayer,
(578) which was given, he expressly told the jury that proof or admission of the derailment of the car raises what the law terms a presumption that such derailment was the result of defendant's negligence. It is true that he omitted the words "and casts the burden of disproving negligence," etc., but we do not perceive how this affected the force of the affirmative declaration just made, especially in view of the instruction given in the charge. His Honor in the general charge repeated that the fact of the derailment raised a presumption of negligence, and, "if not rebutted, is evidence of negligence," etc., with the further instruction, that if they were satisfied that defendant was negligent, and that this negligence was the proximate cause of the injury, they would answer the first issue "Yes." He then instructed them in what manner

the defendant might rebut the presumption. It is possible that some confusion has arisen by not keeping clearly in view the distinction between the "burden of proof" and "burden of the issue." *Meredith v. R. R.*, 137 N. C., 478; *Stewart v. Carpet Co.*, 138 N. C., 60; *Ross v. Cotton Mills*, 140 N. C., 115. In some cases the term *res ipsa loquitur* has been used as synonymous with *prima facie* case, as in *Ellis v. R. R.*, 24 N. C., 138, wherein *Judge Gaston* says: "Where the plaintiff shows damage resulting from defendant's act, which act with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence." *Wright v. R. R., supra.* It is sometimes spoken of as evidence raising a presumption. *Womble v. Grocery Co.*, 135 N. C., 474; *S. v. Barrett*, 138 N. C., 630.

The principle underlying all of these exceptions is based upon general experience and observation, which teaches in this class of cases that ordinarily, when a railway track is properly constructed and in proper condition, the car and motive power in like condition, and oper- (579) ated by competent persons in a proper manner, it does not, without some disturbing agency, become derailed. It is the duty of the railway company to provide for these conditions. Therefore, when a derailment occurs, the law, based upon experience, declares, in the absence of any explanatory cause, that all of these conditions did not exist; that some one or more of them were absent, and that such absence is a breach of duty on the part of the defendant company. But the same experience teaches that human foresight and care have not been able as yet to remove the affairs of men from the domain of what we call, for want of a more accurate term, unavoidable accident, which is defined to be "an event from an unknown cause or an unusual and unexpected event from a known cause, chance, or casualty." As, if a railroad bed be in good order and the engine and cars be in good order, and the engineer and other attendants be skillful and careful, and yet a rail breaks, the train is crushed, and the employees and passengers are killed, that is an unusual and unexpected event from a known cause—an accident. *Reade, J.*, in *Crutchfield v. R. R.*, 76 N. C., 320; *Carter v. Lumber Co.*, 129 N. C., 203; *Raiford v. R. R.*, 130 N. C., 597. This risk, which excludes all ideas of negligence, every one must assume in every relation in life; every contract is made, every right acquired, and every duty assumed with this law of life understood and discounted. It would be impossible to maintain and carry on the affairs of civilized life without a recognition of this truth.

When a common carrier undertakes to carry passengers, the law imposes upon it the duty of exercising the highest practicable degree of care, to provide safe modes of transportation and to keep them in good and safe condition. When an injury is sustained by a passenger by

(580) reason of collision, derailment, or other miscarriage of the car, the carrier is required to show, either from the testimony of the plaintiff and his witnesses or by the introduction of affirmative evidence, that it has discharged this duty. In the absence of either, the jury should find that the conditions producing the injury were caused by negligence of the carrier. When it has done so, the derailment or other condition is necessarily attributed to an accident. Hence it is that the presumption or *prima facie* case established by proof or admission of the derailment is always open to be explained—to be rebutted—that is, that notwithstanding the presumption raised upon the fact of derailment, in truth there was no defect in the car, track or operation; that the derailment was the result of some independent cause, or what is called an accident; and, at this point, legal and moral liability ceases. Professor Thayer says: "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. When the term is legitimately applied, it designates a rule or a proposition which still leaves open to further inquiry the matter thus assumed. The exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate the duty of going forward in argument or evidence on the particular point to which they relate." Treatise on Ev., p. 314. Greenleaf says: "They depend upon their own natural force and efficiency in generating belief or conviction in the mind," etc. Greenleaf Ev., sec. 44. Elliott says that they impose upon the party against whom they are invoked the duty "to go forward with his proof." *Stewart v. Carpet Co.,* 138
(581) N. C., 60; *Ross v. Cotton Mills,* 140 N. C., 116. They are more useful in the trial of causes to aid the court in prescribing the manner of developing the several phases of a controversy than to the jury in reaching a correct conclusion. Their efficiency "in generating belief" in any given case depends so much upon the facts in the particular case that the weight and effect to be given them by the jury should be explained with care by the court. By way of illustration: The possession of stolen property soon after the larceny raises a presumption against the person in whose possession it is found.

So many conditions are found to exist in any given case affecting the strength or weakness of the presumption that it is found to be of little aid to the jury in reaching a verdict—the length of time elapsing after the larceny, the conduct, character, etc., of the person in whose possession the stolen property is found, the kind of property, the place at

which it is found, and the manner in which it is used or kept, and innumerable other conditions occurring to the mind, which may and usually do exist.

Again, when it is shown that A. killed B. with a deadly weapon, the presumption of malice arises. This is elementary. Yet it is manifest that in almost every case surrounding circumstances so modify, strengthen, or weaken the presumption that it is of little value in fixing the degree of guilt. Courts frequently use language calculated to make the impression on the minds of jurors that, unless the defendant introduces evidence, they are compelled by reason of the presumption to find a verdict against him, although, from the plaintiff's evidence and the physical or other conditions surrounding the case, they believe the contrary to be the truth.

The purpose of all rules of evidence is to ascertain the truth, and to this end it is said they are based upon experience rather than logic. It is never intended that the jury shall, except when controlled by an irrebuttable presumption, find a verdict contrary to the truth by invoking a presumption, when there is evidence from which the truth may be ascertained. (582)

In *Coffin v. United States,* 156 U. S., 432 (459), *Mr. Justice White* said that a presumption is "an instrument of proof created by the law," and Greenleaf says it is "evidence, the benefit of which the party is entitled to." Greenleaf Ev., sec. 34. The subject is discussed at length by Elliott and by Wigmore. All of the writers on the law of evidence concede that the subject is involved in "much confusion." In *Coffin's case, supra, Mr. Justice White,* adopting the view of Greenleaf, held that the presumption, raised by the law, based upon experience, in that case, of innocence, was "evidence created by the law," and not a mere rule for regulating the burden of proof. His reasoning and conclusion are said by Professor Thayer to be "very questionable" (Ev., 315), saying: "Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both. . . . Presumptions, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument." In his lecture before the Law School of Yale University (Ev., App. B) he reviews the entire field historically and critically, concluding that:

"1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.

"2. It serves, therefore, the purpose of a *prima facie* case; and in that sense it is, temporarily, the substitute or equivalent of evidence.

"3. It serves the purpose until the adversary has gone forward with his evidence. . . .

"4. A mere presumption involves no rule as to the weight of evidence necessary to meet it. . . .

(583) "5. A presumption itself contributes no evidence and has no probative quality. . . . A presumption may be called an 'instrument of proof' in the sense that it determines from whom evidence shall come, and it may be called something in the nature of evidence for the same reason."

His Honor, we think, adopted this line of thought in his instructions. After telling the jury that the fact alone of a derailment raised a presumption of negligence, he said that if not rebutted "it was evidence of negligence," thus carrying the plaintiff's case to the jury, imposing upon the defendant the duty of persuading the jury, from the evidence introduced by the plaintiff or by going forward with affirmative evidence, that in truth there was no negligence. Thus, the plaintiff was given the benefit of the presumption in favor of his allegation. He further says: "If satisfied that there was negligence and that such negligence was the proximate cause of the injury, the plaintiff was entitled to the verdict." In this way he clearly kept in view the distinction between the "burden of proof," which he placed upon the defendant, and the burden of the issue, which the plaintiff carries throughout the trial. In putting the presumption into the jury box as evidence he followed the opinion of *Judge White,* but from Professor Thayer's point of view he gave the plaintiff more than he was entitled to. He then proceeds to explain to the jury what facts, if proved, would rebut the presumption of negligence, and says to them that if so rebutted the presumption is no longer evidence.

It will be observed that he does not tell the jury that in this event they should answer the issue "No." That would have been to withdraw the case from the jury. He proceeds to instruct them in regard to those matters in respect to which there was affirmative evidence of negligence, which he does with his usual clearness and accuracy.

(584) The danger of leaving the minds of the jury in confusion by a general reference to the terms *"prima facie* case" and "presumption" is strikingly illustrated in the report of *Queen v. O'Doherty,* 6 St. Trials, N. S., 831. The defendant was charged with feloniously compassing to dethrone the Queen by publishing certain alleged treasonable articles. The statute made the fact that he was proprietor of the paper *prima facie* evidence of knowledge that the articles were in it. The judge so instructed the jury. After considering the case for some time they returned, asking for further instructions, when the foreman said that some of the jurors did not know the meaning of *"prima facie"* and wished to know whether the judge meant to say that *prima facie* evidence was sufficient to warrant the jury in convicting; that some of the

jury thought that, there being *prima facie* evidence of guilt, they should "at once go and find him guilty." In response, *Pennyfather, B.,* said: "I did not mean to direct you or to tell you that, in point of law, because he was the publisher and proprietor of the paper, he therefore necessarily knew the contents. I did not mean to tell you that, but I told you that it was evidence that he did know the contents, and that you were to form your verdict upon the whole of the case." He further said, in conclusion: "I before said I would not offer one word of comment upon the weight of that evidence, nor will I do so now." This, we think, was in substance what his Honor told the jury. The same charge given in *S. v. Barrett, supra,* was approved.

The plaintiff produced no evidence of any defect in the car or the method of its operation. There was direct evidence tending to show a slight "dip" in the track near the place of the derailment. There was evidence that the car was running at a higher speed than the ordinance prescribed; on the contrary, there was evidence that it was not running so fast as allowed by the ordinance. His Honor gave the (585) instruction requested by the plaintiff in this respect.

There was evidence on the part of the defendant that the car and the track were inspected a short time before and after the derailment, and found in good condition. He instructed the jury as requested by the plaintiff in regard to the duty of the defendant to so lay out, construct, and equip its track that its cars would keep on the track, and to exercise the highest degree of care and skill consistent with the practical operation of the road and the dangerous method of power employed, and that if there was a "dip" or sunken place in the track where the derailment occurred, and if such condition was the cause of the derailment, they should answer the issue "Yes."

He further instructed the jury, at the defendant's request: "Notwithstanding the fact that the car was derailed, yet if the jury shall find by a greater weight of the evidence that such derailment was the result of a mere accident or the motion of the car, ordinarily incident to cars while running at a lawful rate of speed, then the defendant would not be guilty of negligence, and the jury will answer the issue 'No.'" The plaintiff excepted. This instruction puts upon the defendant the burden of showing that the derailment was accidental. The exception cannot be sustained.

He also instructed the jury that the measure of duty imposed upon the defendant was the exercise of such care and skill in the operation of its cars as an ordinarily prudent person would have exercised under like circumstances. He had already instructed them that the defendant was required to exercise the highest degree of care—that is, such degree of care as is exercised by the ordinarily prudent person under like

circumstances. In the general instructions he carefully and fully sets forth the contentions of the parties, calling attention to the testimony relied upon to sustain each contention, and explained the law ap-
(586) plicable to the several phases of the controversy. A large number of the exceptions are directed to instructions given and refused upon the issue in regard to contributory negligence. While not necessary to the disposition of the appeal, we have examined these instructions upon the suggestion that some of them bore upon the first issue.

We note that a number of instructions asked include hypotheses involving both negligence and contributory negligence, concluding with a direction to the jury to answer the first issue "Yes" and the second issue "No." While this may be, and probably is, the logical method of dealing with the propositions involved in almost every case of negligence, and when, as in *Scott v. R. R.*, 96 N. C., 428, the whole controversy is tried upon one issue, the most satisfactory way to present the question, yet, in view of the statute requiring the defense of contributory negligence to be specially pleaded, and putting the burden of the issue upon the defendant, the instructions should be directed to each issue separately. To undertake the mingling of the two in one instruction is confusing, and certainly the whole question is sufficiently confused now. The efforts of courts to deal with it satisfactorily have been far from successful.

The case appears to have been thoroughly developed and every phase of it considered. There was ample evidence to sustain the verdict. We find in the entire record

No error.

*Cited: Furniture Co. v. Express Co., post,* 644; *Winslow v. Hardwood Co.*, 147 N. C., 277, 279; *Briggs v. Traction Co., ib.*, 392; *Cox v. R. R.*, 149 N. C., 119; *Wright v. R. R.*, 151 N. C., 536; *Houston v. Traction Co.*, 155 N. C., 8; *S. v. Wilkerson*, 164 N. C., 437; *Davis v. R. R.*, 170 N. C., 595.

(587)

W. A. FINCANNON ET AL. V. E. SUDDERTH AND WIFE.

(Filed 14 May, 1907.)

**1. Action, Trespass Quare Clausum Fregit—Pleadings—Boundaries.**

In the trial of an action for trespass *quare clausum fregit*, if the plaintiff sets out in his complaint the deed under which he claims title, containing a description of the *locus in quo*, he will not, without amendment, be permitted to claim some other description not included in his deed. An adverse finding by the jury of the issue directed to his controverted allegation defeats his action.

**2. Same—Evidence—Cotemporaneous Survey.**

In the trial of an action involving a disputed boundary, it is competent to show by a surveyor that, for the purpose of fixing the land conveyed, and at the time of making the deed, an actual survey was had in the presence of the purchaser, the corners marked and the lines run. The party claiming under such deed shall hold according to such survey, notwithstanding a mistaken description in the deed. (Affirming *Cherry v. Slade*, 7 N. C., 82; *Elliott v. Jefferson*, 133 N. C., 207.)

**3. Same—Color of Title—Adverse Possession.**

A party cannot acquire title by an ouster followed by seven years possession under color of title, unless the description in the deed or paper-writing under which he claims covers the *locus in quo*.

**4. Same—Pleadings—Issues—Practice—Judgment.**

Under the Code of Civil Procedure a party may join in his complaint a cause of action for trespass with one to settle a disputed boundary, but he should state the two causes of action separately, to the end that appropriate issues may be submitted and judgment entered upon the verdict.

ACTION, tried before *Cooke, J.*, and a jury, at December Term, 1906, of BURKE.

Plaintiffs sue for a trespass upon the land described in the complaint. They allege that they are the owners of a tract of land situate in Burke County, conveyed by B. A. Berry to their father, Isaac Fincannon, 31 March, 1876: "Beginning on a rock near a small branch 22 poles north of the railroad, the same being the corner of a tract of land (588) owned by the heirs of S. A. Sudderth, deceased, or the heirs of John Sudderth, deceased, and known as the Johnson tract, and runs west with the line of the Sudderth tract 228 poles to a stake in the old Jonathan Duckworth line, then south," etc., making a parallelogram containing 90 acres. They allege that they and their ancestor have been in the possession of the land more than twenty years, and that defendants trespassed upon it and cut and carried away valuable timber. Defendants own the Sudderth-Johnson land, lying adjacent to and north of the Fincannon land. The strip of land in controversy lies between the line shown on the map (140 N. C., 247), beginning at a post-oak, "L," and running east along a marked line to stake "K," and the line beginning at a rock, "E," and running west to a stake, "G." The plaintiffs insist that the original southern line of the Sudderth-Johnson tract runs from the post-oak east to a stake. An issue was submitted to the jury directed to that contention and found against plaintiffs. The defendants contended that, at the time of and cotemporaneous with the deed from Berry to Fincannon, a line was run, by direction of Berry and assented to by Fincannon, fixing the beginning of the tract to be conveyed at the rock and running west to the Duckworth line at "G." To meet this contention, his Honor submitted the following issue: "At the

time of the execution of the deed by Berry to Isaac Fincannon, and just before and cotemporaneous therewith, and for this purpose, did the parties to the said deed, by consent, adopt the rock claimed by defendants as the corner of the land surveyed, and did they then survey the line from the said rock west, along the line of marked trees, 228 poles, to a stake in the old Jonathan Duckworth line, indicated by the red line on the map, and did they, by consent, adopt the said line as the true line of the Fincannon tract and as the true line of the Sudderth-John-
(589) son tract?" He instructed them upon said issue: "Upon the third issue the court instructs the jury that the burden is upon the defendants, and before you can answer either one of these issues 'Yes' you must be satisfied that the parties to the deed by consent adopted the rock as the corner, and that they had the line running west from said rock surveyed 228 poles to a stake in the Duckworth line, and that they found on said line marked trees, and found pointers when the line reached the Duckworth line, and that by consent they adopted this line as the true line, and this was cotemporaneous with and for the purpose of executing the deed, then they should answer that issue 'Yes'; if they shall not so find, they should answer the issue 'No.'" They responded to the issue, "Yes." An issue was submitted, directed to the question of plaintiffs' alleged possession up to the line beginning at the post-oak for twenty-one years (evidently intended to be twenty), which was answered "No."

The fifth issue, "Are the plaintiffs the owners and entitled to the possession of the land between the red and black lines?"—being the land in controversy—may by consent be answered by his Honor as a conclusion of law arising upon the answer by the jury to the other issues. The jury found that no trespass had been committed on the land "as alleged in the complaint." The plaintiffs claimed title as the heirs of Isaac Fincannon, whose death, intestate, was shown. They also put in evidence two deeds executed by him: (1) To W. A. Fincannon, dated 21 April, 1887, containing the following calls: Beginning at a white-oak, and running north 70 poles, crossing the railroad to a stake in Berry's line; thence west with Berry's line, 120 poles, to a stake at his corner; thence south 70 poles and east 120 poles, crossing the railroad, to the beginning, containing 52 acres. The white-oak called for as the beginning is located south of the point marked (Spring) on the map,
(590) thus forming a parallelogram of 120 by 70 poles. The Berry line called for is the same as the Sudderth line referred to in the other deeds. (2) Deed of same date to D. C. Fincannon. (3) Deed of same date to T. A. Fincannon. It is not necessary to set out the boundaries in these deeds.

The plaintiffs asked a number of special instructions, excepted to the refusal to give several of them, and to the instructions given. His Honor, upon the verdict of the jury upon the other issues, answered the fifth issue "No," to which plaintiffs duly excepted. From a judgment on the verdict plaintiffs appealed.

*John T. Perkins and J. M. Mull for plaintiffs.*
*Avery & Erwin and S. J. Erwin for defendants.*

CONNOR, J., after stating the case: This cause was before us at the Fall Term of 1905 (140 N. C., 246) upon an appeal from a judgment of nonsuit. The nonsuit was taken upon an intimation of his Honor that he would charge the jury as set out in that appeal. The evidence sent up was indefinite and fragmentary. We were of the opinion that, in the then condition of the record, the merits of the case had not been disposed of, and directed a new trial. At the trial before Judge Cooke, specific issues were submitted, and the finding of the jury upon them settles the controversy adversely to plaintiffs' contention. If, as found by the jury, the Sudderth line was not from the post-oak, east to the stake, the plaintiffs' contention that the "Sudderth-Johnson line controls the call in the deed from Berry to Isaac Fincannon" fails.

The principle for which plaintiffs contend, that a call for a natural object, or a well settled, fixed line, will control course and distance, does not avail them, because the jury find that the line to which they contend the call carries them is not fixed. How can they go to the Sudderth-Johnson (same as the Berry) line, disregarding the call (591) for the rock, when they fail to establish such line? In this condition of the record we must seek some other source to aid us in fixing the line. The plaintiffs failing to establish the Sudderth (or Berry) line, would be unable to locate their land unless they can resort to some other source or call in their deed. We are thus compelled to adopt the rock as the beginning point and run the line called for to the next station—the Duckworth line—discarding the reference to the Sudderth line. In addition to this conclusion from the finding upon the first issue, and pointing to the rock, the jury find that, at the time of and cotemporaneous with the execution of the deed from Berry to Isaac Fincannon, a survey was made with a view to the execution of the deed in which the rock was made the beginning point, and the calls were therefrom. In the first trial, the notes of Mr. Huffman's testimony were very meager and indefinite. In this record it is set out in full. He says that he surveyed the land, at the request of Berry, some thirty years ago, and not long before the deed was made to Fincannon. Berry was there; Fincannon was not—he was blind. "I began 22 poles north from the railroad track, at a rock near a branch—same one that is there now.

I would judge the rock to weigh at least 100 pounds. It is 2 feet out of the ground. It was evidently set up there. . . . I think there was one pointer—a pine—there. I did not know of any reputation as to that rock being a corner before I surveyed the tract, but since then I know the reputation that it is a corner of the Johnson and Sudderth lines. Mr. B. A. Berry, now deceased, pointed out this rock to me as a corner of the Sudderth, or Johnson, tract. That was more than thirty-one years ago, when Berry owned the land in controversy, but before he acquired the Johnson-Sudderth tract." He further said that
(592) he ran from the rock west to the Duckworth land; that he ran the calls as they appear in the deed from Berry to Fincannon. The first call was a well-marked line, and at the end found some pointers, marks about the age of those on line; they were between forty and sixty years old. He did not put the rock there; does not know who did; he did not mark any line—the marks were already there. There was evidence tending to show that the rock was put there in 1858 or 1859. Denton swore that he ran the line from the rock some fifteen years ago. Berry was present—no one else. This evidence, if accepted by the jury, was sufficient to sustain defendants' contention in regard to the third issue, and fixed the location of the land conveyed by Berry to Isaac Fincannon, under which plaintiffs claim, from the rock west to the Duckworth land. This testimony brings the case clearly within the rule laid down in *Elliott v. Jefferson,* 133 N. C., 207.

The plaintiffs except to the admission of the declarations of Berry. The exceptions cannot be sustained. Without regard to the true location of the Johnson-Sudderth line, it was clearly competent for Berry to make a new line from the rock west to the Duckworth land for the purpose of conveying to Fincannon, and this the jury find he did, and Fincannon accepted the deed made in accordance with the boundaries so established. It may be that they supposed that the rock was in the Sudderth line; and if that line was fixed and there was no controlling evidence to the contrary, it would, as we said in the first appeal, control; but, as the case is now presented, the jury have found that the Johnson-Sudderth line is not located according to plaintiffs' contention—is not located at all; hence, the rock, the fixed point, must control. This being so, unless there is error in the admission of testimony or his Honor's instructions, the plaintiffs necessarily fail to make out their case. It becomes a question of boundary, dependent upon the location of the beginning point.

(593) We have carefully examined plaintiffs' prayers for instructions together with the instructions given. Many propositions of law included in the special instructions are correct, but not applicable to the issues. His Honor stated the real questions involved in the third

issue, which was conclusive of the controversy, clearly, and instructed the jury correctly. There was evidence tending to show that the post-oak was the original corner of the Sudderth land; there was also evidence to the contrary, and the jury were the sole judges of its weight. It seems that the finding of either issue against the plaintiffs was fatal to their case. There was no exception to the issues submitted. It would seem that, in view of the complaint, no question of title acquired by an ouster, ripening by possession, could arise. It is not necessary, however, to consider this phase of the case because of the verdict on the fourth issue. The exceptions to his Honor's instructions upon that issue cannot be sustained. He may well have instructed them as a matter of law that there was no such *possessio pedis* shown as was necessary to base a claim to title without color. Plaintiffs requested his Honor to instruct the jury that, if they found that W. A. Fincannon had been in the adverse possession of the *locus in quo* for seven years under color of title, they should answer the fifth issue "Yes." This view is based upon the contention that the deed from Isaac Fincannon to W. A. Fincannon of 21 April, 1887, covers the *locus in quo*. It will be noted that this deed does not call for the rock, but, beginning at a white-oak on the southern line of the Isaac Fincannon tract, calls for a line north 70 poles, crossing the railroad to a stake in Berry's line; then west with Berry's line 120 poles to a stake, his corner. The plaintiff W. A. Fincannon says that, eliminating all questions arising from the other deeds, this call carries him to the Berry (formerly Sudderth- (594) Johnson) line. He says that, having shown possession up to Berry's line by an ouster, under color, such possession, at the end of seven years, ripened into a perfect title. He is confronted with the difficulty in making this contention, that he has not been able to locate, according to his claim, the Berry line, for which his deed calls. The jury finds that it runs from the rock west; hence his call would be color only to that line, and any possession beyond would be without color and could ripen only after twenty years of *possessio pedis*, and this the jury find that he had not had. Besides, no issue presenting the theory upon which this instruction is based was asked or submitted. If he had made a general allegation of title, as pointed out in *Mobley v. Griffin*, 104 N. C., 112, he could have maintained his right to recover by showing title out of the State and seven years adverse possession under color. He elected, however, to set out his title, and the issues submitted were in accordance with his allegation. Besides, the record shows that it was agreed that all questions of fact were to be settled by the verdict upon the issues, and that the question of title was to be adjudged by the court as a matter of law. There was, therefore, no phase of the pleadings, or issues, presenting the principle involved in the prayer.

We do not perceive how, in the light of the evidence, and the verdict upon the issues, his Honor could have given the instruction. We have examined the record with care, and find no error. The case has been tried upon its merits, and the jury have found against the plaintiffs' contention. We notice that the action is for tresspass, although the plaintiffs ask that they be declared the owners of the land described in the complaint "to the said post-oak, and the line running east from the same." This prayer enlarges the scope of the action from one simply to recover damages for entering upon the close and invading the
(595) possession into an action to settle a disputed boundary and adjudge title. There is no objection to this being done, under our system of pleading, in one action, provided it is clearly understood. The old action of *trespass quare clausum fregit,* being confined to an injury to the possesssion, unless the title was put in issue and settled, did not operate as an estoppel. The civil action, by which all rights are enforced and wrongs remedied, avoids many of the technical difficulties surrounding the old forms of action. While the advantages of the reformed procedure are manifest, the necessity for so drawing pleadings that parties may know exactly what is included in the issue and settled by the judgment is equally clear. Nothing herein said shall be construed to operate as an estoppel against the plaintiff's claiming title to any land of which he, or those under whom he claims, has been in the adverse possession for more than twenty years.

The judgment must be

Affirmed.

*Cited: Allison v. Kenion,* 163 N. C., 585.

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GEORGE A. STOCKTON v. WOLVERINE GOLD MINING COMPANY.

(Filed 14 May, 1907.)

**1. Judgment—Default—Set Aside—Appeal—Excusable Neglect.**

Under Revisal, sec. 513, when the judge below has found there was excusable neglect on the part of the defendant's counsel in not filing an answer within the prescribed time, and has set aside a judgment by default and inquiry, an appeal therefrom presents only the question whether the neglect was excusable.

**2. Same—Grounds of Excuse—Foreign Counsel.**

An order of the court below, setting aside a judgment by default and inquiry, will be reversed on appeal by the Supreme Court when it appears that the delay in filing answer was occasioned by the "system" of the defendant in employing foreign counsel to draft the answer, when such could have been left to local counsel in attendance upon the court.

**3. Same—Findings Below—Meritorious Defense.**

In setting aside a judgment by default and inquiry for excusable neglect, it is necessary that the judge below should find that the defendant has *prima facie* a meritorious defense.

**4. Same—Admits Cause of Action Only—Measure of Damages—Burden of Proof.**

A judgment by default and inquiry admits only a cause of action and carries nominal damages and costs, leaving the burden of proof upon plaintiff to show further damages.

BROWN, J., concurring in result.

MOTION in the cause to set aside a judgment by default and in- (596) quiry, heard by *Guion, J.*, at February Term, 1907, of RUTHERFORD. Motion granted, and plaintiff appealed. The facts sufficiently appear in the opinion.

*R. S. Eaves for plaintiff.*
*Gallert & Carson for defendant.*

CLARK, C. J. Appeal from an order setting aside a judgment by default and inquiry for excusable neglect, under Revisal, sec. 513 (Code, 274). Upon the facts found, which finding is conclusive on us, the judge decides whether, as a matter of law, there was or was not excusable neglect. From this conclusion of law an appeal lies. *Norton v. McLaurin,* 125 N. C., 185; *Pepper v. Clegg,* 132 N. C., 313.

Under The Code, 274, if the judge correctly adjudged that there was excusable neglect, then whether he should set aside the judgment rested in his unreviewable discretion. *Morris v. Insurance Co.,* 131 N. C., 213, and cases cited. In Revisal, sec. 513, the word "shall" is substituted for "may in his discretion," which was used in Code, 274. Whether this does not take away the discretion of the judge, when he has correctly adjudged that there was excusable neglect upon the facts found, is not now before us, as the judge, having found there was excusable neglect, set aside the judgment, and the plaintiff's appeal pre- (597) sents only the question whether the neglect was excusable.

It is found by the judge that summons issued 4 August, 1906, and that at August term an alias issued, which was returned, duly served, at October term, when, by consent, time was allowed to file complaint and answer. Complaint was filed in December. In the latter part of that month a bar meeting was held to set a calendar for February term. Plaintiff's counsel notified defendant's counsel that the complaint was on file, and asked to set this case for trial, but, on the latter's objection that the answer was not in, plaintiff's counsel requested that the answer should be filed as soon as possible, and defendant's counsel assured him that this would be done. A few days later plaintiff's counsel again called

the matter to the attention of defendant's counsel, and received the same assurance. The defendant was a mining company, operating in Rutherford County, in this State, but chartered in the District of Columbia, and with its principal office in Alpena, Michigan. The defendant's counsel in this State were not intrusted with the duty of filing the answer, and they sent a copy of the complaint to the defendant's general counsel in Alpena, in December, to prepare and forward answer. This was not done, and at February term the plaintiff moved for and obtained judgment by default and inquiry, the complaint being unverified and the demand being for unliquidated damages. The defendant had two local counsel; one of them, being a member of the General Assembly, then in session, was present only three days of that term of court, but the other was present the whole term, and, indeed, in court when the judgment by default was asked for and rendered. It does not appear whether he asked the judge then to extend time to file answer, under Revisal, sec. 512, but if he did, the court thought the mo-
(598) tion should be denied, as he gave judgment by default and inquiry.

It is clear that there was no neglect of any kind on the part of either of the counsel in this State. But there was the grossest neglect, either on the part of the defendant itself, whether it was in North Carolina, District of Columbia, or Michigan, or on the part of its general counsel in Alpena, Michigan, to whom it saw fit to intrust the filing of its answer, instead of to its capable and reliable counsel in this State. We had occasion to condemn this "leisurely, kid-glove, and *dilettante* style of attending to legal proceedings at long range." *Manning v. R. R.*, 122 N. C., 831. We there repeated (p. 828), citing several previous authorities, that the party to an action must "not only pay proper attention to the cause himself, but he must employ counsel who ordinarily practice in the court where the case is pending, or who are entitled to practice in said court, and engage to go thither," and, *ibid.*, on page 829, said: "If the defendant's 'system' of procuring counsel does not enable it to file its answers in the time required of other defendants, it must change its methods to conform to the requirements of the law instead of asking that the courts give it special privileges."

The defendant was operating a mine in Rutherford County. It had an agent there, who committed the act which is the subject of this action. It was served with summons. It employed counsel there fully competent to file the answer and to represent it in every respect before the court. It was notified on 29 December that the answer must be filed. It chose to intrust the duty of preparing the answer to counsel in Michigan, who are not authorized to practice in our courts. But, even then, though not entitled to any delay on account of its remarkable

method of doing legal business "at long range," there were five or six weeks, after notice that an answer was required, before judgment by default and inquiry was taken. The copy of complaint was (599) sent to Alpena in December, as the judge finds, that the answer should be drawn and sent here. If the defendant had been entitled to more time to file answer than other defendants, it takes a letter only two days or less to go to Michigan. The defendant had about forty days to act in, and besides, could have wired or written its counsel here to fine answer even after the February term had begun. Such negligence is not excusable, but inexcusable. If the answer had been filed, trial could have been had at February term. The answer not being on file, the plaintiff was entitled to a judgment by default and inquiry (unless the court had then extended time to file answer, Revisal, sec. 512), that he might have a trial thereon at April term, which his Honor erred in not giving him.

It was also erroneous to set aside the judgment for excusable neglect, in that the judge did not find that the defendant had a meritorious defense. *LeDuc v. Slocomb,* 124 N. C., 351; *Mauney v. Gidney,* 88 N. C., 200. "Under the former system a court of law could not set aside its regular judgment at a subsequent term." *Jarman v. Saunders,* 64 N. C., 370. The remedy was by a bill in equity, which must show, among other things, at least a *prima facie* meritorious defense. This the judge should still find, that the court may not do a vain thing.

The cause of action set out in the complaint is for sale of $2,250 of defendant's stock to plaintiff upon alleged fraudulent representations and an alleged "salting" of its dump with ores from another and better mine, which were shown as samples to plaintiff to induce him to buy the stock. The judgment by default does not establish such allegations of the complaint, which must still be proven, but merely the fact that the plaintiff has a cause of action. "A judgment by default final admits the allegations of the complaint, but a judgment by default (600) and inquiry admits only a cause of action and carries only nominal damages and costs," the burden of proving his right to recover any further judgment being still upon the plaintiff. *Osborn v. Leach,* 133 N. C., 432, citing our own cases and 2 Black on Judgments, sec. 698. As the case goes back for trial, it may be well to call attention to this. The order setting aside the judgment is

Reversed.

BROWN, J., concurs in result.

*Cited: Creed v. Marshall,* 160 N. C., 398; *Pritchard v. R. R.,* 166 N. C., 539; *Pierce v. Eller,* 167 N. C., 675; *Allen v. McPherson,* 168 N. C., 438; *Estes v. Rash,* 170 N. C., 342.

J. LILLY JONES v. J. S. LAYNE.

(Filed 14 May, 1907.)

**Husband and Wife—Domicile of Wife—Year's Support—Where Laid Off.**

The year's provision to the widow was unknown to the common law. The intent of the statute is to provide for her and her young children in preference to taxes and debts, and the fiction of the husband's personal property belonging to his domicile applies only in the distribution of assets. Under Revisal, sec. 3098, upon failure of the personal representative to act, and on application to a justice of the peace, the year's support should be laid off to the widow, a *bona fide* resident, from a fund in this State due her husband, who died domiciled in another State, where letters of administration had been granted.

WALKER, J., dissenting.

ACTION tried before *Ward, J.*, and a jury, at August Term, 1906, of SURRY. At the conclusion of the evidence the court sustained a motion as of nonsuit. Plaintiff appealed.

*J. M. Bodenheimer for plaintiff.*
*No counsel contra.*

(601) CLARK, C. J. The plaintiff and her husband lived in this State at the time of their marriage. They removed to Kentucky. After a while they separated, she returning to this State, her husband going on to the State of Washington, where he died. There being no administration here, upon her application to a justice of the peace, under Revisal, sec. 3098, year's provision was laid off to her to the amount of a fund or debt due her husband ($51.42) by the defendant. This action to recover said amount of the defendant, by virtue of the allotment, was begun before a justice of the peace.

Year's provision was unknown to common law, and is intended by our statute as an emergency provision for the widow and young children who might otherwise suffer or be liable to be thrown upon the county for support. It is to be taken out of the personal property in priority not only to debts of the deceased, but in preference to costs of administration. It is to be promptly allotted, by the personal representative, if there is one, but if there is not, or if he fails or delays to allot, the widow can apply to a justice of the peace. Revisal, sec. 3098.

Dower is allotted under the law obtaining here, though the husband may be domiciled elsewhere. As to the personalty of the deceased, it may be controlled by the statute here if the Legislature so direct, but in the absence of such legislative direction, by comity it will be paid over by the personal representative to the personal representative in the State

of domicile, first subject, however, to payment of debts due here and the legacies. In a remarkable and able discussion, *Judge Pearson,* in *Alvany v. Powell,* 55 N. C., says (p. 53): "After devoting to the question much consideration, we are satisfied that the true principle, both in regard to personal and real estate, is the *situs* of the property, and that the principle by which a distinction is made between personal and real estate, so that in regard to the former a construction depending upon the domicile of the owner is adopted, is based upon a fiction which (602) has no application to 'questions of finance'"—holding, therefore, that our inheritance tax applies—and adds: "The construction which adopts the *situs* of the property is first suggested to the mind and is yielded to at once, because it is based upon a fact; the property is here, it is protected, and passes by force of our laws. The construction which adopts the domicile does not suggest itself, and the mind will not entertain it except after a long argumentation and much ingenious and refined reasoning, because it is based upon a fiction. This makes it necessary to inquire to what extent the original object for adopting the fiction will justify its being carried." And, on page 55, that learned judge further says: "The principle of domicile, which is based on the fiction that personal property attends the person, and is to be considered as being where the owner has his domicile, is adopted by the comity of nations *in reference to the distribution of the personal estate* of deceased persons; but it has no application where the rights of creditors are concerned. Story Confl. Laws, 354; *Moye v. May,* 43 N. C., 131. It has no application to the property of living persons." This has been cited and affirmed. *Redmond v. Commissioners,* 87 N. C., 124; *Jones v. Gerock,* 59 N. C., 193; *Stamps v. Moore,* 47 N. C., 82, and in other cases.

From the above very clear summary it will be seen that the fiction of personal property being considered as belonging to the domicile of the owner applies only to the *distribution of the assets* of one deceased. It has no application to payment of debts, legacies, costs of administration, nor inheritance taxes or death dues. For a stronger reason the fiction cannot apply where the wife is residing here at the death of her husband as against the year's provision, which is a humane provision to keep her and children from suffering and from being a county charge. The law sets it apart for that purpose in priority to debts, legacies, taxes and charges of administration, against none of which does the (603) fiction of the law of domicile prevail.

The subject has been before the courts of this country in only five cases. In *Medley v. Dunlap,* 90 N. C., 527, and *Simpson v. Cureton,* 97 N. C., 112, in both of which the wife was residing with her husband in the State of his domicile at his death. In the latter case the Court,

indeed, says: "This section has reference to a proceeding instituted by a resident widow." The reason for this provision of our law, therefore, did not apply, though the statute says "every widow" (Rev., sec. 3091), and it was properly held that she could not get the benefit of it by subsequently removing here. There were also the same facts in *Mitchell v. Wood,* 64 Ga., 220, though there the minority of the Court was of opinion that the widow could have her year's provision, notwithstanding she did not remove to the State till after her husband's death. In *Gilman v. Gilman,* 53 Mo., 184, the Court simply held that, the husband having died domiciled in that State, it had jurisdiction to determine the allowance to be made to the widow under their statute, and fixed the allowance at $85,000. Evidently this is not authority upon the principle of which our law allots a year's provision. In *Shannon v. White,* 109 Mass., 146, the testator died in Massachusetts, but stated in his will that he was domiciled in Indiana, where his will was probated. His divorced wife, residing in Indiana, for whom his will made no provision, applied for an allowance under the Massachusetts statute, "not to exceed her share of the estate," and it was held that, assuming she was the testator's widow, her rights in the estate must be adjudicated in Indiana.

It will thus be seen that there is no decision to the contrary of the views we have expressed. The fiction that the law of the domi-
(604) cile governs as to personalty applies only to the *distribution* of the surplus, and does not obtain as against debts, legacies, charges of administration and taxes, and hence cannot prevail against the year's provision, which is superior to all these, when the wife is actually and *bona fide* residing here with her children at the time of her husband's death. The technical rule that her husband's domicile is her domicile is well settled, but the fiction of domicile does not, as we have seen, control as to realty, nor even as to personalty, except in the distribution of the surplus. The year's provision is not in the nature of such distribution, but a humane provision of urgency, taking precedence of all other claims against the estate. From its very nature and purpose, it has nothing to do with the husband's domicile, but is for the support of the wife and children if residing here at his death.

Dower is allotted to the widow according to the law here, and not according to the law of the husband's domicile. There is no reason why the year's provision should not also be allotted to the widow as allowed by our statute, if she is actually and *bona fide* resident here. The statute (Rev., sec. 3091) gives the year's support to "every widow of an intestate," or who has dissented from her husband's will. That would clearly include this plaintiff. If by judicial construction some widow must be excluded, certainly, in view of the evident purpose of the law, such construction should exclude the nonresident and not the *resident*

widow. Usually the husband also resides here, but words used in the statute bearing reference to that fact cannot be justly construed as having any relation to the technical doctrine of domicile. It would be a denial of the intent of the statute to send this widow and her two children, resident here, across the continent to obtain this $51.42, which they instantly need, because of the lore in the books, correct technically, but untrue here as a fact, that the wife resides where her husband does.

In nonsuiting the plaintiff there was error.

Reversed. (605)

WALKER, J., dissenting: The plaintiff and L. L. Jones were married in this State and lived here after their marriage for seven years, when they went to Kentucky. The plaintiff and her husband parted there. She returned to this State and he went to the State of Washington, where he was domiciled at the time of his death, she being resident here at the same time. No reason for the separation is stated. The plaintiff has been allotted her year's provision, under our statute and not according to her deceased husband's domicile. If she was entitled to have it allotted under our statute and not according to the law of the State which was her husband's domicile at the time of his death, then she must succeed in this suit; but if the law is otherwise, she must fail.

The domicile of the wife, instantly upon the marriage, merges in that of her husband and continues to follow it through all its changes so long as the marriage relation subsists, although she may not accompany him to his new place of abode. Tiffany Persons and Dom. Rel., p. 53. She cannot acquire a domicile for herself as distinct from that of her husband, and even after his death she retains the domicile of her husband until she establishes one of her own. A woman, when she marries a man, does, in the most emphatic manner, elect to make his home her home. Jacob's Law of Domicile, sec. 209: "So that the domicile which a wife receives upon marriage usually is, in a certain sense, a domicile of choice, although not technically so. As regards subsequent changes, however, her will is subordinate to that of her husband, and, within reasonable limits, he is allowed to select for himself and his wife such domicile as his interests, his tastes, his convenience, or, possibly, under certain circumstances, even his caprice may suggest. And, (606) whatever may be the ground of the rule, the presumption of law that husband and wife dwell together is so strong that proof to the contrary, either of fact or of intention, will not be admitted in any but a few exceptional cases." *Ibid.* Several reasons have been assigned for this rule of the law: (1) The theoretical identity of husband and wife. (2) The subjection of the latter to the former. (3) The duty of the

wife to make her home with her husband. *Ibid.* Whatever the true rule may be, the rule itself is well settled, and it has not been changed by our present Constitution and marriage laws, for husband and wife still, in contemplation of the law, remain one. *S. v. Robinson,* 143 N. C., 620. She has certain property rights, it is true, but the oneness of the two, in their marriage relation, still continues, and, as will appear hereafter, she derives all her right to participate in her husband's personal property from the law of his domicile, though adopted and enforced by us as our law. The administration of the husband's local personal assets will always be carried on under the supervision and control of the court of the *situs;* but when all the expenses of the ancillary administration and debts due creditors there are paid, the surplus will either be remitted to the place of the decedent's domicile or distributed by the court of the *situs* in accordance with the law of that domicile, as the special facts of the case may require. Jacobs on Domicile, sec. 45. The only exception to this rule is probably in the case of taxes collectible under the laws of other States than those of the domicile, operating upon movables found within their territorial limits. *Ibid.,* sec 42.

It is singular that we should take different views as to what was decided in the leading case of *Alvany v. Powell,* 55 N. C., 51, but it so happens that we do, as I think the clear and vigorous opinion of *Judge Pearson* demonstrates that the principles already stated by me (607) are applicable here. See how lucidly he states the doctrine:

"After the debts are paid, in the disposition of the surplus, our courts, from comity, adopt and act upon the laws of the country of the domicile as our law in reference to the particular case, so as to hold those entitled who would be entitled according to the law of the country of the domicile; but all this is very far from reaching the proposition that the property is not administered under the authority of our courts and by our law. It is clear that the authority to act, the letters testamentary or of administration by which the property is collected and reduced into possession, must be granted by our courts. It is also clear that the debts must be paid according to the priority established by the general law, and that, in regard to the rights of creditors, we refuse to adopt, as a special law for the particular case, the law of the country of the domicile; and it is also clear that in the payment of legacies and the disposition of the surplus our courts consider those entitled who are so according to the law of the country of the domicile. If one dies intestate, under the belief that his property will belong to certain of his kindred, because such is the law of his country, it would be hard to disappoint his expectations by enforcing the general law of the country where the property happens to be, instead of adopting for his special case the law of his country. The administrator here proceeds, in the manner as if the domi-

cile was here, to administer the assets by paying debts and disposing of the residue. With respect to debts he is governed by the general law; in disposing of the residue he is to pay it to the person entitled, and the only difference is that, in ascertaining who are entitled, he is governed, not by the general law, but by a special law, which holds those persons to be entitled who would be entitled according to the laws of the country of the domicile, if the property was situate there."

Some confusion has resulted from the fact that our courts ad- (608) minister the laws of another country or State, which is a novelty in the science of jurisprudence; but *Judge Pearson* says, in the case cited, that, nevertheless, the principle that in particular cases our courts will adopt and act upon, as our law, the law of another jurisdiction, is a familiar one and is well settled, according to the comity of nations, "in reference to the 'disposition' of the property of deceased persons who have a foreign domicile." *Ibid.,* 58. So that the case of *Alvany v. Powell* is authority for the position that, without regard to the residence of the particular claimant of a deceased person's property, the domicile of the latter determines what law is applicable in the "disposition," in any way, of his estate. I am not speaking of real, but of personal property, and as to the latter, when debts, costs, and taxes are paid, no part of the estate can be applied, in any form, to legacies, distributive shares, or year's support, but according to the domiciliary law. The exceptions we have stated rest upon peculiar grounds of their own. *Judge Pearson,* in *Alvany v. Powell, supra,* expressly says that the law of domicile applies to legacies and to the disposition of all the surplus of the estate after paying debts and taxes. Creditors must be paid, he says, as they have a *legal* right not dependent upon the will of the decedent or upon any mere statutory requirement. Their rights are superior to legatees, distributees, etc. The latter have no "legal" claim. Taxes must be paid, as the sovereign occupies the position of a creditor and is entitled to priority and special consideration. Minor Conflict of Laws, sec. 81, p. 176, states the law with clearness: "Marital rights in the personalty of the consort, if regarded as mutual transfers of interests in the property, are transfers by operation of law, not by the voluntary act of the parties, and, like other transfers by act of the law, such as the succession to a decedent's personalty, are to be controlled by the law of the legal *situs* of the owner, not by the law of his actual *situs,* nor by (609) the law of the actual *situs* of the property. The law of the domicile will govern the marital rights of the parties in personal property, not only because of the general principle just pointed out, but also because these rights are incidents of the marriage status, and governed, therefore, by the same law that regulates that status in other respects. And it should be particularly observed that the domicile whose law gov-

erns in these matters (supposing the married pair to have changed their domicile several times) is that domicile possessed by them at the time the particular marital right in question became vested. A mere contingency cannot be said to be either a transfer or an incident of the status. Hence, as to rights acquired by either in the personalty of the consort upon his or her death, as distributee or otherwise, the law of their domicile at the time of the death will control, not that of the domicile at the time of the acquisition of the property, nor that of the place where the death took place. Such rights do not vest until the death occurs. Indeed, this is merely one instance of the rule that the law of the last domicile of a decedent controls the succession to his personal property." And Dr. Wharton, in his Conflict of Laws (3 Ed.), p. 414, sec. 193, says: "When, however, the personal estate of either husband or wife is to be distributed upon intestacy, the intestate laws of the place of the last domicile must prevail. The right of either widow or of surviving husband is governed, as to personalty, by the law of such last domicile of the deceased. Where this law gives certain exemptions, in case of insolvency, to the widow, she is entitled to enjoy such, though she has never herself resided in the State." See, also, sec. 192a; Dicey on Domicile (1896), p. 655, Rule 173.

Every section of our law relating to the widow's year's support, and the allotment thereof, shows a clear and unmistakable intention
(610) to confine the provision only to widows whose husbands are domiciled here. For example, Revisal, sec. 3091: "Every widow of an intestate, *or of a testator from whose will she has dissented,* shall be entitled to a year's allowance." Revisal, sec. 3093: "The family of the deceased (for the purpose of allotting a year's allowance) shall be deemed to be, besides the widow, every child of the deceased or of the widow who was residing with the deceased at his death." Revisal, sec. 3095: "Such allowance shall be assigned from the crop, stock, and provisions of the deceased in his possession at the time of his death." Revisal, sec. 3097: "The value of the stock, etc., allowed shall be ascertained by a justice and two persons qualified to act as jurors of the county in which administration is granted or will is proved." These provisions unquestionably show that the Legislature was referring to the widow of an intestate or testator who resided and was domiciled in this State at the time of his death. The allowance extends to the widow and to every child who resided with the deceased at the time of his death. If the claimant comes here after his death, it is admitted, in the Court's opinion, that he or she cannot have a year's allowance allotted, and it is also expressly so decided in two cases I will cite hereafter. Revisal, sec. 3093, therefore, necessarily refers to children who lived with the intestate or testator in this State at the time of his death. Referring to sec-

tion 3095 of the Revisal, is it at all likely that an intestate residing and domiciled beyond the limits of this State would have his crop, stock, and provisions here? I hardly think so, and yet we must so conclude if the construction of the statute by the Court is the correct one. But section 3098 of the Revisal places the meaning beyond any doubt: "Upon application of the widow, the personal representative of the deceased shall apply to a justice of the peace of the township *in which the deceased resided,* or some adjoining township, to summon two persons as jurors, who shall, with him, ascertain the number of the family (611) of the deceased, according to the definition given in this chapter, and examine his stock, crop, and provisions on hand." There is a proviso to the section, to the effect that if the personal effects of the deceased husband shall have been removed from the township or county in which "he resided before his death," the widow may apply to a justice of the township or county to which they have been removed. There are other provisions indicating the clear intention that the law should apply only to the widows and children of deceased persons who resided in this State at their death, or had their domicile here, but section 3098 of the Revisal so conclusively shows this to have been the intention, by its very language expressly confining the law to such widows, that it is useless to comment further upon the statute.

The question, however, has been set at rest by positive decisions of this Court, giving this construction to the statute. "The Code, sec. 2116" (Rev., sec. 3091), says this Court, in *Medley v. Dunlap,* 90 N. C., 527, "does not apply to or embrace widows of deceased husbands citizens of other States. If the Legislature has power to do so in any case, it has not seen fit to make temporary provision for such widows and their families out of assets, in this State, of deceased husbands. The purpose of the statute is to make temporary provision for the widow and such members of her family as cannot take care of themselves, immediately after the death of the husband, a citizen of this State, and until some regular provision can be made for their support according to the conditions and circumstances of the estate, and as may be allowed by law. It is very clear that the plaintiff is not entitled to a year's support, as she claims, under the laws of this State, and the judgment must be reversed, and judgment entered here for the defendant." The Court further says: "Such property is treated in the course of administra- (612) tion, with the exception mentioned above (payment of debts and taxes), as if it were in the State where the owner thereof lived at the time of his death," citing *Alvany v. Powell,* 55 N. C., 51; *Jones v. Gerock,* 59 N. C., 190; *Moye v. May,* 43 N. C., 131.

The decision of this Court is put solely upon the ground stated in the passage I have taken therefrom, and the fact of the widow's residence,

before or after her husband's death, had nothing to do with it, nor did the Court attach any importance to it as affecting the question one way or another. In the nature of the principle involved, it could not have done so. The Court referred to the fact that the widow came to the State, after her husband's death, incidentally and for the purpose of emphasizing the other fact that the only test for determining her right was her husband's domicile, and that her residence at any time was irrelevant to the question. That decision was affirmed later on in *Simpson v. Cureton,* 97 N. C., 112, in which *Chief Justice Smith* says: "In our opinion there is error in the ruling, and this allotment and appropriation of the assets of the estate are unauthorized and void, and afford no defense to the action. In *Medley v. Dunlap,* 90 N. C., 527, it is declared that section 2116 of The Code does not 'embrace widows of deceased husbands citizens of other States,' and that a subsequent removal to this State does not change her relations toward the estate, since they are fixed, and her rights to share therein are determined at the intestate's death, *and by the law of his domicile.* If provision is made by the law of South Carolina for the temporary relief of decedent's family, and there is no personal property, or not sufficient to meet the requirements, it may be that such laws would be given effect upon the principle of comity, as in the distribution among those entitled under such laws." That case is directly in point and is, in my judg-
(613) ment, utterly in conflict with the ruling now about to be made.

If the law is adjudged to be as stated in the opinion of the Court in this case, the two cases of *Medley v. Dunlap* and *Simpson v. Cureton* are overruled as effectually as if it had been done by explicit words. I think they should stand as containing a correct exposition of the law and one that is in harmony with a well-settled doctrine of general application, which will itself be shaken, if not overthrown, by a contrary decision, as proposed in this case. The idea of the domicile, as controlling the rights of the wife in her husband's estate after his death, permeates our statute and seems to have been embodied in its every line. To argue that the widow is entitled to a year's provision because by our statute it has a preference in the distribution of the estate is to beg the question, for it assumes that our statute applies, which is the very proposition to be established. It is what the logicians call a *petitio principii,* and is reasoning in a circle.

There is clearly no analogy between dower and year's provision. Dower is allotted according to our laws, because it is assigned from the realty, which is always governed by the *lex rei sitæ* or the law of the place where the property is situated. The law is otherwise as to personal property. It is extremely dangerous to change the law—even the "lore in the books"—by judicial legislation to meet the supposed hardship of

an individual case. We have often been told that what we may consider as hard cases may become the quicksands of the law. A serious mistake may be made in a case involving only $42 as well as in one involving many thousands. It is not a question of amount, but of principle. A much larger amount may be involved in some future litigation than in this suit.

My personal sympathy is entirely and unreservedly with the widow, who is the plaintiff in this case; but the law is not. I am compelled to follow the established principle, not only because it is (614) well established, but because, also, it is right, and has come to us through many centuries with the strong and unqualified approval of the greatest sages of the law. A new precedent, which virtually destroys a principle so ancient, and so essential to be preserved unimpaired, must sooner or later produce uncertainty and confusion and finally lead to a long train of evil consequences. "We cannot be wiser than the law," and especially that law which has been accepted almost universally as based upon the best of reasons and sanctioned by the highest wisdom and the most enlightened public policy. The Legislature may change this principle, if it will, but it has not done so, and this fact but confirms my belief that it was intended that it should remain as a part of our common law, as it still is the elementary law of other States and countries.

My conclusion is that, if the plaintiff is entitled to a year's allowance at all, it must be allowed to her according to the law of her husband's domicile, not only by the general law, but by the express words of the statute.

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J. B. WINDERS ET AL. v. E. J. HILL ET AL.

(Filed 22 May, 1907.)

1. **Pleadings—Statute of Frauds.**

When the plaintiff sues upon contract, and the defendants deny the existence of any contract, the defendants can avail themselves of the plea of the statute of frauds, when pertinent, without specially pleading it.

2. **Same—Written Contracts—Evidence.**

If the statute of frauds requires that the contract sued on be in writing, it must be established in evidence by the contract itself.

3. **Same—Admissions.**

As to whether an admission in writing of a contract sued on required by the statute to be in writing, containing all the requisites of the statute for a valid contract or memorandum thereof, would be competent evidence, discussed: *Quære.*

(615) ACTION, tried before *Jones, J.*, and a jury, at November Term, 1906, of DUPLIN.

*Rountree & Carr and George E. Butler for plaintiffs.*
*Stevens, Beasley & Weeks and Fuller & Fuller for defendants.*

WALKER, J. This case was before us at a former term and was heard and decided upon a demurrer to the complaint. It is reported in 141 N. C., 694. We then held that, upon the facts as stated in the original complaint and admitted by the demurrer, there was some evidence of ratification by the defendant E. J. Hill, the principal of L. F. Hall, if the latter had exceeded his authority in selling the land on credit instead of for cash. The Court further held that another party was interested with the plaintiff Winders in the prosecution of the action, as appeared by the complaint, and directed that he should be brought in by process and made a coplaintiff. This was done, and the original complaint was superseded by an amended complaint for the purpose of declaring also in behalf of the new plaintiff, W. I. Hill, and of making material allegations of fact not found in the first pleading. The defendant answered, denying the contract which the plaintiff alleged had been made by L. F. Hall, as agent for the defendant E. J. Hill, and also averring that, if any such contract had been made, his agent, Hall, had exceeded his authority in executing it, and also denying the allegation of the complaint that, if there had been any such excess of authority, the defendant E. J. Hill waived or ratified the unauthorized act of his agent, Hall, by his own conduct; and, if not in that way, then by and through the acts and conduct of his lawfully authorized agent, I. F. Hill.

There were many other averments of fact in the pleading upon
(616) which issue was taken, but it is not deemed necessary to set them out, as our decision of the case, as at present constituted, must rest upon a single point to which they are not considered relevant. Omitting, for the present, all reference to the matter of ratification, we will confine ourselves to a statement of such facts as have any bearing upon the decisive question in the case, but we may premise that the evidence adduced at the last trial does not correspond with the allegations as made in the original complaint. There are striking and essential differences between them. Both parties introduced evidence upon the issues joined between them, viz.: First, as to the execution of the contract of sale by the agent, Hall; second, as to whether he had exceeded his authority in making the same; and, third, as to whether, if he had done so, his unauthorized act had been ratified. At the close of the testimony the defendant moved to dismiss the action under the provision of the statute. Revisal, sec. 539. It seems that after this motion was

made the defendants' counsel suggested, as one ground of the motion, that the plaintiffs had not put in evidence any written contract between L. F. Hall, agent of E. J. Hill, and the plaintiff Winders and his associates, nor any memorandum thereof signed by the defendant E. J. Hill or his said agent. The plaintiffs' counsel thereupon asked permission of the court to introduce the memorandum of a contract between Hall, as agent, of the first part, and Winders and others, of the second part, which is in the form of a receipt and dated 29 July, 1905, and is fully set out in the statement of the case on the former appeal. This the court refused to grant, and the case was heard without the receipt. The court sustained the motion to dismiss, and the plaintiffs excepted and appealed.

The defendants having taken issue with the plaintiffs as to the existence of any contract between Hall, Hill's agent, and Winders, by denying the allegation to that effect in the complaint, they could (617) avail themselves of the statute of frauds without specially pleading it, for it has been settled by numerous adjudications that if the contract is denied, or a contract different from that alleged is set up, or if the contract is admitted and the statute of frauds is specially relied on by plea, or now by answer, parol evidence of the contract is incompetent. As the contract cannot be proved, it cannot be enforced. *Holler v. Richards,* 102 N. C., 545; *Jordan v. Furnace Co.,* 126 N. C., 143; *Hall v. Lewis,* 118 N. C., 509; *Browning v. Berry,* 107 N. C., 231; *Morrison v. Baker,* 81 N. C., 76; *Bonham v. Craig,* 80 N. C., 224; *Thigpen v. Staton,* 104 N. C., 40. Where the plaintiff sues upon a contract, the performance of which he seeks to enforce specifically in equity, or for the breach of which he seeks to recover damages at law, he must establish the contract by legal evidence, and if it is required by the statute to be in writing, then by the writing itself, for that is the only admissible proof. *Fortescue v. Crawford,* 105 N. C., 29; *Gulley v. Macy,* 84 N. C., 434; *Wade v. New Bern,* 77 N. C., 460; *Jordan v. Furnace Co., supra.*

The court was right in sustaining the motion to nonsuit, because no evidence of the contract had been introduced, unless there was proof of it or something in the case which dispensed with such proof. 26 Cyc., 316 and 320; *Bambrick v. Bambrick,* 157 Mo., 423. The plaintiff contends that the contract was admitted in certain correspondence between Hall and the defendant E. J. Hill, between the latter and his agent, I. F. Hill, and in a conversation between I. F. Hill and J. B. Winders; but we have discovered no such admission, even assuming, though not deciding, that in law it would have been sufficient to take the place of the writing itself. The following authorities hold that an admission in a letter, telegram, or other writing by the person to be charged, to his agent or to a third person, is a sufficient memorandum (618)

if it otherwise complies with the statute, and those who desire to pursue the subject may, perhaps, profitably consider them: 20 Cyc., 255, and note 73; *Welford v. Beasley,* 3 Atk., 503; *Coles v. Treothick,* 9 Ves., 235; *Allen v. Bennett,* 3 Taunton, 169; *Gibson v. Holland,* L. R. 1, C. P. 1; *Cook v. Burr,* 44 N. Y., 156; *Peabody v. Sayers,* 56 N. Y., 230; *Moore v. Montcastle,* 61 Mo., 424; *Warfield v. Cranberry Co.,* 63 Iowa, 312; *Miller v. R. R.,* 58 Kans., 189; *Moss v. Atkinson,* 44 Cal., 3. There are authorities to the contrary. The written admission, though, however made, must contain internal evidence of the contract or refer to some writing that does. *Provision Co. v. Sauer,* 69 Miss., 235; *Ballengill v. Bradley,* 16 Ill., 373; *Johnston v. Churchills,* Litt. Selected Cases (Ky.), 177; 20 Cyc., 320.

The postscript to the letter of Hall, addressed to E. J. Hill, stating that he had given the purchasers a receipt and that he desired a receipt from E. J. Hill to show that he had paid to him the money thus received from them, is not such an admission (*Fortescue v. Crawford,* 105 N. C., 32), and the other parts of the correspondence are of no greater import. They do not tend to prove that E. J. Hill, by himself or his agent, ever admitted the existence of a writing or memorandum signed by Hall and showing a contract of sale between him and Winders, and this must be the scope of the admission, as the mere admission of a contract, if there is such, does not go to the extent of proving a compliance with the statute, or of showing the substance of the contract which it is alleged was reduced to writing and properly signed. It is not merely a contract that must be admitted, but the written contract, there being no sufficient admission of the same to be found in the pleadings, so as to render proof of the contract unnecessary. Any admission of the contract outside of the pleadings should, of course, be in writing and so made as to comply with the statute of frauds, or it should (619) at least sufficiently refer to some writing in which the terms are set out and which itself contains all the requisites of a valid contract or memorandum under the statute. It is not pretended that there was any written admission of the contract by E. J. Hill to Winders, and the language of I. F. Hill, his agent, to the latter in their conversation is certainly not susceptible of any interpretation which goes to show the contents of any written contract of sale made by Hall. Besides, it appears that what E. J. Hill wrote to I. F. Hill was based entirely upon statements of Hall to him, the truth of which he could not then deny, as he did not know the real facts, and he should not, therefore, be concluded by them; and, too, his letter of 7 August, 1905, had evidently not been received by I. F. Hill when the latter had the conversation with Winders at Warsaw. The telegram which I. F. Hill received from E. J. Hill on 29 July, 1905, merely stated that the latter

had sold the lands. None of this evidence comes up to the requirement of the law that there must be proof showing a memorandum in writing, signed by the party to be charged, or by his duly authorized agent. There is no reference to the memorandum or the terms of the agreement as expressed therein. *Shoe Co. v. Brooks,* 64 Pac. Rep., 342; *Givens v. Calder,* 2 Am. Dec., 690. It may be that, as contended by counsel, the plaintiffs should have been permitted to introduce the memorandum in evidence, but we cannot review the ruling of the judge in refusing their application, no such case having been made by the proof as calls for our interposition in behalf of the plaintiffs for the purpose of corrrecting a gross abuse of discretion.

Our conclusion upon the single question we have discussed eliminates all other matters so ably debated by counsel. We find no error in the decision and judgment of the court.

No error.

*Cited: Miller v. Monazite Co.,* 152 N. C., 609; *Henry v. Hilliard,* 155 N. C., 379.

(620)

## DUCKWORTH AND NORWOOD v. DUCKWORTH ET AL.

(Filed 22 May, 1907.)

**1. Partition—Statute of Limitations—Account—Appeal.**

No order of reference to take and state an account should be made in partition proceedings when there is a plea in bar of account which goes to the entire demand, until the plea has first been considered and determined; an appeal by the defendants from such order is proper when, under plaintiffs' petition for the sale of lands alleged to be held in common, he avers sole ownership and pleads the statute of limitations.

**2. Statute of Limitations—Pleadings—Sufficiency.**

The statute of limitations is sufficiently pleaded for title under adverse possession if it appears by plain and reasonable intendment that defendants assert as a fact that they had adverse possession of the lands for twenty consecutive years.

PETITION for sale of lands for division, transferred from Superior Court clerk and heard before *Cooke, J.,* at April Term, 1907, of TRANSYLVANIA.

Defendants excepted to an order by which the cause was referred for the purpose of stating an account of the estate of William Duckworth, under whom the parties claimed, in order to ascertain whether any of the claimants had been fully advanced, and appealed.

*Merrimon & Merrimon, G. A. Shuford, Shepherd & Shepherd, and Davidson, Bourne & Parker for defendants.*

*No counsel contra.*

HOKE, J. The plaintiffs file their petition for sale of the lands described therein, claiming that plaintiffs and defendants are tenants in common and own the said lands as heirs at law of William Duckworth, deceased, and as assignees of such heirs at law.

Defendants answer and deny that plaintiffs and defendants are tenants in common, because, as the said answer avers, "The plaintiffs have received their full share of the estate of William Duckworth in
(621) real property in the town of Brevard, N. C., and which was received prior to the death of William Duckworth, and defendants aver that they are sole owners of all the lands," etc. And defendants answer further, and say: "The defendants, for a further defense, plead the statute of limitations of twenty years adverse possession under known and visible lines and boundaries in such cases provided, as a bar to plaintiffs' recovery."

It has been established with us that no order of reference to take and state an account should be made when there is a plea in bar of account which goes to the entire demand until said plea has been first considered and determined. And it is further held that when such an order has been improperly made, the litigant who is prejudiced may at once appeal. *Jones v. Wooten,* 137 N. C., 421.

In the case before us the first plea of sole seizin would not be in bar of an account, because by its very terms it is placed on a ground that makes an accounting necessary; but the second plea, that of sole seizin by reason of twenty years adverse possession, does raise such an issue, and no order for an accounting should have been made until the same had been determined.

The appeal itself and the exception noted in the record sufficiently raise the question of the validity of the order, and no statement of the case on appeal was required. *R. R. v. Stewart,* 132 N. C., 248.

It is urged that the statute has not been sufficiently pleaded and that the allegation of the defendants addressed to that question should be ignored. But we do not take that view of the defendants' plea. While it is not very full and precise, "nor to be commended as a model," as said in one of the decisions on the subject, we think it appears, by plain and reasonable intendment, that defendants assert, and intended to assert as a fact, that defendants had held adverse possession of the lands in question for twenty consecutive years, under known and visible lines
(622) and boundaries; and that, under the authorities, the statute should

be held as sufficiently pleaded. *Threadgill v. Commissioners,* 116 N. C., 616; *Grady v. Wilson,* 115 N. C., 345; *Pemberton v. Simmons,* 100 N. C., 316.

The order of reference will be set aside and the trial proceeded with in accordance with this opinion.

Reversed.

*Cited: Alley v. Rogers,* 170 N. C., 539.

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THORNTON v. McNEELY.

(Filed 22 May, 1907.)

**Referee's Report—Confirmation—Evidence.**

When there is competent evidence to sustain the findings of fact by the referee, and his report is confirmed by the judge below, it will not be disturbed.

*P. J. Sinclair for plaintiff.*

*J. W. Pless for defendant.*

PER CURIAM. This is an action of trespass, which seems to have been tried, without final result, several times in the Superior Court of McDOWELL County. It was finall tried and determined upon a consent reference by Clyde R. Hoey, Esq., and comes to this Court upon exceptions to the judgment of his Honor, *Judge Guion,* confirming the report of the referee. The matters involved are largely questions of locating boundaries and are principally questions of fact. His Honor, after consideration, has adopted the findings of fact of the referee, and, while the evidence appears to be conflicting, there is evidence to support such findings, which are therefore binding upon us. In his conclusion of law, based on such findings, we are unable to discover any error, and therefore the judgment is

Affirmed.

*Cited: Bailey v. Hopkins,* 152 N. C., 750; *Thompson v. Smith,* 160 N. C., 259; *McCullers v. Cheatham,* 163 N. C., 63.

(623)

J. A. CATHCART AND WIFE *v.* LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 22 May, 1907.)

**Insurance—Contract—Fraud—Waiver.**

In an action upon a policy of life insurance alleged to have been induced by the false representations of the defendant's agent, the plaintiff by his conduct may waive the right to rely upon such representations. The plaintiff appearing to be an intelligent person, it was error in the court below to refuse to charge the jury upon defendant's request: "The plaintiff admits that at the time he received the policy he could have read it; that nothing was done by any agent of the company to keep him from reading it; that he put the policy away, and several years thereafter he heard a general rumor that the company would not live up to the statements made by the agents; that he then read the policy, or such portions thereof as he saw proper; and the court instructs the jury that, this being the evidence of the plaintiff himself, you will, on the whole evidence," find for the defendant.

ACTION, tried before *W. R. Allen, J.*, and a jury, at January Term, 1907, of MECKLENBURG. From a judgment for plaintiffs, defendant appealed. Pertinent facts stated in the opinion of the Court.

*Stewart & McRae and C. D. Bennett for plaintiffs.*

*W. B. Rodman, Winston & Bryant, and Morrison & Whitlock for defendant.*

CLARK, C. J. The plaintiffs, husband and wife, allege that they were induced to take out these policies of insurance upon their own lives and the lives of their children, relying upon the representation of the agents of the companies that the policies should contain a provision that at the end of ten years the beneficiaries thereunder would be paid the face value of the policies, as in case of death, or the amount of premiums paid, with 4 per cent interest. The defendant denied that any such representations were made.

(624) The husband testified to the above representations, and that, four or five years after he had taken out the policies, hearing doubt as to this being the meaning of his policy, he got it, read part of it, and could have read it all, and continued to make payments five or six years longer, until it matured. He then demanded his money back, with interest, which the company refused to pay; and he brought this suit.

The *feme* plaintiff testified substantially to the same representations. All the agents named by the plaintiffs as having made these representations testified that they did not make them. The *feme* plaintiff testified that she read the policies, saw exactly what they said, and she paid the premiums after reading them; that one of the defendant's agents told

her she would not get the face value of the policy if living at the end of ten years, but she thought he was joking. Another agent told her to read the policy, which she did, and reread it.

The defendant asked the court to charge the jury: "The plaintiff admits that at the time he received the policy he could have read it; that nothing was done by any agent of the company to keep him from reading it; that he put the policy away, and several years thereafter he heard general talk among the people that the company would not live up to statements made by the agents, and that he then took his policy and read it, or read such part of it as he saw proper, and the court instructs the jury that, this being the evidence of the plaintiff himself, you will, on the whole evidence, answer the sixteenth issue 'Yes.'" This issue was as to whether the plaintiff had waived the right to rely upon the alleged false representations, if made, and it was error to refuse the prayer, for the plaintiff testified that after reading the policy he continued to pay the premiums. This was an acquiescence in the terms and conditions of the policy. The *feme* plaintiff was even more explicit—that she read the policies again and again, and she and her husband thereafter continued to pay the premiums on all the policies which they had taken out for themselves and their children. The (625) evidence is that the plaintiffs were intelligent persons.

This case is not like *Caldwell v. Insurance Co.*, 140 N. C., 100, for there the plaintiff was an illiterate old colored woman, who could not read the policy, but relied on the statement of the agent. Furthermore, when she became alarmed, the defendant's agent lulled her into security and induced her to continue to pay the premiums. There was nothing of that in this case; on the contrary, the agents told the plaintiffs to read their policies, which they were well able to do, and did.

Nor is this like *Gwaltney v. Insurance Co.*, 132 N. C., 925. There the policy was handed the insured by the general agent of the company, who had authority to waive any provision in the policy, and the application was for "a level-rate policy." The company issued a policy which increased the premiums with age. The insured was put off his guard by the agent handing him the policy on the street, with expressions which naturally led him to believe the policy conformed to the terms of his application. This was held to excuse the assured from any waiver of the fraud in not reading the policy. This case is rather like *Floars v. Insurance Co., ante,* 232, where it was held that a failure to read the policy or examine it for three months is a waiver of any right to reform the policy on the ground of mistake.

Error.

*Cited: Sikes v. Insurance Co., post,* 629; *Clements v. Insurance Co.,* 155 N. C., 61; *Wilson v. Insurance Co., ib.,* 176.

(626)

J. M. SIKES AND WIFE v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 22 May, 1907.)

**Insurance—Contract—Demurrer—Evidence—Waiver.**

In an action to recover premiums paid upon an accepted written policy of life insurance induced by the fraudulent oral representations of defendant's agent, the plaintiffs, nearly illiterate, do not waive their rights by such acceptance, or by payment of premiums, having read the policy without understanding it, and subsequent to its acceptance having been assured by the agent that the policy was such as he had represented it to be.

ACTION tried before *Ward, J.*, and a jury, at March Term, 1907, of MECKLENBURG. Upon the close of plaintiffs' evidence, his Honor directed a verdict as of nonsuit, and the plaintiff appealed. The pertinent facts are set out in the opinion of the Court.

*Stewart & McRae and C. D. Bennett for plaintiffs.*

*W. B. Rodman, Winston & Bryant, and Morrison & Whitlock for defendant.*

CLARK, C. J. The plaintiffs, husband and wife, alleged that they took out the policies on their own lives and lives of their children on false representations of the agent; that at the end of ten years they would get back all they had paid in, with 4 per cent interest. The plaintiff J. M. Sikes testified that the defendant's agent came to his house and asked him to take out insurance. He refused; but same agent came the second and third time and talked a good deal; that he, the plaintiff, signed no application; that the agent told him that if he died at the end of six months, if he kept up the policies, the plaintiff would get one-third; at the end of twelve months he would get the full face of the policies, that is, what they called for; the agent told him that it was a good thing, and the plaintiff here says immediately after he told him
(627) that he got to studying about it; the agent told him that it was the same as a savings bank; that if he died the money would be paid, and if he did not die he would get the money; that he would get the money either way, and at the end of ten years he would get the money back that he paid in, with interest at 4 per cent. The plaintiff says he asked him how he could do it; the agent answered that so many stayed in five, eight, or nine years and then dropped out, and he further said that they had a surplus to pay to the ones that stayed in ten years, and the plaintiff says he took out the policy on that ground. He so told the plaintiff that two or three different times; that all of these conversations were at his home; that there was no one present but his

wife. The agent said that he would do the same thing with reference to his wife's policy; that if she kept it up ten years she would get what she paid in and interest on it; and also with reference to the policy on the life of his son.

Plaintiff says that his wife paid the premiums on these policies out of his money; perhaps some of it was her own. Plaintiff says that about five weeks after he took out the policies the same agent delivered it to him, and at that time the agent said the policies were all right and the plaintiff would get the money he paid in, if he kept it up ten years, with 4 per cent interest. He had never taken out any insurance before, and did not have much education; never went to school much.

The plaintiff said he reckoned it was about thirty days before he looked over the policies; just looked at them to see; that he could not understand anything; that in consequence of what he saw he laid them down, and after that had a conversation with the agent about the policies and told him he could not understand it, and that the agent said there was exactly in the policies what he said there would be; and he asked the agent to read them to him, but he did not do it. That was the same agent, Mr. Miller, and that he said that the super- (628) intendent instructed him to sell them that way. Mr. Miller was also the collector from the plaintiff, and he collected about two years.

Plaintiff carried the policies ten years. When the ten years were out, plaintiff took his book and went to the office of the Life Insurance Company of Virginia and made his last payment and told them he wanted what was coming to him, and they said, "All right." This was the last pay day, and plaintiff asked them what he would get. Plaintiff did not get his money.

Plaintiff said that he never read all the policies; that he looked over part of them, and that he did not read that part beginning with "doth hereby agree." Plaintiff says that he could not pronounce the words in the policies; he could have read them, but could not pronounce them. Plaintiff says he was depending on getting his money back at the end of ten years, and that the agent was instructed by the superintendent to sell them that way, and that plaintiff knew nothing about how many people dropped out.

Mrs. Sikes said that the agent told them at the same time that the money would be saved; that it would be paying out a little each week and at the end of ten years, if plaintiffs were living, that they would get it back, with 4 per cent interest, and not lose anything. "We did not want to take them out at first. The agent was there a lot of times, a heap of times that Mr. Sikes was not there. This was the statement made at the time the policies were taken out. Mr. Miller was collector for two years or more. I never saw an insurance policy before; I was

present when the policies were delivered. Mr. Miller delivered them himself. I did not read the policies, because I relied simply on what the agent told me." (629)

At the close of the plaintiff's evidence the court directed a nonsuit. This was error. The testimony must be taken as true and in the most favorable aspect for the plaintiffs, with the most favorable inferences. So taken, the jury might well have found that a fraud had been perpetrated upon these plaintiffs. This case much resembles *Caldwell v. Insurance Co.*, 140 N. C., 100. The plaintiffs are nearly illiterate; they could not pronounce the words in the policies; they could not understand what they did read. The policies were taken back to the agent in thirty days, who said the policies were all right and at the end of ten years they would get back the amount paid in, with interest. The plaintiffs relied upon the statement and the renewed assurance of the agent. The plaintiffs' statement of the representations of the agent must also be taken as true. There was thus evidence of fraud, which, if believed by the jury, entitled the plaintiffs to recover their payments and interest (*Caldwell v. Insurance Co., supra*), and the case should have been submitted to the jury with such evidence in defense, if any, which the defendant might have offered. This case is not like *Cathcart v. Insurance Co., ante,* 623. There the insured were intelligent; they read their policies; they were not lulled into security, as in this case and in *Caldwell v. Insurance Co., supra,* both when the policies were delivered and later when they asked for information of the agent and were told the policies were all right. In the *Cathcart case* the agent, when applied to, told them they would not get back the face of the policies with interest, and told them to read their policies. This they were well able to do, and after reading the policies they took the risk of the agent being wrong (joking, they said they thought), and continued to pay. In that case *(Cathcart's)* we held that the court should have given the defendant's prayer, that if the jury believed the plaintiffs' evidence there was a waiver, for the plaintiffs could read and did read their policies, and, by continuing to pay the premiums after above replies of the agents and after reading their policies, acquiesced in them, and waived any right to set up that they had been misled and deceived by the defendant's agents and that their ignorance had been imposed upon. (630)

In the present case the plaintiffs tried to read, but could not understand. The apostle Philip's question to the Ethiopian, "Understandest thou what thou readest?" applies to others than him to whom it was addressed. The plaintiffs say they did not understand the policies, carried them back to the agent in thirty days, and were again assured they were according to the original representations and that at the end of ten

years they would get their money back with interest. On this motion this must be taken as true, and a jury should have passed upon the evidence. The nonsuit is set aside and

Reversed.

*Cited: Clements v. Insurance Co.,* 155 N. C., 62.

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A. A. LANEY v. J. J. MACKEY.

(Filed 22 May, 1907.)

**1. Appeal—Docketing—Rules 5 and 17.**

If a case is not docketed seven days before beginning the call in the Supreme Court of the district to which it belongs, under Rule 5, the appellee can have the appeal dismissed under Rule 17; but upon the appellee failing to do this, the appellant can docket any time during the term, if before appellee moves, but not later.

**2. Register of Deeds—Marriage License—Penalty—Warrant—Amendment.**

When the warrant in an action against the register of deeds under Revisal, sec. 2090, is defective in that it did not allege that the marriage license for plaintiff's daughter, under 18 years of age, was issued "without reasonable inquiry," it is in the discretion of the court below to permit an amendment inserting those words (Rev., secs. 507, 512, 515), especially when the proceedings were begun before a justice of the peace. Revisal, sec. 1467.

**3. Same—Reasonable Inquiry.**

When either party to the marriage is under age, the register of deeds is liable to a penalty for issuing the license (Rev., sec. 2088), as set out on the face of the license (Rev., sec. 2089); and where the license for the marriage of a motherless girl about 16 years old is issued without inquiry as to the consent or residence of the father, with whom he could have communicated, there is not such reasonable inquiry which would protect the register, especially where the license was issued upon the representations of an unknown man, who was subsequently shown to be untrustworthy and of bad general character.

ACTION against the register of deeds of Buncombe, to recover (631) a penalty for the issuance of a marriage license for a female under 18 years of age, tried before *Moore, J.,* and a jury, at April Term, 1906. Judgment, signed by *W. R. Allen, J.,* at May Term, 1906, of BUNCOMBE, for plaintiff. Defendant appealed. Pertinent facts stated in the opinion of the Court.

*Charles A. Moore for plaintiff.*

*Craig, Martin & Winston and J. G. Merrimon for defendant.*

CLARK, C. J. The motion of appellee to dismiss this appeal because not docketed at last term seven days before the call of the district to which it belongs (Rule 5) must be denied. The case was tried at May Term, 1906, of Buncombe County. It was required to be docketed, therefore, at Fall Term, 1906, of this Court. If not docketed seven days before beginning the call of the district to which it belonged, as required by Rule 5, the appellee could have had the appeal dismissed by complying with the requirements of Rule 17. *Vivian v. Mitchell, ante,* 472, and cases cited. But the appellee not having done this, the appellant could docket at any time during said Fall Term, but not later (*S. v. Telfair,* 139 N. C., 555), if before the appellee moved to dismiss; and appellant did so docket this appeal on 11 December, 1906, before adjournment of Fall Term. This has often been decided. *Craddock v.*
(632) *Barnes,* 140 N. C., 428; *Curtis v. R. R.,* 137 N. C., 308; *Benedict v. Jones,* 131 N. C., 474, and cases there cited.

This is an action against defendant register of deeds for Buncombe County, under Revisal, sec. 2090, for recovery of penalty of $200 for issuing license for marriage of plaintiff's daughter, who was under 18 years of age, and without plaintiff's consent. This action was begun the day after the marriage. The defendant demurred *ore tenus* in the Superior Court that the warrant did not contain the allegation, "without reasonable inquiry." *Maggett v. Roberts,* 108 N. C., 174. It was in the discretion of the court to permit, as he did, an amendment inserting those words (Rev., secs. 507, 512, 515), and most especially when the proceedings began before a justice of the peace (Rev., sec. 1467).

The plaintiff testified that he lived in the same town with the register of deeds, whom he had known for ten or twelve years, he (the plaintiff) having been for part of this time deputy sheriff and later keeper of the county jail, defendant at that time serving in some capacity under the register of deeds, and often seeing plaintiff; that there was a telephone in the office of defendant and another in the factory, half a mile distant, where plaintiff and his daughter worked; that his daughter was at that time only three days over 16 years of age; that he did not give his consent for the issuing of the license or marriage; that he received no inquiry of defendant, and as soon as he heard of the marriage he went to look for defendant, who on seeing him spoke first and said: "I know your business, but I am not to blame. I qualified the man"—which last was not true.

The defendant testified that he issued the license for plaintiff's daughter to marry one Kine, upon the application of a "good-looking man, of good address," whom he had seen on the street and had spoken to before, but whose name he did not know; that he asked this man the
(633) usual questions, and the man signed the oath on back of the

license, but he did not administer the oath to him. He could not say that he asked this man (whose name is O'Connor) where he lived, nor who the plaintiff was or where plaintiff lived, and does not remember whether O'Connor said the girl's mother was dead or not; that he (defendant) knew plaintiff, and did not know whether or not there was any other Laney in the county.

Plaintiff testified that O'Connor's general character was bad, and this was not contradicted. The failure to administer the oath to O'Connor, while not fatal, was a circumstance, along with the other evidence, tending to show a lack of reasonable inquiry. *Furr v. Johnson,* 140 N. C., 157.

There being no conflict in the evidence, whether reasonable inquiry was made was a question of law (*Joyner v. Roberts,* 114 N. C., 389), and the court properly instructed the jury that if they believed the evidence to answer the first issue (whether defendant issued the license without plaintiff's consent and without reasonable inquiry) "Yes." Where either of the parties to the marriage is under 18 years of age, the register of deeds is liable to a penalty for issuing the license (Rev., sec. 2090) without the written consent of the father, mother, or guardian (Rev., sec. 2088), and this is set out in the face of the license (Rev., sec. 2089). The register violating these requirements is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. *Agent v. Willis,* 124 N. C., 29; *Cole v. Laws,* 104 N. C., 656; *Williams v. Hodges,* 101 N. C., 303. In the latter case it is said: "The license shall not be issued as of course to any person who shall apply for it; the register is charged to be cautious and to scrutinize the application; it must appear probable to him, upon reasonable inquiry, when he has not personal knowledge of the parties, that the license may and ought to be issued."

Here the defendant issued a license for the marriage of a (634) motherless girl, 16 years and 3 days of age, without the written (or any) consent of the father, as required by the statute, without any inquiry as to the consent or residence of the father, whom he had known for ten or twelve years, and whom, if he had inquired as to his place of work, he could have reached by phone in his office. The application was made by a man whose name was not known to the defendant, whom he does not show to have been trustworthy, and as to whom the only evidence is that his general character is bad. Such inquiry as the defendant made in this case was not reasonable. It was purely perfunctory and did not furnish the security against a violation of the law required by a proper observance of the requirements of the statute.

No error.

*Cited:* *Joyner v. Harris,* 157 N. C., 301; *Gupton v. Sledge,* 161 N. C., 214; *Hawkins v. Tel. Co.,* 166 N. C., 214.

J. MITCHELL BROWN v. SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1907.)

**1. Negligence—Evidence—Nonsuit.**

If there is sufficient evidence to support the finding of the jury, a motion as of nonsuit upon the evidence should be refused. When there was evidence that the plaintiff was at work under the direction of the defendant upon its track, and was injured by being run into by defendant's approaching train; that there was no proper warning given or lookout kept by those in charge of the train; that the position of the plaintiff was such as to render him insensible to danger, there being considerable noise from other causes to prevent his hearing the train, the question of fact is sufficiently raised to go to the jury.

**2. Same—Contributory Negligence—Instructions.**

It is sufficient if the judge below substantially charges in accordance with a proper request. Under pertinent evidence the following charge is correct upon the issue of contributory negligence: If the jury find from the evidence that the plaintiff was in the performance of his duties to the defendant so near to the track as to be stricken by defendant's approaching train if he did not move out of the way; that defendant's engineer blew the whistle so that plaintiff, under the circumstances as known to him, could have heard it in time to avoid the danger, he could not recover.

(635) ACTION for damages for personal injuries, tried at October Term, 1906, of BUNCOMBE, before *O. H. Allen, J.*, and a jury. The usual issues of negligence, contributory negligence, and damage were submitted. The findings were in favor of the plaintiff. From the judgment rendered, the defendant appealed.

*Locke Craig, George A. Shuford, Shepherd & Shepherd for plaintiff.*
*Moore & Rollins for defendant.*

BROWN, J. The evidence in behalf of the plaintiff tends to prove that he belonged to a "regular section squad" of the defendant, and that at the time of the injury he was engaged in repairing defendant's track, under the direction of foreman Lominac, in the depot yard at Alexander, a station on defendant's road. At this point there is a main track and two side-tracks. The plaintiff, with the others of the squad, was engaged in leveling ballast between the rails of the center or main track. While so engaged he was run into by an approaching freight train and injured. At the time of the injury plaintiff testifies that he was obeying the directions of foreman Lominac in leveling the ballast, and that "he was all over the track—had to be." Plaintiff also offers evidence tending to prove that the whistle was not blown and no other warning given him of the approaching train, and that if a proper lookout had been kept the

engineman could have avoided striking him. There was also testimony tending to show that the position of the plaintiff was such as to indicate that he was insensible to the danger. His back was turned toward the approaching train and he was engaged in shoveling ballast, which necessarily causes considerable noise, and also that the river and (636) milldam near there always made noise—a "roaring noise all the time"—which prevented his hearing the train. The evidence also discloses that at the time an engine was standing by on the siding, blowing off steam.

The evidence of the defendant's witnesses tended to contradict the plaintiff very materially, and to prove not only that the engineman gave the precautionary signals, but that plaintiff heard them and heeded them by stepping off the track, and that plaintiff stated that he thought he had stepped off the track far enough to avoid injury and that his injury was due entirely to his own negligence. The value of this declaration is denied by the plaintiff, who states he was not in his right mind when he made it.

An examination of the evidence discloses that, while the defendant made out a very strong case upon both issues, his Honor committed no error in denying the motion to nonsuit, as the summary of plaintiff's evidence given in this opinion shows. The jury adopted the plaintiff's version of the facts, and, that being so, the law is too well settled to need any further discussion to sustain the refusal of his Honor to nonsuit. *Smith v. R. R.*, 132 N. C., 824, and cases cited.

The defendant excepts further to the failure of the court to give special instruction No. 5. We think the desired instruction was substantially given and that view of the case fully presented to the jury. His Honor charged that, "If the jury find from the evidence that the plaintiff, in the performance of his duties, was at a point on or near the track upon which one of the trains was approaching, and so near as to be stricken by said train if he did not move himself out of the way; that the defendant's engineer blew the whistle of the engine in time while approaching the plaintiff, and in such a way and manner as that the plaintiff could have heard it, under such circumstances of the situation as were known to the defendant, and in time for him (637) to have moved out of danger, then the defendant performed its duty to the plaintiff, and the answer to the first issue should be 'No.'" The court further told the jury that the engineman had a right to assume, if he saw plaintiff on or near the track, that he would remove to a place of safety after the whistle had been blown reasonably sufficient under the circumstances to give proper warning. The charge of his Honor is very full, and presented to the jury with impartiality and

ability the different phases of the evidence and the contentions of both parties. The matter is plainly one of fact, and the findings of the jury are supported by evidence.

No error.

*Cited:* *Wolfe v. R. R.*, 154 N. C., 575.

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SMATHERS, RECEIVER, v. W. J. SPROUSE ET AL.

(Filed 22 May, 1907.)

**Judgment—Collateral Attack—Presumption.**

Upon motion to revive a dormant judgment, the defendant cannot show *aliunde* that no service of process had been originally made upon him. The presumption that he was properly a party is conclusive until removed by a correction of the record itself in a direct proceeding for that purpose.

MOTION to revive the above entitled dormant judgment, heard on appeal from the clerk by *O. H. Allen, J.*, at September Term, 1906, of BUNCOMBE. From the order of his Honor affirming the judgment of the clerk the defendants appealed.

*Charles N. Malone for plaintiff.*

*Adams & Adams and W. P. Brown for defendants.*

BROWN, J. Upon the hearing before the clerk, defendants offered to show that they had not been served with summons in the original
(638) action. To this the plaintiff objected, and the clerk sustained the objection, ruling that the judgment could not be attacked in this way in this proceeding, and ordered and adjudged that execution issue. There is no error in such ruling, and his Honor very properly affirmed it, as it is supported by many uniform precedents. A void judgment may be regarded as a nullity and attacked whenever it may come in question, but it must appear affirmatively upon the judgment record that it is void. If the summons and record in this case, upon being produced, discloses that there had been no service upon the defendants and no appearance by them or by any one in their behalf, then the judgment is void on its face, and the defendant's position would be correct, that it could be attacked and its void character shown in response to the notice to show cause why execution should not issue. *Doyle v. Brown*, 72 N. C., 393.

The original record in this case is not fully set out in the transcript of appeal, but we assume from the briefs that it does not appear affirmatively upon the face of the record that the defendants were not duly served with process. As we understand the matter, the defendants claim the right to show *aliunde,* upon the hearing of the motion, that no service was actually made. This cannot be allowed. Where it appears from the record that a person was a party to an action, when in fact he was not, the legal presumption that he was properly a party is conclusive until removed by a correction of the record itself by a direct proceeding for that purpose. *Summer v. Sessoms,* 94 N. C., 371 (377); *Doyle v. Brown,* 72 N. C., 393; *Spence v. Credle,* 102 N. C., 75; *Card v. Finch,* 142 N. C., 145.

Affirmed.

*Cited: Simmons v. Box Co.,* 148 N. C., 345; *Bailey v. Hopkins,* 152 N. C., 752; *McDonald v. Hoffman,* 153 N. C., 256.

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(639)

HARPER FURNITURE COMPANY v. SOUTHERN EXPRESS COMPANY.

(Filed 22 May, 1907.)

1. **Evidence—Judicial Notice.**

The courts will take judicial notice of prominent towns in this State, especially county-seats, their accessibility by railroads connecting them with trunk lines of the country; also of the distance of prominent business centers of other States, their accessibility by railway, and the time between them by the usual routes and methods, to the extent that the facts are sufficiently notorious to make their assumption safe and proper. (*Walker v. R. R.,* 137 N. C., 163, cited and distinguished.)

2. **Same.**

When it appears that goods shipped by express from the city of Erie, Pa., to the town of Lenoir, N. C., have been on the road for a period of fourteen days, the courts will take judicial notice of the time required for shipment between the two points so far as to hold that there has been a *prima facie* wrongful or negligent breach of the contract of carriage.

3. **Common Carriers—Negligence—Presumptions.**

Where there arises a presumption of actionable negligence against one of several connecting lines of carriers by reason of a wrongful delay of transportation of goods, such presumption is against any one of them in whose custody the goods are shown to have been after the delay occurred, and the burden of proof is upon it to rebut the presumption.

(The difference between "*prima facie,*" "presumptions," and "burden of the issue" distinguished.)

WALKER, J., concurring in result.

ACTION to recover damages for delay in shipment of goods by express, tried before *Bryan, J.*, and a jury, at November Term, 1906, of CALDWELL. From judgment of nonsuit plaintiff appealed.

G. F. Harper, for plaintiff, and being the only witness examined, testified as follows:

"I am a member of the firm trading under the name of the Harper Furniture Company, and am general manager of the same. On 28 October, 1905, I received a through bill of lading by mail from Erie,
(640) Pa., to Lenoir, N. C., issued by the Adams Express Company, as shown on the face of the bill, and which showed that on 26 October, 1905, a certain engine shaft and crank had been delivered to the said Adams Express Company by the Erie City Iron Works, of the said city of Erie, Pa., and from which the plaintiff had ordered the said shaft and crank a few days before. Said bill of lading showed on its face that the shaft was to be delivered in Lenoir, N. C., by the company issuing it and its connecting lines. The shaft did not reach Lenoir until 9 November, 1905. Upon its arrival in Lenoir it was delivered to me by the agent of the defendant Southern Express Company, and I paid him the sum of $26.50 as the freight charges for the transportation over the entire line from Erie to Lenoir. During all the time it was on the road, and before, our factory was standing idle, as we could not turn a wheel without the shaft. We made, both before the shaft broke and after the repairs were made, $30 per day net profit on the output of the mill, and we could have made the same had we received the shaft in proper time. We were forced, also, to turn down orders which we could have filled at a profit of $300 had the machinery been received in proper time."

Cross-examined:

"I have no means of knowing where the delay occurred—whether on the line of the initial company or on that of the defendant company. I do not know whether there were traffic arrangements between the two companies further than is shown by the bill of lading, which was a through bill from Erie to Lenoir, and from the fact that I paid the freight for transportation to the agent of the defendant company at Lenoir, N. C."

At the close of the testimony defendant moved to dismiss the cause as on judgment of nonsuit. The motion was allowed, and plaintiff excepted and appealed.

(641) *Jones & Whisnant for plaintiff.*

*W. C. Newland and John A. Barringer for defendant.*

HOKE, J., after stating the case: It is said by McKelvey, in his work on Evidence, that there is a class of facts of which a court may take

judicial notice in its sound legal discretion, and supporting them is the single principle of common notoriety, the vital question being whether sufficient notoriety attaches to any particular fact to make it safe and proper to assume its existence without proof. McKelvey on Evidence, pp. 33 and 34. Speaking further of this class of facts, the same author says: "In every case the particular circumstances must govern, and no general rule can be laid down. The decisions in particular cases are very useful, as they serve to furnish illustrations by way of analogy. They are not useful as precedents, inasmuch as the same facts may, at a different time and under different circumstances, be entitled to different treatment."

Speaking to the same principle, Professor Wigmore, in his work on Evidence, sec. 2580: "Applying the same general principle (as to judicial notice), especially in regard to the element of notoriousness, courts are found noticing from time to time a varied array of unquestionable facts ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable as well as impracticable to seek to connect them by generalities and distinctions, for the notoriousness of a truth varies with differences of time and place. It is even erroneous in many if not most instances to regard them as precedents. It is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance." And in section 2581: "Among the common instances under this miscellaneous class are the facts of time, season, and distance; though here, also, the quality of notoriousness will naturally vary with the place and epoch as well as with the greater (642) and less accuracy involved in the facts desired to be noticed."

Accordingly, it is generally held that the courts will take judicial notice of the placing of the prominent towns within their jurisdiction, and especially of county-seats and their accessibility by railroads connecting them with the trunk lines of the country; and there is well considered authority to the effect that courts may also take such notice of the distance to prominent business centers of other States, their accessibility by railway, and the time between them by the usual routes and methods of travel, to the extent that these facts are sufficiently notorious as to make their assumption safe and proper. *Insurance Co. v. Robinson,* 58 Fed., 723; *Williams v. Brown,* 65 N. Y. Supp., 1049; *Morgan v. Farrell,* 58 Conn., 413; *Pearce v. Langfit,* 101 Pa. St., 507, 17 A. & E., 905; 16 Cyc., 861; 1 Greenleaf on Evidence, sec. 5; 1 Wharton on Evidence, sec. 340. And with this limitation, judicial notice may also be taken of the general business methods of railway and other well-known or *quasi*-public corporations when these methods are universally practiced or commonly known to exist. Wigmore on Evidence, sec. 2580; McKelvey on Evidence, 1032; *Bank v. Hall,* 83 N. Y., 338; *R. R. v. Miller,* 25 Mich., 275.

The present case affords an apt illustration of the rule and the limitation suggested, and the doctrine has been stated at some length in order that the parties may be correctly guided in its application on the further trial of the cause. The court can safely assume, as a matter of common knowledge, that the railroad lines connect Lenoir with the principal trunk lines leading north; that the city of Erie, Pa., is situated on Lake Erie, in said State, and accessible by railway. We can safely assume, further, that express companies are agencies organized for the purpose, at a higher price, of providing greater security and dis-
(643) patch in the delivery of freight, and that they select and secure for their business, as a rule, the most desirable and direct routes. The Court taking judicial notice of these facts, it must follow, as a fair and reasonable inference, that fourteen days is too long a time for the transportation of freight by express between the two points—Lenoir, N. C., and Erie, Pa.—and that, *prima facie,* there has been actionable negligence in the performance of the contract of carriage. While, however, the Court may assume the general facts suggested so as to permit the inference that in the absence of satisfactory explanation the time taken has been too long between the two points, it would not follow that the Court should go further and take judicial cognizance of additional facts which would be required to determine how much too long it was. This would likely involve the existence of further facts entirely too minute for the application of the doctrine, such as the route selected, the number and schedule of the trains, etc. "The principle of judicial notice is largely one of common sense," says McKelvey, *supra.* In the one case the general facts could be assumed because sufficiently notorious to make it safe and proper to do so. In the other it would not be safe and might lead to an erroneous conclusion, working harm to the litigants; and, therefore, if, in the further trial of the cause, it should become desirable to establish more accurately the exact *quantum* of wrongful delay, it would, no doubt, be proper that proof should be offered.

There is nothing here said which militates in any way against the intimation of the Court in *Walker v. R. R.,* 137 N. C., 163, as to the requirement of proof, on the facts there presented. The question to which that intimation was addressed was in reference to the distance and time required for a freight train from Cumnock, N. C., to Graham, N. C., via Greensboro. Between these places there were fourteen sta-
(644) tions, and the point involved was the exact *quantum* of delay in delivery of the goods, with a view of fixing the amount of a penalty imposed by statute for each day's delay after a given time, allowed as free time. The accuracy required in such an investigation would make it entirely unsafe for a court to act without proof, and the case clearly comes within the limitation suggested that a court will only take judicial notice of such facts as are sufficiently notorious to make it safe and proper to do so.

The facts testified to, and those of which the Court takes judicial cognizance, having established that there arises a presumption of actionable negligence against some one by reason of wrongful delay, our decisions are to the effect that on such facts there is also a presumption that the cause of action exists against defendant, in whose custody the goods are shown to have been after the delay occurred.

It may be well to note here that in using the terms *prima facie* and presumption, the terms do not import that the burden of the issue is changed, but that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury under a proper charge as to existence or nonexistence and the effect of any presumption which may attach, as indicated in the cases of *Womble v. Grocery Co.*, 135 N. C., 475; *Stewart v. Carpet Co.*, 138 N. C., 60; *Overcash v. Electric Co., ante*, 572.

To resume the line of principal discussion, the decisions referred to have established that when there has been a contract for continuous carriage of goods over a line composed of different and connecting carriers, and the goods are shown to have passed, under such contract, into the hands of the initial carrier in good shape and condition, the shipper will have a *prima facie* right of action against any one of the carriers in whose custody the goods are proved to have been in a damaged condition. This was held as to initial carrier in *Meredith v. R. R.*, 137 N. C., 479. And as to the ultimate or intervening carrier, in (645) *Mitchell v. R. R.*, 124 N. C., 236; the general principle being stated in the last case as follows: "Among connecting lines of common carriers the one in whose hands the goods are found damaged is presumed to have caused the damage, and the burden is on it to rebut the presumption."

It is true that in the cases cited the injury complained of was wrongful damage to the goods, and here the negligence charged for is wrongful delay; but the same reasons for establishing the principle of proof in the one case exist with equal force in the other.

As said by *Judge Poland* in 32 Vt., 667, cited with approval in *Meredith's case, supra:* "The ruling is placed upon the ground that this is all the proof the nature of the case permits to plaintiff, and that proof of delivery by defendant to the next road was a matter peculiarly within the power of defendant, and not at all in the power of the plaintiff." And in *Mitchell's case, supra,* the ruling is referred to the same principle: "It is a principle of law when a particular fact, necessary to be proved, rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof." And in 6 A. & E., 609, it is said that "The liability of the initial carrier for delay is governed by the same rules which determine its liability for loss or injury of goods shipped to a point beyond its line."

There would seem to be evidence here that each one of the connecting carriers in this case might be jointly liable for the default of the others; but we forbear giving definite expression on this question until the facts can be more fully developed in the further trial of the cause. Decisions which may be helpful in determining this question will be found in *Rocky Mount Mills v. R. R.*, 119 N. C., 694; *Lindley v. R. R.*, 88 N. C., 547; *Phillips v. R. R.*, 78 N. C., 294; *Bradford v. R. R.*, 7 Rich-
(646) ardson (S. C.), 201; *Holliday v. R. R.*, 74 Mo., 159; *R. R. v. Weakly*, 50 Ark., 397.

There was error in dismissing the action as on judgment of nonsuit. Reversed.

WALKER, J., concurring: There is evidence which I think tended to show that the iron shaft was not transported from Erie, Pa., to Lenoir, N. C., with due diligence, and this was sufficient to carry the case to the jury without the necessity of taking judicial notice, even generally, of the distance between the two places and the time necessary for transportation, with a view of deciding that the time consumed was unreasonable and the delay therefore negligent, although judicial notice is not taken of the exact time required. Having some doubt as to whether we are authorized to determine the fact of unreasonable delay, under the circumstances of this case, by invoking the doctrine of judicial notice, I express no opinion on that point, but confine my assent to the conclusion of the Court only, that the nonsuit was improper, and for the reason I have already stated.

I do not mean to say that the doctrine of judicial notice is not correctly stated and applied by the Court, but that I prefer to rest my opinion of the case upon the other ground, which I am quite sure is a safe one, and especially as in either view a *prima facie* case is made for the plaintiff in the sense that the burden of proof (and not of the issue) is shifted to the defendant.

*Cited: Walker v. Carpenter, post,* 681; *Watson v. R. R.*, 145 N. C., 239; *Winslow v. Hardwood Co.*, 147 N. C., 277; *Mason v. Cotton Co.*, 148 N. C., 507; *Furniture Co. v. Express Co., ib.*, 87; *Cox v. R. R.*, 149 N. C., 119; *Lumber Co. v. R. R.*, 152 N. C., 78; *Kissenger v. Fitzgerald, ib.*, 253; *Land Co. v. Kinsland*, 154 N. C., 81; *Richards v. Lumber Co.*, 158 N. C., 59; *Beville v. R. R.*, 159 N. C., 229; *S. v. Wilkerson*, 164 N. C., 437; *Trust Co. v. Bank*, 166 N. C., 117; *Wilkins v. McPhail*, 169 N. C., 558; *Brinson v. R. R., ib.*, 431; *In re Allred*, 170 N. C., 159; *Mewborn v. R. R.*, 170 N. C., 208; *Reynolds v. Express Co.*, 172 N. C., 491.

(647)

W. R. ODELL v. MARTHA AND JOHN HOUSE.

(Filed 22 May, 1907.)

**Administrators—Evidence of Debt—Private Sale—Price—Burden of Proof.**

Revisal, sec. 66, providing the hours, etc., of sale by administrators, etc., does not apply to private sales; and section 67 of The Code, permitting executors, administrators, etc., to apply to the clerk for an order to sell insolvent's evidences of indebtedness and prescribing the manner of sale, is directory, and it is well to follow it. In the absence of fraud or collusion, it is error in the court below to sustain a demurrer to the evidence upon the ground that the administrator sold certain notes of his intestate at private sale, without order of court. The burden of proof is upon the administrator to show that he obtained a fair and full price.

ACTION, tried before *O. H. Allen, J.*, and a jury, at October Term, 1906, of MADISON.

Plaintiff sues upon certain notes executed by defendants, payable to H. T. Rumbough, the consideration being the purchase money of a parcel of land, for the conveyance of which, upon payment of the notes, the payee executed a bond. Subsequent to their execution, Rumbough died and his duly appointed administrator made private sale of said notes to the plaintiff, delivering them into his possession. At the trial the plaintiff produced the notes and tendered to the defendants a deed for the land, executed by the administrator. He introduced the witness who made the purchase, showing that he purchased them at a private sale from the administrator. It was admitted that no order for the sale was made by the court. The defendants demurred to the evidence. Demurrer sustained. Plaintiff excepted and appealed.

*George A. Shuford and Shepherd & Shepherd for plaintiff.*
*No counsel contra.*

CONNOR, J., after stating the facts: The case on appeal states that his Honor was of the opinion that the sale of the notes by the administrator was without authority of law and void. We were not (648) favored with any argument or brief by the appellee. We assume that his Honor based his opinion upon the provisions of section 67 of The Code, permitting executors and administrators to apply to the clerk for an order to sell insolvent evidences of debt and prescribing the manner of making the sale. This provision is first found in our statutes, in Laws 1868-'69. Prior thereto there was no statute empowering a personal representative to dispose of insolvent choses in action; he was compelled, upon his final account, to return them into court. This statute was enacted to provide a way for the administrator to relieve himself

of liability and at the same time realize something from choses in action which, by reason of homestead and exemption laws, were not collectible, but which might have some prospective value. For many years the statute made it the duty of the administrator to sell all personal property at public sale, after advertisement, but the courts always held that the administrator could sell and pass the title to the personal property of his intestate. The law is laid down by *Mr. Justice Daniel* in *Wynns v. Alexander,* 22 N. C., 58. After noticing the language of the statute, he says: "The executor might, before the passage of the act, have sold *bona fide* the goods and chattels of the testator or intestate. The legal title was in him, and an honest purchaser from him would always have acquired a good title. The common law on this subject is not repealed by this act. The statute is only directory, which, however, it will always be well to follow, for, if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue, he or they would have been bound to make good the deficiency out of their own pockets." A note is attached to the report of this case (Ed. 1860) by *Judge Battle,* explaining the language used in *Fanshaw v. Fanshaw,* 44 N. C., 166, which apparently conflicts with the language of *Judge*
(649) *Daniel.* The decision in *Wynns' case* is peculiarly applicable because the property in controversy was a slave, and the statute, like that regarding choses in action, required the administrator to obtain an order from the county court to sell. In *Gray v. Armistead,* 41 N. C., 74, *Pearson, J.,* says: "The exigency of estates sometimes makes a sale of notes necessary." *Dickson v. Crawley,* 112 N. C., 632; *Cox v. Bank,* 119 N. C., 305. There is no suggestion of any fraud or collusion between the administrator and the purchaser. Section 66, Revisal, provides that all *public* sales shall be between certain hours, and imposes a penalty upon one who shall make a sale otherwise. This does not apply to private sales. They are, of course, made at the risk of the administrator, putting upon him the burden of showing that he obtained a full and fair price. The judgment of nonsuit must be vacated and the cause heard upon its merits.

New trial.

I. S. FISHER v. W. J. OWEN.

(Filed 22 May, 1907.)

**1. State's Lands—Entry—Description—Evidence.**

The entry upon the State's unimproved and vacant lands must import to describe the land so that another person may identify it thereby. Under Revisal, sec. 1707, an entry describing the lands as "640 acres on the waters of the Toxaway River, Transylvania County," followed by a grant to "a tract of land lying on both sides of Toxaway River, beginning at a hickory on the east side of the river, the northwest corner of Harriet Fisher's homestead tract, . . . containing 430 acres," etc., is void for uncertainty of description, and affords no notice to a subsequent enterer; and the description cannot be aided by testimony that the State had no other land which it could grant in that immediate locality adjoining Harriet Fisher's homestead tract, and did not own there more than 430 acres.

**2. Same—Notice—Trustee.**

When an entry upon the State's unimproved and vacant land is void for vagueness of description as against a subsequent enterer, and not made more definite by survey in the required time, it can afford no actual or implied notice to the subsequent enterer; and he, having perfected his entry, cannot be declared to hold as trustee for the prior enterer.

ACTION tried before *O. H. Allen, J.*, and a jury, at August (650) Term, of TRANSYLVANIA.

The plaintiff seeks to have the defendant declared a trustee for his benefit, in respect to the land described in the complaint. The case was disposed of in the Superior Court upon the opinion of the judge that plaintiff was not entitled to judgment, and so instructed the jury. The plaintiff introduced the record of an entry made in the entry taker's office, Transylvania County, by J. B. Burgess, 4 July, 1896, as follows: "J. B. Burgess enters and claims 640 acres of land on the waters of Toxaway River, in Transylvania County, North Carolina, beginning on the northwest corner of the Harriet Fisher homestead tract of land and adjoining the lands of I. S. Fisher and others, and runs various courses for complement." The defendant objected to the entry because the description was too vague and uncertain. His Honor was of the opinion with defendant, but admitted the entry to enable the plaintiff to show the location by survey—or to show actual notice to defendant. Plaintiff next introduced a grant from the State to J. B. Burgess, I. S. Fisher, and John Fisher, assignees, bearing date 28 December, 1898, to a tract of land "lying on both sides of Toxaway River, beginning at a hickory on the east side of the river, the northwest corner of Harriet Fisher's homestead tract," and running by metes and bounds set out in the grant in full to the beginning, containing 430 acres. The plaintiff testified to

the location of the land described in the grant. He thereupon introduced an entry made by defendant of 100 acres, 24 October, 1896,
(651) which is conceded to cover a portion of the land included in the grant to plaintiff. He also introduced a grant from the State to defendant, bearing date 26 July, 1897, registered 9 June, 1898. This grant covers 59 acres, being a portion of the land included in the entry of 25 October, 1896. This entry and grant were introduced by plaintiff to show legal title in defendant. For the purpose of showing actual notice to defendant, the plaintiff introduced A. J. Lee, who testified: "I was present when W. J. Owen had his survey made for his grant. I. S. Fisher was not present, but J. B. Burgess came to us while we were surveying. He came up and asked us what we were doing. He said we would better get out of there; said 'This is Slick Fisher's land.' That he (Fisher) would be mad when he found it out. Before beginning the survey, Owen said for us to wait and he would go out of there; said 'This is Slick Fisher's land.' That he, said Fisher, was not at home, but that he would go and run out the land anyway."

Plaintiff offered to show that the State had no other land in that immediate locality adjoining the lands of Harriet Fisher's homestead tract, I. S. Fisher, and others, vacant, which it could grant, except what the Burgess entry was intended to cover and did cover; that the State did not own more than 430 acres of land in that locality. Plaintiff offered to show that the grant issued on the Burgess entry was surrounded on every side and on every line and angle with State grants, or deeds and possessions equal to grants. This testimony was excluded, and plaintiff excepted. Burgess testified that while defendant was making the survey he told him that "he better not make the survey; it might cause hard feelings." His Honor instructed the jury to answer the issue, Did the defendant, W. J. Owen, lay his entry and take out his grant with notice of the plaintiff's entry, as alleged? "No." Plaintiff excepted.
(652) From a judgment on the verdict plaintiff appealed.

*Welch Galloway for plaintiff.*
*George A. Shuford and Shepherd & Shepherd for defendant.*

CONNOR, J., after stating the case: The plaintiff insists that his Honor erred in holding that the Burgess entry was void for vagueness and uncertainty in the description of the land intended to be included in it, and that it did not afford notice to defendant. He further insists that if he is in error in this, that defendant had actual knowledge of facts and circumstances putting him upon inquiry, which, if prosecuted, would have given him notice, and that he thereby had constructive notice. It is well settled that an entry of land creates an "inchoate

equity" which becomes a complete legal title upon payment of the money and taking grant. That a person making a subsequent entry, followed by a survey and grant, with notice of the first entry, acquires the legal title, but will be declared to hold as trustee for the prior enterer. *Gilchrist v. Middleton,* 107 N. C., 678; *Newton v. Brown,* 134 N. C., 439. Section 1707, Revisal, containing the statute in force in 1896, provides that "Claimant shall set forth in his entry where the land is situated, the present watercourses and remarkable places as may be therein, the natural boundaries and the lines of any other person, if any, which divide it from other lands." Does the description in the entry, under which plaintiff claims, comply with these requirements? It will be observed that we are not discussing the question whether the entry is sufficient, after survey is made and grant issued by the State, to vest the title. The State alone is interested in this question, and, as said by *Judge Ruffin* in *Harris v. Ewing,* 21 N. C., 369, it is only so in regard to the quantity. In that case it is said: "The entry must import to describe the land so that another person may identify it (653) thereby; and, therefore, that one who makes a second entry might have done it before he laid out his money." The learned judge says in that case that if the plaintiff's claim had depended on his entry alone, the Court would have had no difficulty in pronouncing it defective, but that he surveyed it and completely identified it, and of that the defendant had full knowledge before the inception of his title. While, to a large extent, each case must depend upon its peculiar facts, we may be aided by referring to some of the decisions of this Court in regard to the sufficiency of entries to put a second enterer upon notice. In *Johnston v. Shelton,* 39 N. C., 85, the language was "640 acres of land, beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear Pen, on the Hog Back Mountain, and running various courses for complement." *Ruffin, C. J.,* says: "Its vagueness renders it void as against a subsequent enterer who surveys and pays his money before the plaintiffs had made their entry more specific, if the expression may be allowed, by a survey, identifying the land they meant to appropriate." The opinion in this case is exhaustive and conclusive. In *Munroe v. McCormick,* 41 N. C., 85, the entry was "640 acres of land in the county of Cumberland, on the head of Big Cross Creek, joining the Toney and Murchison lands." *Pearson, J.,* holding the entry void, says: "Where one makes an entry so vague as not to identify the land, such entry does not amount to notice, and does not give any priority of right as against another individual who makes an entry, has it surveyed, and takes out a grant. Where an entry is vague, it acquires no priority until it is made certain by a survey. The good sense of this principle will strike every one as soon as it is sug-

gested." In *Fuller v. Williams,* 45 N. C., 162, the description is "100 acres of land on the waters of Uharie, adjoining the lands of his (654) own, and runs for complement." Held void for uncertainty. In *Grayson v. English,* 115 N. C., 358, *Mr. Justice Avery* reviews the case and says: "The two methods of affecting all subsequent enterers with constructive notice are: (1) By making a survey of a floating or vague entry containing an indefinite description, and thus identifying that which was before uncertain. (2) By making the description, etc., explicit, so as to give reasonable notice to a second enterer of the first appropriation. The object of description is to identify the thing for which the contract is made, and whatever means will effect that end must be all sufficient." In that case the entry was "540 acres of land lying on both sides of Huntsville (or Haney) Mountain, extending from the north end along the summit and down both sides to deeded lands adjoining Miles Higgins, John Jarrett, the Prices, and others."

By the light reflected upon the subject by these decisions, and the reasoning upon which they are supported, we are brought to concur with his Honor that the entry is too vague and indefinite to affect the rights of one who enters, surveys, pays his money, and takes a grant. The land entered is said to be on the waters of Toxaway River, but when the grant is taken the location is made "on both sides" of the river. Again, it is to be noted that while the beginning is sufficiently definite, there is nothing in the entry indicating in what direction the first call would go or where it would reach the I. S. Fisher land. We note that in the grant there are nine calls before the Fisher land is reached. Giving to the entry the most liberal construction in aid of its sufficiency, we are unable to see how a person desiring to make an entry in that section could ascertain, by reference to the entry itself, where the enterer intended to locate. In our judgment, it comes clearly within the description of a "floating entry," which, until surveyed and located, is void as to other persons who may make and take a grant. The enterer (655) may have surveyed his entry and thereby acquired his inchoate equity or preëmption, which, if perfected within the time prescribed, would have given him a good title or a perfect equity against any intervening enterer. Does the testimony, taken most strongly for plaintiff, show knowledge of such facts and circumstances as were sufficient to put him upon inquiry? A number of expressions are used by the judges indicating the opinion that the only notice which will be sufficient to protect a vague, indefinite entry is a survey, and, as said by *Judge Pearson,* the good sense of this principle is manifest. Suppose that Burgess had taken the defendant to the beginning point called for, and used to him the exact language of the entry, what more would he have known than the entry disclosed? In *Harris v. Ewing, supra,*

wherein the second enterer is held to be fixed with notice of a vague entry, the land was surveyed "before the inception of his title." *Judge Ruffin* says that such "specific notice" will supply the original defect in the entry. Assuming, however, that the defendant can be fixed with notice otherwise than by a survey, the question arises, What facts and circumstances were known to him? Lee says that Burgess told him that the land being surveyed was "Slick Fisher's land." This is very far from telling him that it was land which he (Burgess) had entered. Defendant went off to see if Fisher was at home, and said that he was not there. The statement made by Burgess was not true. It was not Fisher's land. So far as the evidence shows, the assignment by Burgess to the two Fishers of an interest in the entry had not at that time been made; the date of the assignment was not shown. The grant, made several months later, was to Burgess and the two Fishers as tenants in common. Burgess says that he told defendant he better not make the survey; it would cause hard feeling. This falls far short of indicating that Fisher claimed the land. We do not see how Jacob's testimony is any more helpful to plaintiff. We concur in the well (656) considered argument of plaintiff's counsel, that knowledge of any facts and circumstances reasonably calculated to put a man on inquiry makes it his duty to make inquiry, and that he will be fixed with notice of all facts which such inquiry would have elicited. We do not find in the testimony knowledge of such facts and circumstances. Burgess knew he had entered the land, and should have known what land he entered, and yet when he saw defendant surveying what he claims to be his entry he does not suggest to him that he is on such entry, but contents himself with saying that to survey it will cause hard feelings and that Fisher will be angry—that he "is on Slick Fisher's land." There is another fatal defect in plaintiff's case. The grant shows that the title is in Burgess, the plaintiff, and another. There is no sufficient evidence that his cotenant had ever conveyed to him the land covered by defendant's entry and grant. Burgess says that there was some agreement to that effect. In any aspect of the testimony we concur with his Honor's ruling. The judgment must be

Affirmed.

*Cited: Call v. Robinett,* 147 N. C., 617; *Babb v. Manufacturing Co.,* 150 N. C., 140; *Lovin v. Carver, ib.,* 711; *Cain v. Downing,* 161 N. C., 596.

JOHN L. WORTH v. E. H. WRENN, ADMINISTRATOR, ET AL.

(Filed 22 May, 1907.)

1. **Bond for Title—Vendor and Vendee—Statute of Limitations.**
In an action to enforce a vendor's lien for unpaid purchase money, where a bond has been given to make title to real property, the statute of limitations does not begin to run until the possession of the vendee has become hostile; and neither the lapse of time nor the statute of limitations will operate to prevent the subjection of the realty or its proceeds, as distinguished from an action on separate notes given for the purchase price or *in personam*, to the payment of whatever may be due, until some action has been taken that places one of the parties in a position of resistance to the claim of the other.

2. **Evidence—Transaction with Deceased Persons.**
It is competent for plaintiff's witnesses to testify what the deceased maker of the note sued on testified on a former trial as to its payment. Such is not within the meaning of the statute, Revisal, sec. 1631, concerning certain transactions with a deceased person.

(657) SPECIFIC PERFORMANCE of a contract for the sale of land, tried before *Ward, J.*, and a jury, at November Term, 1906, of SURRY.

There were statements in the record, admission of parties and evidence of plaintiff which tended to show that on 10 November, 1863, Job Worth and Ice Snow contracted in writing to sell and convey unto William Colson the land described in the complaint; that William Colson agreed to pay 1,200 pounds of good tobacco, and executed his three bonds set out in the complaint; that William Colson immediately went into possession of the said land and held undisturbed possession until his death, and his children, the defendants, except the administrator, have held possession since his death; that this action was commenced against William Colson on 23 May, 1901; that while the action was still pending William Colson died, and E. H. Wrenn was duly qualified as administrator of his estate; that at the Spring Term, 1905, the heirs at law of William Colson were made parties defendant; that the heirs at law filed an answer denying the execution of the bonds, denying that plaintiff was the owner of the bonds, and also denying that plaintiff could make good title to the land, admitting that $2 was still due, and the parties plead the statute of limitations. The execution of the bonds was proven by the testimony of John Snow, a witness to the said notes. That it was admitted that the plaintiff was in possession of the notes; that he was the only heir at law and distributee of Job Worth, deceased, one of the payees in the note, and was also the purchaser of the interest of Ice Snow, the other payee in the notes; and it was further admitted that plaintiff was in a condition to make a good title to the land;

(658) that 10 cents per pound was a reasonable price for tobacco during

the years of 1862-1864; that 300 pounds of tobacco were delivered to the payees to be credited on the bonds on 8 February, 1867, and 401 pounds on 3 May, 1870; that William Colson was insolvent from the date of the contract until his death.

The plaintiff offered himself as a witness, and was asked the question, "State if you ever heard William Colson testify in public trial, before a referee appointed by the court, in the case of *Ice Snow v. John I. Worth,* administrator of Job Worth, deceased, with reference to the notes sued upon in this action, as to whether said notes had been paid; and if you did so hear him examined, state what he said." This question was objected to by the defendants and the objection sustained by the court, and the plaintiff excepted and assigned same as error.

Defendants then stated that they would offer no evidence. They tendered plaintiff a judgment for $2, and the same was rejected.

His Honor held that the plaintiff had not made out a case, and, the statute being pleaded, plaintiff had not brought himself within it, and the defendants consented to the judgment in the sum of $2, admitted to be due by them in their answer, and judgment was rendered accordingly. From this judgment plaintiff prayed an appeal, and, by exceptions duly noted, assigned the following errors, to wit:

1. That his Honor erred in excluding the evidence of John I. Worth with reference to the sworn statements of William Colson before the referee.

2. That his Honor erred in holding as a matter of law that the plaintiff could not recover, except the $2 admitted to be due by the defendants in their answer.

*W. F. Carter for plaintiff.* (659)
*J. M. Bodenheimer for defendants.*

HOKE, J. The Court is of opinion that neither the lapse of time, as applied under our former system, nor the statute of limitations now in force, as a conclusion of law, will operate to bar the plaintiff's claim, and on the testimony and admission the plaintiff is entitled to have the case submitted to the jury.

The action is to enforce the vendor's lien for unpaid purchase money where a bond has been given to make title to real property on payment of the purchase price, the plaintiff owning the debt and holding the legal title as successor to the rights of the vendor, and the defendants holding as heirs of the vendee, the defendants and their ancestor from whom they claim having been in continuous possession of the property under and from the date of the contract. In such case our decisions are to the effect that neither lapse of time nor the statute of limitations will oper-

ate to prevent the subjection of the property or its proceeds to the payment of whatever may be due until after one party or the other has made some move looking to the execution of the contract, either by demand for specific performance or possession of the property which has been refused, or until some action has been taken that places one of the parties in a hostile attitude to the other or in resistance to his claim.

The doctrine, as applied to lapse of time under the old system, and the reasons for it, are stated in the case of *Scarlett v. Hunter,* 56 N. C., 85, where *Judge Pearson,* delivering the opinion of the Court, says: "Where there is a contract for the sale of land, the vendee is considered in equity as the owner, and the vendor retains the title as security for the purchase money. He may rest satisfied with this security as long as he chooses, and when he wants the money he has the same right to compel payment by a bill for specific performance as the vendee has to call for
(660) title. The right to have a specific performance is mutual, and when the vendee is let into possession and continues in possession, as in our case, it is taken for granted that the parties are content to allow matters to remain *in statu quo* until a movement is made by one side or the other. These principles are fully discussed in *Falls v. Carpenter,* 21 N. C., 237, which is decisive of this case."

In *Scarlett v. Hunter* the action was brought within twenty years from the maturity of the debt, and therefore the common-law doctrine that payment of a claim is presumed after twenty years, applied by analogy in some instances to equity causes, was not presented. The tenor of the opinion, however, is to the effect that while the vendee is in possession of the property in recognition of the contract, and until something occurs to place the parties in a hostile attitude to each other, the lapse of time does not operate to protect the property from the amount found to be due. Conceding that the presumption of payment after twenty years should apply with us, and the weight of authority seems to support this view—*Falls v. Torrence,* 11 N. C., 412; *Cox v. Brower,* 114 N. C., 422; *Lewis v. Hawkins,* 90 U. S., 119; *Evans v. Johnston,* 39 W. Va., 300; *Williams v. Mitchell,* 112 Mo., 301; Jones on Liens, sec. 1108; Lawson on Presumption, sec. 72—it is a rebuttable one, and there is testimony which requires that the question be submitted to a jury.

In addition to the testimony of the pecuniary condition of the vendee, there is an admission of record that there is a balance due on the contract for unpaid purchase money to the amount of $2, which had been repeatedly tendered, thereby admitting that the defendants are in possession of the property in recognition of the contract, and that there is purchase money due thereon and still unpaid. And in reference to

the statute of limitations now in force and made applicable to (661) all causes of action instituted since 1 January, 1893, by chapter 113, Laws 1891, our Court has held that where a vendee has entered and continued in possession, under a bond for title and in recognition of the contract, the statute does not begin to run until the possession of the vendee has become hostile by a refusal to surrender after a demand and notice. In *Overman v. Jackson,* 104 N. C., 4, it is held: "While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, the statute prescribing the time within which actions to foreclose must be brought does not embrace actions arising out of executory contracts for sales of land. In an action to recover possession by vendor against a vendee who enters upon the contract, the only statute of limitation applicable is that of ten years (Code, sec. 158), and it only begins to run when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced." And *Chief Justice Smith,* speaking to this question, said: "But, as the relation of vendor and vendee is not within the words of the statute, though it possesses many features in common with that provided for in the statute, we do not feel at liberty to extend its terms and take in the case to which they do not apply. Proceedings to foreclose and redeem are thus limited and confined to mortgages and deeds in trust, and to these the time is restricted, and to none arising out of executory contracts of sale. The only statute here applicable is that of Code, sec. 158, which prescribes a ten years limit for causes of action not specifically provided for in preceding sections. But to the application of this statute the obvious objection presents itself that it must be put in operation by an adverse holding, and hence the possession is that of a tenant holding under the owner, rendered hostile by no demand and refusal to surrender or resistance offered to the owner's (662) reëntry. *Parker v. Banks,* 79 N. C., 480; *Allen v. Taylor,* 96 N. C., 37. Equally without support is the suggestion that if the debt is barred, so must be the mortgage to secure it. These are essentially distinct as affected by the statute of limitations, as held in *Capehart v. Dettrick,* 91 N. C., 344; *Long v. Miller,* 93 N. C., 227."

The statute of limitations, when properly pleaded, will bar an action for the debt, so as to prevent any judgment *in personam* to be collected out of other property of the debtor; but it will not prevent the appropriation of the property held and occupied under the bond until ten years have elapsed from the time when there has been a demand and refusal. This follows, no doubt, from the principle uniformly held with us, that the occupation of the vendee in such cases is permissive and

rightful, and that such occupant is entitled to a demand and reasonable notice before he can be required to surrender the possession. *Allen v. Taylor, supra,* and the authorities therein cited.

The Court is of opinion, also, that the evidence offered as to what plaintiff heard William Colson, now deceased, testify concerning these notes on a trial before a referee should have been received on the issue as to payment. The proposed testimony was neither within the letter or spirit of the statute which, under certain circumstances, excludes testimony of a party litigant as to transactions with a person deceased (Code, sec. 590; Revisal, sec. 1631), and the reception of such evidence has been expressly approved (*Costen v. McDowell,* 107 N. C., 546). The case states that the plaintiff holds the legal title, and in that respect is able to perform the contract; and as to the debt, under our present system of procedure, where an action is prosecuted in the name of the real party in interest, the possession of the bond, though non-
(663) negotiable, is *prima facie* evidence of ownership in plaintiff as against every one except the payee. *Jackson v. Love,* 82 N. C., 405; *Holly v. Holly,* 94 N. C., 670.

If, however, it should be made to appear that there are unpaid debts outstanding and enforcible against the estate of Job Worth, the vendor, it may be necessary to have his administrator made a party plaintiff or defendant.

For the errors indicated the plaintiff is entitled to have a

New trial.

*Cited: In re Dupree's Will,* 163 N. C., 259; *Davis v. Pierce,* 167 N. C., 138; *Knight v. Lumber Co.,* 168 N. C., 453; *Love v. West,* 169 N. C., 15.

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J. F. WATERS, ADMINISTRATOR, AND C. L. EPLEY v. SECURITY LIFE AND ANNUITY COMPANY.

(Filed 22 May, 1907.)

1. **Insurance—Contract—Evidence—Nonsuit.**

It is error in the court below to dismiss an action upon a contract of insurance as on judgment of nonsuit under the Hinsdale Act upon the evidence, when there is testimony tending to prove that there was a complete and definite contract of insurance between the intestate and defendant company as contained in the policy, and no evidence tending to show that the contract was ever modified or rescinded.

2. **Same—Policy Delivered.**

When a policy of insurance which complies with the application has been unconditionally delivered, in the absence of fraud it is conclusive evidence that the contract exists between the parties.

3. **Same—Acceptance.**

Acceptance by the insurance company of the applicant need not necessarily be evidenced by physical possession by the insured of the policy, as delivery is largely a question of intent, frequently indicated by mailing a letter in due course containing an unconditional acceptance, or by sending the policy to an agent with instructions for unconditional delivery, where there is no contravening stipulation in the contract itself.

4. **Same—Evidence—Declarations—Questions for Jury.**

The physical delivery by the company of the policy of insurance to the applicant thereof makes out a *prima facie* case that there is a completed contract of insurance as contained in the policy; but the effect of such physical delivery can be qualified and explained, and, on issue properly joined, pertinent declarations of plaintiff's intestate made at the time, or afterwards, when against the interest of declarant, may be relevant as testimony on the question.

5. **Same—Policy Forms—Alterations—Judicial Notice.**

The Court takes judicial notice that policies of insurance are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes are made to meet special conditions; in the absence of special circumstances tending to cast suspicion thereupon, entries by marginal notes and "pasters" on the policy raises no presumption of alteration, but the nature of the entry and its placing are simply circumstances on the general question for the jury as to a completed contract.

6. **Same—Cancellation—Mutual Consent.**

While a contract of insurance may be set aside by mutual consent upon a sufficient consideration, until such is effected it remains binding. If the insured, acting under an erroneous impression that the policy was not such as he had agreed to take, returned it and said he would not pay his notes given therefor, and the company did not accept the proposition unconditionally, such conduct was nothing more than a proposal to cancel, and upon the death of the insured before acceptance the negotiation was off and the contract of insurance remained effective.

ACTION on policy of insurance, tried before *Cooke, J.*, and a (664) jury, at December Term, 1906, of BURKE.

The defendants contended that:

1. No policy of insurance of defendant company had ever existed in favor of plaintiff's intestate.

2. If any such policy had ever existed, the same had been canceled by mutual consent and was not in force at the time of intestate's death.

At the close of plaintiff's evidence, and again at the close of the entire evidence, there was a motion by defendant to dismiss the action as on judgment of nonsuit. The latter motion was allowed, and plaintiff excepted and appealed.

(665) *S. J. Ervin for plaintiff.*
*Avery & Avery for defendant.*

HOKE, J. There was evidence offered on the trial tending to show that in February, 1906, plaintiff's intestate, a liveryman doing business in Morganton, N. C., made written application for a policy of insurance of a specified kind in defendant company, passed a satisfactory physical examination, and executed two notes as payment on premiums, each for $107.30, and payable, respectively, one 1 November, 1906, and the second 1 March, 1907. The application, indorsed and approved by the company's agent, was forwarded to the company and a policy was immediately issued, returned to defendant's agent at Morganton and there delivered to the intestate. The kind of policy desired is thus stated in the application:

"(Margin) Accepted: E. R. Michaux.

"Date policy, 25 February, 1907; term insurance.

"I hereby apply to the Security Life and Annuity Company, Greensboro, N. C., for insurance upon my life, and agree that this application shall be the basis and a part of the proposed contract for insurance.

"Premiums, $170.10. Term, $44.50."

A part of this description, to wit, "Date of policy, 25 February, 1907; term insurance," was written on the margin, and perhaps some other portions of the statement. The policy insured Charles L. Epley, the applicant, in defendant company, in the sum of $5,000, and on the face of the policy was pasted a slip, termed a paster, as follows:

"Whereas Policy No. 4415, for $5,000, has been issued by the Security Life and Annuity Company of Greensboro, N. C., upon the life of Charles Lee Epley (hereinafter called the insured), of Morganton, N. C., to take effect on 25 February, 1907, provided payment of
(666) the first premium specified therein shall have been made upon delivery of this agreement; and

"Whereas the insured desires temporary insurance for the same amount during the period intervening between 25 February, 1906, and 25 February, 1907:

"Now, therefore, the company agrees that upon delivery of Policy No. 4415 and of this agreement, and payment at the date of such delivery of the premium of $44.50, receipt of which amount is hereby acknowledged, in consideration of this agreement, and provided that insured shall die, or in event of total and permanent disability before 25 February, 1907, it will admit the same liability which would exist if said Policy No. 4415 were in force at the time of such death or disability."

And at or near the close of the policy is a stipulation to the effect that no premiums thereon shall be required after 25 February, 1920.

Shortly after the delivery of the policy, intestate was heard to complain, by several persons examined as witnesses, that the policy was not the kind he had applied for, and that he believed he would send it back. To one he stated, in substance, that it required sixteen payments instead of fifteen; to another, that it was dated a year forward and the rate was higher; and yet to another, that he had applied for a straight policy and they had sent him a term policy, etc., and soon thereafter he returned the policy to the company, accompanied by a letter, as follows:

MORGANTON, N. C., 27 February, 1906.

THE SECURITY LIFE AND ANNUITY COMPANY,
*Greensboro, N. C.*

DEAR SIRS:—I am to-day returning the policy you sent me, which is not the one I bought, and I do not propose to accept it. My policy was to correspond with the date of the application, and the one sent me is dated for 1907, and, of course, I will not accept it. I still (667) have the receipt Mr. Yates gave me, and will keep it until I get the policy I bought or my notes, one. I will protest these notes if policy does not come according to contract. Respectfully,

C. L. EPLEY.

The officers of the company, in reply, wrote several letters to him, as follows:

2 MARCH, 1906.

MR. C. L. EPLEY, *Morganton, N. C.*

MY DEAR SIR:—Your letter, with Policy No. 4415, issued in accordance with your application, just received, and I note what you say in regard to same. The policy is all right as it is. However, if you prefer it different, of course we shall be glad to change it for you. I am referring the letter to our Mr. Yates, who will take it up with you, and I am sure will make it satisfactory to you.

With best wishes, I am, Yours truly,

GEORGE A. GRIMSLEY, *Secretary.*

The plaintiff next offered the following letter:

2 MARCH, 1906.

MR. P. P. YATES, *Asheville, N. C.*

DEAR SIR:—I am sending you the policy of Charles L. Epley and his letter in regard to same. I think it best for you to go right down to see him. I am writing him that the matter has been referred to you, and that you will take it up with him.

Sorry I did not get to see you before you left town. Hope you will have the biggest business during March you ever had.

Yours truly,

GEORGE A. GRIMSLEY, *Secretary.*

(668) Plaintiff next offers letter from Mr. P. P. Yates, general agent of the defendant company, dated:

ST. LOUIS, MO., 7 March, 1906.

C. L. EPLEY, *Morganton, N. C.*

DEAR SIR:—I have just received a letter from our secretary, Mr. Grimsley, telling me that you did not understand your policy, and had sent it back. Now I, of course, know that you did this simply because you did not understand it, and I would not want you to have it unless it is in every particular just what I sold you, and it shall come up to that standard in every way; but I will soon be in Morganton again, and as there never was so nice a policy put on paper before, I am sure I can make it all right with you.

With best wishes, I am, Yours truly,

PETER P. YATES.

Speaking to this matter of returning the policy, J. L. Jarvis, a witness for defendant, testified:

"Q. Did he ask you anything about returning the policy?

"A. Yes; he wanted Mr. Johnson (another agent) and myself to take the policy. We refused to do it, and then I said to him, 'You can take it up through Mr. Yates.' I gave him his address. Cannot say whether he told me in so many words whether he would return it or not."

While the matter remained in the condition indicated by these letters and testimony, the intestate was accidentally drowned, by reason of high water in driving across country, in the line of his occupation; and, at the time of his death, both the policy and the notes given by plaintiff on the premium were in possession of the company. The policy, or a copy of it, was furnished plaintiff in response to notice, and the notes
(669) were produced at the trial by order of the court made in the cause.

| | |
|---|---|
| The two notes for $107.30 each equal $214.60, being the equivalent of the term insurance for year 1906 | $ 44.50 |
| Premium due 25 February, 1907 | 170.10 |
| | $214.60 |

By correct interpretation, there is evidence here tending to prove that there was a complete and definite contract of insurance between the intestate and defendant company as contained in the policy, and if this should be established there is nothing in the testimony as it now appears which shows or tends to show that such a contract was ever modified or

rescinded. It is a recognized principle of the law of contract, applied by well considered decisions to contracts of insurance, that where there has been formal application made for a specified kind of insurance, all the required preliminaries having been complied with, and such application has been unconditionally accepted and the acceptance signified by some definite act of the company, that the contract of insurance is then complete and will bind the parties according to its terms. *Crook v. Cowan,* 64 N. C., 743; *Borden v. R. R.,* 113 N. C., 570; *Eames v. Insurance Co.,* 94 U. S., 299; *Insurance Co. v. Hallack,* 27 N. J. L., 645; *Heiman v. Insurance Co.,* 17 Minn., 153; Vance on Insurance, 160; Bliss on Insurance, 210-215.

It is not required at all that the acceptance by the company should be indicated by a manual delivery of the policy to the insured; for, as said in some of the cases cited, "It is not the physical possession of the policy, but the legal right thereto which is determinative of the question." Accordingly, a binding acceptance can be, and frequently is, indicated by the mailing of a letter in due course containing an unconditional acceptance, or by sending a policy to an agent with instructions for unconditional delivery, where there is no contravening stipulation in the contract itself. *Insurance Co. v. McArthur,* 118 Ala., 695; *Insurance Co. v. Babcock,* 104 Ga., 67; reported, also, in 69 Am. (670) St. Reports, 134, with a very instructive and satisfactory note on the subject by the editors; Joyce on Insurance, sec. 91, pp. 92, 93. And where a policy which complies with the application has been unconditionally delivered, in the absence of fraud it is held to be conclusive evidence that the contract of insurance exists between the parties. *Rayburn v. Casualty Co.,* 138 N. C., 379; *Grier v. Insurance Co.,* 132 N. C., 542; *Insurance Co. v. Jones,* Civil App. (Texas), 32 Tex. Civ. App., 146. It may be noted, as postulates of this last proposition, (1) that the policy complies with the application; (2) that the delivery is unconditional.

The fact that the policy in a given case has been turned over to the insured is not conclusive on the question of delivery. This matter of delivery is largely one of intent, and the physical act of turning over the policy is open to explanation by parol evidence. It does, however, make out a *prima facie* case that there is a completed contract of insurance as contained in the policy. Vance on Insurance, 169; Joyce on Insurance, sec. 94.

In the case before us, considering the policy with the paster or rider in connection with the application—and it is right so to consider them (*Insurance Co. v. Bussel,* 75 Ark., 25)—it appears on the face of the papers that, while the intestate seems to have had a different impression, as a matter of fact the policy complied with the application. It did not

require, as he erroneously supposed, sixteen instead of fifteen payments; and both as to containing, in part, term insurance, and in the amount of the premium, the application and the policy were in accord.

If, then, this application was the one which intestate really made, and the policy complying with it was unconditionally delivered, in such case the minds of the parties had met on one and the same thing at (671) the same time, and the contract of insurance was complete. If, however, as defendant contends, the agent, without the knowledge or consent of the intestate, had changed the application, then the policy which was sent him in accordance with an application so wrongfully changed would not be the contract until the applicant had been given reasonable time to consider and had signified his assent to the proposition as amended. And if, in the exercise of that right, he returned the policy, in such case the negotiation would have ended without a contract. Or, if the policy did accord with the application as made by the intestate, and the delivery which was actually made was not unconditional, but on approval, this would leave the matter in the tentative; and if the intestate, in such case, exercising the privilege given him by the terms of the delivery, returned the policy, in that case there would be no binding agreement, and plaintiff could not recover. It is a question for the jury as to whether there was a valid and binding contract of insurance between the parties; and the declaration of the intestate would seem to be relevant on that issue in so far as they tended to show that the application had been changed without his knowledge, and as to whether the delivery was unconditional or qualified.

It is urged upon our attention that some of the entries, by means of which the application was made to accord with the policy and the paster, were made on the margin of the application and written longitudinally, and that such entries, so made, and even the paster itself, are presumptive evidence of a change in the contract after the application had been first signed. But neither the authorities nor the known usage in the making of such contracts are in support of the position to the extent contended for. We know that these policies, as well as the applications, are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes (672) are made to meet special circumstances; that these are ordinarily noted on the margin, and a slip is then pasted on the face of the policy to express the contract as affected by these changes. In the absence, therefore, of some special circumstances tending to cast suspicion on such entries, there should be no presumption of any alteration; but the nature of the entry and its placing are simply circumstances on the general question as to whether there has been a completed contract of insurance. And so it is held by authority: *Pierce v. Insur-*

*ance Co.*, 138 Mass., 161; *Patch v. Insurance Co.*, 44 Vt., 481; *McLaughlin v. Insurance Co.*, 57 Me., 170; Joyce on Insurance, sec. 195. The question, then, should be submitted to the jury, and if a binding contract of insurance should be established as contained in the policy, we see nothing in the correspondence or conduct of the parties which tends to show that such contract had ever been canceled by mutual consent, as alleged by defendant company. Contending that the policy was sent in strict accordance with the contract, they offer to take it up with the intestate and to make it right with him if it does not so accord; but not once do they assent to the proposition that there is no longer a contract of insurance. Moreover, they held on to the intestate's notes, and have never said or written anything which would prevent their collection in case the policy could be shown to comply with the application as made by the intestate, and that the delivery was absolute. A contract of insurance may be set aside by mutual consent, the consent of one of the parties being respectively the consideration for the consent of the other. But where, as here, this is the sole consideration claimed, in order to make a binding agreement there is required the essential element in the law of this and all other contracts—that of mutuality. As said by Clark, in his work on Contracts, speaking of mutual promises, the one being in consideration of the other (page 117): "The promises may be contingent or conditional, except that mutuality (673) of engagement is necessary; and if the condition or contingency produces a want of mutuality, the consideration is insufficient; both parties must be bound, or neither is bound."

If, therefore, the intestate, acting under an erroneous impression, sent the contract back to the company with the statement that it was not the policy he ordered and he did not intend to pay the notes, the company could have made this proposition a binding contract by an unconditional acceptance, signified in some definite manner; but until they did this, the act of the intestate in sending back the policy was nothing more than a proposal to cancel; and if he died before acceptance the negotiation was off and the contract of insurance remained. *Insurance Co. v. Jones, supra; Sitterding v. Grizzard*, 114 N. C., 108; *Fertilizer Co. v. Moore*, 118 N. C., 191; *Bank v. Hall*, 101 U. S., 43.

*Travelers Co. v. Jones* is very similar to the case we are discussing, and is an apt authority on the different points presented. In that case it was held, among other things: "(1) The execution and delivery of a policy to an insurance company in accordance with a written application evidences a completed transaction and constitutes a contract between the parties. (2) Death of insured revokes all offers of cancellation made by him prior to his death and not accepted by insurer prior thereto. (3) Where an insurance company, in pursuance of the terms

of a policy, sent in its claim for a premium to insured's employer, and, before its payment, insured, who had requested a cancellation, died, the rights of the parties having then become fixed, the insurance company could not alter them and accept insured's offer of cancellation by withdrawing its claim on his wages." And in *Sitterding v. Grizzard,* 114 N. C., 108, it is held: "Where one party to a contract relies upon a renunciation of it by the other, the burden is on him to show, by (674) positive and unequivocal proof, not only that the other party abandoned the contract, but that he himself accepted the renunciation."

The question of whether there had ever been a valid contract of insurance between the intestate and company of the kind contained in the policy will be considered and determined on the principles heretofore indicated; and if such a contract is established, then the act of the intestate in sending the policy back to the company amounts to no more than a proposition by him to cancel, and, not having been accepted by the company, from anything that now appears, the death of the intestate, under such circumstances, puts an end to the negotiation and would leave the policy in force.

There was error in dismissing the action, and the order to that effect is

Reversed.

*Cited: Perry v. Insurance Co.,* 150 N. C., 145; *Gaylord v. Gaylord, ib.,* 233; *Annuity Co. v. Forrest,* 152 N. C., 625; *Powell v. Insurance Co.,* 153 N. C., 129; *Lancaster v. Insurance Co., ib.,* 289; *Dunlap v. Willett, ib.,* 321; *Hardy v. Insurance Co.,* 154 N. C., 440; *Pender v. Insurance Co.,* 163 N. C., 103; *Blount v. Fraternal Assn., ib.,* 169; *Britton v. Ins. Co.,* 165 N. C., 152; *Murphy v. Ins. Co.,* 167 N. C., 336.

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W. E. WALKER v. HENRY CARPENTER.

(Filed 27 May, 1907.)

**Burden of Proof—Entries for Vacant Lands.**

The burden of proof is upon him who states an affirmative in substance and not merely in form, without reference to whether it may appear from the form of pleadings or in the record that he is party plaintiff or defendant; under sections 1707 and 1693, Revisal, the burden is upon the enterer to sustain his right to make entry by showing such to be in substantial form a compliance with the statute, that the lands

were vacant and unappropriated so far as protestant is concerned, and of the character that are open to entry, and that the line of other lands which he is required to set out in his entry are correctly stated.

HOKE and WALKER, JJ., dissenting.

PROCEEDINGS under entry laws (Revisal, ch. 37), tried before *Guion, J.*, at February Term, 1907, of RUTHERFORD.

The defendant, Carpenter, entered a certain parcel of land, and (675) the plaintiff, Walker, filed his protest. Thereupon the matter came by proper process under the statute before the Superior Court for trial. His Honor submitted the following issue without objection: Is the land described in the protest and entry vacant and unappropriated? Answer: No. From a judgment for plaintiff, defendant appealed.

*D. F. Morrow for plaintiff.*
*McBrayer, McBrayer & McRorie for defendant.*

BROWN, J. The only question presented for determination is whether the court below erred in holding that the burden was upon the enterer, the nominal defendant in this case, to make out his *prima facie* case that the land in dispute, which he claims to have entered, was subject to entry; that is, vacant or unappropriated. It is immaterial that the clerk of the Superior Court has arrayed this protestant as a plaintiff and the claimant as defendant. In the view we take of the matter, it is more orderly in giving a title to proceedings of this character to put the claimant down as plaintiff and the protestant as defendant. However they may be arrayed on the docket, it is a fundamental rule of evidence that the burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant. We think the learned counsel for the claimant is in error in describing the proceeding as "an action by the plaintiff, protestant, to vacate an entry laid by defendant." It is purely a statutory proceeding regulating the manner in which entries of vacant and unappropriated lands belonging to the State may be made and perfected and grants issued therefor, and it appears to us that the enterer or claimant is the actor therein, and when his right to make the entry is challenged, or denied by protest, he must make good in the Superior Court his claim of right to enter the land described in his entry. It is singular that this question has heretofore never been passed upon by this Court, and, so far as (676) we can find, the point has never been raised, except in the case of *Johnson v. Westcott,* 139 N. C., 29, when it was deemed unnecessary to decide it. There seems to be a dearth of judicial precedents to guide us, for neither the diligence of counsel nor our own investigations have been able to discover any. So, in coming to a conclusion, we can only inter-

pret the statute according to what we think is the manifest will of the General Assembly, and apply to the subject the general principles of law governing the *onus probandi.* In every mode of litigation an assertion of fact avails nothing without proof. Some party to it must commence by producing proof to sustain his allegation. The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative. Of course, such affirmative must be one in substance and not merely in form. An eminent writer on the law of evidence says: "This rule of convenience, which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat,* has been adopted in practice not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable; and, moreover, it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case." Taylor on Evidence, quoted in Bailey's Onus Probandi, p. 2, note.

The chapter regulating the entry of public lands describes the enterer as claimant of the land and prescribes with particularity what he shall set out in his written declaration. Among other requirements, the paper-writing must set out "the natural boundaries of any other person, if any, which divide it from other lands." When the entry is published, (677) any person who thinks his land is covered by it may file a protest, whereupon the *claimant* may be commanded to appear at the next term of the Superior Court and show cause why his entry shall not be declared inoperative and void. Upon the trial of the issue we think the burden is thus cast upon the claimant to make good his entry. How does he do it? First, by showing a written entry duly filed with the entry taker which fully complies with the requirements of the statute (Rev., sec. 1707); second, by showing that the lands he claims by virtue of his entry come within the description of the act as "vacant and unappropriated lands," at least so far as protestant is concerned, and are not embraced within the exceptions in the act (Rev., sec. 1693). The statute particularly declares that every entry made for any lands not authorized by the act to be entered shall be void. The statute further declares that where protest is filed the claimant's right to enter the land must be sustained before official survey is made and warrant issued for the same. It is, therefore, reasonable that the claimant should assume the burden and expense of proving at least that his entry does not trespass upon the protestant's domain, and that in his entry he has set out correctly the lines dividing the land entered from protestant's land. It seems to us not only unreasonable, but directly contrary to elementary principles, to require the protestant to take up the *onus probandi* and

to show that the lands are not vacant lands and that the claimant has not complied with the terms of the statute. It appears to us to be more consistent with reason and principle to require the claimant affirmatively to sustain his right to make entry by showing an entry which in substantial form complies with the statute, and by offering evidence tending to prove that the lands were vacant and unappropriated lands, so far as protestant is concerned, and of the character that are open to entry, and that the lines of other lands which he is required to set out in his entry are correctly stated. This is no great hardship on the (678) claimant. He must necessarily be acquainted with the land before entry, and in order to write an entry in due form he must set out the dividing lines of those persons whose lands adjoin it. These requirements are evidently safeguards thrown around the appropriated lands of the neighbors in order that they may discover if their boundaries are trespassed upon, and, if so, enter a protest under section 1709 of the statute. This section provides that if any person shall claim title to or an interest in the land covered by the entry he may file his protest in writing. This protest stops the issuing of a grant until "the right of the claimant to make the entry is sustained." Section 1713. The claimant is the one who asserts his right to make the entry, and he should sustain it by proof, for it is but reasonable and just that the party who relies upon the existence of a fact, or asserts a right, should be required to support it by proof before his adversary is called upon to reply. We admit that the determination of this question is not without difficulty, but we think it would subject the *bona fide* owners of lands to great annoyance and expense if land speculators and timber hunters are permitted to enter all outlying tracts of woods and timbered lands and compel those who own them to enter their protests and prove their titles before the claimant is called upon to prove anything except a mere entry, which is his own *ex parte* production.

Affirmed.

HOKE, J., dissenting: I cannot think that the judge below made a correct ruling as to the burden of proof; certainly not to the extent to which it was imposed on defendant by the facts of the case as presented in the record.

It appears that, defendant having made an entry of a piece of land, plaintiff filed his bond and protest, and the cause was transferred to the civil-issue docket. Coming on for trial, an issue was sub- (679) mitted as to whether the land was vacant, and the judge held *in limine* that the burden of proof was on the defendant, the enterer, and defendant excepted. Defendant then made proof that his entry was formally regular, and both parties offered further testimony on the issue.

The court charged the jury that the burden of proof was on the defendant, and exception was again duly made. The jury, having deliberated for some time on the case, returned for a special instruction as to the burden of proof, and the court again told the jury that such burden was on defendant, exception being made, and verdict was thereupon entered in favor of plaintiff.

The force and effect of this ruling was to impose on defendant not only the burden of showing that his entry was formally regular, but also of showing that the land in question had never before been withdrawn from entry, either by grant or appropriation, statutory or otherwise; and in this I think there was error which entitles the defendant to a new trial.

I concur in the view expressed by the Court that it is not a matter of first importance on which side of the docket the parties appear, nor do I think that the precise form of the issue is of great consequence; but the question is, by proper construction of the statute, addressed to this subject, Where is the burden of proof after defendant has made formal proof of his entry? Is it incumbent on him to establish further, under the same rule as to the burden of proof, that the land has never before been granted or otherwise appropriated, and is, therefore, still subject to entry? Such a requirement is one that it would be very difficult, and in many instances impossible, to meet; and to impose it upon a litigant would very likely result in stopping all further entries of public
(680) lands wherever any one saw proper to file his bond and enter protest.

We know that there are great numbers of grants in this State, embracing large tracts of territory, the same grant often extending through different counties, many of them taken out in the remote past, and their location, even now, uncertain. It is, therefore, as stated, well-nigh impossible for the average citizen, and especially one who is a stranger to these titles, to establish whether a given piece of land is not already covered by one of these old grants. Though he might know of their existence, if location of their boundaries were in doubt the expense of having an accurate survey, rendered necessary by this rule of proof, would very likely deter a man of reasonable business prudence from entering on or pursuing a contest of this kind.

Says Black, in his Interpretation of Laws, p. 99: "A statute is never to be understood as requiring an impossibility if such a result can be avoided by any fair and reasonable construction." And in Lewis's Sutherland on Statutory Construction (2 Ed.), sec. 488, it is said: "In the consideration of the provisions of any statute they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not

infringed. Considerations of what is reasonable, convenient, or causes hardship and injustice have a potent influence in many instances. It is always assumed that the Legislature aims to promote convenience, to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a flagrant departure from this aim, it will not be adopted if any other is possible by which pernicious consequences can be avoided." And Endlich on Interp., sec. 441, and Sedgwick are to like effect. It is an accepted principle of statutory construction, and, in my opinion, should prevail in the case now before us.

Again, it is a recognized rule of proof that the burden should (681) be placed on him who has the special opportunity of knowing the facts. In Lawson on Presumptive Evidence it is stated as a definite rule (No. 5) that the burden of proof is on the party to show a material fact of which he is best cognizant, and this is well established with us. *Furniture Co. v. Express Co., ante,* 639; *Meredith v. R. R.,* 137 N. C., 428; *Mitchell v. R. R.,* 124 N. C., 236. In this last case it is held to be "a principle of law that when a particular fact, necessary to be proved, rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof." An application of this principle to the procedure now under discussion would, I think, properly place the burden of proof on the protestant. It was evidently never designed that an entry of land, regular in form, should be stayed by an officious intermeddler. The statute was designed for the benefit of one who was the owner or had some good reason to believe that a grant on the entry objected to would be of some injury to him; and in such case, if a protestant conceived, or had any valid reason to conceive, he would be injured, he best knows how and why this injury would arise. He, better than any one, specially knows the basis of his own claim; and it is not unreasonable, but in accord with this established rule, just stated, that he should produce his proof and make exhibit of such claim as he may have—not, perhaps, to the extent of showing a perfect title, but at least of showing that the land in question has been withdrawn from entry by statute, or is covered by some former grant, or protected by adverse occupation from being again appropriated.

If the statute, in express terms, requires the interpretation applied in this case and upheld in the opinion of the Court, it should undoubtedly be obeyed. But no such words appear in the law. The Court, I think, places entirely too much stress on the concluding words of section 1709, that "On protest of bond being duly filed, the cause shall (682) be transferred, and therefore notice shall issue to claimant, commanding him to appear and show cause why his entry shall not be declared inoperative and void." It might well be that this should be considered done when proof is made that the entry has been regularly

made; but, to my mind, this is nothing but a form for the notice, and was not intended to bear in any way on the burden of proof. It is similar to most other notices where a person is required to appear and answer some assault on his rights. The old form of summons in debts was to appear and show cause why judgment should not be taken for a sum certain. And, to set aside a judgment, the notice is to appear and show cause why a given judgment should not be set aside. But it would never occur to a court that the person notified, when he did appear, should be required to show, in the one case, that he did not owe the complainant; and in the other, that no assault could be successfully made on his judgment. It is simply a form for the notice, and in section 1713—this is in a different portion of the statute from the entry—it is a section as to the survey, and the words in that section directing a survey, "If no protest is filed," or, "if filed, and the right of claimant is sustained," evidently refer to the fact that there has been a contest determined, and has no reference to the burden of proof. Certainly, they would be considered very slight support for a construction that could only be upheld by the use of plain and explicit terms.

It is the policy of the State, and has been from the beginning, that the public and vacant lands should pass into the possession and ownership of its citizens. *Pearson, J.*, in *Ashley v. Sumner*, 57 N. C., 123. Pursuant to this policy our statute has enacted that any citizen of this State, or any one who comes into the State with the *bona fide* intent to become a citizen or resident thereof, may make entries and obtain
(683) grants for vacant lands, and all vacant lands belonging to the State shall be the subject of entry, as therein provided. And while it has been found necessary to impose some restraints on the entries *ad libitum*, as at first allowed, it was never designed, I think, to establish a rule of proof that in its practical application will put it in the power of any one who is willing to give a bond of $200 to seriously impede and, in most cases, absolutely obstruct the carrying out of the State's beneficent purpose.

I think the charge of the court below objectionable because, in a statute which permits of construction, it adopts an interpretation (1) which is obstructive of public policy; (2) which imposes on one who desires to enter land requirements which it is well-nigh impossible to meet; and (3) which violates an established rule of proof, that the burden is on him who has the best opportunity of knowing the facts.

I therefore think there should be a new trial of the cause.

WALKER, J., concurs in the dissenting opinion.

*Cited: Bowser v. Westcott*, 145 N. C., 57, 71; *Babb v. Manufacturing Co.*, 150 N. C., 140; *Lumber Co. v. Clarke*, 152 N. C., 546; *Cain v. Downing*, 161 N. C., 598; *McKeel v. Holloman*, 163 N. C., 135; *Walker v. Parker*, 169 N. C., 153.

(684)

V. B. BOWERS v. EAST TENNESSEE AND WESTERN NORTH CAROLINA RAILROAD COMPANY.

(Filed 27 May, 1907.)

**Negligence—Damages—Proximate Cause.**

Proximate cause "is an essential ingredient of actionable negligence, as a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." The defendant company is not responsible in damages, as the proximate cause of the injury, in permitting large stacks of lumber and quantities of tan-bark to be placed by its patrons, for shipment, on its right of way and partly in the adjacent street, by means of which a fire, originating in a building off its right of way and owned and controlled by another person, was indirectly communicated to plaintiff's building and destroyed it.

HOKE, J., not sitting.

ACTION to recover damages for the alleged negligent burning of plaintiff's hotel building at Elk Park, tried before *Moore, J.*, and a jury, at May Term, 1906, of MITCHELL. From a judgment of nonsuit, plaintiff appealed.

*Avery & Avery, L. D. Lowe, and T. A. Love for plaintiff.*
*S. J. Ervin for defendant.*

BROWN, J. All the evidence tends to prove that the plaintiff was the owner of a hotel building located to the south of defendant's track, which was destroyed by fire on the night of 23 December, 1903. The fire originated in the Manning & Ellis building, some distance from the hotel, and on the north side of the track, and burned that building and several others on the same side of the track before reaching the latter, and there spread to and burned piles of lumber on and along the defendant's right of way, and then spread from the lumber to the hotel and destroyed it. There is a public street in the town of Elk Park which crosses the railroad track between the Manning & Ellis building and the hotel. The former building was situated some (685) little distance to the east of said street and the hotel to the west of it, as we gather from the map filed with the record. A fraternal society—the Odd Fellows—had a supper in the Manning & Ellis building, where the fire originated, on the night on which the fire occurred, but the origin of the fire was unknown, whether accidental or by design; but it was conceded that the defendant was not responsible for the fire, and no testimony was offered tending to show that it was. The plaintiff

contends (1) that the defendant negligently suffered large stacks of lumber and quantities of tan-bark to be placed by its patrons for shipment on its right of way and partly in the adjacent street, and suffered the same to accumulate; that the fire was communicated to such material and thence to his hotel; (2) that such alleged negligence was the proximate cause of his injury.

It is not necessary that we discuss or determine whether or not it is negligence on the part of a common carrier operating a railroad and engaged in transporting lumber to market to allow or permit its patrons engaged in shipping lumber to deposit such lumber on its right of way and near its track, with a view to loading such lumber upon its cars. Assuming, for the sake of the argument only, that such acts constitute negligence, then the question arises, Is this negligence the proximate cause of the destruction of the plaintiff's hotel, the fire having originated in a remote building without fault on the part of the defendant, either by accident or by the design or negligence of third persons, and having spread thence to several other buildings, one after the other, and thence carried to the lumber and from the lumber to the hotel?

We do not think that, under the well established principles of law, the defendant can be held proximately responsible to the plaintiff for the unfortunate consequences of such a conflagration. That the burn-
(686) ing of the lumber caused the destruction of the hotel and was the remote cause of plaintiff's injury does not subject the defendant to liability. The maxim of the law is *in jure non remota causa sed proxima spectatur,* of which *Lord Bacon* says: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Maxims Reg., 1, quoted in Broom's Maxims, 216. No exact rule for determining when causes are proximate and when remote has yet been formulated. But the general principles which govern the determination of the question appear to be quite well settled. In *Ramsbottom v. R. R.,* 138 N. C., 41, an oft quoted case, *Mr. Justice Hoke* defines the proximate cause, which is an essential ingredient of actionable negligence, as "a cause that produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." See, also, *Raiford v. R. R.,* 130 N. C., 597; *Pittsburg v. Taylor,* 104 Pa., 306. In *Brewster v. Elizabeth City,* 137 N. C., 395, it is said: "The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of, and the second requisite is that such an act or omission did actually cause the injury."

In *Schwartz v. Shull,* 45 W. Va., 405, it is said that the proximate cause of an injury is the last negligent act contributing thereto and without which the injury would not have resulted. 21 A. & E., 485, describes it as a cause which operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred. And again, it says that it is not a proximate cause of the injury when the negligence of the (687) person who actually inflicted it is a more immediate and efficient cause. 7 A. & E., 384. See, also, *R. R. v. Kellogg,* 94 U. S., 475.

It seems from the authorities that there are two very essential elements in the doctrine of proximate cause: (1) It must appear that the injury was the natural or probable consequence of the negligent or wrongful act; (2) that it ought to have been foreseen in the light of attending circumstances. Applying these general principles to the facts of this case, we have no difficulty in approving the ruling of the court below. It is plain that the original first cause of the destruction of the hotel was the burning of the Manning & Ellis building, but for which the plaintiff's property would not have been destroyed. Whether done accidentally, negligently, or wantonly, it is conceded the defendant is not responsible for it. The wind carried the fire in the direction both of the track and of the hotel, which caused the destruction of several other houses before it reached the track. The burning of the intervening houses was as much the cause of the destruction of the hotel as was the burning of the lumber. Neither was the immediate and efficient cause. Nor can the rule of "contemplated consequences" be extended to a case like this.

The language of the Supreme Court of Pennsylvania in *Morrison v. Davis,* 20 Pa., 171, is peculiarly applicable to the facts of this case. "In any other than a carrier's case," says the Court, "this question would present no difficulty. The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate and as may on this account be foreseen by ordinary forecast, and not those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." Again: "Now, there is nothing in the policy of the law relating to common carriers that calls for any different rule as to consequential damages to be applied to them. They are answerable for the ordinary and proximate (688) consequences of their negligence, and not for those that are remote and extraordinary." See, also, *Extinguisher Co. v. R. R.,* 137 N. C., 278; Cooley on Torts, 68, 69, 70, 71; *Whitson v. Wrenn,* 134 N. C., 86; *Williams v. R. R.,* 119 N. C., 746.

The defendant's officers and agents must have been endowed with more than ordinary human prescience could they have foreseen such extraor-

dinary results as naturally and probably flowing from the piling of lumber and the storing of tan-bark on the right of way. The class of cases wherein railroad companies have been held responsible for fires originating on their rights of way have no application here.

In *Moore v. R. R.*, 124 N. C., 338, which in some of its features is very similar to this, there was evidence tending to show a foul right of way, that the fire originated on the right of way from defendant's engine, and also evidence that it originated off of the right of way, and, setting fire to the foul matter on it, burned plaintiffs' property. After discussing the circumstances under which the defendant would not be liable in case of fire, this Court said, in reference to the contention that the fire had originated off the right of way: "Or, if the fire originated outside the right of way from some other cause and communicaed itself to the right of way and then to the plaintiff's premises, the defendant would not be chargeable with negligence." This case is cited with approval in *Williams v. R. R.*, 140 N. C., 625, and *Insurance Co. v. R. R.*, 132 N. C., 78.

Upon a review of the record, we find his Honor committed no error in allowing the motion to nonsuit, and his judgment is

Affirmed.

HOKE, J., did not sit.

*Cited: Bollinger v. Rader*, 151 N. C., 386; *Penny v. R. R.*, 153 N. C., 301; *McBee v. R. R.*, 171 N. C., 112.

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(689)

WAYNESVILLE WOOD MANUFACTURING COMPANY v. BERLIN MACHINE WORKS.

(Filed 27 May, 1907.)

**1. Nonsuit—Evidence—Contract—Nominal Damages.**

It is error to sustain a motion as of nonsuit when there is evidence tending to show a breach of contract of sale; if such be proved, nominal damages are at least recoverable.

**2. Same—Measure of Damages.**

When there is evidence tending to show a breach of contract in the respect of the construction and perfectness of a machine sold by defendant, that plaintiff notified defendant of its declining to receive the machine, but at the request of defendant repeatedly tried it, which resulted in the defendant remedying it so it then proved to be perfect and capable of doing the work for which it was constructed, the plaintiff's measure

of damages is a recovery of all extra expense incurred while trying the imperfect machine, as well as such damages as were reasonably within the contemplation of the parties at the time the contract was made.

3. Same—Breach of Warranty—Collateral Contracts.

In an action against the seller for breach of warranty of sawmill machinery, the purchaser cannot recover for loss of profits in lumber contracted to be sold, if such contract was not known to the seller.

ACTION to recover damages for an alleged breach of contract in the construction and sale of certain planing machinery, tried before *McNeill, J.*, and a jury, at Spring Term, 1906, of HAYWOOD. From the judgment of the court sustaining a motion to nonsuit, the plaintiff appealed.

*Crawford & Hannah and W. B. & H. R. Ferguson for plaintiff.*
*Merrimon & Merrimon for defendant.*

BROWN, J. The plaintiff purchased from defendant certain machinery, under a written contract, dated 1 January, 1900, under the terms of which the purchaser had the right to reject the same if upon trial it proved to be deficient. The plaintiff offered evidence (690) tending to prove that it was defective and not according to contract, and that plaintiff notified defendant of its defects and that the machinery was subject to its order. The plaintiff also offered evidence that it tried the machinery again for some time at defendant's request, and that defendant sent its agent to plaintiff's mill to remedy the defects, but that they were never remedied until a new cylinder head was constructed by defendant and put in place of the one shipped in first instance with the machinery.

The ground of the nonsuit seems to be that his Honor was of opinion that there was no evidence of damage, and therefore refused to submit appropriate issues raised by the pleadings to the jury. In this we think there was error. There was evidence tending to prove a breach of the contract of sale in respect of the construction and perfectness of the machine; and further, that plaintiff tried the machine at defendant's request for some time after it had notified defendant of its declination to accept it as a compliance with the contract. This entitled plaintiff to have the issue relating to such breach submitted to and determined by the jury, and if found for plaintiff, entitled it to recover at least nominal damages, which would carry the costs. The rule of damage that the plaintiff may recover the difference in value between the machine first shipped and its value had it come up to contract and been a perfect machine cannot well be applied in this case, because, after repeatedly trying the imperfect cylinder head at plaintiff's mill, the de-

fendant constructed and put in place another, which proved to be a perfect machine and capable of doing the work for which it was constructed. But we think the plaintiff is entitled to recover all extra expense incurred while trying the imperfect cylinder at defendant's request, as well as such actual damage as is sustained which might be said to be reasonably within the contemplation of the parties at (691) the time the contract was entered into. *Kesler v. Miller,* 119 N. C., 476; *Critcher v. Porter Co.,* 135 N. C., 543.

The learned counsel for plaintiffs contended that plaintiff had a written contract with one Smith, of New York, to sell to him at a certain price the entire output of its mill, and that in consequence of the defective cylinder, while using it before the new one came, plaintiff lost the net profits on six carloads of its manufactured lumber, and that it is entitled to recover this sum as damage. As the case is to be tried again, we will not go fully into this contention, as the evidence on the next trial may present a different aspect. But in the well considered opinion of *Mr. Justice Connor* in *Critcher v. Porter, supra,* it seems to be settled that "in an action for breach of warranty as to sawmill machinery the purchaser cannot recover for loss of profits in lumber contracted to be sold if the contract was not known to the seller." To the same effect are *Manufacturing Co. v. Rogers,* 19 Ga., 416; *Sycamore Co. v. Strum,* 13 Neb., 210; *Allen v. Tompkins,* 136 N. C., 210. In the record before us there is no evidence whatever that when defendant entered into the contract with plaintiff it had any knowledge of the alleged contract with Smith.

Reversed.

*Cited: Berbarry v. Tombacher,* 162 N. C., 499.

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(692)

MATILDA HOUGH, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY COMPANY ET AL.

(Filed 27 May, 1907.)

**1. Railroads—Torts—Separable Controversy—Removal of Cause.**

At common law and under Revisal, sec. 469, an action in tort against several defendants is joint or several according to the declaration of the complaint, and the plaintiff's election determines the character of the tort, whether joint or several; the complaint in a suit against a foreign railroad company and its resident train dispatcher and telegraph operators, alleging that the plaintiff's intestate was killed by the negligence of the defendants, caused by the collision and wreck of two trains owned

and operated by the railroad company, does not state a separable controversy, and cannot be removed to the Federal court on the ground of diverse citizenship.

**2. Same—Fraudulent Joinder of Parties—Record.**

The mere allegation in the petition of the foreign defendant that the joinder of the resident with the foreign defendant was a device of the plaintiff for the fraudulent purpose of defeating the defendant's right of removal is insufficient. To remove the cause, the defendant must not only allege but prove that there was a wrongful joinder of defendants for the purpose of preventing the removal, and the question of the insolvency of the resident defendants cannot alone determine the right of the plaintiff to join them in the action.

**3. Same—Record.**

The question of separable controversy is alone determined by the record at the time of filing the petition.

MOTION for removal of cause to the Federal court, heard by *Cooke, J.*, at February Term, 1907, of BUNCOMBE.

This action was brought to recover damages for the death of plaintiff's intestate, which is alleged to have been caused by the negligence of the defendants. The intestate was killed in a wreck resulting from the collision of two trains which were moving in opposite directions on the road of the railway company. The plaintiff alleges in her complaint that at the time of the collision the defendant W. C. Hudson was train dispatcher, the defendant L. D. Flack was telegraph operator and (693) station agent at Swannanoa, and the defendant, O. T. Hallman was telegraph operator and station agent at Black Mountain, all of them being in the employ of their codefendant, the Southern Railway Company, and that the plaintiff's intestate was at the same time the conductor of one of the colliding trains which was proceeding from Asheville to Salisbury, and in the proper discharge of his duties as such. The railroad at the time of the collision, was being operated by the defendant corporation. The plaintiff further alleges, in section 4 of her complaint, as follows:

"On 18 February, 1906, the said W. R. Hough, the plaintiff's intestate, was killed by the negligence of the defendants; the said negligent killing of plaintiff's intestate was in and caused by the collision and wreck of two trains owned and operated by the defendant railway company between Swannanoa station and the town of Black Mountain; and the said collision, wreck, and killing was caused by the negligence of the defendants and their negligent failure to perform and discharge the duties which they owed to plaintiff's intestate. By the negligent killing of the plaintiff's intestate, as herein set forth, the plaintiff has been damaged in the sum of $50,000," for which sum she prayed judgment.

The defendants, the Southern Railway Company and W. C. Hudson, jointly answered the complaint and admitted the truth of all its allegations except those contained in the fourth section thereof, and except, also, the allegation that the plaintiff, at the time he was killed, was in the proper discharge of his duty as conductor of the train from Asheville to Salisbury, and these were denied. The qualification of the plaintiff as administratrix of the intestate is also alleged and admitted. The defendants specially averred in their answer, as a defense to the action,

that the intestate's death was caused by his own negligence, in
(694) that he disobeyed a written order delivered to him when he left

Asheville and by which he was notified that the train proceeding from Salisbury to Asheville was running two hours and forty minutes late. That it then became his duty under the known rules and regulations of the company to take the siding at Swannanoa station with his train and wait for the other train to pass. Instead of doing so, he negligently undertook to run his train beyond Swannanoa to Black Mountain, and met the other train between the two stations, where the collision occurred.

The complaint was filed on 11 December, 1906, and the answer on 23 February, 1907. Between the two dates—that is, on 21 February, 1907—the defendant, the Southern Railway Company, filed a petition in the State court for the removal of the cause to the United States court, alleging diverse citizenship between the railway company and the plaintiff and making the necessary formal allegation as to the amount in controversy. It is then alleged in the petition that the petitioner operates one of the largest railway systems in this country and is amply solvent and able to pay any judgment the plaintiff may recover in this action, and that W. C. Hudson and the other defendants are insolvent and unable to pay any amount. The petitioner further alleges as follows: "That it is advised, informed, and verily believes that the plaintiff wrongfully and unlawfully joined with the petitioner the said W. C. Hudson, L. D. Flack, and O. T. Hallman as sham defendants for the fraudulent purpose of preventing the removal of this suit by your petitioner, the real defendant, to the Federal court; that the said defendants W. C. Hudson, L. D. Flack, and O. T. Hallman were in no wise connected with or responsible for the collision in which the plaintiff's intestate lost his life; that in no view of this suit are the said W. C.

Hudson, L. D. Flack, and O. T. Hallman more than mere nomi-
(695) nal or formal parties, joined with your petitioner for no other

purpose on the part of the plaintiff than to deprive your petitioner of its legal right of removal herein. That no substantial relief could possibly be obtained against the said defendants W. C. Hudson, L. D. Flack, and O. T. Hallman, and that they are neither proper nor

necessary parties to a complete and final determination of this action. If said W. C. Hudson, L. D. Flack, and O. T. Hallman are proper and necessary defendants in this suit, which is expressly denied, the said controversy is of a separate nature and is a separable controversy, as appears from the complaint filed herein."

The petitioner, the Southern Railway Company, duly executed, tendered, and filed a proper bond with the petition, which was approved by the judge, who ordered that the action be removed according to the prayer of the petitioner. To this order the plaintiff excepted and appealed to this Court.

*Craig, Martin & Winston for plaintiff.*
*Moore & Rollins for defendant.*

WALKER, J., after stating the case: This is an action in tort for causing the death of the plaintiff's intestate by negligence. The defendant, the Southern Railway Company, was the master and its codefendants servants of that corporation, and it is alleged that as such they owed a duty to the intestate which they disregarded and neglected, and that their joint omission of that duty proximately resulted in his death; whereas if they had, while acting in coöperation and in a careful manner, as they should have done, in the discharge of the duty, each bestowing upon it that degree of care required of and due from him or it, the injury and death would not have occurred. This is the substance of the cause of action, which, being for a tort, may be made joint by uniting all the tort feasors as defendants in one action, or several by suing (696) each in a separate action. The plaintiff, or party aggrieved by the wrong, may make it joint or several, at his election, and it is not open to the wrongdoer to complain of the election so made or to dictate how he shall make his choice. If the injured party chooses to sue the wrongdoers jointly he thereby declares that the tort shall be joint, and the law so regards it, without listening to or even hearing from the wrongdoer. And so it is when he sues them separately. His election finally determines what shall be the character of the tort, whether joint or several. This principle has controlled the courts in deciding upon applications for the removal of causes from the State to the Federal courts whenever it becomes necessary to inquire whether a separable controversy is presented as between the plaintiff and the nonresident defendant, or opposite party of diverse citizenship. It has been well expressed by *Mr. Justice Gray* in *Torrence v. Shedd,* 144 U. S., 527: "As this Court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, separate answers by the several defendants sued on

joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleading." Citing *R. R. v. Ide,* 114 U. S., 52; *Pirie v. Tvedt,* 115 U. S., 41; *Sloane v. Anderson,* 117 U. S., 275; *Little v. Giles,* 118 U. S., 596; *Hedge Co. v. Fuller,* 122 U. S., 535

(697) A case much like this, and certainly sufficiently like it in principle to control its decision, is *Pirie v. Tvedt,* 115 U. S., 41, in which the plaintiff sued the defendants for malicious prosecution, and one of the latter sought to remove the case as to him to the Federal court. In respect to his right to do so the Court said: "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts, any more than it does a joint action on contract." *R. R. v. R. R.,* 52 N. J. Eq., 58; *Telegraph Co. v. Griffith,* 104 Ga., 56. The principle thus stated was held, in *R. R. v. Ide,* 114 U. S., 52, to apply where railway companies made joint contracts for the transportation of goods. With reference to the provision of the removal acts, that "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them," the Court further said in that case, speaking of the count in the declaration on the joint contract: "On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants." So, where an employee sued his employer for injuries in tort and joined a cause of action in contract against his codefendant, an accident insurance company, upon a policy issued to indemnify the employer against loss by injuries to his employees, it was held that the insurance company had no separable controversy with the plaintiff so as to authorize a removal of the case as to it. *Moore v. Iron Co.,* 89 Fed., 73. See

(698) also, *Insurance Co. v. Carrier,* 91 Tenn., 537; *Fidelity Co. v. Huntington,* 117 U. S., 280; *Putnam v. Ingraham,* 114 U. S., 57. Moon, in his work on the Removal of Causes, sec. 142, thus summarizes

the result of the decisions: "There are many causes of action which are, in their nature, joint and several. A plaintiff may sue all the parties liable, or sue any one or more of them, at his election. Where the plaintiff has a right under the law to sue defendants jointly, the defendants cannot obtain an advantage from the fact that he also has a right to sue them separately. If a plaintiff sues two or more persons jointly in such a case, the fact that the plaintiff might have brought several actions against each defendant instead of one action against them all does not make the suit embrace separable controversies. This rule applies to actions upon joint and several contracts. It applies as well to actions in tort, which are in their nature joint and several. Where a plaintiff brings a suit, the declaration in form charging a joint tort against two or more defendants, it is not sufficient to make the controversy between plaintiff and one defendant separable that the complaint does not state facts sufficient to constitute a cause of action against him. The sufficiency of the complaint as to the various defendants is a matter for the determination of the State court. The fact that there may be, under the local practice, a judgment rendered for one defendant and against another upon the trial does not affect the question whether a case contains a separable controversy." But *R. R. v. Dixon,* 179 U. S., 131, is precisely like our case in its facts, with but one slight and immaterial exception. There the plaintiff's intestate was killed while crossing the track of the defendant corporation at the junction of that and another track, and the action was brought against the railway company and its employees who were operating the train to recover damages for their joint negligence, which was alleged to have caused the intestate's death. That case and ours are therefore practically identical and (699) governed by the same principle. It was there held, following prior decisions, that in an action of tort the cause of action is whatever the plaintiff declares it to be in his pleadings, and matters of defense do not necessarily have the effect of dividing or disintegrating it into separate controversies, so as to be availed of as ground of removal by a nonresident defendant, and that, when concurrent negligence is charged, the controversy is joint and not separable; and as the complaint in the case, when reasonably construed, alleged that kind of negligence, the State court did not err in retaining jurisdiction when passing upon an application for removal, as no separable controversy as to the applicant, within the meaning of the act of Congress, was presented. It is too obviously true to require any argument to demonstrate it that the mere fact of the employees in the case just cited, being engineer and fireman, and in this suit the train dispatcher, cannot differentiate the two cases. It was further said, in *Railway v. Dixon,* that "in respect of the removal of actions of tort on the ground of a separable controversy, certain mat-

ters must be regarded as not open to dispute," and the rule we have stated is then held to be among them. The two cases are further alike, in that a fraudulent joinder of defendants for the purpose and with the motive of preventing a removal to the Federal court is alleged in the petitions for removal in both cases, and in the *Dixon case* held insufficient without proof. *Powers v. R R.*, 169 U. S., 92, is cited by the Court to sustain its position in the *Dixon case*, and there the subject is fully discussed and the conclusion reached that an action in tort is joint or several, as the pleader may choose to make it, unless the defendants were sued jointly as a device and with a fraudulent purpose of defeating the right of removal, when in fact no cause of action existed
(700) against the resident, and the assertion of his liability to the plaintiff is a mere sham or pretense. But this must be alleged and proved by the defendant in his petition for the removal of the cause. *R. R. v. Wangalin*, 132 U. S., 599. See, also, *Sloane v. Anderson*, 117 U. S., 275; *Little v. Giles*, 118 U. S., 596; *Connell v. Smiley*, 156 U. S., 335; *R. R. v. Martin*, 178 U. S., 245; *Wilson v. Oswego Township*, 151 U. S., 56; *Bellaire v. R. R.*, 146 U. S., 117; *Life Association v. Farmer*, 77 Fed., 929; *Thurber v. Miller*, 67 Fed., 371. There was no proof of fraud in this case. The defendant, who petitioned for a removal, simply controverts the allegations of the complaint, for that is what the petition means, and all that it means. Its vituperative expressions prove nothing. Calling an act fraudulent does not make it so. It must be alleged and proved in what the fraud consists. We have practically nothing before us but the joinder and the bare allegations of fraud. That will not do.

Another principle equally well settled in the law of removal is that the question of separable controversy must be determined by the state of the record in the State court at the time of filing the petition, independently of the allegations in the latter or in the affidavit of the petitioner, unless he both alleges *and proves* that the defendants were wrongfully made joint defendants for the purpose of preventing a removal of the cause. *R. R. v. Wangalin*, 132 U. S., 599; *R. R. v. Dixon*, 179 U. S., 131; *Wilson v. Oswego Township*, 151 U. S., 56; *Association v. Insurance Co.*, 151 U. S., 368; Moon on Removals, sec. 141. The complaint in this case states a cause of action for a joint tort, and, although the plaintiff might have elected to sue the defendants separately, they also are liable to him jointly and may be held answerable for their wrong in one and the same action. This was so at the common law. *R. R.*
(701) *v. Dixon*, 179 U. S., 137; *Solomon v. Bates*, 118 N. C., 311; *Alpha Mills v. Engine Co.*, 116 N. C., 797; *Cook v. Smith*, 119 N. C., 350; 15 Enc. Pl. & Pr., 560, and note; *Staton v. R. R., ante*, 135. They can certainly be joined as defendants under The Code of this

State. Clark's Code (3 Ed.), sec. 267 (2) and (3), and notes; Revisal, sec. 469. This being so, where two defendants are sued together and the plaintiff demands judgment against both, the court cannot assume that either one of them is the real party against whom the plaintiff intends to prosecute his action and that the other has been joined merely for the fraudulent purpose of depriving the real defendant of his right of removal. In order to sustain the jurisdiction of the Federal court on that ground, it is necessary for the removing defendant to allege and prove such fraudulent purpose. *Doremus v. Root,* 94 Fed. Rep., 760. It was said by the Court in *R. R. v. Wangalin, supra,* citing and quoting from *Plymouth Co. v. Amador Co.,* 118 U. S., 264: "It is possible, also, that the company may be guilty and the other defendants not guilty; but the plaintiff in its complaint says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself, but until his defense is made out the case stands against him, and the rights of all must be governed accordingly. Under these circumstances, the averments in the petition that the defendants were wrongfully made (parties) to avoid a removal can be of no avail in the Circuit Court, upon a motion to remand, until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. The corporation was the moving party and was bound to make out its case." And in *Little v. Giles,* 118 U. S., at p. 600, the Court says: "Giles (the petitioner) could not, by merely making contrary averments in his petition for removal and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle (702) himself to remove the case into the United States court. This matter has been fully considered in numerous cases." *R. R. v. Ide,* 114 U. S., 52; *Farmington v. Pillsbury,* 114 U. S., 138; *Pirie v. Tvedt,* 115 U. S., 41; *Crump v. Thurber,* 115 U. S., 56; *Starin v. New York,* 115 U. S., 248; *Sloane v. Anderson,* 117 U. S., 278; *Insurance Co. v. Huntington,* 117 U. S., 280; *Core v. Vinal,* 117 U. S., 347; *Mining Co. v. Canal Co.,* 118 U. S., 264.

It is not material that, as alleged in the petition for removal, W. C Hudson was joined as a party defendant for the single purpose of preventing a removal of the case by the Southern Railway Company to the Federal court, nor is it a matter of any moment what the plaintiff's motive was for bringing a joint action against the defendants, unless they were wrongfully and illegally joined. *Tobacco Co. v. Tobacco Co., ante,* 352. When a party is in the lawful assertion of a right in bringing an action, either as to form or substance, the law disregards his motive as unimportant and having no practical bearing upon the question of his right to proceed in the prosecution of the suit as he has

elected to do. Black's Dillon on Removal, sec. 146. A plaintiff cannot well be right and wrong at the same time in proceeding by action to recover damages against those who have injured him. Testing the right of removal by the case as made in the present record, as it stood at the time of the application, and even including the petition as a part thereof, we see no ground upon which it can be urged that the defendant, the Southern Railway Company, has entitled itself to have the case transferred and tried in the Federal court. The record proper clearly does not disclose any such right, and the petitioner has neither sufficiently alleged nor attempted to prove that the defendants were improperly joined (703) in the action. *R. R. v. Dixon,* 104 Ky., 608 (affirmed in same case, 179 U. S., 131). There must of necessity be such allegation and proof. *Offner v. R. R.,* 148 Fed., 201.

The questions we have discussed have recently been fully considered, and the principles upon which we rest our decision of this case sustained in *R. R. v. Thompson,* 200 U. S., 206. That case disposes of all matters raised on this record, adversely to the petitioner's contention. The latter makes the broad and sweeping charge in the petition that its codefendants were fraudulently made parties for the purpose of depriving it of the right to have the cause removed, but it assigns no good or valid reason why this is so. No proof is offered and no fact found indicating that to have been the purpose of the plaintiff. The only ground of attack stated is that the codefendants are insolvent, and for that reason the plaintiff had no right to join them. Mere insolvency of a defendant cannot be permitted alone to determine the right of a plaintiff to join him in the action, if he is liable for the tort. Insolvency does not destroy the remedy, but can only affect the ability of the plaintiff, who has a good cause of action and reduces it to judgment, to obtain the fruits of his recovery. A cause of action unquestionably valid may be prosecuted in perfect good faith against an insolvent person. The test is not the amount that may eventually be realized upon a recovery, but the nature of the cause of action itself, as being one good or not good in law against the codefendant alleged to have been wrongfully united with the petitioner, and the good faith of the plaintiff in making the joinder. As said by *Chief Justice Fuller* in *R. R. v. Dixon,* 179 U. S., at p. 135: "The question to be determined is whether the Court of Appeals erred in affirming the action of the (State) Circuit Court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. (704) If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkley and Sidles was immaterial. The petition for removal did not charge

fraud in that regard or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry." There are no facts showing any fraud alleged in this case. Allegation, itself insufficient and unsupported by proof, it has been shown, cannot avail the petitioner. *Tobacco Co. v. Tobacco Co., ante,* 252.

While the averments of the complaint are not as specific or definite as good pleading requires that they should be, they are good under our law, in the absence of any motion to make them more definite and certain, or of a demurrer to the form of the pleading, and the complaint, as it is, sufficiently states a cause of action for a joint tort against all of the defendants. By not moving for a more definite statement, or by not demurring, the railway company waived any defect in the pleading. Revisal, secs. 496 and 498; *Wood v. Kincaid, ante,* 393. The defendant corporation did not ask that the complaint be made more specific in respect to the allegations of negligence, nor has it demurred; but, on the contrary, it has filed a joint answer with Hudson, denying the negligence as to both defendants. This denial in the answer, and the one to the same effect in the petition, cannot affect the question as to separability of the controversy. *Staton v. R. R., ante,* 135. In the case last cited and in *Tobacco Co. v. Tobacco Co., supra,* some of the questions involved in this case are fully and learnedly discussed by *Justice Connor.*

There is nothing decided in *Wicker v. National Co.,* 27 Sup. Ct., 184, that militates against the views herein expressed. Uncontradicted evidence was considered in that case, without objection, in the (705) Federal court on a motion to remand, and the fact was actually found that the codefendant of the petitioner was in no way liable to the plaintiff, having had no connection whatever with the alleged negligence; and it was further found as a fact that the plaintiff had not joined the codefendant of petitioner with the latter in good faith, but for the sole purpose of preventing a removal of the suit. It is thus distinguishable from the other cases we have cited in support of our ruling.

Our conclusion is that the court below erred in ordering a removal of the case to the United States Circuit Court. Its order is therefore reversed and set aside, with directions to enter an order denying the prayer of the petition.

Reversed.

*Cited: White v. R. R.,* 146 N. C., 341; *Davis v. Rexford, ib.,* 425; *Howell v. Fuller,* 151 N. C., 318; *Rea v. Mirror Co.,* 158 N. C., 27; *Lloyd v. R. R.,* 162 N. C., 494; *Smith v. Quarries Co.,* 164 N. C., 351, 353; *Pruitt v. Power Co.,* 165 N. C., 419; *Lloyd v. R. R.,* 166 N. C., 37; *R. R. v. Spencer,* 167 N. C., 523; *Guthrie v. Durham,* 168 N. C., 576; *Hipp v. Farrell,* 169 N. C., 554; *Hollifield v. Telephone Co.,* 172 N. C., 720, 723.

## CITY OF DURHAM v. ENO COTTON MILLS.

(Filed 27 May, 1907.)

**1. Sewerage—Revisal, Sec. 3051—Construction.**

The meaning of "sewerage," under Revisal, sec. 3051, is confined to the liquid and solid matter flowing from the water-closets through the sewer and drain; and as to this an injunction will issue without proof as to any injurious effects upon the water supply at the intake of the plaintiff's water system. Dyestuff or fecal matter from privies, which were not passed through defendant's sewer to the river from which defendants received its water supply, does not come within the meaning of the act.

**2. Same—Injunction—Nuisance—Uncertainty.**

Equity will not restrain a private nuisance that is merely dubious, possible, or contingent. When the plaintiff city seeks to enjoin defendant from injuriously polluting a river from which it draws its water supply, under Revisal, sec. 3862, declaring it unlawful to corrupt or pollute a stream which is the source of supply to the public of water for drinking purposes, and under section 3052, declaring it unlawful for an industrial settlement not to have a system of sewerage or to provide and maintain a tub system for collecting and removing human excrement from the slope of any public water supply, it must show special damage, or that such condition rendered the water unfit for the usages to which it may be applied.

**3. Same—Statutory Amendment—Relief.**

An amendment made to Revisal, sec. 3052, since the institution of an action thereunder, by striking out all after the word "maintain," in line five, and inserting in its place the following: "A system for collection and disposing of all accumulations of human excrement within their respective jurisdictions or control, at least once each week, by burning, by burial, or some other method approved by the State Board of Health," may be taken advantage of by the defendant.

**4. Practice—Appeal—Power of Court—Correcting Erroneous Judgment.**

When the Supreme Court reviews a judgment entered by the court below, supposed to be in conformity with a former order, but erroneous, it is proper, in setting aside the judgment, to direct the proper order to be made in accordance with its declared purpose in the former appeal, when the case is in its interlocutory stage and nothing has been done to prejudice either party.

(706) ACTION heard upon a motion for an injunction before *Justice, J.*, at March Term, 1907, of DURHAM. From a judgment for the plaintiff the defendant appealed.

This case was before the Court at a former term, and is reported in 141 N. C., at p. 615. When the case came on to be heard at March term of the Superior Court it was adjudged that the injunction issued by *Judge Ferguson* be made perpetual. There was no trial by jury and no waiver thereof in writing by the parties, nor were there any additional

findings of fact made by the presiding judge. The judgment perpetuating the injunction was based entirely upon the findings of *Judge Ferguson,* his order, and the opinion and order of this Court.

The defendant excepted to the judgment of the Superior Court on the ground that section 3051 of the Revisal embraces only sewage, and that the flow of that only can be enjoined. That dyestuffs (707) are not embraced by the statute, and the commission of the defendant's acts in respect to them is not *per se* a nuisance and not enjoined, and, if this is so, the defendant has the right to a trial by jury upon the issues raised by the pleadings. The defendant did not then demand a trial by jury, but reserved its right to the same. The court offered to allow the defendant a trial by jury, but the offer was refused. The defendant also excepted because section 3052 of the Revisal has been amended by the act of 1907, and by that amendment the plaintiff has no longer any right by injunction to enforce the use of the tub system alone and to restrain the deposit of fecal matter, which is not sewage, in any other way than is provided by the law as it now is. From the judgment the defendant appealed.

*R. P. Reade and Fuller & Fuller for plaintiffs.*
*John W. Graham, S. M. Gattis, and Frank Nash for defendant.*

WALKER J. It would have been better and more in accordance with correct procedure if the defendant had accepted the offer of a jury trial and raised the question now made at the final hearing, when all of the disputed facts would have been settled and the case disposed of upon its merits. We directed the injunction or restraining order of *Judge Ferguson* to be continued only to the hearing, and it was error in the court below to continue it perpetually. In this respect the judgment should have followed exactly the order of this Court. As the answer came in after our decision was rendered, his Honor perhaps was of the opinion that the admission of the defendant therein that it did dispose of its dyestuff and maintain the privies as alleged in the complaint, though it denied that the water of Eno River at the Durham intake was polluted thereby, was sufficient to warrant a perpetual injunction, as the dyestuff and the fecal matter from the privies are to be consid- (708) ered as "sewage" within the meaning of section 3051 of the Revisal, or that, by sections 3045, 3052, and 3862, the acts of the defendant with respect to them were prohibited to such an extent as to give the plaintiff a right to an injunction without first showing that by reason of the said conduct of the defendant with respect to them the water of the stream was actually contaminated at the intake. Neither of these views was the correct one. We do not think that the dyestuff or

the fecal matter from the privies, which was not passed through the defendant's sewer, could be regarded as sewage within the intent and meaning of section 3051. It is confined, under the facts of the case, to the liquid and solid matter flowing from the water-closets through the sewer and drain to the river, and that was our conclusion at the former hearing of this case, as is apparent from the opinion. Some courts have construed "sewage" to mean excreted, as well as waste, refuse or foul matter, carried off in sewers and drains, whether open or closed, by the water flowing therein. *Morgan v. Danbury,* 67 Conn., 484; *Winchell v. Waukesha,* 110 Wis., 101; *Clay v. Grand Rapids,* 60 Mich., 451. In *Sutton v. Mayor,* 27 L. J. (Eq., 1858), 741, the *Vice Chancellor* says that, "in the common sense of the term 'sewer' it means a large and generally, though not always, underground passage (or conduit) for fluid and feculent matter from a house or houses to some other locality," usually the place of discharge. Other courts have defined a sewer to be a closed or covered waterway for conveying and discharging filth, refuse, and foul matter, liquid or solid, while ditches are drains which are or may be open and so arranged as to take away surface water. *State Board of Health v. Jersey City,* 55 N. J. Eq., 116; 7 Words and Phrases, 6457 *et seq.* Whatever may be the true and definite meaning of the word, if it has one, either generally or when ascertained (709) from its use in any given connection, we think the Legislature did not intend, when the word was used in section 3051, that it should embrace dyestuff and feculent matter other than sewage from the water-closets in the mill, as the defendant dealt with them, but only such deleterious matter as was carried by conduits of some kind into the river or other source of public supply, and would, therefore, in such large and concentrated quantities, most probably, if not necessarily, pollute the stream at the intake. It seems from the finding of *Judge Ferguson* that the defendant, once in each week, "hauled off and buried" the excrement from the open privies of its operatives, but it is also found that not only the dyestuffs, but the feculent matter from the open privies, are washed into the river by the surface drainage and contaminate the same. However this may be, we are satisfied that the Legislature did not intend to include within the prohibition of section 3051, under the name of sewage, any matter carried into the supplying watercourse by mere surface washing.

It is true that by section 3052 the failure of any industrial settlement, not having a system of sewerage, to provide and maintain a tub system for collecting and removing human excrement from the shed of any public water supply is declared to be unlawful and criminal, and is punishable as a misdemeanor, and it is also true that by section 3862 it is declared unlawful to corrupt or pollute any stream which is the source of

supply to the public of water for drinking purposes, and it is also made criminal and punishable as a misdemeanor. The acts and omissions thus described in those two sections may be public nuisances, but even if they are, the plaintiff is not entitled to an injunction in respect to them, unless it can show special damage or such a pollution of the river as would render the water at the intake near Durham, and not merely at the outlet near Hillsboro, unfit for the uses to which it may be applied. The plaintiff must make out a case, not of theoretical and possible, but of actual and real, injury, present or certainly impending. (710) The Court, when stating the governing principle of such cases in *Brookline v. Mackintosh,* 133 Mass., 215, said: "The plaintiff contends that the statute, in prohibiting drainage or refuse matter from being put into the river so as to corrupt or impair the quality of water, makes it an offense to do so not only where the water supply is taken, but also at or near the factory, and that the evidence shows that the water is there corrupted. Even if this construction is correct, which we do not decide, the plaintiff cannot ask an injunction on that account, as such corruption at that place would not be an injury to it as a private nuisance, even if it might be to others, or even if, as a public nuisance, it is remediable by indictment." The Court further held it not sufficient to show, at the time of applying for the injunction, that injury may be done which cannot be proved by analysis of the water. "Apprehended danger is indeed a ground for issuing an injunction, but it must be apprehended upon a state of facts which shows it to be real and immediate," page 227. To the same effect is *Baltimore v. Manufacturing Co.,* 59 Md., 96, where the Court, by *Alvey, J.* (one of the greatest of American jurists), says that the water must be defiled in such manner and to such extent as to operate an actual invasion of the rights of the complainant. The alleged wrongful act must be prejudicial to the lower riparian proprietor, who is interested in having the water descend to him in its ordinary natural state of purity. "Any use," says the Court, "that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he would be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust (711) in those using the water for the ordinary purposes of life, will constitute a nuisance, for the restraint of which a court of equity will interpose." In that case the plaintiff had dammed the Gunpowder River, thereby forming a lake or reservoir, from which the water was taken and conducted into the city of Baltimore through mains, where it

was distributed. The alleged grievance, as in this case, was that the defendant discharged from its factory and caused to flow into the stream refuse water impregnated with divers injurious ingredients and substances, by means of which the water of the river was polluted and rendered less pure and less fit for drinking purposes. The Court refused an injunction, as it was not shown by proof, nor did it appear by the bill, that the purity of the water in the lake or reservoir had been impaired to any extent by the acts of the defendant. The law has for many years been settled in this State that "for any of those acts which are in the nature of a public nuisance no individual is entitled to an action unless he has received extraordinary and particular damage not common to the rest of the citizens, as if a man suffer an injury by falling into a ditch dug across a common highway." *Dunn v. Stone,* 4 N. C., 241; *Gordon v. Baxter,* 74 N. C., 470; *Barnes v. Calhoun,* 37 N. C., 199. The principle rests, says the Court, upon the distinction between a public wrong, to be redressed by indictment, and a private wrong, to be redressed by civil action. It is equally well settled by our cases that equity will not restrain a private nuisance that is merely dubious, possible, or contingent. The Court must first be informed that its actual effect will be injurious to the complaining party. *Ellison v. Commissioners,* 58 N. C., 57; *Dorsey v. Allen,* 85 N. C., 358; *Vickers v. Durham,* 132 N. C., 880; *Reyburn v. Sawyer,* 135 N. C., 328; *Barnes v. Calhoun, supra.*

(712) We held before that the testimony, as to the actual pollution of the stream at the reservoir or place where the water is taken and forced into the main for the purpose of being carried to the city, was not of a satisfactory character, nor did it sufficiently show the imminence of danger to the health of the community using it; that is, if the suit is considered as one to suppress and enjoin a nuisance and to be decided upon the general principle applicable to such cases, and not merely as one brought under the statute to secure protection against a threatened and menacing injury by the discharge of sewage into the stream, the remedy by injunction being specially given "to any person" by section 3051.

We did not mean to say, and did not, in fact, say, in the former appeal, that expert or scientific evidence would not be considered in determining whether a private nuisance or injury was sufficiently imminent to warrant the interference of the Court by issuing an injunction to prevent it, and we must not be understood as so ruling; but what we did say, and what we intended to decide, was that the testimony in this case is not of that satisfactory character which courts of equity require in cases of this kind, and under the facts and circumstances as they appear in the record, having specially in view the facility with which the plaintiff could have furnished proof more reliable and of greater weight, if it

had been so minded. Indeed, the statute requiring chemical, biological, and bacteriological analyses to be made periodically by an expert State officer appointed for that purpose convinces us that the plaintiff has not presented to the Court the best attainable proof of the fact it alleges to exist, but instead has offered mere opinion evidence, based on disputed facts. It may be that the plaintiff can prove its case, without the aid of a demonstration by actual analysis of water specimens drawn from its faucets or from the river at the intake or at other places along the stream, but the excuse for not producing such an analysis has not been shown, and in the absence of any good reason dispensing (713) with its production, we consider the proof as it now stands insufficient as the basis for a provisional injunction, treating this as an action to enjoin a mere nuisance. As to sewage from the water-closets in the mill, which is discharged into the river at Hillsboro, we have already said in our former opinion that the injunction should issue without proof as to any injurious effect upon the water at the intake, because the Legislature, in the exercise of a rightful authority, has so provided (Rev., sec. 3051), it being an act so manifestly dangerous to the public as not to come within the principle allowing compensation for property taken for public use. If this is not so, where shall we draw the line? Shall we jeopardize public health by stopping to inquire whether the act is actually injurious? This same argument in favor of private right might be made in the case of any structure, however plainly a menace to public health or safety—for example, a powder magazine or any other depository for a deadly explosive.

It was not intended by citing the English decisions to justify the constitutional argument, but merely to show how the courts of that country had construed such statutes. Our construction of that section of the Revisal we find directly and clearly supported by the case of *Board of Health v. Paper Co.*, 63 N. J. Eq., 111, where a similar statute was considered by the Court. As to the other acts of which the plaintiff complains, we do not think they are covered by that section, and therefore, as to them, the plaintiff can succeed in this action only by showing at the final hearing that they constitute a nuisance specially injurious to them in the respect we have indicated, and that they are so interested, in a legal sense, as to maintain this action for the suppression of the wrong which they allege is thus being committed. This was the opinion held by us when this case was here before, and the reasoning of the opinion, we think, clearly so indicates; but in formulating the (714) judgment we were not at the time sufficiently advertent to the effect of our conclusion upon the ultimate rights of the parties with respect to the two different propositions involved, and for this reason, and also, perhaps, because the great stress of the argument had been laid

upon the true construction of section 3051, the injunction was permitted, in affirming the order below, to have a broader scope than was really intended. We are not deciding upon the rights of the parties, as upon a final hearing, for we do not adjudicate those rights, but merely remand the case for a trial of the issues raised by the pleadings. The case, therefore, is not within the principle of *Carter v. White*, 134 N. C., 469, and *Solomon v. Sewerage Co.*, 142 N. C., 439, which were cited by the defendant for the position that this Court is not bound by the former decision as settling the law of the case. It is not necessary to go further into this matter, as we will treat the exception of the plaintiff as a motion to amend the former judgment, so that it may be restricted to the one the Court intended to enter, as appears by the opinion, or this Court may of its own motion correct the former entry in this respect to make it express the true decision and judgment of the Court. There is full authority for the taking of this course. In *Scott v. Queen*, 95 N. C., 340, it appeared that the opinion of the Court clearly showed it to be its purpose to reverse the judgment below, whereas it entered an order for a new trial. On motion made here, at a subsequent term, that order was corrected and an order for reversal and remand substituted, so as to carry out the intention of this Court. So in other cases the entry has been changed from "reversal" to an "affirmance," from "new trial" to "remanded," and other modifications made so that the judgments should correspond with what this Court actually did decide. *Cook v. Moore*, 100 N. C., 294; *Summerlin v. Cowles*, 107 N. C., 459; *Scroggs v.* (715) *Stevenson*, 108 N. C., 260; *Bernhardt v. Brown*, 118 N. C., 710; *Solomon v. Bates*, 118 N. C., 321. In most if not all of those cases it is held that the Court may proceed *ex mero motu*, though it is best to do so upon notice first served on the party to be affected by the amendment. See, also, *S. v. Marsh*, 134 N. C., 184.

We distinctly stated in our former opinion that but for section 3051 of the Revisal we would be compelled to reverse the judgment below. That section relates only to sewage, and there was no contention that it embraced any of the alleged injurious acts of the defendant, except the maintenance of the system of sewerage connected with the mill and the discharge of the water-closets through the sewer into the river, the plaintiff, in respect to the other acts of the defendant, relying altogether upon the general principles of the law concerning nuisances, and sections 3045, 3052, and 3862 of the Revisal. It is apparent, therefore, that the Court intended to order an affirmance as to the discharge of sewage into the Eno River, and a reversal as to the rest of the order of the Superior Court from which the appeal was taken. But we now have possession of the case by virtue of this appeal, and are reviewing a judgment entered by the court below in supposed conformity with our former

order, though it is not so. It would seem entirely proper, in setting aside that judgment, that we should direct the proper order to be made in accordance with our declared purpose when we decided the former appeal, as the case will still be in its interlocutory stage and nothing has been done as yet that can prejudice either party.

The defendant filed in this Court a certified copy of an act of the last Legislature amending section 3052 of the Revisal by striking out all after the word "maintain," in line five, and inserting in its place the following: "a system for collecting and disposing of all accumulations of human excrement within their respective jurisdictions, or control, at least once each week, by burning, by burial, or by some other (716) method approved by the State Board of Health," and its counsel contended that the defendant is entitled to the benefit of that provision in determining what is a compliance with the law in respect to the disposal of fecal matter which is not sewage; and so we think, if the question, in view of our present decision, is any longer a practical one. Whether the defendant is committing a nuisance in the disposal of fecal matter, not sewage, on its premises, which is specially injurious or detrimental to the plaintiff, or whether it has disposed of it as required by law, are questions to be determined by the principles we have already laid down and the existing statutory requirements, so far as they are applicable.

The former judgment of this Court is so modified as to affirm the order for an injunction made by *Judge Ferguson,* so far as it relates to the discharge of sewage from the defendant's water-closets in the mill into the river, and to reverse it in other respects. The judgment rendered at the last hearing in the court below, and from which this appeal is taken, is set aside for error, with directions to submit the issues raised by the pleadings to a jury and to proceed further in the cause according to law.

Modified.

*Cited: Shelby v. Power Co.,* 155 N. C., 199; *Rope Co. v. Aluminum* Co., 165 N. C., 576.

(717)

A. S. T. JOHNSON ET AL. V. EVERSOLE LUMBER COMPANY.

(Filed 27 May, 1907.)

**1. State's Lands—Grant—Registration—Statute of Limitations.**

The defendant's cause of action accrues upon the registration of a junior grant to plaintiff's grantor, and the ten-year statute of limitations (sec. 158 of The Code) runs from the time of such registration.

**2. Same—Computation of Time.**

Chapter 113, Laws of 1891, repealed sections 136 and 137 of The Code, which exempted actions accruing before 24 August, 1868, from the statute of limitations during the time from 20 May, 1861, and 1 January, 1870; therefore, when defendant's cause of action accrued against plaintiffs' entry of 27 June, 1856, his equity was barred 27 June, 1866, by the ten-year statute (Code, sec. 158).

**3. Issues.**

When every phase of the contention of the parties has been fully presented under the issues submitted, it is not error in the court below to refuse to submit others.

**4. State's Lands—Aliens.**

Laws of 1852, ch. 169, sec. 3, was inapplicable to aliens entering Cherokee lands (Laws 1854-'55, ch. 31, sec. 18).

**5. Same—Estate Divested.**

An alien has full capacity to hold realty until his estate be divested by office found or some other equally solemn sovereign act.

**6. Registered Deeds—Evidence.**

Deeds, if registered, can be put in as evidence, when otherwise competent, even when registered during trial.

(Closer attention of officers charged with the duty of collecting State and county taxes is called to a not uncommon occurrence of persons claiming wild lands, not in possession, escaping payment of taxes thereon.)

ACTION tried before *McNeal, J.*, and a jury, at March Term, 1906, of SWAIN. From a judgment for plaintiffs, defendant appealed. The facts sufficiently appear in the opinion.

*Shepherd & Shepherd and George H. Smathers for plaintiff.*
*Davidson, Bourne & Parker and A. M. Fry for defendant.*

(718) CLARK, C. J. Action for damages for cutting and removal of timber trees from two tracts of land described in the complaint. The plaintiffs derive title by *mesne* conveyances from J. T. Foster, to whom State grants 150 and 151 issued 20 April, 1855, for 640 acres each, upon entries made by him 5 November, 1853, and surveyed April, 1854. These grants were registered 27 June, 1856.

The defendant derives title by *mesne* conveyances from Allison & Welch, under State grant 408, for 5,000 acres (embracing the *locus in quo*), issued 26 December, 1857, upon an entry made 23 March, 1853, and surveyed 17 and 18 October, 1853. This was registered 27 July, 1858. The defendant asks that the plaintiffs be decreed trustees for its benefit and to convey whatever title, if any, they may have. The plaintiffs' replication pleads the bar of the ten years statute of limitations.

If the statute of limitations is a bar to the equity set up by the defendant, it is unnecessary to consider whether the equity alleged is otherwise valid or not. In *McAden v. Palmer,* 140 N. C., 258, where the

defendants, claiming, as here, under a grant junior to plaintiff's grant, but issued upon an entry prior to his, asked to have the plaintiff declared trustee of the legal title for their benefit, the Court sustained the plaintiff's plea of the statute of limitations. The defendant's cause of action in this case accrued upon the registration, 27 June, 1856, of the grant to Foster, under which the plaintiffs claim. The matter is so fully and clearly discussed by *Mr. Justice Brown* in *McAden v. Palmer, supra,* that it is sufficient to refer to the opinion in that case without repeating what is there so well said. The plea of the ten years statute upon the same state of facts was also sustained in *Ritchie v. Fowler,* 132 N. C., 790. "The legal title vesting in the first grantee drew the constructive possession, which continued until there was an ouster." *Janney v. Blackwell,* 138 N. C., 442. Here there is no evidence of possession of the lands within the bounds covered by grants (719) 150 and 151 by the defendant, or those under whom it claims, after the registration of the grant to Foster in April, 1855, and its registration in June, 1856, till the cutting of timber by the defendant in 1900 or 1901, for which this action was begun 31 July, 1902. Indeed, neither party was in possession nor paid taxes. The latter is probably a not uncommon circumstance as to wild lands, and may well call for the closer attention of officers charged with the duty of collecting State and county taxes.

The defendant contends, however, that the statute does not run in favor of plaintiffs because Foster, the original grantee, left the State in 1860, and he and those under whom the plaintiffs claim have been nonresidents ever since, relying upon Code, sec. 162, now Revisal, sec. 366. But that section by its terms did not apply to causes of action accrued prior to 24 August, 1868. *Blue v. Gilchrist,* 84 N. C., 239.

It is true that this claim, having accrued 27 June, 1856, was governed by the ten years statute of presumptions (R. C., ch. 65, sec. 19; *Campbell v. Brown,* 86 N. C., 376), and that Code, sec. 136, provided that the limitations in The Code should not apply to causes of actions accrued prior to 24 August, 1868, and section 137 suspended the statute of limitations and presumptions from 20 May, 1861, to 1 January, 1870. The ten years statute of presumptions expired, therefore (eliminating 8 years, 7 months, 10 days), on 9 March, 1875, and there was no evidence to rebut the presumption. Chapter 113, Laws 1891, repealed sections 136 and 137, *i. e.,* it repealed the exemption of actions accruing before 24 August, 1868, from the statute of limitations and repealed the suspension of time between 20 May, 1861, and 1 January, 1870, so that the defendant's equity was really barred since 27 June, 1866. *Alexander v. Gibbon,* 118 N. C., 802. It did not repeal the proviso of Code, sec. 162, which is not a statute of limitation, but merely prevents (720)

the statute of limitations protecting a nonresident as to causes of action accruing since 24 August, 1868. There is no reference to section 162 in the repealing statute, Laws 1891, ch. 113, whose object was to extend the protection of the statute, not to withdraw it. Every phase of the contention of the parties was fully presented by the two issues submitted, and it was not error to refuse to submit others. *Wilson v. Cotton Mills,* 140 N. C., 57, and cases there cited.

If, as defendant contends, Foster was an alien, the law at that time applicable to Cherokee lands (which this was) did not debar aliens (Laws 1852-'53, ch. 169). The general land law did not apply to these lands, as was expressly provided by section 18, chapter 31, Laws 1854-'55. But even if an alien was prohibited from entering these lands, the State only could divest his title, for "an alien has capacity to take, but not capacity to hold land; . . . he cannot hold it against the sovereign, should the sovereign choose to assert his claim thereto as forfeited. But against all the rest of the world the alien has full capacity to hold, and he can hold even against the sovereign until the state of the alien be divested by an office found or some other equally solemn sovereign act." *Rouche v. Williamson,* 25 N. C., 146; *Wilson v. Land Co.,* 77 N. C., 457.

Whether the first probate of the deed from Wilson to Wilson and Roller was valid, the second probate and registration thereunder was sufficient, and, though made after suit begun, entitled the deed to be used as evidence. The act of 1885 makes deeds valid only from registration against purchasers and creditors—which these defendants are not. Deeds, if registered, can be put in evidence, when otherwise competent, even when registered during the trial.

There are other exceptions, but they do not require discussion.

No error.

*Cited: Frazier v. Cherokee Indians,* 146 N. C., 480; *s. c.,* 147 N. C., 250; *Phillips v. Lumber Co.,* 151 N. C., 521; *Hodges v. Wilson,* 165 N. C., 328; *Lynch v. Johnson,* 171 N. C., 615.

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(721)

McDOWELL AND WIFE v. BLUE RIDGE AND ATLANTIC RAILWAY COMPANY.

(Filed 27 May, 1907.)

**1. Contract—Conditions—Limitations—Performance.**

When the time for the performance of a condition of a contract is strictly limited, forfeiture is incurred by nonperformance within the time. A deed granting a right of way to the defendant railway company

upon consideration of benefits thereby to accrue, with the provision that if the defendant should fail or neglect for a period of five years from the date of the conveyance to construct its line of railway thereon it should revert to the grantor, will, in the absence of any controlling equitable element, restrict the right of defendant to complete its line of road within the period fixed therefor.

**2. Same—Equitable Excuse.**

Upon failure to perform the condition that its line of road shall be completed within five years, equity will not relieve against a forfeiture upon the ground that defendant, pursuant to a statute affecting its construction, concentrated its force on some other part of its line.

**3. Same—Railroads—Notice.**

The doctrine that equity will afford relief in preventing the enforcement of a forfeiture has no application when there is a total failure on the part of the one seeking it to perform the condition, without sufficient equitable excuse. When the plaintiff retains possession of the lands granted defendant for a right of way to be used for railroad purposes within the period of five years, and within that time limit the defendant had not begun to perform its part of the contract, the estate revests in him at once upon the conditions broken, and his notification to defendant's contractors not to enter upon the land is a sufficient manifestation of his intention to hold by reason of the breach of the condition.

**4. Same—Forfeiture—Defense.**

While in some cases equity will relieve against a forfeiture, it will not do so when the plaintiff is standing upon his legal rights under a contract fixing the time limit for defendant's performance of the condition, and when there is nothing harsh or inequitable in its terms or enforcement.

**5. Same—Condemnation Proceedings.**

When equitable relief against a forfeiture under a time limit, in a conveyance of lands for railroad purposes, cannot be successfully sought, the defendant railway company is confined to condemnation proceedings under the statute.

ACTION tried before *O. H. Allen, J.*, trial by jury being waived (722) by consent, at Spring Term, 1907, of MACON. From a judgment for plaintiff, defendant appealed.

This proceeding was instituted in the Superior Court of Macon County by the plaintiffs, A. L. McDowell and wife, against defendant, Blue Ridge and Atlantic Railway Company, alleging that defendant, as authorized by its charter to do, had entered, occupied, and appropriated for the purpose of locating, grading, constructing, and operating a railroad, a strip of plaintiffs' land 100 feet in width, particularly described in the petition. Petitioners prayed that commissioners be appointed to assess their damages, etc. Defendant answered the petition, admitting the entry upon plaintiff's land for the purpose set forth, and alleged that it made such entry by virtue of the right and title conferred upon it by a deed (a copy of which is attached to the answer) executed by plain-

tiffs to said corporation, bearing date 24 May, 1901. It appears, by an inspection of said deed, that plaintiffs, on said day, conveyed to defendant a strip of land 100 feet wide, which was sufficiently described. The consideration set forth in the deed is "the benefits that will accrue to them by reason of the construction and extension of a railway through and over their lands and the further consideration of $1." Following the *habendum* in said deed are the following words: "*Provided,* that if the above granted land shall cease to be used for railroad purposes, then the same is to revert to and become the property of the said parties of the first part, or their heirs: *Provided further,* that if the party of the second part shall fail and neglect for a period of five years from this date to construct its line of railway over the premises hereby
(723) granted, then and in that event the title to said lands shall revert to the parties of the first part, their heirs and assigns, without any obligation on the parties of the first part to reënter for condition broken." Upon the coming in of the answer and the reply of plaintiffs, the parties submitted the cause to the decision of the court upon an agreed state of facts, the material portions of which are as follows:

Plaintiffs were, on 23 May, 1901, the owners of the land upon which defendant has entered, as alleged. Defendant was duly incorporated by chapter 87, Private Laws 1901, and is authorized to construct and operate a railroad in Macon County, in this State. On 24 May, 1906, plaintiffs notified defendant's contractors at work on said road not to enter upon or do any work on their said land. At that time no work of grading had been done thereon, the defendant having concentrated its forces on another part of said line as a result of the passage by the Legislature of North Carolina of chapter 630, Laws 1905. On 7 June, 1906, defendant entered upon and occupied the strip of land described in the petition for railway purposes, and on 30 June, 1906, this proceeding was begun. Pending the proceeding, the work of grading over the land has been practically finished, except surfacing, but no ties or track have been laid. About 50 per cent of the work of grading the entire line of railway from the Georgia State line to Franklin had been completed on 24 May, 1906, and about 75 per cent of the grading between the Georgia line and Prentiss, a station on said railway, 5 miles from Franklin, was completed on said day. No track nor ties had been laid on any part of said railway, nor any part of the grading been completed, ready for the ties and track, on the said 24 May, 1906, but parts or sections of the grade on said line had been approximately built, ready for the surfacing or subgrading necessary for exact grade. Other facts re-
(724) garding the progress of the work during the intervening years are set forth which are not material to the decision of the cause. The relation which defendant company bore to the Tallulah Falls Railway

Company is also stated. The court, upon the agreed facts, appointed commissioners to go upon that portion of plaintiffs' land occupied by the defendant and assess his damages. Upon the coming in of the report, after hearing exceptions thereto, judgment was duly rendered in the Superior Court, at a regular term, condemning for defendant's use a right of way over plaintiffs' land and assessing the damages therefor. Defendant excepted and appealed.

There are several assignments of error in the record, but they are all involved in the two contentions argued in this Court:

1. That, in the light of the facts agreed upon, there has been no forfeiture by defendant.

2. That if there has been such forfeiture at law, upon the allegations in the answer and the facts agreed upon, the defendant is entitled to be relieved therefrom by a court of equity.

*Horn & Mann for plaintiffs.*
*Jones & Johnston and Shepherd & Shepherd for defendant.*

CONNOR, J., after stating the facts: It will be noted that the language used by the grantors confines the defendant to the construction of "its line of railroad over the premises hereby granted"—and not the construction of the whole of the proposed road. This was evidently for the benefit of the grantee, whose title was not to be dependent upon the completion or maintenance of the road, nor was the title to be perfected by beginning its construction. While the courts do not favor forfeitures, and will, in case of doubt, so construe language that estates shall vest where there is a condition precedent, and, when vested, be protected from being divested on account of conditions subsequent, (725) at the same time, where, in solemn instruments, under seal, parties use language capable of only one construction, force and effect will be given to it, and their intention, as manifested by their written words, be effectuated. There is no room for controversy in regard to the meaning of the language in this deed. We are not called upon to inquire why this peculiar language was used. It appears, however, that the proposed road was to be of considerable length, and doubtless to be constructed at heavy cost and to consume a long period of time, and that many changes in conditions would occur before its completion. In view of these and possibly other reasons not known to us, the grantor was unwilling to burden his lands with this somewhat indefinite easement for more than five years. How all of this is we do not know, and for that reason the only way in which we can safely interpret their contract is to give effect to its language. "If the time for the performance of the condition is strictly limited, forfeiture is incurred by nonperform-

ance within the time. In all cases where a time is set for the doing or performance of the matter contained in the condition, be it to pay money, make an estate or the like, it must be done at the time agreed upon and set down in the condition. . . . If the condition be that a building shall be erected on the granted land within five years, for municipal purposes, a failure to erect the building within the time named is a breach of the condition, for which a forfeiture may be enforced." 1 Jones on Conv., sec. 684, citing *Clark v. Brookfield,* 81 Mo., 503, 51 Am. Rep., 243, which sustains the text. In *Morrill v. R. R.,* 96 Mo., 174, no time was fixed within which the road was to be constructed. The case is rested upon the peculiar facts in the record. In *Preston v. R. R.,* 11 Iowa, 15, it is said that by construction "more is meant than the mere making of the roadbed; . . . it implies preparation
(726) and readiness for use." We can have no doubt that the failure of defendant to "construct its line of road over the premises hereby granted" within the five years worked a forfeiture.

Defendant next insists that no entry was made for "condition broken." Two answers occur to the mind in response to this objection: (1) The deed expressly provides that no entry shall be necessary, or, in the language of the deed, there is to be "no obligation on the parties to reënter." (2) On the day upon which the condition was broken plaintiff was in possession. It was not contemplated that defendant should enter until it began the construction of the road. "If the grantor is, himself, in possession when the condition is broken, the estate revests in him at once, and his possession is presumed to be for the purpose of holding under the forfeiture. If he is already in possession, it is, however in some cases, declared that the grantor must manifest an intention of holding by reason of the breach of the condition." 1 Jones Conv., 722. It is admitted that the grantors, on the day of the forfeiture, notified defendant's contractors not to enter upon the land. If required to do anything to revest the estate, by reason of condition broken, it would seem that he did all that was possible. At law the estate revested and the defendant's right to enter was gone. Its entry thereafter was by virtue of its right to do so under its charter, for the purpose of constructing a railroad, and could not affect plaintiffs' right to pursue his remedy for compensation. The right to enter, followed by condemnation and payment of compensation, usually but inaccurately called damages, vests in the corporation the easement as provided by its charter. The defendant, conceding the forfeiture at law, earnestly contends that upon the agreed facts the case comes within the protective principle of equity jurisprudence, whereby relief is granted against forfeiture.

As we have seen, on 24 May, 1906, the estate which had been
(727) conveyed by plaintiffs to defendant came to an end and revested

in the plaintiffs as if it had never been out of them; in other words, they were in, as of their original estate, by reverter on account of condition broken. Is it within the province, or the power of a court of equity to destroy the estate now in plaintiffs and revest it in the defendant? No point is made of the fact that this alleged right is set up as an equitable counterclaim in a proceeding for condemnation. Probably it is the only way open to defendant to do so. That courts of equity have, from time immemorial, relieved against forfeitures is elementary. In doing so the chancellors have evolved rules based upon equitable principles and precedents for their guidance. The jurisdiction is not exercised arbitrarily and in every case where the chancellor may think that the party taking advantage of the forfeiture should not, upon merely ethical grounds, do so. One underlying principle by which the equity for relief has been granted is that the intention of the parties is thereby effectuated.

It is also well settled that where there has been substantial part performance of a condition involving a work requiring time for completion, equity will relieve and prevent the harsh and oppressive enforcement of the forfeiture. Many cases are cited illustrating this familiar principle. The difficulty here is that the condition is that the defendant shall construct the road over the premises granted within the time fixed, and on the day named it had constructed no part of the road; "no work of grading had been done" thereon. There was a total failure to perform the condition. The only reason assigned for such failure is that "as a result of some legislation" its force was concentrated on some other part of its line. This legislation required a part of the road to be finished within a time which we presume made it necessary to use the force on it. We do not perceive how this matter affected the rights of the plaintiffs under the deed. The defendant knew the condition in (728) its deed and the time within which the work must be done. There is no suggestion that by an unforeseen or uncontrollable condition the defendant was prevented from constructing the road across plaintiffs' land. Again, this case is not like a deed made to secure the payment of a debt, as a mortgage, in which the measure of damages for failure to perform the condition is fixed. The parties must be presumed to have contracted with reference to the surrounding conditions and had some purpose in fixing their rights and obligations, with the results to follow a failure to discharge them promptly. It is true that the consideration was the benefits to be enjoyed by the building of the road, but it is not stated that the defendant was induced to build the road by reason of the grant of the right of way or title to the strip of land, or that any money has been expended by reason of anything said or done by plaintiffs. In *R. R. v. South Orange,* 58 N. J. Eq., 83, there was substantial

part performance of the condition. Plaintiff had expended large sums in the construction of the railway over the streets of the town. The failure to *finish* the work was caused by conditions over which plaintiff had no control. To have enforced the forfeiture would have entailed the loss of large sums to the plaintiff. We think that there is a clear distinction between the two cases. In *Gardner v. Lightfoot,* 71 Iowa, 577, there was part performance and the parties could not be placed *in statu quo.* This is the limitation put upon all of the cases and in accordance with the equitable doctrine laid down. 1 Pomeroy Eq., 451. Bispham says: "But equity will not, in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act." It will be observed that while in many cases equity will not enforce a forfeiture, the plaintiff here is not in-
(729) voking equitable relief; he is standing upon his legal right—his contract. There is nothing harsh or inequitable in the terms of the contract in the time fixed for constructing the road over his premises. During the five years the value of his land was probably impaired by the burden upon it; he may well have been willing to carry the burden during that time, but no longer; this is what his deed declares. At the end of the five years he simply says, "Take my land, but pay me for it." We cannot see in the principles of equity jurisprudence any reason why he may not do so. To hold otherwise would seriously impair the freedom and integrity of contract. If the road had been constructed within the time limited in the deed the plaintiffs were bound; it was not done, and the defendant may build its road, but must pay for the right of way. This is the contract. The judgment must be

Affirmed.

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CHARLES W. THOMAS AND WIFE v. BLUE RIDGE AND ATLANTIC RAILWAY COMPANY.

(Filed 27 May, 1907.)

**Railroads—Contracts—Conditions—Forfeiture.**

A railroad company cannot avoid a forfeiture under a time limit for the construction of its line of road, unless it substantially complies with the provision therefor in its deed.

(The opinion in *McDowell v. R. R.* (next above) controls the disposition of this appeal.)

THOMAS *v.* R. R.

ACTION tried before *O. H. Allen, J.*, trial by jury being waived by consent, at Spring Term, 1907, of MACON. From a judgment for plaintiff, defendant appealed.

The facts in this case are substantially like those in *McDowell* (730) *v. R. R., ante,* 721. The deed executed to the defendant by plaintiff and wife contained the same condition as set out in the *McDowell case.* The same proceedings were had, the parties entering into an agreed state of facts as in that case. The facts in this case, in respect to the performance of the condition, are as follows: "About 1 May, 1906, the defendant entered upon and occupied the strip of land through and over said described tract for railway purposes, and on 23 May, 1906, about one-half the grading of said road had been done, and the work of grading, except surfacing, was finished on 16 June, 1906, but no ties nor track were laid upon said land until August, 1906, after the commencement of this action. The plaintiffs, soon after 23 May, 1906, notified the contractors at work on said land not to do any more work thereon, and petitioners instituted this condemnation proceeding on 21 July, 1906. About 50 per cent of the work of grading of said entire line of railway from the Georgia State line to Franklin had been done on 23 May, 1906, and about 75 per cent of the grading between the Georgia State line and Prentiss, a station on said railway, 5 miles from Franklin, had been done on said date. The land of the plaintiffs is situated about 1 mile from Prentiss and between that station and the Georgia line. No track nor ties had been laid upon any part of said line of railway, nor had any part of the grading been completed, ready for the ties and track, upon said 23 May, 1906; but parts or sections of the grade on said line had been approximately built, ready for the surfacing or subgrading necessary for exact grade. The first contract for the grading of said road was let in the year 1905, and work was begun upon said contract about May, 1905, and has been continually in progress since. The track was laid and train service inaugurated to Prentiss station, above mentioned, on 29 August, 1906."

The court, upon the agreed facts, appointed commissioners to (731) go upon that portion of plaintiffs' land occupied by the defendant and assess their damages. Upon the coming in of the report, after hearing exceptions thereto, judgment was duly rendered in the Superior Court, at a regular term, condemning for defendant's use a right of way over plaintiffs' land and assessing the damages therefor. Defendant excepted and appealed.

There are several assignments of error in the record, but they are all involved in the two contentions argued in this Court:

1. That, in the light of the facts agreed upon, there has been no forfeiture by defendant.

2. That if there has been such forfeiture at law, upon the allegations in the answer and the facts agreed upon the defendant is entitled to be relieved therefrom by a court of equity.

*Horn & Mann for plaintiffs.*
*Jones & Johnson and Shepherd & Shepherd for defendant.*

CONNOR, J., after stating the case: The decision in *McDowell v. R. R., ante,* 721, controls the disposition of this appeal. The only difference between the two cases is found in the fact that "about 1 May, 1906, defendant entered upon and occupied the strip of land through and over said described tract for railway purposes, and on 23 May about one-half the grading of said road had been done." We do not think that this act of the defendant substantially complies with the condition in the deed. In all other respects the two cases are conceded to be alike.

For the reasons set forth and upon the authorities cited in the opinion in that case, the judgment herein must be

Affirmed.

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(732)

## CAROLINA COAL AND ICE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 27 May, 1907.)

**1. Removal of Causes—Diverse Citizenship—Purchasing Company—Domestic Corporation—Statute.**

Where the language of the statute manifests a clear intention to create a new corporation, and not to license or permit an existing foreign corporation to exercise its power in the State, and such act of creation is accepted, a domestic corporation is created. A suit cannot be removed from the State to the Federal court upon the ground of diversity of citizenship by a corporation of another State which became the purchaser of a corporation of this State under a sale made pursuant to a deed of trust or mortgage, by virtue of The Code, sec. 697, providing upon the conveyance being made to "the purchaser, the said corporation shall *ipso facto* be dissolved and the said purchaser shall forthwith be a new corporation, by any name which may be set forth in the conveyance," etc. (*R. R. v. Allison,* 190 U. S., 326, cited and distinguished.)

**2. Same—Judicial Notice.**

The courts of this State cannot take judicial notice of the contents of a private statute of another State.

MOTION for removal of cause to the Federal court, heard by *Cooke, J.*, at the February Term, 1907, of BUNCOMBE.

Plaintiff, a North Carolina corporation, alleges: That the General Assembly of this State, at its session of 1854-'55, incorporated "The Western North Carolina Railroad Company," chapter 228, Private Laws 1854-'55. It sets forth several acts amending the charter of said company, the provisions of which are not material to the point presented upon this appeal. At the special session of 1880 (ch. 26) an act was passed authorizing a sale of the State's interest in the property, etc., of the said company. That pursuant thereto, the commissioners appointed for that purpose executed a deed to the purchaser, a copy of which is made a part of the complaint. That on 2 September, 1884, the said Western North Carolina Railroad Company, pursuant to an act of the General Assembly, executed a second mortgage to the (733) Central Trust Company of New York, conveying to said trust company all of its property, rights, privileges, franchises, etc., for the purpose of securing the payment of certain bonds, a description whereof is fully set out in the said mortgage. That thereafter, in a suit of equity in the Circuit Court of the United States for the Western District of North Carolina, wherein the said Central Trust Company of New York was complainant and the Western North Carolina Railroad Company and another were defendants, a decree was passed directing a foreclosure of said mortgage and sale of the property, franchises, etc., of the said railroad company, and appointing Charles Price, Esq., special master to make sale of said property conveyed in said mortgage. That said Price, special master, pursuant to said decree, made a sale of said property, etc., when the Southern Railway Company became the purchaser. That said sale was duly confirmed and the said special master directed to make title to the purchaser. That, pursuant thereto, the said Charles Price, special master, on 22 August, 1894, executed and delivered to the Southern Railway Company a deed conveying, assigning, and setting over to the said railway company all of the property, franchises, etc., of the said Western North Carolina Railroad Company conveyed in said mortgage. That defendant, the Southern Railway Company, under and by virtue of the said deed, has continuously held and used the tangible property, operated the line of railway, and exercised and enjoyed all and singular the rights, powers, privileges, franchises, and immunities granted and conveyed in said deed.

That plaintiff is advised, informed and believes, and so avers the fact to be, that by reason of the matters and things set forth and by virtue of the laws of the State of North Carolina said defendant, the Southern Railway Company, became and was the successor of the Western North Carolina Railroad Company, and that said defendant, as (734)

such successor, became, was, and is a corporation created and existing under and by virtue of the laws of the State of North Carolina, and is a citizen of the State of North Carolina. The plaintiff proceeds to set out the facts upon which it bases its prayer for relief against the defendant corporation, which, in view of the question presented upon the appeal, it is not necessary to set out. The Southern Railway Company, within the time permitted, files its petition for a removal of the cause to the Circuit Court of the United States. The petition sets out that the Southern Railway Company was, at the time of the commencement of this suit, and still is, a corporation originally created, organized, and existing under and by virtue of the laws of the State of Virginia, and is now, and was at the commencement of this action, a citizen of the State of Virginia and of no other State, etc., all of which is in strict accordance with the statute prescribing the procedure for removal of causes from the State into the Federal courts on account of diverse citizenship. The court, upon petition, ordered the cause to be removed in accordance with the prayer of the petitioner. Plaintiff excepted and appealed.

*Frank Carter and H. C. Chedester for plaintiff.*
*Moore & Rollins for defendant.*

CONNOR, J., after stating the case: The record, upon which alone this appeal is to be decided, presents an anomalous condition. The plaintiff sues what it asserts to be a North Carolina corporation, setting forth at length the legislative and judicial process by which it is created. It further alleges that this domestic corporation is now and was at the time of committing the injuries complained of and threatened, for which it seeks redress and injunctive relief, the owner of and operating a railroad, with all of its property, franchises, privileges, etc.,
(735) from Salisbury to Paint Rock, in this State. It further alleges that this corporation was created, in the manner set forth, by the Legislature of this State, by the name of the Southern Railway Company. Process is returned served on the "freight agent of the Southern Railway Company at Asheville, N. C."

Thereupon, a corporation of the same name, alleging itself to be, and for the purpose of this appeal to be so taken, a Virginia corporation, comes into court and files a petition for removal of the cause into the Circuit Court of the United States, averring that, plaintiff being a citizen of North Carolina, there exists what, for the purpose of removal, is termed "diverse citizenship." The plaintiff insists that, conceding the existence of a corporation having its domicile or origin or creation in Virginia, by the name of the Southern Railway Company, such corpora-

tion, in respect to the line of railway formerly known as the Western North Carolina Railroad, with its franchise, has no existence or status in this State. That said railway, franchises, etc., are the property of the defendant, and is operated by the Southern Railway Company, a corporation created by the Legislature of North Carolina. If the contention of the plaintiff be true, the Southern Railway Company, the Virginia corporation, is not a party to this action and has no standing in court for any purpose. If such contention is not true, it would seem that the same result follows. The plaintiff insists, and its complaint avers, that it is suing a North Carolina corporation. The return of the service of the summons does not indicate of which corporation the "freight agent of the Southern Railway Company at Asheville" is the local agent. It would seem, in this state of the record, the plaintiff has sued one corporation and another corporation of the same name has come into court. If, as assumed by the petitioning corporation, the Southern Railway Company, the Virginia corporation, is the owner of the property, franchises, etc., formerly owned by the Western North Carolina (736) Railroad Company, no judgment in this action would affect it or its property. Passing this phase of the question, however, we will, as the appeal and the argument invite us to do, consider the case upon its merits.

The first question presented for examination is whether, upon the facts alleged in the complaint, there is a corporation created by and existing pursuant to the laws of this State by the name of the Southern Railway Company. It is alleged in the petition, and for the purpose of this appeal conceded, that the petitioner is a corporation created by and existing pursuant to the laws of Virginia. We are not advised in regard to the extent of its power to acquire, own, and operate railroads beyond the limits of its domicile of creation. The complaint sets out and makes part thereof the charter, with all of its amendments, of the Western North Carolina Railroad Company. An examination of the charter discloses that the corporation is empowered to construct and operate a railroad from Salisbury to certain points west of Asheville, in this State. The franchise, with the right of eminent domain, to take tolls, and other powers incident to railroad companies, is conferred upon the corporation. We also find that in 1880 the State parted with its interest in the corporation and its property. The effect of this statute (Special Session 1880, ch. 26) and the deed made pursuant thereto is passed upon by this Court in *Marshall v. R. R.*, 92 N. C., 322. Subsequent to and in pursuance of the powers conferred upon the assignees of the State a new corporation by the same name was formed, with enlarged powers, to provide for the completion and extension of the road by the issuing of bonds to be secured by mortgage, etc. It further appears from the complaint

that two mortgages were executed to trust companies to secure bond issues, pursuant to the powers conferred. The Central Trust Company foreclosed the second mortgage by suit in the Circuit Court of the
(737) United States, and at the sale the Southern Railway Company, "a corporation organized and existing under the laws of the State of Virginia," became the purchaser. At this point the question arises: By what authority did this Virginia corporation become the purchaser of and assume to exercise the franchises, privileges, and powers conferred by the Legislature of this State upon a domestic public-service corporation? That the franchise was sold and passed to the purchaser as indissolubly connected with and as a component part of the tangible property is settled beyond controversy. *Gooch v. McKee,* 83 N. C., 59. Section 697 of The Code of 1883, being the law in force at the time of the sale, provides what property shall pass to the purchaser by a sale made pursuant to a deed of trust or mortgage executed by a corporation, and further provides, "Upon such conveyance to the purchaser, the said corporation shall *ipso facto be dissolved and the said purchaser shall forthwith be a new corporation,* by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the same manner in which the conveyance shall be recorded." "The corporation *created by or in consequence of such sale and conveyance* shall succeed to all such *franchises, rights and privileges and perform all such duties as would have been, or should have been, performed by the first corporation but for such sale and conveyance.*" The Code, sec. 698. The section proceeds to provide for the issuance of stock, etc. Section 2005 (Code, 1883) provides that, "When any railroad corporation shall be dissolved, or its property sold and conveyed under execution, deed of trust, mortgage, or other conveyance, the owner or purchaser shall constitute a new corporation," etc. This section seems to contemplate the dissolution of the corporation by decree of the court, and does not, we think, have any bearing upon the question before us. The neces-
(738) sity for the statute, or, as we find in other States, one similar to it, is manifest. The sale of the entire property of a corporation, especially one the property of which is dedicated to a public use, severed from the franchise, would be of little or no value. The franchise, originally granted for the benefit of the public, gives value to the property, and by permitting it to pass with the property gives the corporation credit. By the sale of the property and franchise, keeping the corporation in existence, the purchaser becomes liable for the debts and liabilities. For the purpose of avoiding this and other results affecting its value, the statute, which is read into the decree of foreclosure, dissolves the old corporation, and a new corporation is "forthwith," by operation of law, created, succeeding to the franchise and assuming the duties, etc.,

of the dissolved corporation. It is manifest that if one or more individuals had purchased, at the sale of the special master, the statute, being read into the deed of conveyance, would have *quoad* the property and franchise so purchased *ipso facto* converted such purchaser into a new corporation. Does the fact that a corporation, created by and existing pursuant to the laws of another State, becomes the purchaser prevent the same legal result by operation of the statute? Unless the statute has this effect, by what authority does the Southern Railway Company, a Virginia corporation, own and operate a railroad in this State? Certainly the old corporation is dissolved. *Julian v. Trust Co.,* 193 U. S., 93. It does not appear that by its charter any power is conferred upon it to do so, and if it did so appear, of course no such right could be exercised in this State without the consent of the State, granted by its Legislature, subject to such conditions as it saw fit to impose. *Paul v. Virginia,* 8 Wall., 168. In *R. R. v. Harris,* 79 U. S., 65 (81), it is said: "The company (complainant) was chartered to construct a road in Virginia as well as Maryland. The latter could not be done without the consent of Virginia. That consent was given upon (739) the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, the same powers, privileges, obligations, restrictions, and liabilities were granted as those contained in the original charter." We take it as well settled that it is within the power of the Legislature to prescribe the terms upon which a foreign corporation may come into the State, purchase and operate a railroad. It has been uniformly held that one State may make the corporation of another State, as there organized and conducted, a corporation of its own *quoad* any property within its territorial jurisdiction. *R. R. v. Harris, supra; R. R. v. Wheeler,* 1 Black, 297; *Clark v. Barnard,* 108 U. S., 436; *R. R. v. Louisville Trust Co.,* 174 U. S., 552.

Assuming that the language of sections 697 and 698 was incorporated into the decree of foreclosure and into the deed—and this, we think, the law does—what would have been the status of the purchaser? In *Clark v. Barnard, supra,* the facts, as stated by *Mr. Justice Matthews,* so far as applicable to the question under discussion, were: The Boston, Hartford and Erie Railroad Company was a Connecticut corporation. Power was conferred by its charter to purchase the franchise, etc., of certain other railroad companies. In pursuance of this power it purchased the franchise, etc., of the Hartford, Providence and Fishkill Railroad. This road was a consolidated corporation, deriving its existence from both Connecticut and Rhode Island. By a subsequent act of the Legislature of Rhode Island the sale and transfer of the Hartford, Providence and Fishkill Railroad was ratified and confirmed, with the provision that "the Boston, Hartford and Erie Railroad Company, by that name, shall

and may have and use, exercise and enjoy all of the rights, privileges, and powers heretofore granted and belonging to the said Hart-
(740) ford, Providence and Fishkill Railroad Company, and be subject to all the duties and liabilities imposed upon the same by its charter and the general laws of the State." The Court said that the Hartford, Providence and Fishkill Railroad Company was, so far as it owned and operated a railroad in Rhode Island, a corporation in and of that State, and the Boston, Hartford and Erie Railroad Company became its legal successor in that State as owner of its property and exercising its franchise therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that State. The learned justice, referring to an act of the Legislature of Rhode Island, passed subsequent to the purchase, regarding the status of the Boston, Hartford and Erie Railroad Company, said: "If it had no previous existence as a corporation under the laws of Rhode Island, it would have become such by virtue of the act in question. For although, as a Connecticut corporation, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity, by virtue of its Connecticut charter, to exercise any franchise not contemplated by it, yet the natural persons who were corporators might as well be a corporation in Rhode Island as in Connecticut, and by accepting charters from both States could well become a corporate body, by the same name and acting through the organization, officers and agencies in each, with such faculties in the two jurisdictions as they might severally confer; . . . so that in Rhode Island it was exclusively a corporation of that State." *R. R. v. Alabama,* 107 U. S., 581. The question again came before the Court in *Graham v. R. R.,* 118 U. S., 161. The Legislature of New York passed an act authorizing the Boston, Hartford and Erie Railroad Company to consolidate with other New York corporations, providing that when the consolidation was completed and a certificate thereof filed with
(741) the Secretary of State, the Boston, Hartford and Erie Railroad Company should become possessed of the rights of charter, property, etc., of the selling company. *Mr. Justice Blatchford* said: "This act professes in its title to be an act to consolidate the three companies. It authorizes the sale to the Boston, Hartford and Erie Railroad Company of the franchise and property of the other two corporations (which were New York corporations) and provides that such sale shall pass the title to such franchises and property, and that the purchasing company shall thereby become possessed of the rights of charter and property sold, and thereafter have, hold, and use the same in its own name and right. As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation by its then existing name."

In *R. R. v. Vance,* 96 U. S., 450, *Mr. Justice Harlan,* discussing the legal effect of language used in a statute, not so strong as in The Code (sec. 697), says: "The language was something more than a mere license to an Indiana corporation to exert its corporate powers and enjoy its corporate rights and privileges in another State. . . . We cannot thus restrict the effect of the act without disregarding wholly the ordinary meaning of the plain words of the second section, which declares that the lessees, their associates, successors, etc., shall be a railroad corporation in the State of Illinois. . . . The fact that it bears the same name as that given to the company incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence derived from the legislation of another State." The learned justice clearly distinguishes the case from *R. R. v. Harris, supra,* by saying that the Illinois act declares in express terms that the Indiana corporation leasing the road "shall be a railroad corporation in that State, . . . with authority to exercise, not the powers which had been granted by the State of Indiana to another corporation of the same name, created under the laws of that State, but the same (742) powers which were possessed by a corporation theretofore created under the laws of Illinois." The distinction, so clearly pointed out in that case, is again stated by *Mr. Justice Gray* in *Martin v. R. R.,* 151 U. S., 673, and the cases illustrating the two classes cited, concluding with the declaration that those falling within the first class—of creation—"cannot remove into the Circuit Court of the United States," whereas those in the second class—of licensing—can do so.

*Judge Thompson,* in 10 Cyc., 290, thus states the principle deduced from these and other cases cited in the note: "The Legislature of one State may make a corporation organized under the laws of another State, which has become the purchaser of the properties and franchises of a corporation of the domestic State, a domestic corporation *quoad* any property thus purchased which has its *situs* within the domestic jurisdiction." The question was decided by the Supreme Court of Georgia in *Angier v. R. R.,* 74 Ga., 634. The facts in that case are strikingly illustrative of the principle involved in this appeal. The Cincinnati and Georgia Railroad Company, a domestic corporation, had under its charter constructed a road from Macon to Brunswick. The Cincinnati and Georgia Railroad Company sold and transferred all of its "rights, titles, privileges, properties, franchises," etc., to the East Tennessee, Virginia and Georgia Railroad Company, a Tennessee corporation, and it assumed all of the duties, etc., and the two became merged under the name of the purchasing corporation. A suit having been brought against the corporation, a petition for removal was filed and allowed. The plaintiff appealed. *Jackson, C. J.,* after comment-

ing upon *Clark v. Barnard, supra,* says: "The power granted to the Cincinnati and Georgia Railroad Company to sell its charter,
(743) franchises, rights and privileges is so broad as to embrace its life, its all; and when it did, under this power, sell its rights, franchises, powers and privileges of every description to the East Tennessee, Virginia and Georgia Railroad Company, and the latter assumed its debts, obligations, and burdens of every sort, it does appear to have sold itself, and nothing was left of the corporate being Georgia had made, but its life passed into its buyer, and the purchaser became the Georgia corporation in its stead. . . . This is no license to the East Tennessee, Virginia and Georgia Railroad to use its franchises, or any of its powers already granted, in Georgia, but it is a right to buy the charter and all the franchises of a Georgia road. In other words, the charter of that Georgia company gives it power to buy this East Tennessee, Virginia and Georgia Railroad Company or sell itself to that company; to sell its entire charter, by which alone it has life, and when it does sell, it dies, but another entity immediately lives in its place, and, living in its stead, becoming itself under the charter granted to the being it bought, it is immediately, by the charter which it bought, a domestic Georgia corporation, having all the powers and subject to all the liabilities of that charter. . . . It is not by implication or inference at all that the new corporation steps into the shoes of the old one. It is by the direct, clear, and unmistakable grant of the power to buy a charter or contract of the State. . . . The truth is to be ascertained whether the State intended merely to license a foreigner to exercise franchises and buy a charter she granted to another, without assuming all the liabilities which the charter it bought required, or did she intend it to be a domestic corporation and under all the obligations of corporation citizenship?" The learned *Chief Justice* says that it is clear that the State intended to substitute the purchaser for the entity she allowed to be purchased, and to make the purchaser subject to her control in her own borders as fully as the seller of the charter had been before its
(744) sale; that the purchaser absorbed the life of the seller, "drawing all its breath into its own lungs; it is a question of life, not of names." The petition for removal was denied. It is stated by the reporter that a writ of error was applied for, and declined, it would seem, for the reason that there was no final determination of the cause.

The effect of the sale of a charter or franchise by a corporation is thus stated by *Welch, C. J.,* in *Ohio v. Sherman,* 22 Ohio St., 411 (p. 428): "That a corporation can, when authorized by law so to do, transfer, sell, or convey its charter or franchise to be a corporation, and thus vest it in others, seems to be quite well settled by judicial decisions. . . . The real transaction in all such cases of transfer, sale, or con-

veyance in legal effect is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators and a grant *de novo* of a similar charter to the so-called transferee or purchaser. To look upon it in any other light and to regard the transaction as a literal transfer or sale of the charter is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the *law* under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter, couched in a few words and to take effect upon condition of the surrender or abandonment of the old charter, and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment." *R. R. v. People,* 123 Ill., 467. "The Legislature, in giving a corporation of another State power to purchase a railroad in this State, with the privileges and franchises belonging thereto, had the undoubted right to prescribe the terms upon which the purchase could be made." *S. v. R. R.,* 89 Mo., 523. "Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exer- (745) cised." *S. v. Bailey,* 16 Ind., 46.

It will be noted that in all of the cases from which we quote it was shown that the purchasing corporation had, by its charter, the power to purchase, giving basis to the contention that the power conferred upon the selling company was but a license to the purchasing company to exercise the functions conferred by the charter in the State of the selling company. This contention is, in every instance where the language of the statute denotes an intention to create and not to license, denied. There are cases in which the language of the statute is so construed. *Martin v. R. R., supra.* It is elementary that a corporation can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and its powers. *R. R. v. Wheeler,* 1 Black, 286. It is equally so that "having no absolute right of recognition in other States, but depending for such recognition in other States and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. . . . A State may, for reasons of its own, adopt the foreign corporation by creating it a domestic corporation. . . . When a State pursues the latter course and adopts the foreign corporation as one of its own creation, it follows, we think, that all of its subsequent acts and transactions within the State of its adoption are the acts of a domestic corporation, that the franchise and powers there exercised were conferred by local laws," etc. *Thayer, Circuit Judge,* in *R. R. v. Meek,* 69 Fed., 753; *S. v. R. R.,* 89 Mo., 523; *Insurance Co. v. Prewitt,* 200 U. S., 246.

"The Legislature, in granting to a foreign corporation power to purchase a railroad and franchise within the State, may prescribe the terms and conditions upon which the purchase may be made and
(746) define the status within the State of the purchasing corporation." Noyes on Intercorp. Rel., sec. 164. Whether the Legislature has licensed a foreign corporation to exercise its powers within the State or has created a new corporation "is always a question of legislative intent and not of legislative power or legal possibility." *R. R. v. Harris, supra.* That the Legislature intended that any person or corporation purchasing the franchises and property of another corporation in this State should "forthwith become a corporation," succeeding to all of the rights, franchises, duties, etc., of the dissolved corporation, is manifest both from the *language* of the statute and history of its enactment read in the light of the decisions of this Court.

The question in respect to the power to subject corporate property, separate from the franchise, to sale for debt first attracted the attention of this Court in *S. v. Rives,* 27 N. C., 297, wherein *Ruffin, C. J.,* in a carefully considered and elaborate opinion, discussed the question, holding that, while the property of a railroad company could be sold under execution, its franchise could not be disposed of without legislative sanction. He suggested that there should be legislation "providing for the keeping of the franchise with the estate." The question again came before the Court in *Gooch v. McGee,* 83 N. C., 59. It appeared that the plaintiff had purchased the lands of the Roanoke Navigation Company under execution. The question presented was whether he acquired any title. *Smith, C. J.,* reviewed the legislation enacted in consequence of what was said in *Rives' case,* and held that the purchaser acquired no title. He says: "This legislation, springing out of the decision in *Rives' case* and intended to obviate the inconveniences of a disruption of the company and a loss of those facilities for travel and transportation which it now afforded, must, we think, be deemed an expressed of the legislative will to substitute the new in place of the former rem-
(747) edy." By several amendments the statute law took the form found in The Code, 1883, secs. 697, 698. When the State, by an act of the Legislature, at a special session called for that purpose, sold its stock and interest in the Western North Carolina Railroad, a great work of internal improvement in the prosecution of which the State had expended an immense sum of money, it was expressly provided that the assignees of the State's interest should recognize the corporation, with a capital of several million dollars. Acts Special Session 1880, ch. 26, secs. 8, 9; *Marshall v. R. R.,* 92 N. C., 322. There is not, in either the general or special legislation, the slightest indication that it was con-

templated that this great thoroughfare, with its franchise, upon which so much time, labor, and money had been expended, should become the property of a foreign corporation.

While it is true that we know, as a part of the State's history, that she has leased a portion of her railroads, this is very far from granting the franchise and the ultimate ownership of the property in foreign corporations not amenable to her courts or control. The right of her citizens to sue the lessor corporation in the State courts for redress of wrongs committed and enforcement of contracts made by the lessee is safeguarded and settled by repeated decisions of this Court. In *Logan v. R. R.,* 116 N. C., 940, *Mr. Justice Avery,* in a well considered and able opinion, says that the power granted by the State to lease railroads "does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults. The lessor company remains liable for the performance of public duties to private parties . . . for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter." *Pierce v. R. R.,* 124 N. C., 83. We are not inadvertent to the decision of this Court in *James v. R. R.,* 121 N. C., 523. Without entering (748) into a discussion of the reasoning upon which the conclusion is reached, it is sufficient to say that we should feel constrained to follow the decision of the Supreme Court of the United States in *Julian v. Central Trust Co.,* 193 U. S., 93, wherein it is held that the effect of the sale, by the special master, of the property, franchise, etc., of the Western North Carolina Railroad Company operated to dissolve that corporation, thereby giving full force and effect to sections 697, 698 of The Code. We think the reasoning of the Court satisfactory. We do not perceive how the fact that the sale was under a second mortgage affected the status of the purchaser. The rights of the first mortgage were fully protected. What, then, became of the franchise of the dissolved corporation? It did not revert to the State or become separate from the property. It does not appear that the Southern Railway Company, "a corporation created by and existing pursuant to the laws of the State of Virginia," had any capacity, by its charter, to take, hold, and exercise it. Certainly there is nothing in the statute law of this State indicating that a foreign corporation could, without express legislative authority, take, hold, and use a charter granted by the State to a public service corporation, with the right of eminent domain, to carry passengers and freight for fare and toll, thus holding and exercising one of the highest attributes of sovereignty. It is true that *Mr. Justice Day,* in *Julian's case, supra* (p. 107), says: "The Southern Railway Company was authorized by its charter, among other things, to purchase or other-

wise acquire the property of any railroad company organized under the laws of another State." We presume that it so appeared in the record. It does not appear in this record, and we cannot take judicial notice of the contents of a private statute of a sister State. Again it is
(749) said: "We have been cited to no statute of the State of North Carolina forbidding the purchase of a railroad at a foreclosure sale by a corporation of another State." It is of no importance to the State whether a foreign or domestic corporation, or whether individual citizens of this or some other State, purchase, because, by the act of purchasing, it or they, as the case may be, "shall forthwith be a new corporation (of this State), and the corporation *created by or in consequence of such sale and conveyance* shall succeed to all such franchises, rights and privileges, and perform all such duties as are owed by or imposed upon the first corporation."

It seems too clear to admit of controversy that, while there is nothing in our statute or State policy which forbids a foreign corporation from buying a railroad, *eo instanti* that it does buy and take the conveyance, *and because thereof,* it becomes by statutory creation a domestic corporation. If, as we have seen from a line of decisions of the Supreme Court of the United States, the *purchase* of a franchise by a foreign corporation, by authority of the Legislature, makes the purchasing corporation *quoad* the franchise and property purchased a domestic corporation, much more certainly does the result follow where the power to purchase is coupled with the declaration that it "shall forthwith become a new corporation." It is inconceivable that the State of North Carolina ever intended or contemplated that franchise granted by her to public-service corporations, for the benefit of the public, the furnishing of transportation for her own people and their products and property, should be purchased and owned by foreign corporation, over which her Legislature and courts have no control or power of visitation. We know from public records that every railroad company operating in this State issues bonds and is mortgaged to secure their payment. If the contention of the Virginia corporation be correct, every railroad, with its franchise and property, may, by defaulting in the pay-
(750) ment of interest, be sold under such mortgages and purchased by foreign corporations, with all of the legal incidents flowing therefrom. Her citizens may thereby be taken from the courts of the State at immense cost, expense, and delay, and by reason thereof be practically denied redress for many wrongs committed by such foreign corporations. We have carefully examined the language of *Mr. Justice Day* in *Julian's case, supra.* It will be noted that the question presented and discussed in that case did not in any manner involve the point now under examination. This Court, in *James v. R. R., supra,*

had held, for the reasons set out in the opinion, that the sale by the special master did not work a dissolution of the original corporation, and that therefore the purchaser was operating the road and using the franchise granted to that corporation, thereby being liable for its torts and debts. The purpose of the *Julian case* was to have that case reviewed and enjoin the sale of corporate property under execution issued against the Western North Carolina Railroad Company. The question of domicile was neither presented, argued, nor considered. It seems from the language of the learned justice that the suggestion was made "that the State requires a domestic corporation, organized under and subject to its laws, to become the purchaser of a railroad." He says that he does not find "such to be the case." We entirely concur with his conclusion. As we have said, the State does not require a domestic corporation organized to purchase, but does *create* the purchaser into a domestic corporation, which, by operation of law, takes, owns, and uses the franchises of the dissolved or, in the language of the statute, "the first corporation." The learned justice cites section 1936 of The Code for the purpose of finding the status of the purchasing corporation. It will be noted that section 1936 does not refer to corporations which, by virtue of a sale of their property and franchises, have been dissolved and their franchise vested in the purchaser, but to those (751) cases where the "real estate, track, and fixtures" have been sold, power is given to the purchaser to form a corporation in the manner prescribed. This act, it will be observed, was enacted at the session of 1871-'72, ch. 138, whereas sections 697, 698 were enacted at the session of 1872-'73, ch. 131. The facts set out in the complaint bring the case clearly within the last act. Of course, both statutes were reënacted in The Code of 1883 and are to be construed together and reconciled.

The deed executed by the special master evidently had reference to sections 697, 698, because, following the mortgage, it expressly transferred the rights, privileges, and franchises of the Western North Carolina Railroad Company. There is no suggestion that the purchaser at the sale has organized as a corporation, pursuant to the provisions of section 1936; hence, if this section is controlling, the Virginia corporation, without any authority and without having complied with the laws of this State, has for more than twelve years operated a railroad, extending its lines, condemning property, and otherwise exercising attributes of sovereignty in this State without authority and without limit. If it is not limited by the charter of the Western North Carolina Railroad Company, it has no limit. It does not, in its petition, profess to hold the property by virtue of having complied with section 1936. Unless, by virtue of the provisions of sections 697, 698, it owns and exercises the franchise of the Western North Carolina Railroad Company,

it occupies a most anomalous position in this State. If it may do so and avoid the clear, unmistakable legal operation of the only statute by which as purchaser it could acquire the franchise, we can see no reason why, by the same mode of procedure, every railroad in the State, other than those in which the State owns a controlling interest, may not, by sale under mortgage upon them, pass into the control of foreign
(752) corporations, with all of the incidents attaching thereto. We are not prepared to reach such a conclusion, nor do we think our statutes capable of such construction. Foreign corporations may purchase, and their rights of property thus acquired will be protected, but by the act of purchasing and taking title the breath of the expiring domestic corporation passes into and imparts life to a "new corporation," and by such life-giving process the purchaser becomes like "the first corporation"—domestic. The statutes thus construed secure harmony, protect rights; the State retains control of her corporate creature and the citizen is permitted to litigate his rights in the courts of the State.

It is insisted, however, that recent decisions of the Supreme Court hold that a foreign corporation may become domestic for some purposes, but retain its citizenship in its domicile of original creation for the purpose of jurisdiction. That, notwithstanding the fact that the Southern Railway Company is created for the purpose of owning the Western North Carolina Railroad Company, a domestic corporation, the Virginia corporation may remove a cause brought against it into the Federal court. It would seem that the language used by *Judge Gray* in *Martin v. R. A., supra,* is conclusive that where a corporation of one State is *created* a corporation of another State, it cannot remove its cause, whereas where such corporation is *licensed* to do business in another State it may do so, and this we understand to be the distinction upon which the *Allison case,* 190 U. S., 326, is decided. In that case the Court construed the act of 1899, known as the "Craig Act," to license and not create. By the provisions of that act the foreign corporation was required to file a copy of its charter in the office of the Secretary of State, whereupon it should "become a corporation of this State." This act the Court held to license the foreign corporation to come into this State. Cer-
(753) tainly no such attitude can be assumed by the Virginia corporation in this case. It is either a foreign corporation, owning and exercising in this State corporate franchises conferred by the State of Virginia, or it has no legal status here. No language can be found in the statute capable of any such construction as was given to the "Craig Act." The language quoted by *Justice Shiras* from the opinion in *R. R. v. Alabama,* 107 U. S., 581, seems peculiarly applicable here. Speaking of the Alabama statute, he says: "The whole act taken together manifests the understanding and intention of the Legislature of Alabama that

the corporation which was thereby granted a right of way to construct through this State a railroad . . . was and should be in law a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the Legislature of Tennessee." The Court held in that case that, for the purpose of jurisdiction, the corporation thus created was a citizen of Alabama. By comparing the powers conferred upon the corporation in that case with those conferred upon the Western North Carolina Railroad Company, to which the purchaser succeeded, it will be seen that the latter are equally extensive and can be exercised only in the State. The power is given the Western North Carolina Company to condemn land, to construct branches, to do any and all things necessary to extend, construct, and operate a railroad. The very acts of which this plaintiff complains are an assertion of the right and power to enter upon and take private property for tracks. "That the wrongs and injuries aforesaid were done and are threatened by said defendant in its capacity as successor of said Western North Carolina Railroad Company and pretending to act under color of the deed set out in the ninth paragraph of the complaint." For the purpose of this appeal this is admitted to be true. We are unable to see why the language used in the Alabama case is not applicable here. The defendant, being a corporation of the State of Virginia, has no existence in this (754) State, as a legal entity or person, except under and by force of its incorporation by this State. The Court, in *Allison's case, supra,* recognizes the distinction. Two other cases are relied upon to sustain the proposition that, for the purpose of jurisdiction, the domicile of original creation controls the jurisdiction.

The fact must be kept in view that this is not a case of consolidation or of licensing. It is true that the Virginia corporation was received as a purchaser of the property, but immediately, by operation of law, upon becoming a purchaser a "new corporation" came into existence, drawing its life from the expiring corporation to whose franchise it succeeded. The Virginia corporation took no property or franchise, but the "new corporation" took both. It is not practicable to set out the facts in *R. R. v. James,* 161 U. S., 545. The language of *Judge Gray* in *R. R. v. Alabama, supra,* is quoted with approval. The following language of *Judge Miller in R. R. v. R. R.,* 118 U. S., 290, is also quoted: "It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence, under laws of another State, to exercise its functions in the State where it is so received. . . . To make such a company a corporation of another State the language must imply creation

or adoption in such form as to confer the power usually exercised over corporations by the State, or by the Legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it, as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers."

In the *James case* the St. Louis, etc., Railroad Company, a Mis-
(755) souri company, purchased from corporations of Arkansas certain railroads already built by them. The Arkansas corporations maintained their separate organizations, but did not operate railroads. The Court said: "It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject to certain conditions." The distinction between that case and the one before us is obvious. Here the corporation whose property, franchise, etc., were sold ceased to exist or maintain any organization—it was dissolved. *Julian's case, supra.* There was legislation in Arkansas subsequent to the purchase by the foreign corporation which the Court held did not create an Arkansas corporation out of a foreign corporation. Again the learned justice says: "It shall be observed that, in the present case, the corporation was not incorporated as such by the State of Arkansas. The Legislature of that State was professedly dealing with the railroad corporations of other States." It was further noted that the Constitution of Arkansas provided "that foreign corporations may be authorized to do business in this State," etc. But they were not to have the right of eminent domain. A careful examination of the facts in the case, and the opinion, show clearly that the decision is put upon the language of the Arkansas statute, which is radically different from ours.

If we are correct in the conclusion that the defendant is a North Carolina corporation, it is clear that, if composed of three or more persons who were citizens of Virginia, the corporate entity thus created would be domestic for all purposes. We are unable to see how or why the fact that the corporate entity having its domicile in Virginia, created a cor-
poration in this State, occupies any different status; if so, all
(756) that is said about the power of the State to incorporate a foreign corporation in such State goes for nothing, and the language used in *Martin v. R. R., supra,* is overruled, although we find no suggestion that it is so intended.

It is conceded by the learned justices of the Supreme Court of the United States that the decisions of that Court in regard to the presumption of citizenship of stockholders in corporations are not uniform. We do not presume to undertake to reconcile the contradictory decisions,

if there be any. The last case in which the question is discussed is *R. R. v. Trust Co.*, 174 U. S., 552. It seems from the statement of the case that the plaintiff, called in the record New Albany Company, was originally incorporated by the Legislature of Indiana. Power was conferred upon it to exercise all of the franchises, powers, privileges, etc., conferred upon it by the laws of that State, "or any other State in which any portion of its railroad may be situate," etc. The Legislature of Kentucky passed an act to incorporate the New Albany and Chicago Railroad Company, conferring power upon it to purchase, lease, etc., certain property, with the right of eminent domain. Thereafter the New Albany Company, describing itself as an Indiana corporation, consolidated with certain railroads in Illinois. The New Albany Company was not shown to have formally accepted the statutes passed by the Kentucky Legislature or to have organized as a corporation under them, but the Court holds that it did acts which amounted to acceptance. The New Albany Company filed a bill in equity in the Circuit Court of the United States for the District of Kentucky, describing itself a "corporation duly organized and existing under the laws of the State of Indiana," against certain Kentucky corporations. Pleas to the jurisdiction were filed, asserting that plaintiff was a corporation and citizen of Kentucky. They were overruled. *Mr. Justice Gray*, repeating the language so often used regarding the power of one State to (757) create a corporation of another State a corporation of the first State, and noting the distinction between such an act and one merely granting privileges, etc., to an existing corporation, and citing the authorities which we have so often cited, says: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this Court to be required for the disposition of this case, either as to the jurisdiction or as to the merits." We must say, with all possible deference, that the language which follows this statement is not very clear to us. He says: "As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purpose of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created." The fact that it was created a corporation by the State of Kentucky of course did not affect the corporate entity existing in Indiana or prevent its suing in the courts of Kentucky as an Indiana corporation. This is exactly what it did, so describing itself. The judge goes on to say: "It could neither have brought suit as a corporation of both States against a corporation of either State, nor could it have been sued as a corporation of Kentucky in any court of the United States." It would seem that, in view of the

fact that the suit was brought by the Indiana corporation, as such, against Kentucky corporations, there could be no question as to the jurisdiction, and, as said by the Court, the question whether there was also a Kentucky corporation of the same name was immaterial. The last part of the quotation seems to be *obiter* and not in harmony with numerous decisions to the contrary. This is the view of Mr. Moon in his work on Removal of Causes, sec. 129. While the later expressions of the Court appear to indicate a purpose to recognize the dis-
(758) tinction between the domicile of creation, for the purpose of control and of jurisdiction, we do not find any decision overruling the line of cases holding that where the language of the statute manifests a clear intention to create a new corporation, and not to license or permit an existing foreign corporation to exercise its powers in the State, and such act of creation is accepted, a domestic corporation is created. The later decisions are discussed by *Putnam, Circuit Judge,* in *Smith v. R. R.,* 96 Fed., 504.

There is not in this record any indication that the Virginia corporation had the power or capacity to buy and operate the Western North Carolina Railroad Company and its franchises, nor is there anywhere to be found such indication that the State ever empowered or intended to empower a foreign corporation to buy and own, free from the jurisdiction of her courts, the franchise granted by her to a domestic corporation for the benefit, primarily, of her own citizens. If she has by some fiction of the courts done so, and made it possible for every mile of her great railroad systems, with the liberal charters granted to them, conferring power near akin to that of taxation, which has been said to be the power to destroy, it may be well, in the language of *Chief Justice Ruffin,* "if it so please the Legislature" to find some lawful means, under her constitutional reservation of power, to restore to the State the control of these creatures of her own creation. Const., Art. VIII, sec. 1. They were created by her sovereign will, their property constructed by money taken from her revenues, built upon land acquired by the right of eminent domain and protected by her Constitution and laws. It would seem that they should be held responsible in her own courts for the manner in which they use and exercise these attributes of sovereignty. We are of opinion that, by the weight of authority, and certainly the reason of the thing, such is the law.

(759) The order for removal must be
Reversed.

*Cited: Latta v. Electric Co.,* 146 N. C., 310; *Hurst v. R. R.,* 162 N. C., 368, 370, 372, 373; *Hyder v. R. R.,* 167 N. C., 586.

E. L. FREY ET AL. v. MIDDLE CREEK LUMBER COMPANY.

(Filed 27 May, 1907.)

1. **Evidence—Referee—Findings of Fact—Appeal.**

The findings of fact by the referee, when there is evidence tending to support them, affirmed by the judge on the hearing, are conclusive on appeal and must be made the basis of the judgment.

2. **Damages—Evidence—Counterclaim—Contracts—Fraud.**

Representations which were mere matters of opinion as to the quantity of timber covered by a contract to sell, given and received as such when the parties were at arm's length, each having equal opportunity of informing himself, cannot be set up as a ground of counterclaim for damages in an action upon notes given by defendant for the purchase price, as constituting legal fraud.

APPEAL from the justice of the peace, tried before *W. R. Allen, J.*, at October Term, 1906, of SWAIN.

The action was to recover $190, alleged to be due by note of defendant company given to plaintiff, which was unpaid.

Defendant answered, admitting the execution of the note, and setting up a defense by way of counterclaim that the note was given as part of the sale, as to the quantity of timber contracts held by plaintiff, and that said plaintiff made false and fraudulent representations inducing the sale, as to the quantity of timber covered by the contracts, causing damage to defendant in the sum of several thousand dollars, which was set up in bar of plaintiff's recovery. Defendant admitting the execution of the notes, the question as to the counterclaim in the cause was, by consent, referred to E. R. Hampton as referee, who heard the testimony and made his report, finding the facts and making con- (760) clusion against the counterclaim.

The cause came on to be heard on the report and exceptions, and the judge sustained certain exceptions, modifying the report in some respects, but affirmed the finding of fact No. 12 by the referee, to the effect that no false representations had been made which had caused defendant to make the contract, and thereupon adjudged that plaintiff receive the amount of the note and interest and costs, and defendant excepted and appealed.

*A. M. Fry for defendant.*
*No counsel contra.*

HOKE, J., after stating the case: The findings of fact by a referee, when there is evidence tending to support them, affirmed by the judge on the hearing, are conclusive upon this Court, and must be made the basis of the judgment. *Harris v. Smith, ante,* 439.

The referee in the case before us reports his finding of fact No. 12 as follows:

"Twelfth. I find as a fact that in some conversations between the plaintiffs and the defendant's agent and manager that John Frey told the defendant's agent that he felt satisfied that there was from 250,000 to 300,000 feet of good timber on the boundary embraced by the Breedlove lands; that the declaration was made to apply to the entire Lick Log Creek boundary; that it was given as a mere guess or opinion, based upon what the plaintiff had seen himself and had been told by John Breedlove, but that it was not intended as a willful or gross misrepresentation of the quantity of timber on the boundary; that the parties were dealing with each other at arm's length, on practically equal terms; that it was easily within the power of the defendant to have had
(761) the timber on the boundary estimated or measured; that he had been upon and examined part of the timber and had equally as good opportunity, in the exercise of reasonable diligence, to have examined the whole boundary; that the negotiations for the sale were pending for more than two months before the assignment of the contract; that the parties were upon the identical premises on which the timber was located at the time of closing the contract; that the defendant had one or more opportunities to rescind the contract before it was finally closed, which it refused to do; that the contract showed and the defendant knew that he was getting the timber under the contracts by the 1,000 feet, at a certain fixed price; that the price of $100 paid was for the benefit of the contracts and not for the timber; that there was no guaranty or warranty by the plaintiffs that the boundary contained any particular quantity of timber, and that there was no complaint of any shortage or fraudulent misrepresentations by the plaintiffs in making the sale until the plaintiff brought this action to recover the amount due on the cattle on account of the funds in the defendant's hands by Breedlove and Grooms for that purpose. I therefore find as a fact that the sale of the contracts to the defendant by the plaintiffs was not brought about by false and fraudulent representations that were calculated to deceive and mislead a prudent business man."

There was evidence in the record in support of this action by the referee, and, the same having been affirmed by the judge, the conclusion necessarily follows that defendant's counterclaim has not been sustained.

We are referred by counsel to *May v. Loomis,* 140 N. C., 350; but that case decides a question entirely different from that presented by this report. There the assertion complained of as being false and fraudulent was the assertion of a fact: "That the vendor, at the time of negotiating the sale, as an inducement thereto, falsely asserted that he had
(762) caused a survey to be made of the timber within the boundary

and the survey disclosed that there were three million feet; whereas the survey referred to had shown that the boundary contained only one million, and of this the vendor must have been fully aware."

In the case before us the finding is that the representations were mere matters of opinion, given and received as such, and when the parties were at arm's length, each having equal opportunities of informing himself; and the cause comes rather within the principle so clearly announced by *Mr. Justice Brown* in *Cash Co. v. Townsend,* 137 N. C., 652, that "Expressions of commendation or opinion or extravagant statements as to value or prospects do not, as a rule, constitute legal fraud."

As heretofore stated, the finding of fact No. 12, which we have no power to disturb, determines the question of the counterclaim against the defendant, and the judgment below is

Affirmed.

*Cited: Bailey v. Hopkins,* 152 N. C., 750; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *Williamson v. Bitting,* 159 N. C., 325; *Thompson v. Smith,* 160 N. C., 259; *McCullers v. Cheatham,* 163 N. C., 63; *French v. Richardson,* 167 N. C., 44.

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(763)

CHARLES D. NELSON v. PRISCILLA HUNTER, ADMINISTRATRIX, ET AL.

**Slaves—Marriage—Validity—Act of March, 1866—Evidence.**

When it is not shown that the marriage of two slaves has come within the provision of the act of March, 1866, declarations of the woman claiming the man as her husband, and "general reputation" thereof, are incompetent as evidence of a lawful marriage, to legalize the issue born of them.

*S. G. Ryan for plaintiff.*
*Peele & Maynard and J. N. Holding for defendants.*

PER CURIAM. We have carefully considered the petition to rehear this cause and the brief of the learned counsel for defendants. We are unable to find any material point overlooked in our former decision at last term or any error in the conclusion arrived at. The plaintiff's right to recover depends upon the establishment of a legal marriage between Solomon Nelson and Jackie Cook. The uncontradicted evidence proves that a form of marriage between them took place during 1861, or not long thereafter, and that they continued to live together during and after the war and were living together at the date of the ratification of the act of 10 March, 1868. The plaintiff was the issue of such co-

habitation and was born in January, 1867. We find nothing in the record tending to prove that such relationship was not exclusive in March, 1866. It may be that after that time Solomon Nelson returned to Beaufort County and resumed his antebellum relations with the woman Viley, but, as we have declared in our former opinion in this case, "by virtue of the provisions of that act (10 March, 1866) the relation of man and wife existing between Solomon and Jackie, if continued until the passage of the act, culminated into a valid marriage and was legalized by the statute. The act has a retroactive effect, so as to legalize the relation from its beginning, thereby legitimizing the offspring of such cohabitation born during the entire period. If Solomon re-
(764) sumed his cohabitation with Viley after 10 March, 1866, it could have no effect upon the legitimacy of his and Jackie's children."

The "general reputation" that Viley was Solomon's wife in antebellum days, and her declarations claiming him as her husband, are utterly valueless and incompetent, for there is no pretense that any valid marriage ever took place between Solomon and Viley after they became free, and they could not enter into the marriage contract while slaves. There is no evidence whatever that the alleged relation between Solomon and Viley existing prior to the war was continued and terminated into a marriage under the act of 10 March, 1866.

The declarations of Viley and the evidence of "general reputation" therefore tend to prove, not a lawful marriage, but only that Solomon, prior to the war, lived and cohabited with Viley, and that in 1867 he renewed such relation. Such evidence was incompetent to prove that on 10 March, 1866, the relations between Solomon and Jackie were not exclusive.

Petition dismissed.

*Cited: S. c.,* 145 N. C., 335; *Spaugh v. Hartman,* 150 N. C., 456; *s. c.,* 151 N. C., 184.

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N. C. HUGHES ET AL. V. E. R. CROOKER.

*Ward & Grimes for plaintiff.*
*W. C. Rodman for defendant.*

PER CURIAM. The court below has found as a fact that the defendant is a nonresident of North Carolina, and we find there is sufficient evidence to support such finding. The motion to dissolve the attachment was properly denied.

Affirmed.

(765)

L. J. FAIN v. A. J. GADDIS.

**Dower—Evidence—Lost Papers—Verdict.**

When the sole controversy is as to whether a certain lot was assigned to plaintiff as dower, some of the papers in the dower proceedings having been lost, and under competent evidence and instructions the jury has found their contents to be as contended by the plaintiff, the defendant is not entitled to a new trial.

ACTION tried before *W. R. Allen,* J., at Fall Term, 1906, of CHEROKEE. From a judgment for plaintiff, the defendant appealed.

*Busbee & Busbee, Axley & Axley, and Ben Posey for plaintiff.*
*Dillard & Bell for defendant.*

PER CURIAM. The court, in its discretion, after careful examination, denied the motion for new trial for newly discovered evidence. The action is brought to recover possession of a parcel of land known as lot No. 189, or the Dugan lot, which plaintiff alleges was duly assigned to her as dower. It is admitted that J. B. Fain, plaintiff's husband, owned the lot in fee during the coverture, and that plaintiff has never released her dower right. The defendant claims under the husband. The sole controversy is as to whether the said lot was actually assigned to plaintiff as dower. Some of the papers in the proceedings under which dower was allotted having been lost or mislaid, the court submitted to the jury these issues:

1. Was the Dugan lot embraced in the petition for dower? Answer: Yes.

2. Was the Dugan lot embraced in the allotment of dower? Answer: Yes.

3. What is the average rental value of the Dugan lot? Answer: Rents per year, $15.

The plaintiff introduced the summons in the dower proceed- (766) ings and certain docket entries, and then proved the existence of the papers and that due search had been made. Both parties offered parol evidence as to what the lost record contained. The answer sets up the lost record very fully and seeks to establish it by proof. The original summons and docket entries constitute most conclusive proof of its existence, which was not denied. The only controversy was as to whether the Dugan lot was included in the proceedings and allotment. The jury find it was. There was abundant evidence to support the finding, and we find in the record nothing that entitles defendant to another trial.

No error.

A. W. ROUGHTON ET AL. v. SPENCER SAWYER ET AL.

**Reference—Exceptions Must be Definite.**

A right to a trial by jury is waived unless order of reference is excepted to definitely and specifically, pointing out specific facts upon which it is demanded.

APPEAL by plaintiff and certain defendants.

*Ward & Grimes and Shepherd & Shepherd for plaintiffs.*
*Aydlett & Ehringhaus and C. E. Thompson for defendants.*

PER CURIAM. This action is brought to recover certain purchase money from defendant lumber company and by it deposited in defendant bank. The cause was referred to a referee by the court. Plaintiffs did not except to this order, and as to them it is a consent reference. They are not now entitled to a jury trial upon the issues arising upon the exceptions to referee's report.

(767) The defendants T. C. Morris, J. C. Morris, and C. T. Sample excepted to the order of reference, but they have waived the right to a trial by jury upon the issues of fact arising upon their exceptions filed to referee's report, by failing to assert such right definitely and specifically in each exception and pointing out in each exception the specific fact excepted to upon which they elect to demand a jury trial, as is required in *Driller Co. v. Worth,* 117 N. C., 520.

The judgment of the Superior Court is
Affirmed.

*Cited: Ogden v. Land Co.,* 14 N. C., 446; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *Wynn v. Bullock,* 154 N. C., 383.

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WASHINGTON AND VANDEMERE RAILROAD COMPANY v. RALEIGH AND PAMLICO SOUND RAILROAD COMPANY.

*Small & McLean and Murray Allen for plaintiff.*
*Bragaw & Harding for defendant.*

PER CURIAM. It appearing to the Court from the record in this case that there is at present no irreparable injury and no immediate conflict between the plaintiff and the defendant at the crossing mentioned in the pleadings, and that the plaintiff's road is not yet constructed, the judgment refusing the injunction at this time is affirmed, without prejudice to the plaintiff's right to renew the motion in the Superior Court.

Affirmed.

# CASES DISPOSED OF WITHOUT WRITTEN OPINION AT SPRING TERM, 1907

W. E. CAPPS *v.* S. A. L. RAILWAY, appellant. From Warren. *T. T. Hicks and M. J. Hawkins for plaintiff; Day, Bell & Allen for defendant.* Affirmed.

STATE *v.* J. V. MOYE, appellant. From Pitt. *Attorney-General for State; Skinner for defendant.* Affirmed.

J. F. MORGAN, appellant, *v.* O. W. HARRINGTON. From Pitt. *G. M. Lindsey and Shepherd & Shepherd for plaintiff; Skinner & Whedbee for defendant.* Affirmed.

BARRUM FORREST *v.* I. H. SMITH, appellant. From Craven. *R. W. Williamson and P. M. Pearsall for plaintiff; D. L. Ward for defendant.* Affirmed.

NAHOUM HATEM *v.* A. ELLIS, appellant. From Craven. *W. W. Clark for plaintiff; H. C. Whitehurst and R. A. Nunn for defendant.* Affirmed.

C. H. DUGGAN & Co. *v.* ATLANTIC COAST LINE RAILROAD, appellant. From Craven. *W. D. McIver and R. A. Nunn for plaintiff; Simmons, Ward & Allen for defendant.* Affirmed.

STATE *v.* HENRY CLAYTOR, appellant. From Wilson. *Attorney-General for State.* Affirmed.

CHARLES F. DUNN, appellant, *v.* A. MARKS. From Lenoir. *Dunn for plaintiff; Y. T. Ormond for defendant.* Affirmed.

CHARLES F. DUNN, appellant, *v.* NATIONAL BANK OF GOLDSBORO. From Lenoir. *Dunn for plaintiff; S. W. Isler for defendant.* Affirmed.

C. R. KERNODLE *v.* WESTERN UNION TELEGRAPH COMPANY, appellant. From Alamance. *King & Kimball and F. H. Busbee & Son for defendant.* Affirmed.

W. T. OSBORNE *v.* NORTH CAROLINA RAILROAD COMPANY, appellant. From Guilford. *John W. Hinsdale and J. A. Barringer for plaintiff; King & Kimball for defendant.* Affirmed.

STATE *v.* H. T. MARTIN, appellant. From Rockingham. *Attorney-General for State; C. O. McMichael for defendant.* No error.

WINSTON CIGARETTE MACHINE COMPANY, appellant, *v.* WELLS-WHITEHEAD TOBACCO COMPANY. From Forsyth. *Manly & Hendren and Wat-*

*son, Buxton & Watson for plaintiff; F. A. Woodard, Connor & Connor, and Lindsay Patterson for defendant.* Affirmed.

J. P. JONES, appellant, *v.* REYNOLDS TOBACCO COMPANY. From Forsyth. *Lindsay Patterson and J. S. Grogan for plaintiff; Watson, Buxton & Watson, and Manly & Hendren for defendant.* Affirmed.

ORMOND MINING COMPANY, appellant, *v.* BESSEMER CITY COTTON MILLS. From Gaston. *Winston & Bryant, O. F. Mason, and Burwell & Cansler for plaintiff; Tillett & Guthrie for defendant.* Affirmed.

P. C. HARTY *v.* JAMES HARTY, appellant. From Mecklenburg. *Pharr & Bell for plaintiff; Burwell & Cansler and R. J. Hutchison for defendant.* Affirmed.

F. B. MCKINNE *v.* R. L. MCCONNAUGHEY, appellant. From Cabarrus. *Adams, Jerome, Armfield & Maness, and L. T. Hartsell for plaintiff; Montgomery & Crowell for defendant.* Affirmed.

WILKESBORO AND JEFFERSON TURNPIKE COMPANY *v.* E. M. ABSHER, appellant. From Wilkes. *Finley & Hendren for plaintiff; Cranor & Cranor for defendant.* Affirmed.

G. W. HARPER *v.* T. N. LOCKE, appellant. From Caldwell. *Jones & Whisnant for plaintiff; Lawrence Wakefield and Mark Squires for defendant.* Affirmed.

STATE *v.* W. H. HESTER, appellant. From Rutherford. *Attorney-General and Hayden Clement for State; D. F. Morrow for defendant.* Affirmed.

L. J. FAIN *v.* A. J. GADDIS, appellant. From Cherokee. *Busbee & Busbee, Axley & Axley, and Ben Posey for plaintiff; Dillard & Bell for defendant.* No error.

# INDEX

NOTE—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

FRAUD OR MISTAKE—*Continued.*

6. *Same—Matters of Record at Time—Allegations of Petition.*—When a cause is sought to be removed to the Federal court by reason of diversity of citizenship under the statute, an allegation of the petition that defendants believe the joinder of resident defendants was for the purpose of defeating Federal jurisdiction, and not in good faith, will not, in the absence of any finding of the fact, be considered. *Ibid.*

7. *Attorney and Client—Compromise—False Representations.*—There is no error in the court below sustaining defendant's motion to dismiss upon the ground that the complaint does not state facts sufficient to constitute a cause of action, in a suit to recover damages, when it appears in the complaint that a compromise has been entered between the same parties on account of the same injury by the plaintiff's attorney of record, with her approval, in the absence of allegations of fraud sufficient to impeach the judgment. Allegations that the attorney compromised the case with the consent of the plaintiff, obtained by importunity and false representations, without averment of collusion or fraudulent combination with the defendant, are insufficient. *Painter v. R. R.*, 436.

8. *Corporation — Sale of Entire Assets — Rights of Creditors.*—All the directors and stockholders of a corporation may not sell practically the entire assets of the corporation for their own benefit and advantage, upon a consideration moving to themselves alone, to the prejudice of the rights of its creditors. *McIver v. Hardware Co.*, 478.

9. *Same—Fraud in Law—Equity Follows Assets—Recovery.*—It is the duty of the directors to preserve the assets of the corporation and administer them for the benefit of the creditors; therefore, when one corporation attempts to buy practically the entire assets of another from all of the directors and stockholders, paying therefor the stock of the purchasing corporation at par, but worth less than par, and subsequently becoming worthless, and reserving for the payment of debts of the selling corporation a certain amount of said stock, the transaction is fraudulent in law as to the creditors, and void; and equity will follow the assets into the hands of other than *bona fide* creditors or purchasers for value and compel them to be applied to the satisfaction of the debts, or, if not available, their value may be recovered. *Ibid.*

10. *Same—Bona Fide Purchaser for Value.*—A corporation purchasing almost the entire assets of another corporation, paying the individual directors and stockholders therefor, and not ascertaining and providing for the debts of the other corporation, is not an innocent purchaser for value, without notice. *Ibid.*

11. *Same — Liability—Charter Provisions—Officers—Torts—Statute.*—The charter provisions, that "no stockholder of the corporation shall be individually liable for any debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle, also embodied in Revisal, sec. 1192, holding the stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. *Ibid.*

12. *Insurance—Contract—Fraud—Waiver.*—In an action upon a policy of life insurance alleged to have been induced by the false representa-

NEGLIGENCE—*Continued.*

15. *Evidence—Nonsuit—Burden of Proof—Demurrer.*—On motion for nonsuit upon the evidence, under the statute, the burden of proof was upon the plaintiff to show that the injury was caused by the negligent act of the defendant, though the evidence will be construed most favorably for her; when the evidence of the plaintiff disclosed that she had presence of mind sufficient to avoid the injury at the apparent point of danger, and owing to fright, not inferable from her former conduct, again approached the track and was injured in a manner not reasonably to be seen or anticipated by the motorman of the street car, to whom the negligence was imputed, the motion should be allowed, there being insufficient evidence that the injury was caused by defendant's negligence. *Crenshaw v. Street R. R.*, 314.

16. *"Sudden Peril"—Proximate Cause.*—It is error in the court below to refuse a motion to nonsuit upon the close of the evidence, under the statute, in an action against a street car company on account of negligence imputed to the motorman, when it appears, without material conflict of evidence, that the motorman slowed down the car before reaching the point of apparent danger and was otherwise not negligent; that the plaintiff had presence of mind to escape the danger, and thereafter approached the track in a manner not reasonably to be seen or anticipated by the motorman, and that she did not look, when she could easily have done so and avoided the injury to herself, and that she was struck by the car to the rear of the motorman, and thereby injured; the cause of the injury being the negligent and unforeseen act of the plaintiff, upon which the doctrine of "sudden peril" can have no application. In any view, the injury was the result of the plaintiff's negligence, which was its proximate cause. *Ibid.*

17. *Railroads—Passengers—Damages.*—Compensatory damages may be recovered of the defendant for failure of the engineer to stop a train at a flag station when he should have stopped upon being signaled, he having failed to see the plaintiffs' signals by reason of negligence in not keeping a proper lookout, and plaintiffs being ready to pay their fare and to take the train from that station to another on defendant's road. *Williams v. R. R.*, 498.

18. *Same—Punitive Damages.*—Defendant is liable to plaintiffs for such punitive damages, in addition to compensatory damages, as the jury may see fit to award, upon its engineer willfully refusing to stop the train at a flag station, where it should have stopped under the circumstances. *Ibid.*

19. *Same—Relief Accorded—Actions, Form of—Suit Upon Contract—Tort.* Relief should be given according to the facts alleged and established in a civil action under Revisal, sec. 354, presenting one form of action for the enforcement of private rights and the redress of private wrongs. It makes no difference whether the plaintiff elect to sue upon contract or in tort, forms of action having been abolished. *Ibid.*

20. *Same—Measure of Damages.*—The plaintiffs' measure of damages, arising from the defendant's responsible negligence in failing to transport them from one station on its road to another station thereon, are those arising from personal annoyance, inconvenience, discomfort,

NONSUITS.

1. *Intimation of Opinion—Appeal.*—When the judge below intimates the opinion that the plaintiff cannot maintain his action upon the allegations of his complaint, if taken as true, he may assign the ruling as error; and appeal. *Morton v. Lumber Co.*, 31.

2. *Negligence—Evidence.*—The mere killing by a railroad train of an employee engaged in its operation raises no presumption of negligence, and a judgment of nonsuit was proper when the witness for plaintiff testified, without other evidence as to negligence of the defendant, that he and plaintiff's intestate brought a turn of wood to the shanty-car of the train; that the witness remained thereon; the plaintiff's intestate went back with the apparent intention of bringing another turn; the train started and went forward after the usual signals were given therefor, and that the plaintiff's intestate was killed, as such does not establish sufficient facts from which actionable negligence could be inferred. *Jones v. R. R.*, 79.

3. *Appeal—View of Evidence.*—An appeal from a denial of motion for nonsuit entitles defendant in the Supreme Court to urge any view of plaintiff's evidence which involves the right to maintain the action. *Stone v. R. R.*, 220.

4. *Same.*—In an appeal from a judgment of nonsuit, the plaintiff's evidence is taken in the view most favorable to his contention, and so construed in all its aspects. *Britt v. R. R.*, 242.

5. *Evidence—Burden of Proof—Demurrer.*—On motion for nonsuit upon the evidence, under the statute, the burden of proof was upon the plaintiff to show that the injury was caused by the negligent act of the defendant, though the evidence will be construed most favorably for her; when the evidence of the plaintiff disclosed that she had presence of mind sufficient to avoid the injury at the apparent point of danger, and owing to fright, not inferable from her former conduct, again approached the track and was injured in a manner not reasonably to be seen or anticipated by the motorman of the street car, to whom the negligence was imputed, the motion should be allowed, there being insufficient evidence that the injury was caused by defendant's negligence. *Crenshaw v. Street R. R.*, 314.

6. *Same—Negligence—"Sudden Peril"—Proximate Cause.*—It is error in the court below to refuse a motion to nonsuit upon the close of the evidence, under the statute, in an action against a street car company on account of negligence imputed to the motorman, when it appears, without material conflict of evidence, that the motorman slowed down the car before reaching the point of apparent danger and was otherwise not negligent; that the plaintiff had presence of mind to escape the danger and thereafter approached the track in a manner not reasonably to be seen or anticipated by the motorman, and that she did not look, when she could easily have done so and avoided the injury to herself, and that she was struck by the car to the rear of the motorman, and thereby injured; the cause of the injury being the negligent and unforeseen act of the plaintiff, upon which the doctrine of "sudden peril" can have no application. In any view, the injury was the result of the plaintiff's negligence, which was its proximate cause. *Ibid.*

TRIALS.

1. *Trial Judge—Charge—Intimation of Opinion of Fact.*—Under Revisal, sec. 535, the trial judge is restricted to plainly and correctly stating the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusions of fact, a *venire de novo* will be ordered. *Withers v. Lane*, 184.

2. *Argument—Charge—Improper Language of Attorneys—Duty of Judge.* It is the duty of the trial judge, when objection is made to language used by attorneys in their argument to the jury as improper, to note down the language at the time, with the exception, to avoid any question thereafter. *Moseley v. Johnson*, 257.

3. *Same—New Trial—Exception.*—Improper and reprehensible language, uncorrected by the trial judge, is ground for a new trial; but when it appears from the inspection of the record that the findings of the jury were fully justified by the evidence and practically the same as the conclusion of three referees before whom the case was heard, and a new trial would probably result in similar conclusions, this Court will exercise a sound discretion as to granting a new trial. *Ibid.*

4. *Jury—Verdict—Set Aside Upon One Issue.*—Upon excepting to and appealing from the order of the court below, setting aside the verdict of the jury upon one issue and awarding a new trial upon that alone, no judgment signed, the appeal is premature; but, in this case, both parties having requested the Supreme Court to consider the cause, an opinion was given without permitting it to become a precedent. *Jarrett v. Trunk Co.*, 299.

5. *New Trial on One Issue—Charge—Caution to Superior Court Judges.*—The judges of the Superior Court are cautioned that, in awarding a new trial upon one issue alone, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, can be had without danger of complication, and that no possible injustice can be done either party. *Ibid.*

6. *Trial Judge — Charge — Improper Remarks — Error.*—It is reversible error in the judge below in his charge to the jury to say that the authorities argued by counsel to the jury, under the statute, were directly against his position, and this he knew, or should have known, being an impeachment, though unintentional, of the attorney's character, and tending to weaken, in a measure, the client's cause. *Perry v. Perry*, 328.

7. *Cases Consolidated on Trial—Separate Appeals.*—Where actions are united and tried together in the court below for the sake of convenience, and not consolidated in the sense that they thereby became one action, nor within Revisal, secs. 469 and 411, and the verdict being substantially different as to each party, separate appeals should be taken. *Williams v. R. R.*, 498.

8. *Reference—Exceptions Must be Definite.*—A right to a trial by jury is waived unless order of reference is excepted to, definitely and specifically, pointing out specific facts upon which it is demanded. *Roughton v. Sawyer*, 766.